

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

BETWEEN:

LAURENCIAGO LIMITED

AND

KAY ANTHONY

PETER ANTHONY

Appearances:

Andrew O. O'kola for the Claimant/Applicant

Ms. Karen Campbell and Mr. S. Carrott for the Defendants/Respondents

2017; April 12

DECISION

[1] HENRY, J.: This is an application by Laurenciago Limited (the applicant) for an order under Part 17 of the Civil Procedure Rules that the respondents their servants and/or agents be restrained from carrying out further tree felling, clearance or construction activities on lands described as Registration Section: Falmouth & Bethesda; Block 34 27804 Parcels 161 and 162 pending determination of claims against the respondents.

[2] The grounds of the application are:

- 1) The Respondents are owners of covenanted lands.
- 2) The Respondents are building in breach of their restrictions and covenants
- 3) The Applicant has the benefit of the covenants being breached by the Respondents.
- 4) The Applicant objects to the continued breach of restrictions and covenants.
- 5) The Applicant is being denied the use and enjoyment of his property.

- [3] According to the affidavit in support of Joseph Gatt, a Director of the applicant, the respondents purchased lands in a residential development scheme called Savannah Estate, of which the applicant is a homeowner. The respondents were aware, prior to purchasing their property, that all the plots in the scheme of development were subject to reservations, restrictions, easements, rights, covenants stipulations and provisions for the benefit of all the homeowners/developer in the Savannah Estate. He states that the Savannah Estate comprised several acres of lands sold by Atlantic Properties Limited (the Common Vendor). The respondents are successors in title having obtained Parcel 98 from the previous owners, which they later subdivided into parcels 161 and 162.
- [4] The previous owners obtained the said lands from the Common Vendor by way of a transfer instrument. The transfer **instrument states that the conveyance is "Subject to the covenants and provisions specified in the Second, Fifth and Eight Schedules to and elsewhere in the said Deed."** The applicant obtained its title to Parcel 89 by way of transfer instrument dated 9th May 1994.
- [5] The applicant asserts that the respondents are in breach of several of the said covenants including:
- (a) The respondents are presently constructing a development on their land which is not a single private residential accommodation in keeping with the covenant 19.
 - (b) The respondents failed to commence the construction within six months of the date of purchase or grant of a licence under the Non-citizen Land Holding Regulation and to complete construction within one year thereafter contrary to covenant 12
 - (c) Not to behave in an unneighbourly manner contrary to covenant 19.
- [6] In addition, the purchasers of lands in Savannah Estate are subject to additional legal consideration in respect of construction of a house including:
- (a) No building works will be permitted between 15th December and the following 15th March.
 - (b) Site clearance and tree felling may not be undertaken without prior approval of Savannah Management Ltd.
- [7] The claimants assert that the respondents are also in breach of these additional consideration.
- [8] In response, the respondents state that they became the registered proprietors of the land in April 2011. They state unequivocally that the land is not covenanted; that they have absolute title, free and clear. They submit a copy of the land certificate which shows no encumbrances listed in the appropriate section. According to the affidavit evidence, the covenant document referred to by the applicant was seen by them for the first time as an exhibit to the affidavit of Mr. Gatt.
- [9] The land, they state, was marketed for sale by independent estate agents, and after some negotiation it was purchased. They deny that they purchased the land with knowledge that (a) the

land was part of a residential development scheme and (b) that all plots to the scheme were subject to covenants of which they are in breach

- [10] The respondents also assert that the lands included in the residential development not clearly set out in the deed. Therefore the applicant has failed to establish that Parcel 98 was a part of the Savannah Estate Development at the time the Deed of Covenant was signed.
- [11] Further, the said Deed of Covenant is dated 18th November 1999. In the 18 years since it was signed it was never filed with the Registrar of Lands. The Land Register in respect of Parcel 98 shows that Peter Deeth of English Harbour was registered as the proprietor on 16th March 2000. However, no encumbrances are listed on the land register.
- [12] The Respondents deny that they had knowledge of these covenants alleged to be attached to the land. According to the respondents, prior to purchase they made specific enquiry regarding the issue of covenants. They were informed by the **Attorney representing the vendor** “that the parcel being sold is completely unencumbered as is reflected in the incumbrances section of the land **register**”. They were repeatedly informed by the professionals in the transaction that no covenants were applicable, as none were registered. Further they also assert that the management company Savannah Management Company is now defunct. The respondents therefore request that the application be denied with cost.
- [13] It is common ground that on an application for an interim injunction the principles as set out in the case of *American Cyanamid Co. v Ethicon Ltd*¹ are applicable. In this regard the court must be satisfied that:
- 1) The applicant has established a serious issue to be tried;
 - 2) Damages are not an adequate remedy;
 - 3) The balance of convenience lies in favour of granting such relief (that is, the grant of an injunction will do more good than harm) and
 - 4) The applicant is able to compensate the respondent for any loss which such injunction may cause him in the event that it is later adjudged that the injunction ought not to have been granted.

