**BRITISH VIRGIN ISLANDS**

**THE EASTERN CARIBBEAN SUPREME COURT**
**IN THE HIGH COURT OF JUSTICE**
**(CIVIL)**

**Claim No. BVIHCV2007/0030**

**BETWEEN:**

**BELMONT ASSOCIATION**
**BELMONT ESTATES LIMITED**

**Appellants**

**-and-**

**THE REGISTRAR OF LANDS**
**EDWARD LYLE**
**TARA FORD-LYLE**

**Respondents**

**Appearances:**

Mrs Hazel-Ann Hannaway-Boreland of Harney Westwood and Riegels for the Appellants
Ms Shona Griffith, Senior Crown Counsel, Attorney-General's Chambers for the Registrar of Lands
Mr Gerard St C. Farara QC of Farara Kerins for the Second and Third Respondents

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2007: July 9, 11, December 10
2008: April 25

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**JUDGMENT**

[1] **HARIPRASHAD-CHARLES J:** On 15 February 2007, the Appellants applied by way of Fixed Date Claim Form and pursuant to section 147(1) of the Registered Land Ordinance, Cap. 229 ("the Act") for a reversal of the decision of the Registrar of Lands ("the Registrar") which was delivered on 15 January 2007. The Registrar dismissed the Appellants' application for the registration of a restrictive covenant on Parcel 24 Block 2034B West End Registration Section ("Parcel 24"). In his decision, he stated:

> "Upon review of the oral and written submissions, it is concluded that if the Land Registrar in 1973 erroneously did not insert the note of the restrictive covenants on the land register, there are no covenants noted on the title register of Parcel 24 to this day despite subsequent transfers made for valuable consideration of the said

parcel. The transfer from Kramer to Taylor and from Taylor to Lyle made no mention of the covenants on the transfer documents where such notes are made. Before the filing of the Kramer to Taylor transfer, Taylor filed a caution on Parcel 24 to register his interest as the intended purchaser. To support the application for the caution the Purchase Agreement between Kramer and Taylor was attached. The Agreement set [sic] out the covenants. However, the transfer documents subsequently submitted to the Registry for registration did not contain any restrictive covenants. Therefore, any application now to register the covenants must be with the consent of the current owner, Tara Louise Ford-Lyle."

**Grounds of appeal**

[2] The Appellants are aggrieved by the decision of the Registrar and have appealed to this Court on the following grounds namely:

a) The decision of the Registrar is against the weight of the evidence.

b) The Registrar failed to take into account the effect of the error of the Registrar of Lands in 1973 in not inserting the covenant when the property and the title page were created in that year.

c) The Registrar failed to give consideration to the effect of the documents referred to on the title's register page, namely the caution including the Agreement for Sale transferring Mark Taylor's interest to Edward Lyle's predecessor in title Martin Kramer which as the Registrar found included the Covenants.

d) The Registrar failed to give consideration to and made no mention of the Affidavit evidence of Renata Macrelli and the fact that the Lyles did not deny actual knowledge of the restrictive covenant at the time of Mr Lyle's purchase.

e) The Registrar failed to give consideration to the fact that Mrs Mary Bell wrote to Mr Lyle complaining of breach of the restrictive covenants immediately before Mr Lyle transferred the property to his wife.

f) The Registrar failed to take into account the fact that Mrs Lyle was not a bona fide purchaser for value and the effect of this on the principles of equity as it relates to unregistered interests.

g) The Registrar failed to take into account the relevant circumstances and the facts and as such the decision is flawed and should not be maintained.

**Background facts**

[3] The background facts, largely undisputed, are methodically and succinctly summarized in the written submissions of Mrs Hannaway-Boreland who appeared for the Appellants. For present purposes only, I can do no better than to gratefully adopt them.

[4] On 31 December 1969, Martin H. and Eleanor Kramer ("the Kramers") purchased Parcel 24 from Belmont Estates Limited ("BEL"). Clause 4 of the Agreement of Deed outlined specific restrictive covenants with BEL and by Clause 5 extended the restrictive covenants to future purchasers, their heirs, personal representatives, successors and assigns.

[5] Clause 4 reads:

1. "The Purchaser (s) hereby covenant with the vendors:

   a) That he will not resell or part with the possession of the said premises without first giving written notice to the Vendors and to the Vendors' Tortola agent, if any, at least thirty days prior to such resale that they have received a bona fide offer to purchase the said premises…

   b) …..

   c) ……

   n) Each lot purchaser shall be and remain a member of the Belmont Association, a club whose purposes are:

      i. To provide in perpetuity for the care and maintenance of all Association properties now or hereafter owned, leased or otherwise acquired…

ii. To formulate rules and regulations, and provide for the enforcement thereof, for the use of all Association properties and facilities, now owned and/or hereafter acquired;

o) Each lot owner shall pay a share (as determined by the Board of Governors of the Belmont Association…) of the annual audited costs, including interest expense, plus 15% for administration of maintaining and improving estate roads, commercial areas including beaches and other special costs and assessments as provided for in the By-Laws by the Belmont Association…"

[6] Clause 5 of the Restrictive Agreement provides as follows:

> "The rights of access, rights of use, easements and covenants granted and reserved in the foregoing paragraphs shall run with the land and shall be binding upon and inure to the benefit of the Vendor and of the Purchaser(s) and their respective heirs, executors, administrators, successors and assigns."

[7] A perusal of the Land Register for Parcel 24 does not show that these restrictive covenants were ever noted. However, the Certificate of Title, which was the instrument of title prior to the coming into force of the Act, noted these restrictive covenants, which it appears, were incorrectly removed. Additionally, this can be gleaned from a letter dated 25 September 1973, written by a representative of the then Barclays Bank International ("the Bank") to Mr Kramer in which he was informed that the Bank had sent his Certificate of Title to their solicitors for them to have the mortgage removed but on receiving the Certificate of Title, it was noted that other incumbrances and specifically those imposed by BEL had been incorrectly removed sometime around the cadastral survey restructuring in the early 1970's. The Bank's representative informed Mr Kramer that the Certificate of Title was returned to the Registrar's Office to have the mistakes remedied and that the Bank was promised the return of the Certificate of Title with all the errors corrected. This was not done.

