GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 15 OF 1999

BETWEEN:

[1] RAPHAEL DONALD
[2] LEROY NECKLES
[3] ROSLYN AIRD

Appellants

and

EGMONT DEVELOPMENT INC.

Respondent

Before:

The Hon. Mr. Satrohan Singh	Justice of Appeal
The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Albert Matthew	Justice of Appeal [Ag.]

Appearances: Mr. R. Ferguson for the Appellant
Mrs. L. Grant for the Respondent

1999 : July 9,19.

JUDGMENT

ALBERT REDHEAD J.A.

The respondent, Egmont Development Inc., has undertaken a very ambitious project to develop ultimately 172 acres of land into about 300 housing lot estate. At present about 35 acres are being developed into about 74 housing lots.

In order to achieve this objective the company felt it necessary to construct a 400 foot long bridge over the waterway which separates the proposed development from Mauchette Development which is contiguous to or on the other side of the proposed development.

The respondent company also proposes to construct a road 200 feet long, 20 feet wide over lot 4 of Mauchette Development. This road would join or link up with the bridge. Lot 4 is owned by the respondent. The appellants opposed the construction of the road and the bridge on the ground, inter alia, that the respondent is in breach of the restrictive covenants attached to Mauchette Development.

The appellant, on 23rd February, 1999 began an action in the High Court against the respondent. In their statement of claim the appellants sought the following Declarations and injunctive relief.

1. "A declaration that the properties comprising Mauchette Development are held by their respective owners under a scheme of development subject to certain restrictive covenants to which the defendant is bound;
2. A declaration that the access road to Mauchette development is for the sole use, benefit and enjoyment of the property owners and residents thereof and not for the use, benefit and enjoyment of any other persons or properties;
3. A declaration that the building of a road or structure at Mauchette Development by the defendant to facilitate access via a bridge to its commercial venture at Egmont Development is in breach of the restrictive covenants governing Mauchette Development.
4. A declaration that the planned construction of the bridge linking Mauchette Development to Egmont Development will seriously impair the plaintiffs use and enjoyment of their properties and effectively change the small community of Mauchette;
5. An injunction restraining the defendant whether by itself its servant or agents or otherwise howsoever from doing the following acts or any of them, that is to say:

    [i] constructing any bridge, road or structure to provide access, through the access road on Mauchette Development, to the commercial venture of the defendant at Egmont Development; and
    [ii] using lot 4 at the said Mauchette Development for any other purpose other than erecting there on a private dwelling house;
    [iii] using lot 4 of the said Mauchette Development for any commercial venture or for facilitating or promoting any such venture."

St. Paul J. in dismissing the appellants' claim opined that:

> "…upon a true construction of the deeds of conveyance to the Plaintiff from the factory, the nature and extent of the restrictive covenants thereby imposed are personal only and are enforceable by the original covenantor and the original covenantee for the following reasons:-
> 1. The benefit was not expressly annexed to any other lands.
> 2. The covenants imposed did not enure for the benefit of any lands except lands of the factory
> 3. The factory did not assign the benefit of the covenants
> 4. There was no building scheme in evidence at the time when the covenants were imposed."

The appellants are dissatisfied with the judgment of the learned trial judge. They appeal to this court.

Mr. Ferguson, learned counsel, for the appellants argued that the real issue is whether the appellants are entitled to the benefits of the restrictive covenants and therefore are able to enforce them against the respondent. This to my mind is the pith and substance of this case, notwithstanding the many grounds of appeal that were filed in this matter.

Mr. Ferguson argued that the learned trial judge correctly stated the law governing restrictive covenants and the prerequisite for a building scheme but wrongly applied it to the instant case and wrongly concluded that Mauchette was not a development scheme.

The lands now owned by the appellants were initially owned by the Grenada Sugar Factory. The lands were sub-divided into 29 lots and sold to various purchasers, including the appellants. It appears that the sale of the lands began in the eighties. The respondent purchased lot 4 in or about the latter part of 1998, it seems for the expressed purpose of constructing a road thereon.

Learned Counsel referred to the conveyance, in support of his contention that the learned trial judge erred in law when he held that the transfers to the various lot owners did not suggest that the said lot owners had acquired the benefits and burdens incurred by other persons and

erred when he held that the Mauchette Development is not a scheme of development.