[8] On 5 October 1973, Mr Kramer submitted the Restrictive Agreement for registration. This was given Instrument No. 696 of 1969. On 6 November 1987, he sold the property to Mark Taylor ("Mr Taylor"). The Agreement for Sale between Mr Kramer and Mr Taylor

("the Kramer/Taylor Agreement") bears registration number 1298/1987. Clause 6 of the Agreement provides:

> "The Vendor is registered as proprietor with absolute title under the Registered Land Ordinance 1970 and will transfer title to the Purchaser free of all incumbrances other than the covenants restrictions stipulations and other matters contained or referred to in the afore-mentioned Agreement of Deed dated 31st December, 1968 [sic] registered as Instrument No. 696 of 1969."

[9] On 9 November 1987, Mr Taylor lodged a caution in respect of Parcel 24 asserting that he was entitled to the benefit of an executed agreement which was annexed to the caution and which forbade the registration of dealings and the making of entries in the Land Register without his consent until he has withdrawn the caution or it has been removed by an Order of the Court or of the Registrar. This caution was discharged on 25 May 1988 by Instrument No. 607/1988.

[10] On 14 November 2002, Mr Taylor transferred Parcel 24 to Mr Lyle for the sum of $45,000. No reference was made to the restrictive covenants in the transfer instrument. On 17 November 2004, Mrs Mary Ann Bell, an adjacent property owner wrote to Mr Lyle complaining about his breach of the restrictive covenant. In her letter, she stated that she was advised that he was in the process of building a multifamily home, whereas proprietors of BEL properties are only permitted to build single family dwellings (this allegation appears to be incorrect). She also invited him to join and to formally register as a member of the Belmont Association and pay his outstanding dues. Mr Lyle did not respond and did not become a member of the Association.

[11] In January 2005, he transferred Parcel 24 to his wife for natural love and affection. Once again, no reference was made of the restrictive covenants in the Transfer documents.

[12] As a result of the lack of response to Mrs Bell's letter, on 19 August 2005, the legal practitioners for the Appellants and Mrs Bell wrote to Mrs Lyle alleging that she was committing breaches of the restrictive covenants. Concurrently, the Appellants filed an application pursuant to section 94 of the Act for a rectification of the Land Register to

include a note of the restrictive covenants on the title page. On 13 April 2006, the Registrar heard the application. Written submissions in support of the application were filed on 11 May 2006. On 15 January 2007, the Registrar dismissed the Appellants' application. Quintessentially, he found that any application now to register the restrictive covenants must be with the consent of the current owner, Mrs Lyle.

**The Extent of the Court's Jurisdiction**

[13] At the 9 July 2007 hearing, the Lyles queried whether additional witnesses should be permitted on appeal. The short answer is in the affirmative.

[14] Section 147 of the Act provides as follows:

> "(1) The Governor or any person aggrieved by a decision, direction, order, determination or award of the Registrar may, within thirty days of the decision, direction, order, determination or award, give notice to the Registrar in the prescribed form of his intention to appeal to the High Court against the decision, direction, order, determination or award.
>
> (2) On receipt of a notice of appeal, the Registrar shall prepare and send to the Court and to the appellant, and to any other person appearing to him from the register to be affected by the appeal, a brief statement of the question in issue.
>
> (3) On hearing of the appeal, the appellant and the Registrar and any other person who, in the opinion of the Court, is affected by the appeal may, subject to any rules of court, appear and be heard in person or by a legal practitioner."

[15] The section is to be read in conjunction with Part 60 of the Civil Procedure Rules 2000 ("the CPR") which outlines the procedure to be followed in the High Court when hearing appeals from any tribunal or person under any enactment. Part 60.8 states:

> "(1) Unless an enactment otherwise provides, the appeal is to be by way of rehearing.
>
> (2) The court may receive further evidence on matters of fact.
>
> (3) The court may draw any inferences of fact which might have been drawn in the proceedings in which the decision was made.

(4) The court may-

a) give any decision or make any order which ought to have been given or made by the tribunal or person whose decision is appealed; and

b) make such further or other order as the case requires; or

c) remit the matter with the opinion of the court for rehearing and determination by the tribunal or person.

(5) The court is not bound to allow an appeal because of –

(a) a misdirection; or

(b) the improper admission or rejection of evidence;

unless it considers that a substantial wrong or a miscarriage of justice has been caused."

[16] Thus, it is palpably plain that an appeal of this nature is by way of a rehearing and the Court can receive evidence that was not placed before the Registrar.

**Preliminary Issues**

[17] Learned Queen's Counsel Mr Farara appearing as Counsel for the Lyles took two preliminary objections at this hearing. In a nutshell, he submitted that (i) the Appellants have no standing to bring this appeal and (ii) as Mr Lyle is no longer the registered proprietor of Parcel 24, the appeal against him should be summarily dismissed with costs.

**Standing to bring appeal**

[18] Mr Farara QC forcefully submitted that Belmont Association has no standing to make this application because it is not a legal entity but a mere association of owners of property at Belmont Estate. Mr Archie McKellar ("Mr McKellar") who swore a joint affidavit with Mr William Walker ("Mr Walker") on behalf of the Appellants was extensively cross-examined on this issue. However, on 23 November 2007, approximately two weeks before the resumed hearing date, Mr Walker swore a third affidavit in which he exhibited the Certificate of Incorporation of Belmont Association

Limited. It was incorporated on 28 March 2003. Undoubtedly, this puts an end to this vexed issue. It is now plain that Belmont Association Limited is a legal entity and not merely an association or club which can only sue by its members.

[19] Unquestionably, the correct designation on the Claim Form should be Belmont Association Limited and not Belmont Association. As Mrs Hannaway-Boreland for the Appellants correctly asserted, no prejudice would be caused to the Respondents if the Court merely adds "Limited" to Belmont Association since such addition will not affect the substance of the case. The witnesses and the facts remain the same. Accordingly and pursuant to CPR 19.3(1) and 19.4(3), I will substitute Belmont Association Limited as the First Appellant. Henceforth, any reference in this judgment to Belmont Association shall be interpreted to mean "Belmont Association Limited".

[20] Mr Farara QC next argued that both Appellants do not have standing to make this application because they do not own any property which benefits from the restrictive covenants. With respect to BEL, he asserted that it was the vendor when what now comprises Parcel 24 was sold vide Deed 696 of 1969 ("the Restrictive Agreement") to the original purchasers, the Kramers but the Appellants have not provided actual proof to show that BEL own land at Belmont Estate, as registered proprietor under the Act, which benefits from the Restrictive Agreement.

[21] In response to this objection, Mrs Hannaway-Boreland submitted that BEL was the original vendor and is a current owner of affected property at Belmont Estate.

[22] It is an elementary principle of law that the burden of a covenant does not run with freehold land at common law so as to bind it in the hands of a successor in title of the original covenantor. In **London County Council v Allen and Another**[1], the Court of Appeal held that where the covenantee had no adjoining land or land affected by the covenant, that is, no land capable of enjoyment, as against the land of the covenantor, of

[1] [1914-1915]All E.R. 1008

the benefit of the covenant, the derivative owner claiming under the covenantor was not bound by the covenant.

[23] Lord Millett in **Half Moon Bay Limited v Crown Eagle Hotels Limited**[2] cited with approval the decision in **London County Council v Allen and Another**. At paragraph 17 of the judgment, he said:

> "While the appellants are the original covenantees, however, the respondents are not the original covenantors but their successors in title. The burden of a covenant does not run with freehold land at common law so as to bind it in the hands of a successor in title of the original covenantor. A negative covenant may be enforced against a successor in title of the original covenantor in equity, but only for the benefit and protection of land of the covenantee or his successor in title. Even an original covenantee therefore, cannot enforce such a covenant against a successor in title of the covenantor unless he retains the ownership of land which is capable of enjoying the benefit of the covenant."

[24] Whether BEL or Belmont Association own property capable of being benefited from the covenants is a question of fact.[3] BEL was the original covenantee, however, the Lyles are not the original covenantors but their successors in title. Belmont Association was not a covenantee. Mr McKellar gave evidence that the properties at Belmont Estate are not the properties of Belmont Association and it does not own the roads which are owned by the property owners. Each lot, he deposed, goes to the middle of the estate road. As it is not a property owner, Belmont Association cannot enforce the covenant against the Lyles and by extension, cannot be a proper Appellant before this Court in these proceedings. Belmont Association can only enforce the covenants if it retains property at Belmont Estate which benefits from the restrictive covenants.

[25] Mr Walker gave evidence that he obtained a listing of the lot owners and the cadastral numbers for each lot. He stated that from the listing[4] and information obtained from Smiths Gore, he found out that the lots referred to as BL properties were actually properties still owned by BEL. He asserted that these properties that are retained by BEL

[2] [2002] UKPC 24, Judgment delivered on 20 May 2002
[3] Paragraph 18 of judgment in Half Moon Bay Limited Case
[4] The listing and cadastral maps were admitted into evidence as WW1 – See pages 84 to 85 of transcript dated 11 July 2007

are a part of one large subdivision. The registers of land for the lots owned by BEL were also produced and admitted into evidence. It appears that the lots are held under two block numbers: 2134B and 2034B respectively. BEL appears as the registered proprietors on the land registers for Block 2134B but not for Block 2034B. Mr Walker indicated that as owner of lots, BEL has being paying dues.

[26] The appurtenances sections of the Land Registers for all the parcels in Block 2134B that are owned by BEL have either a 15 feet or a 30 feet right of way to all parcels at Belmont Estate. Some of the Land Registers include as well that the rights of way are subject to all covenants and restrictions pertaining to these parcels.

[27] It seems to me that BEL does own property that is sufficiently contiguous to Parcel 24 and as such, is capable of being benefitted by the covenants in the Restrictive Agreement. I accept the evidence of Mr Walker that the BEL properties are all part of one subdivision. Additionally, these properties have a right of way to all parcels at Belmont Estate and this is similar to the right of way that is noted on the Land Register for Parcel 24.

**Is Mr Lyle a proper Respondent?**

[28] Learned Queen's Counsel, Mr Farara submitted that Mr Lyle is not the registered proprietor of Parcel 24 and consequently, the appeal against him ought to be summarily dismissed with costs. Mrs Hannaway-Boreland is of a contrary opinion. She placed heavy reliance on section 94 (4) of the Act which states:

> "In so far as the restrictive agreement is capable of taking effect, not only the proprietors themselves but also their respective successors in title shall be entitled to the benefit and subject to the burden of it respectively, unless the instrument otherwise provides."

[29] She argued that the Restrictive Agreement also expressly states that the covenants run with the land and is enforceable by and binding on not just the original parties but they apply equally to any purchaser or successor in title and it was on this basis that both Mr and Mrs Lyle were joined with the Registrar of Lands in these proceedings.

[30] I cannot accept this argument. Mr Lyle transferred Parcel 24 to Mrs Lyle in January 2005. The application to the Registrar of Lands was not filed until August 2005. It therefore means that at the time of the application, the absolute title of Parcel 24 was no longer vested in Mr Lyle but in Mrs Lyle. Mrs Lyle acquired the property without valuable consideration and therefore holds it subject to any unregistered rights or interests to which Mr Lyle held it.[5]

[31] Mrs Hannaway-Boreland relied on section 94(4) but, with respect, I think Learned Counsel has misconstrued the meaning of the section. Section 94 (4) expressly provides that in cases where a restrictive covenant is found to apply, not only are the proprietors themselves but also their respective successors in title shall be entitled to the benefit and subject to the burden of it, unless the instrument provides otherwise. In short, it cannot be that all the successors in title can sue and be sued even though they have transferred all of their interest in the property. If that were the case, these successors in title would be perpetually liable to be sued. The practical interpretation of this section must be that the only person who can sue and be sued is the person who is the current registered proprietor of the property. Mr Lyle was not the owner of Parcel 24 when the application was made and therefore, he is not the owner of any property to which these restrictive covenants can be held to apply. He has no standing to sue or be sued in these proceedings. In my judgment, the proceedings against Mr Lyle ought to be dismissed with costs.

[32] Perhaps, I should add that in determining whether Mrs Lyle's property is subject to the restrictive covenants, the court has to determine whether they applied to Parcel 24 when Mr Lyle acquired it. If they did, then although they are not registered, Mrs Lyle would have acquired the property subject to these covenants as she did not acquire the property for valuable consideration.

**The Substantive Appeal**

[33] Fundamentally, there are four issues which the Court is called upon to determine at this rehearing namely: (i) whether Parcel 24 is subject to the restrictive covenants in the

[5] Section 27 of Registered Land Ordinance

Restrictive Agreement; (ii) whether the Lyles had notice of the restrictive covenants and if so, its effect? (iii) is Mrs Lyle benefiting from the Restrictive Agreement and if so, is it equitable for her not to get the burdens of this Agreement and (iv) whether the Court should order rectification of the Land Register for Parcel 24 with or without the consent of the Lyles.