In all of the conveyances from the Sugar Factory there is this clause:

> "For the benefit and protection of the adjoining property of the vendor the Purchaser as to the property hereby conveyed and with intent to bind all persons in whom the same shall for the time being be vested so that the purchaser shall not be liable under this covenant after he has parted with the same hereby covenants with the vendor and its assigns as follows:
> [a] Not to carry on or suffer to be carried on in or upon the said property or any part thereof any dangerous noxious noise, offensive or illegal trade or business of any nature which may create a nuisance or be offensive or objectionable to the company or to the adjoining on neighbouring occupiers or owners of land comprised in the said development.
> [b] To use the said property for the purpose of erecting thereon a private dwelling house…….".

Mrs. Grant, learned Counsel, for the Respondent submitted in her skeleton arguments that the learned trial judge was correct when he held that Mauchette was not a scheme of development. Counsel argued that this is so because there was no defined area and the various purchasers did not know the extent of their obligation. Mrs. Grant contended that the Sugar Factory when it sold these lands did not define the area it was selling and that, as I understand Counsel to be saying, was not in keeping with a building scheme.

Learned Counsel for the respondent pointed to the affidavit evidence of the appellants, Raphael Donald, Leroy Neckles and Rolyn Aird. In paragraph three [3] they swore inter alia:-

> “Mauchette Development …….. consists of approximately 25 lots of land”.

Whereas, as Mrs. Grant, argued that it turned out to be 30 lots. Mrs. Grant also drew attention to a letter written by the Grenada Sugar Factory to Mr. & Mrs. Donald. The letter says in paragraph 2:

> "The company has decided to make a special offer of ten lots of land for sale at $1.00 per square foot for persons wishing to buy before infrastructure is put into place……".

This paragraph does not say that the entire area to be sold was 10 lots as Mrs. Grant was urging. The Company merely said that it was making an offer of 10 lots at a special price of $1.00 per square foot before the infrastructure was put in.

This paragraph in the letter does not support learned Counsel's contention that the area of land to be sold by the Sugar Factory was not defined. Her contention is not supported either by the appellants' swearing that the Mauchette Development consisted of approximately 25 lots. Mr. Ferguson quite rightly pointed out that the appellants said approximately 25 lots which were in fact 29 lots, one of those 29 lots was further sub-divided making a total of 30 lots.

Mr. Ferguson has pointed to the first recital in all the conveyances which have this clause:

> "Whereas the company being seised in fee simple in possession of that property known as Mauchette Development situate at Calivigny in the Parish of Saint George in Grenada has sub-divided the same into lots to be sold subject to the stipulations herein described."

Mr. Ferguson argued that the recital and the fact that Mauchette Development was sub-divided into lots before they were sold all point to a Development Scheme.

Learned Counsel, Mr. Ferguson, referred to:

Lamb v Midac Equipment Ltd and Another 52 W.I.R. P.290

Corey J.A. at page 293 referring for **Preston & Newsom** 5th Ed.

Page 13 where the learned Authors state as follows:-

> "There are three, and only three ways in which a plaintiff not being the original Covenantee, can become entitled to the benefit of a restrictive covenant:
> A- He may be an assign of the land to which the benefit of the covenant is annexed.
> B- He may be an express assign of the benefit of the covenant, and some or all of the land for the protection of which it was taken.

C- Both he and the defendant may own land subject to a scheme of reciprocal rights and obligations.

There is no fourth class".

Mr. Ferguson argued that in the instant case C applies.

In Halsbury's Laws of England 4th Edn. Vol. 16 Paragraph 790:

"Covenants restricting the use of land imposed by a vendor on sale may be divided into three classes:-

[1] Covenants imposed for his own benefit;

[2] Covenants imposed as owner of other land, of which the land sold formed a part, and intend to protect or benefit the unsold land, or

[3] Covenants upon a sale of land to various purchasers who, with their respective successors in title, are intended mutually to enjoy the benefit of, and be bound by, the covenants. Covenants falling within head [1] above are personal to the vendor and enforceable by him alone unless expressly assigned by him; covenants falling within head [2] above are said to run with the land and are enforceable without express assignment by the owner for the time being of the land for the benefit of which they were imposed; and covenants falling within head [3] above are most usually found in sales under building schemes, but are not confined to such sales. It is enough that the court is satisfied that it was the parties' intention that the various purchasers from a common vendor of parts of a defined area of land should have rights among themselves."