**Indefeasibility of title**

[34] The Torrens system of land registration which is applicable to land in the BVI has its genesis with the introduction of the Act. Indefeasibility of title is one of the main features of the Act. In **Racoon Limited v Harris Turnbull Executor of James Turnbull (deceased and Others)**[6], a decision from this Territory, the Privy Council held that:

> "The philosophy underlying a system of registration of title is that it confers indefeasibility of title to the specified parcel of land upon the registered proprietor and dispenses with any need on the part of persons dealing with him to investigate further his right thereto."

[35] In **Half Moon Bay Limited**, Lord Millett in dealing with the features of the Torrens system of land registration in Jamaica said:

> "Title to land and imcumbrances affecting land are entered or notified in the Register Book, and everyone who acquires title bona fide and in good faith from a registered proprietor obtains an indefeasible title to the land subject to the incumbrances entered or notified in the Register Book but free from incumbrances not so entered or notified whether he has notice of them or not."

**Relevant Statutory Provisions**

[36] I now turn to the relevant statutory provisions in this jurisdiction. Section 94 of the Act provides:

> "(1) Where an instrument, other than a lease or charge, contains an agreement (hereinafter referred to as a restrictive agreement) by one proprietor restricting the building on or the user or other enjoyment of his land for the benefit of the proprietor of other land, and is presented to the Registrar, the Registrar shall note the restrictive agreement in the incumbrances section of the register of the land or lease burdened by the restrictive agreement, either by entering particulars of the

[6] [1996] UKPC 15

agreement or by referring to the instrument containing the agreement and shall file the instrument.

(2) Unless it is noted in the register, a restrictive agreement is not binding on the proprietor of the land or lease burdened by it or on anybody acquiring the land or lease.

(3) The note of a restrictive agreement in the register does not give the restrictive agreement any greater force or validity than it would have had if it had not been registerable under this Ordinance and had not been noted.

(4) In so far as the restrictive agreement is capable of taking effect, not only the proprietors themselves but also their respective successors in title shall be entitled to the benefit and subject to the burden of it respectively, unless the instrument otherwise provides."

[37] Section 38 states:

"(1) No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned-

(a) to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered; or

(b) to see to the application of any consideration or any part thereof; or

(c) to search any register kept under the Registration and Records Ordinance.

(2) Where the proprietor of land, a lease or a charge is a trustee he shall, in dealing therewith, be deemed to be absolute proprietor thereof, and no disposition by such trustee to a bona fide purchaser for valuable consideration shall be defeasible by reason of the fact that such disposition amounted to a breach of trust."

**Whether Parcel 24 is subject to the restrictive covenants?**

[38] The Certificate of Title issued to the Kramers in 1968 in respect of Parcel 24 states that the property is subject to the mortgages and incumbrances which are noted in the margin thereof and endorsed on it. Mortgages were endorsed in the margin as well as incumbrances that were contained in a certain Deed No. 193 of 1969 and that the incumbrances shall run with the land. It appears that the property which is referred to in

this note as plot 78b is the current Parcel 24 under the new registration of land system. Of importance is the fact that lines have been drawn through the note in respect of the incumbrances as well as the mortgages.

[39] Mrs Hannaway-Boreland submitted that it is clear from the face of the Certificate of Title that there was no actual withdrawal or discharge of the covenants but only a discharge of the mortgages. I find no force in this submission. Lines were drawn through the note in respect of the incumbrances and on the face of this, the inescapable conclusion is that the covenants were removed, withdrawn or discharged.

[40] There is no statutory requirement that the documents filed for the release or discharge of the restrictive covenant need to be noted. All that is required is the cancellation of the note. It follows therefore, that on the face of the Certificate of Title, the incumbrances which were noted, were crossed out and accordingly, cancelled. It is implausible to assert that a person looking at the note that has lines drawn through it would conceive that the crossing out of the note must have been done in error and requires further investigation.

[41] Mr Farara QC succinctly argued that the Restrictive Agreement, Deed No. 696 of 1969, was never noted on the Land Register for Parcel 24 and therefore, the subsequent proprietors were never bound by the said Restrictive Agreement. As already alluded to, the note mentioned above that was erroneously removed was on the Certificate of Title before the advent of the Act. In 1973, documents were presented to the Registrar of Lands to facilitate Parcel 24 to be brought under the Act. On the register, this is noted as the first entry as "A Record dated 17.5.74".

[42] The record, I presume would have included the Certificate of Title with the cancelled incumbrances, the Adjudication Record and Claim Form. Ms Hannaway-Boreland submitted that the documents containing the covenant were presented to the Registrar of Lands for registration and noted on the title as "A Record dated 17.5.74" and therefore, the requirement of section 94(1) is satisfied. I have already found that the incumbrances noted on the Certificate of Title were cancelled, albeit erroneously, and

the error is not perceptible on the face of the title. In respect of the other documents, Learned Queen's Counsel painstakingly cross-examined Mr McKellar who conceded that the Adjudication Record states that there are no restrictions on power of owner to deal, that there is nothing written under section 8 – particulars of any right affecting the parcel which is registerable as a lease….or restrictive covenant and that the Restrictive Agreement with Instrument No. 696 of 1969 is not listed among the documents that were produced to the Recording Officer[7]. Additionally, he admitted that there is no mention of the Restrictive Agreement or the covenants in the Claim Form.

[43] The note "A Record dated 17.5.74" cannot be seen as a note of the Restrictive Agreement on the register. The particulars of the Agreement were not noted on the register or on any documents that were produced (bearing in mind that the first and only note of the incumbrances on the original Certificate of Title was long cancelled). The Restrictive Agreement was not produced to the Recording Officer nor was it referred to in any of the documents produced to that Officer. This first note on the title does not satisfy the requirement of section 94 (1) of the Act. A perusal of the Register of Lands for Parcel 24 does not reveal any note of the Restrictive Agreement in the incumbrances section of the Register. It is plain therefore, that there is no direct note of the Restrictive Agreement in the incumbrances section of the Land Register and I so find.

[44] Next, Learned Counsel, Mrs Hannaway-Boreland placed some reliance on the caution which was filed by Mr Taylor and noted in the incumbrances section of the title as satisfying section 94(1) in that the covenants were presented to the Registrar with the caution which is entered on the title page. It is important to look at the caution.

[45] The caution[8] bearing No.1298/1987 was filed by Mr Taylor in relation to Parcel 24. It states:

> "I, MARK TAYLOR, …claim an interest in the above-mentioned parcel as the person entitled to the benefit of an executed Agreement annexed hereto and forbid the registration of dealings and the making of entries in the Register relating

[7] See pages 37 to 39 of Transcript dated 11 July 2007
[8] See page17 of the Certificate of Exhibits to the joint affidavit of Mr McKellar and Mr Walker at Tab 3 of Appeal Record.

thereto altogether without any consent until this Caution has been withdrawn by me or removed by Order of the Court or the Registrar."

[46] The Agreement for Sale referred to in the caution is the Kramer/Taylor Agreement. Paragraph 1 states:

> "Subject to the granting to the Purchaser of a Non Belongers Land Holding Licence in accordance with the provisions of Clause 3 hereof and subject also to the failure of Belmont Estates Limited to exercise its right to purchase the land hereinafter mentioned in accordance with an Agreement of Deed dated 31st December, 1968 and made between Belmont Estates Limited of the one part and Martin H. Kramer and Eleanor F Kramer of the other part, being registered as Instrument No 696 of 1969…."

[47] Paragraph 6 reads:

> "The Vendor is registered as proprietor with absolute title under the Registered Land Ordinance 1970 and will transfer title to the Purchaser **free of all incumbrances other than the covenants restrictions stipulations and other matters** contained or referred to in the afore-mentioned Agreement of Deed dated 31st December, 1968 [sic] registered as Instrument No. 696 of 1969."

[48] Sections 127 to 131 of the Act provide for cautions. Section 127 deals with lodging of cautions. Section 128 provides that the Registrar shall give notice in writing of a caution to the proprietor whose land, lease or charge is affected by it and section 129 makes provision for the withdrawal or removal of a caution.

[49] What is the import of the caution in this case? It was lodged to protect Mr Taylor's entitlement to the benefit of the Agreement for Sale. No mention is made of the Belmont covenants. Mrs Hannaway-Boreland relied on the caution because it referred to and annexed the Kramer/Taylor Agreement which mentioned generally the Restrictive Agreement.

[50] In **Half Moon Bay Limited**, the Appellants lodged a caveat (similar to a caution) against dealings with any of the lands in question on 17 March 1971. The Registrar lodged Caveat No. 77113 against the Rocamora lands and made an internal note of the caveat

number in manuscript on each of the relevant certificates in the Register Book. The caveat required any future transfer of the Rocamora lands to be made subject to the covenants contained in the 1966 Transfer. Lord Millett observed that this direction has never been complied with. He stated at paragraph 30:

> "The entry of a caveat merely operates to prevent the registration of a transfer or dealing without the consent of the caveator or the removal or withdrawal of the caveat. It does not of itself subject the title of the transferee to the interest or incumbrance which the caveat serves to protect. If, notwithstanding the failure to obtain the consent of the caveator or the withdrawal of the caveat, and in breach of section 142, the Registrar mistakenly registers a transfer without making the appropriate entry or notification of the caveator's interest on the Register Book, then subject to the Registrar's power under Section 15(b) the transferee takes free from that interest."

[51] At paragraph 31, his Lordship continued:

> "It follows that upon its registration as proprietor on 28th August 1990 UDC obtained title to the Rocamora lands free from the covenants contained in the 1966 Transfer, and that the respondents obtained a like title on 20th January 1995".

[52] It is clear from the above authority that the register for Parcel 24 was not subject to the Belmont covenants by virtue of the caution. The caution was merely lodged to protect Mr Taylor's interest in the property and nothing else.

[53] The caution did not mention the covenants nor did it purport to protect the covenants in the Restrictive Agreement. Thus, it is grueling to find that on the face of the register, it is apparent that Parcel 24 is subject to the covenants. This cannot be considered as a note of the Restrictive Agreement in the incumbrances section of the register as there was no entry of the particulars of the agreement nor was there any reference to the Restrictive Agreement in the caution itself. In addition, the Restrictive Agreement was not filed with the caution. For completeness, might I add that the caution was discharged before the property was sold to Mr Lyle.

[54] Section 94 (2) explains that unless the Restrictive Agreement is noted in the register, then it is not binding on the proprietor of the land or lease burdened by it or on anybody acquiring the land or lease. Consistent with my finding above, it follows that the Restrictive Agreement is not binding on the Lyles.

**Actual or constructive notice**

[55] The Appellants contend that the Lyles had both actual and constructive notice of the covenants before they purchased Parcel 24.They called Ms Renata Macrelli ("Ms Macrelli") of Smiths Gore as one of their witnesses. She testified that she gave the covenants to Mr Lyle before he purchased Parcel 24 and explained to him that it was subject to covenants. She added that those discussions took place in the presence of Ms Alecia Penn in April 2004 and that Mr Lyle confirmed that he was given the Belmont covenants before he purchased the property.

[56] Sure enough, Ms Penn was also called to testify on behalf of the Appellants even though she had not sworn an affidavit or a witness statement, a procedural irregularity which both the Court and Mr Farara QC did not seriously probe. Ms Penn did not remember a number of circumstances but recalled with lucidity that Mr Lyle said that he had received the covenants before he purchased Parcel 24 but added that he has a good lawyer.

[57] Mr Lyle gave evidence at the trial. He said that he was first given a copy of the covenants in 2004 by Jon Morley, who was at the time, the treasurer or the secretary of Belmont Association. He next stated that the meeting at Smiths Gore that was referred to was not in fact a meeting. He testified that he and his wife went to Smiths Gore to inquire if they had more land that they could purchase and while they were there with Ms Macrelli, Ms Penn walked in. She proceeded to tell them that they should accept the Belmont covenants and questioned as to why they are being so problematic. According to Mr Lyle, he and his wife left and never went back to Smiths Gore.

[58] In cross-examination, Mr Lyle admitted that he had heard about the covenants from Mr Morley before 2004 but he never saw the book before 2004. He added that he and Mr

Morley had discussions on the matter and he made enquiries from a Mr Paul Backshall who refuted the fact that there have always been covenants. He admitted receiving documents but denied that the covenants were amongst them. Mr Lyle also indicated that he transferred the property to his wife after they got married as a wedding gift.