The learned trial judge in concluding that there was no building scheme in evidence, referred to:

Jamaica Mutual Life Assurance v. Hillsborough Ltd and others 1989 38 W.I.R. 142

Reid v. Biskerstaff 1909 2 Ch. 305 at 319 & 323

White v Bijou Mensions Ltd 1938 Ch.352 at 362

In **Jamaica Mutual Life Assurance v. Hilisborough Ltd** the learned trial judge quoting Lord Jauncey of Tullichettle as the requirements of the two pre requisite for the establishment of a building scheme Lord Jauncey said at page 197:-

"It is now well established that there are two pre-requisites of a building scheme namely:

[1] the identification of the land to which the scheme relates, and

[2] the acceptance of each purchaser of part of the lands from the common vendor that the benefit of the covenants into which he has entered will enure to the vendor and others deriving title from him and that he correspondingly will enjoy the benefits of the covenants entered into by other purchasers of a part of the land. Reciprocity of obligations between purchasers of different plots is essential”

In Biggerstaff s case at page 319 Cozens Hardy MR. Outlined some of the essentials of a building scheme. He said:

> “In my opinion there must be a defined area within which the scheme is operative, Reciprocity is the foundation of the idea of the scheme. A purchaser of one parcel cannot be subject to an implied obligation to purchasers of an undefined and unknown area. He must know the extent of his burden and the extent of his benefit. Not only must the area be defined, but the obligations to be imposed within that area must be defined.”

Buckley L.J. at 323 expressed a similar opinion when he said:-

> “There can be no building scheme unless two conditions are satisfied, namely, first the defined lands constituting the estate to which the scheme relates shall be identified and, secondly that the nature and particulars of the scheme shall be sufficiently disclosed for the purchaser to have been informed that his restrictive covenants are imposed upon him for the benefit of other purchasers of plots within that defined estate which the reciprocal advantage that he shall as against such other purchasers be entitled to the benefit of such restrictive covenants as are in turn imposed upon them.”

In Bijou Mension’s case, Greene MR. At page 362 said:

> "…….The material thing I think is that every purchaser, in order that this principle can apply must know when he buys what are the regulations to which he is subjecting himself, and what are the regulations to which other purchasers on the estate will be called upon to subject themselves. Unless you have that, it is quite impossible in my judgment to draw the necessary inference whether you refer to it as an agreement or as a community of interest importing reciprocity of obligations."

In my judgment the conveyances from the common vendor to the respective purchasers do not have to say on the face of the documents that it is a building scheme. Once it is clearly spelt out in the document or it can be easily inferred from the documents that will suffice to bring into operation a building scheme.

In the instant case the covenants in each deed are identical and are spelt out in each deed. Every purchaser will therefore know what are the regulations to which he is subjecting himself and what are the regulations to which other purchasers will be called upon to subject themselves. It is therefore, apart from what I have said, necessary to draw he inescapable inference that Mauchette Development was a building scheme.

In **Reid v. Bickerstaff 1909 2Ch. 309 at P.311 Joyce J.** said:

> "Now, whenever a quantity of building land is sold in plots, either all or at one action or gradually, as opportunity offers and purchasers can be found and each of the several purchasers is required to enter into the same perpetual covenants restrictive of the position and character of the buildings at any time to be erected on the ground purchased by him and the like ,then, even although there may not have been inserted…….. in each of the material documents an expressed declaration that the covenants are intended to enure and be for the benefit of all, whether prior or subsequent purchasers or their successors in title, and enforceable by them, still, as I understand the result of the authorities at the present time…….. in order that the covenants may confer mutual rights and impose a similar burden upon all, it is not necessary to find any express contract by the vendor or the several purchasers to that effect. It may be collected or inferred from the nature of the transaction. The question whether the several purchasers of parts of a building estate are entitled to enforce against one another the restrictive covenants that they have respectively entered into depends upon the intention which is to be gathered from all the circumstances in each case that is to say, whether the restrictions were imposed merely protecting the vendor himself…….. or for the mutual benefit and advantage of the purchasers".

I refer to some of the covenants [of which there are 14] for the purpose of completeness:

> [b] To use the said property for the purpose of erecting thereon a private dwelling house…….. with a market value of approximately **Seventy five thousand dollars Eastern Caribbean Currency [EC$75,000.00].**

[c] Not to build or erect or place on the said property any building or other structure or erection whatsoever whether permanent or temporary for the purpose of being used as a school, church or factory or any commercial building.

[d] Not to erect on the said property more than one main building with separate garage accommodation and permitted out buildings.

[f] Not to keep or breed on the said property or any part thereof livestock on any commercial basis or scale nor there to keep or breed livestock so as to create a nuisance thereby to any of the person described in stipulation hereinbefore.