[59] I had the advantage of seeing, hearing and observing the witnesses at the hearing. On a balance of probabilities, I find that even though Ms Macrelli had no written record of the meeting or chance meeting between herself and the Lyles, I preferred her evidence to that of Mr Lyle who struck me as being evasive and insincere. Ms Macrelli's evidence was substantially corroborated by Ms Penn and while I am conscious that they may both be self-serving witnesses, I nonetheless found their respective account to be more compelling. I am of the firm opinion that Mr Lyle not only knew of the Belmont covenants but had actual notice of them before he purchased Parcel 24 or at the time that he did so. It naturally follows that Mrs Lyle had notice of the covenants since she was not a bona fide purchaser for value. She acquired Parcel 24 from her husband for love and affection and therefore is fixed with the notice that Mr Lyle had.

[60] Learned Counsel for the Appellants trenchantly argued that the Lyles not only had actual notice but also constructive notice of the covenants. In my considered opinion, an answer to the issue of whether the Lyles had constructive notice takes the matter no further as I have just found that the Lyles had actual notice of the Belmont covenants.

**Whether the covenant runs with the land in equity**

[61] The rule of law for several centuries has been that the benefit of covenants whether positive or negative which are made with a covenantee, having an interest in land to which they relate, passes to his successors in title.[9] It is also the common law rule that the burden of a covenant does not run with the land of the covenantor except in the case of a lease. The latter rule was radically modified by equity in respect of negative covenants. In **Tulk v Moxay**[10], Lord Cottenham stated: "It is said, that the covenant

[9] Shayler v Woolf [1946] 2 All ER 54
[10] (1848) 2 Ph. 774, 777

being one which does not run with the land, this Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased."

[62] Later on in the judgment,[11] the Learned Law Lord stated: "*if an equity is attached to the property by the owner, no one purchasing with notice of that equity stand in a different situation from the party from whom he purchased."*

[63] In **Austerberry v Corporation of Oldham**[12], two law lords expressed the view that the burden of a positive covenant made between a vendor and a purchaser does not run with the fee simple at common law and that the court of equity will not enforce such covenants. The view in **Austerberry** was affirmed by the House of Lord in **Rhone and another v Stephens**.[13] Lord Templeman explained that equity does not contradict the common law by enforcing a restrictive covenant against a successor in title of the covenantor but prevents the successor from exercising a right which he never acquired. He explained further that equity can prevent or punish the breach of a negative covenant which restricts the user of land or the exercise of other rights in connection with land but equity cannot compel an owner to comply with a positive covenant entered into by his predecessors in title without flatly contradicting the common law rule that a person cannot be made liable upon a contract unless he is a party to it. In this respect he added that enforcement of a positive covenant lies in contract; a positive covenant compels an owner to exercise his rights while enforcement of a negative covenant lies in property; a negative covenant deprives the owner of a right over property.

[64] The learned authors of **Cheshire and Burn's Modern Law of Real Property**[14] outline the essential factors which must be satisfied for the burden of a restrictive covenant to bind subsequent purchasers of land from the original covenantors. These factors are:[15]

[11] At page 778
[12] (1885) 29 Ch. D. 750.
[13] [1994] 2 All ER 65, [1994] UKHL 3
[14] 15th edition, 1994.

a) The covenants must be negative in nature.
b) The covenantee must at the time of the creation of the covenant and afterwards own land for the protection of which the covenant is made.
c) The covenant must touch and concern the dominant land (the land retained by the covenantee).
d) It must be the common intention of the parties that the burden of the covenant shall run with the land of the covenantor.

[65] The aforementioned factors are all present in the case at bar and it appears that the negative covenants contained in the Restrictive Agreement would be enforceable in equity as against the Lyles. However, my attention was drawn to section 3 of the Act and more significantly, the recent decision of the Privy Council in **Natalie Creque v Cecil Penn**[16], a case emanating from this jurisdiction.

[66] Section 3 of the Act provides as follows: "Except as otherwise provided in this Ordinance, no other written law and no practice or procedure relating to land shall apply to land registered under this Ordinance so far as it is inconsistent with this Ordinance."

[67] In **Natalie Creque v Cecil Penn**, the Board dealing with the interpretation and application of section 3 held that it was not necessary for their Lordships to attempt to determine the precise content of the rather nebulous words "practice or procedure relating to land". At paragraph 15 of the judgment, Lord Walker of Gestingthorpe, who delivered the opinion of the Board had this to say:

> "There are some rules of equity (notably the general rule as to the effect of actual notice) which plainly are inconsistent with section 23 of the Land Registration Act (effect of registration with absolute title) and do not apply to registered land. It is sufficient to repeat the point made by Lord Wilberforce in *Frazer v Walker [1976] AC 569,* that the continued existence with the Land Registration Act. There is in fact a parallel with the equitable rule as explained in cases such as *Bickerton v Walker (1885) 31 Ch. D. 151, 157:* a plaintiff may contradict a receipt clause as

[15] See pages 616 to 621
[16] UKPC No. 36 of 2005. Judgment delivered on 27 June 2007.

against the original contracting party, but not as against the latter's successor in title."

[68] It follows therefore that the rule of equity which rests on the fact that the Lyles had actual notice of the covenants when they purchased Parcel 24 is ousted by section 3 of the Act and do not apply to registered land in this Territory. Consequently, the Lyles took Parcel 24 free from the covenants in the Restrictive Agreement and BEL cannot enforce the covenants against them in law or in equity.

**Whether the covenants can be considered as overriding interests**

[69] It was argued on behalf of the Appellants that if the Court finds that the restrictive covenants were not registered, then it should alternatively find, that they can be considered as overriding interests, which, even if unregistered, are protected by section 28(c) of the Act. Learned Counsel for the Appellants submitted that the Restrictive Agreement was duly registered under the Registration and Records Ordinance ("the RRO") and deemed enforceable within the meaning of section 3 of that Act. She further submitted that the restriction of user having emanated from the Restrictive Agreement recognized by the RRO, the special provisions of section 28(c) of the Act apply notwithstanding the general words of section 38(c) of the said Act.

[70] She next argued that, as the equitable rights of user or restriction of user are expressly protected by section 28 and that the Respondents' notice of the covenants, actual and constructive binds them in view of the fact that the provisions of the Restrictive Agreement run with the land.

[71] Mr Farara QC forcefully argued that section 28 has no application in this matter. For completeness, I find it necessary to fully set out the relevant sections which are relied upon. Section 28(c) states:

> "Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and effect the same, without their being noted on the register-

(c) rights of compulsory acquisition, resumption, entry, search, user or limitation of user conferred by any other written Ordinance;…"

[72] Section 3 of the RRO reads:

"Every deed shall be absolutely void as against any subsequent purchaser for valuable consideration, or mortgagee, unless such deed shall have been duly registered before the registration of the deed under which subsequent purchaser, or mortgagee, shall claim, and within the time limited for the registration of deeds after their execution."

[73] Section 23 of the Act states:

"Subject to the provisions of section 27, the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel, together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatsoever, but subject-

(a) to the leases, charges and other incumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register:…"

[74] I agree with Learned Queen's Counsel Mr Farara that section 28 of the Act does not apply. It is not disputed that the Belmont covenants as contained in the Restrictive Agreement are incumbrances or restrictions. Section 23 makes it absolutely clear that registration of a proprietor with absolute title (which is what Mr Lyle obtained) confers absolute ownership subject only to the leases, charges and other incumbrances, restrictions if any, shown in the Register. This is of course subject to the overriding interests.

[75] While I feel the full force of the submissions of the Appellants, it seems to me that all that section 3 of the RRO does, is to make deeds that are not registered before the deed under which the subsequent purchaser claims void as against the subsequent purchaser. It does not purport to convert incumbrances in a deed to overriding interests.

Section 3 of the RRO did not confer the limitation of user in this case. This was done by the Restrictive Agreement which was not given any greater force by registration than merely to prevent the deed from being void as against the subsequent purchaser.

**Is Belmont Estates a building scheme?**

[76] The Appellants contended that the restrictive covenants were created for a common community by one original proprietor, BEL, and fall within the equity of scheme of development and is enforceable not only as against the original covenantor and covenantee, but by those affected by the general scheme including the original covenantor and other purchasers subject to the common covenants. Learned Counsel, Mrs Hannaway-Boreland submitted that the facts satisfy the requirements under **Elliston v Reacher**.[17] In that case, Parker J (whose decision was upheld by the Court of Appeal) laid down the requirements which have to be satisfied in order to establish a building scheme. Parker J said (at page 384):

> "In my judgment, in order to bring the principles of *Renals v Cowlishaw (1878) 9 Ch. D. 125* and *Spicer v Martin (1888) 14 App Cas. 12* into operation it must be proved (1) that both the plaintiffs and defendants derived title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and (4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors. If these four points be established, I think that the plaintiff would in equity be entitled to enforce the restrictive covenants entered into by the defendants or their predecessors with the common vendor irrespective of the date of the respective purchases."

[17] [1908] 2 Ch 374.

[77] In **Raphael Donald and others v Egmont Development Inc**[18], Redhead JA quoted, inter alia, the cases of **White v Bijou Mensions Ltd**[19] and **Jamaica Mutual Life Assurance v Hilisborough Ltd**.[20] In the latter case, Lord Jauncey of Tullichettle stated 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 the purchasers of different plots is essential."

[78] In **Bijou Mension's case**, Greene MR stated at page 362:

> "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."

[79] In **Raphael Donald et al**, Redhead JA found that the covenants in each deed were identical and were spelt out. Therefore, every purchaser would know the regulations to which he was subjecting himself and the obligations to which other purchasers would be called upon to subject themselves. He concluded that the inexorable inference was that Mauchette Development was a building scheme.

[80] In **Emile Elias and Company Limited v Pine Groves Limited**[21], Lord Browne-Wilkinson had this to say (at page 6):

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[18] Civil Appeal No. 15 of 1999 (In the Court of Appeal of Grenada) Judgment delivered on 19 July 1999
[19] (1938) Ch. 352 at 362
[20] (1989) 38 WIR 142 at 197
[21] [1993] UKPC 3, Judgment delivered on 09 February 1993

> "It is one of the badges of an enforceable building scheme, creating a local law to which all owners are subject and of which all owners take the benefit, that they accept a common code of covenants. It is most improbable that a purchaser will have any intention to accept the burden of covenants affecting the land which he acquires being enforceable by other owners of the land in the scheme area unless he himself is to enjoy reciprocal rights over the lands of such owners: the crucial element of reciprocity would be missing. That does not mean that all lots within the scheme must be subject to identical covenants. For example in a scheme of mixed residential and commercial development, the covenants will obviously vary according to the use intended to be made of each category of lot. But if, as in the present case, the lots are all of similar nature and all intended for high class development consisting of one dwelling on a substantial plot, a disparity in the covenants imposed is a powerful indication that there was no intention to create reciprocally enforceable rights."

[81] In the present case, it was accepted by most of the witnesses that there are some registers of parcels of land at Belmont Estate that do not have the Belmont covenants noted on their registers. Some of these registers were admitted into evidence. It seems to me that there is a compelling indication that there was no intention to create reciprocally enforceable rights, and therefore, no intention to create a building scheme.

**Taking the benefit of a deed without subscribing to the obligations under it**

[82] The Appellants contended that the Lyles have been taking the benefit of the Restrictive Agreement in that they have been using the private road owned by BEL whilst refusing to either recognize its validity or adhere to any obligation. She relied on the cases of **Elliston v Reacher** [supra] and **Halsall v Brizell**.[22]

[83] The Lyles however countered this argument relying on the note in the appurtenance section of Parcel 24 which provides that there is a 30 feet right of way over Belmont Estate road and therefore, they have a legal right over that road.

[84] In **Halsall v Brizell**, Upjohn J said (at page 182):

> "But it is conceded that it is ancient law that a man cannot take benefit under a deed without subscribing to the obligations thereunder. If authority is required for that proposition, I need not but to refer to one sentence during the argument in

[22] [1957] 1 Ch. 169.