The purchaser hereby **COVENANTS** with the vendor that the purchaser and the purchaser's deriving title under him will share proportionally with the other lot owners in the maintenance upkeep of the access road to the property hereby assured.

Having regard to the above I therefore cannot agree with and I reject the written submission of Mrs. Grant that the restrictive covenants are only personal and that the Sugar Factory intended to protect itself by the restrictive covenants.

It is quite obvious to my mind that the covenants were for the benefit and protection of all the lots.

I therefore agree with the submission of Mr. Ferguson that the nature and extent of the said covenants clearly suggest that they were not only intended for the benefit of the original covenantee, the Grenada Sugar Factory, but also for the benefit of the individual purchaser and for the preservation of Mauchette Development as a peaceful and tranquil residential area.

The learned trial judge at page 18 of his judgment referred to:

Rogers v Hosegood [1900] 2 Ch.388 where at page 408 Farwell J. quoting from **Renals v Cowlishaw** [1878 1 9 CHD. 125 at 130 said:

> “When, as in **Renals v. Cowlishaw** , there is no indication in the original consequence, or in the circumstances attending it, that the

> burden of the restrictive covenant is imposed for the benefit of the land reserved, or any particular part of it, then it becomes necessary to examine the circumstances under which any part of the land reserved is sold, in order to see whether a benefit, not originally annexed to it, has become annexed to it on sale, so the purchaser is deemed to have bought it with the land".

The facts in **Renals v Cowlishaw**, show that the owners of an estate which comprised a mansion and pieces, of adjoining lands, sold some portions of the adjoining lands to the purchaser in each case covenanting with the vendors not to build on the lands conveyed to them within a certain distance from a particular road etc.

There was no contemporaneous sale. Nine years later the vendors sold the mansion and grounds but without the purchaser entering into any restrictive covenant at all.

It was quite clear that the covenants entered into were intended to protect the lands retained and for the benefit of the vendors. This certainly is not so in the instant case. As I have said in the instant case the covenants, were imposed for the benefit of the land owners and, each of them can enforce the covenants against each other.

In the premises the appeal is therefore allowed. The judgment of the learned trial judge is set aside.

The appellants sought declarations and an injunction in the High Court. I have no doubt that they are entitled to the declaratory reliefs. Are they entitled to perpetual injunction to restrain the respondent from the construction of the road through lot 4 and the construction of the bridge, to provide access, through the access road on Mauchette Development, to the commercial venture of the defendant at Egmont Development?

I have no doubt that in the circumstances of this case they are entitled to the injunction [See Halsbury's Laws of England 4Edn. Vol.24 paragraph 826].

However, an injunction restricting the construction of any bridge to provide access through the access road on Mauchette Devlopment, is in my view too wider. The construction of the bridges according to the

evidence in this case is not on any of the lands affected by the covenants. The appellants can enjoin the respondent from constructing any road on lot 4 [the covenanted lot] which will provide access to the bridge or to any commercial venture of the Respondent at Egmont Development. If for instance the respondent can find access to and egress from the bridge by any means other than by way of the covenanted lands the appellants, in my view cannot complain.

It is hereby declared as follows:

[1] That the properties comprising Mauchette Development are held by their respective owners under a scheme of development subject to certain restrictive covenants to which the respondent is bound.

[2] That the access road to Mauchette Development is for the sole use benefit and enjoyment of the property owners and residents thereof and not for the use and benefit and enjoyment of any other persons or properties.

[3] That the building of a road or any structure at Mauchette Development by the respondent to facilitate access via a bridge to its commercial venture at Egmont Development is in breach of the restrictive covenants governing Mauchette Development.

The respondent is hereby restrained by injunction and an injunction is hereby granted restraining the respondent whether by itself, its servants or agents or howsoever from the following acts or any of them, that is to say:

[i] Using lot 4 at the said Mauchette Development for any other purpose other than erecting thereon a private dwelling house.

[ii] Using lot 4 of the said Mauchette Development for any commercial venture or for facilitating or promoting any such ventures.

[iii] Constructing any road on lot 4 which will provide access to the proposed bridge or to any commercial venture of the respondent at Egmont Development.

Costs to the appellants of this appeal and in the court below to be taxed, if not agreed.

ALBERT J. REDHEAD
Justice of Appeal

I Concur

SATROHAN SINGH
Justice of Appeal

I Concur

ALBERT MATTHEW
Justice of Appeal [Ag.]