> *Elliston v Reacher*, where Lord Crozens-Hardy M.R. observed: 'It is laid down in Co. Litt 230b, that a man who takes the benefit of a deed is bound by a condition contained in it, though he does not execute it.' If the defendants did not desire to take the benefit of this deed, for the reasons I have given, they could not be under any liability to pay the obligations thereunder. But, of course, they do desire to take the benefit of this deed. They have no right to use the sewers which are vested in the plaintiffs, and I cannot see that they have any right, apart from the deed, to use the roads of the park which lead to their particular house, No. 22 Sailsbury Road. The defendants cannot rely on any way of necessity or on any prescription, for the simple reason that when the house was originally sold in 1931 to their predecessor in title he took the house on the terms of the deed of 1851 which contractually bound him to contribute to proper proportion of the expenses of maintaining the roads and sewers, and so forth, as a condition of being entitled to make use of those roads and sewers. Therefore, it seems to be that the defendants here cannot, if they desire to use this house, as they do, take advantage of the trusts concerning the user of the roads contained in the deed and the other benefits created by it without undertaking the obligations thereunder. Upon that principle it seems to me that they are bound by this deed, if they desire to take its benefits."

[85] In **Halsall v Brizell**, Upjohn J found that the defendants had no other right, apart from the deed, to use the roads of the park which led to their own house.

[86] In the present case, the right of way was endorsed on the register. Section 23 of the Act makes it clear that registration of any person as the proprietor with absolute title shall vest in that person, ***together with all rights and privileges belonging or appurtenant thereto,***[emphasis added] free from all other interests or claims but subject to leases charges or other incumbrances endorsed on the title. There is clearly a 30 feet right of way over the roads in Belmont Estate entered in the appurtenance section of the register for Parcel 24. Consequently, the Lyles have a legal right to use that right of way outside of the Restrictive Agreement. In my judgment, they are entitled to the benefit of that right of way despite the fact that they do not subscribe to the obligations under the Restrictive Agreement.

[87] The Appellants fought hard to distinguish between the entitlement to a 30 feet right of way and the entitlement to the right to pass over the entire Belmont Estate. They say that the entitlement to the latter right was derived only from the Restrictive Agreement. I am unable to determine this point as there was no evidence before this Court to

demonstrate that the Lyles are taking the benefit of the right to pass over the entire Belmont Estate.

**Can the Court order Rectification?**

[88] Learned Counsel for the Appellants comprehensively argued this issue. She dealt with (i) the Court's powers on appeal and rectification, (ii) the Court's approach to rectification and (iii) factors for the exercise of discretion (she relied heavily on the inference which she is asking this court to draw that the Lyles had notice of the covenants).

[89] Mr Farara QC tersely submitted that if the requirements of section 94 have not been satisfied, it follows that the Restrictive Agreement cannot be registered without the consent of the Lyles and an application to register the Restrictive Agreement, in the absence of such consent from the current owner, Mrs Lyle, must fail. He added that the above position is not affected by any failure of duty by the Registrar of Lands in not registering the Restrictive Agreement. He explained that section 141 of the Act provides a right to indemnification by the Crown to any person aggrieved by the act or omission of the Registrar of Lands. Learned Queen's Counsel elaborated that if this were otherwise, the certainty of title which this Act brought into effect as regards land ownership would be severely eroded and be rendered nugatory.

[90] Section 140 of the Act reads:

> "(1) Subject to the provisions of subsection (2) the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake.
>
> (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession or is in receipt of the rents or profits and acquired land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

[91] Section 141 deals with the right of indemnity. Subsection (1) states in effect that any person suffering damage by reason of – (a) any rectification of the register; (b) any

mistake or omission in the register which cannot be rectified under this Ordinance, other than a mistake or omission in first registration; or (c ) any error in a certificate of official search issued by the Registrar or in a copy of or extract from the register or in a copy of or extract from any document or plan, certified under the provisions of this Ordinance - shall be entitled to be indemnified by the Government out of moneys provided by the Legislative Council.

[92] In **Half Moon Bay Limited**, the appellants and the Registrar had both lodged caveats forbidding the registration of any transfer which was not expressly made subject to the covenants in the 1966 Transfer and reference to the Registrar's caveat was endorsed on the original certificate of title before UDC came to be registered as proprietor. Lord Millett observed (at paragraph 39) that it was not possible to determine whether the transfer to UDC without making it subject to the covenants was the result of a mistake by the Registrar, or was consequent upon the expiry of notice to the appellants pursuant to section 140 of the Registration of Titles Act, 1889 (Jamaica). He subsequently held that UDC, upon its registration as proprietor on 28 August 1990, obtained title to the Rocamora lands free from the covenants contained in the 1966 Transfer, and that the respondents obtained a like title on 20 January 1995. He explained that:

> "The covenants were belatedly entered on the title on 9th February 1997, at a time when the respondents were the registered proprietor, but there is no evidence and no reason to suppose that the entries were made with their consent. They can only have been entered with the consent of the registered proprietor or an order of the Court by the Registrar pursuant to the power to correct errors or supply omissions in the Register Book conferred by section 15 (b); and the concluding words of that paragraph prevent the alteration from affecting prior entries. UDC and the respondents are entitled to rely upon sections 26, 70 and 71 to establish their title to the Rocamora lands free from the covenants in the 1966 Transfer."

[93] The above passage elucidates that the only way restrictive covenants or a restrictive agreement can be entered on a register in circumstances where they were omitted is either with the consent of the registered proprietor, an order of the court or by the Registrar pursuant to his powers to correct errors or supply omissions. In this case, there is no note of the covenants on the register by the Registrar, and, in fact, on the

application of the Appellants, the Registrar refused to note the Restrictive Agreement on the register. I have found as a fact that the Lyles obtained Parcel 24 free from the covenants contained in the Restrictive Agreement. I cannot therefore order rectification of the register. The only other way that the Restrictive Agreement can be noted on the register is with the consent of Mrs Lyle. In view of that, the Lyles are entitled to rely upon sections 23 and 38 of the Act to establish that they obtained Parcel 24 free from the covenants in the Restrictive Agreement.

[94] In the circumstances, it would be superfluous for me to explore the law relating to rectification. The Appellants have failed to establish that the Restrictive Agreement was noted on the register and that the register should accordingly be rectified.

[95] Learned Senior Crown Counsel, Ms Griffith who appeared for the Registrar of Lands supported and endorsed the submissions of Mr Farara QC. She opined that the Registrar was correct in his decision and perhaps, the proper course for the Appellants might have been an application under section 140.

**Conclusion**

[96] For all of the reasons stated above, which owe much to the admirable submissions of all Counsel, I would dismiss the appeal with Costs to the Respondents (including the Registrar of Lands) to be assessed if not agreed.

[97] The Registrar is hereby directed to remove forthwith the caution placed on Parcel 24 by the Appellants on 25 May 2005.

**Indra Hariprashad-Charles**
High Court Judge