Serious Issue to be tried

- [14] According to the learning in the *American Cyanamid* case, the material available to the court at the hearing of the interlocutory injunction must disclose that there is a real prospect of success for a permanent injunction at trial². In regard to this matter, the court must be satisfied that there is a real prospect of successfully showing at trial that parcel 98 at the time of purchase, was a part of the development scheme called Savannah Estate and that parcel 98 was subject to certain covenants and restrictions as alleged by the applicant, of which the respondents are in breach.

¹ [1975]AC 396

² *Supra*, at page 407-408

- [15] **The applicant describes Savannah Estate as comprising “several acres”** of land sold by the common vendor. In support of its claim that the respondents purchased lands in a residential development scheme called Savannah Estate, the applicant refers to exhibit JG1. It consists of what appears to be a photocopy of an aerial survey map **headed “Survey and Mapping”**. The bottom of the map indicates that it was produced by the Survey Division of the Ministry of Agriculture, Lands, and Marine Resources. It makes no reference to a development known as Savannah Estate. It simply indicates that it is a map of Block 34-2780A. The Block number is handwritten and the court is unsure who inserted that information on the map. There is also no indication as to the date of the survey or mapping. The Block number corresponds with the Block number on the land register of parcel 98. It shows parcel 98 about 4 parcels north of parcel 89, which is **the applicant’s parcel**.
- [16] Also exhibited is the Land Register in respect of Parcel 98. The first registration dated 21/2/95 is in the name of Atlantic Properties Limited. The register shows that on 16th March 2000 Peter Deeth was registered as the owner and on 27th April 2011 it was transferred to the respondents. The subdivision took place in September 2015.
- [17] Also exhibited is a two page document headed the Savannah Estate. Except for indicating that it consists of a little over 60 acres of rolling hills it gives no demarcation of the estate, and no drawings or additional maps are attached to it.
- [18] The Instrument of Transfer evidencing the transfer from Atlantic Properties Limited to Peter Deeth makes no mention of Parcel 98 being a part of Savannah Development Scheme. However it does say that the land was being transferred together with the benefit of the rights specified in the Third, Fourth and Seventh Schedules to and elsewhere in a Deed No 32 of 2000 registered in Lilber Z Volume 165 at Folios 238 – 258 . . . and subject to the covenants and provisions specified in the second, fifth and eight schedules to the Deed.
- [19] The Deed of Covenant referred to in the Instrument of Transfer was exhibited. Some information is **provided in the “Whereas” clauses**. They provide that the vendor, Atlantic Properties is the owner of approximately 62 acres of land situated at Willoughby Bay in the Parish of St. Phillip and **registered as Block 34 3780A Parcel 76 referred to as “the Estate”**. It further provides that the owner has divided a part of the Estate into lots **“as shown on the Estate Layout Plan on each of** which it is proposed to erect a house, each such lot and the house to be erected thereon, to be subject to the covenants restrictions and stipulations mentioned. Clause 3 of the Whereas clauses states that the vendor by the Instrument of Transfer has, for the consideration mentioned, sold and transferred one of the lots forming part of the Estate to the Purchaser, subject to and with the benefit of the restrictions, easements, rights, covenants, stipulations and provisions contained in the Deed of Covenant.
- [20] Unfortunately, the Estate Layout Plan which would have demarcated the part of the Estate divided into lots and intended to form the residential scheme was not exhibited.

- [21] According to the learning there are at least two pre-requisites of a building scheme³:
- 1) There must be reciprocity of obligation between the purchasers of the various lots. There must be an intention to impose a scheme of mutually enforceable restrictions in the interest of all the purchasers and their successors, which must be known to them⁴;
 - 2) The area affected by the scheme should be clearly defined. It is not sufficient that the common vendor has himself defined the area. It must be clearly known to the purchasers⁵. Neither is it sufficient that the particular claimant and the defendant are within an area affected by an alleged scheme if there is uncertainty as to the full geographical reach of the scheme, as it must be certain which purchasers of which plots are entitled to enjoy mutual enforcement⁶.

[22] The applicant has failed to put before the court evidence of the parameters of the Savannah Estate Development scheme. The Deed of Covenant clearly states that only a part of the Estate was to be divided into lots for the residential scheme. The evidence presented does not clearly define the area affected.

[23] Ownership and Transfers of lands, including matters dealing with restrictive agreements, are governed by the provisions of the Registered Land Act, Cap 374. Section 23 provides in part:

23. 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

Section 9(2) C provides that every register for a parcel of land shall contain:

C the incumbrances section, containing a note of every incumbrance and every right adversely affecting the land or lease.

Section 94 (1) and (2) provide:

94. (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

³ *Jamaica Mutual Life Assurance Society v Hillsborough Ltd* [1989] 1 WLR 1101 at 1106

⁴ *Hugh Small v Oliver & Saunders (Developments) Limited* [2006] EWHC 1293, paras 45-47

⁵⁵ *Lund v. Taylor* (1975) 31 P & C R 167; *Emile Elias & Co Ltd v Pine Groves* [1993] 1 WLR 305 at 309

⁶ *Whitgift Homes v Stocks* [2001] EWCA Civ 1732

agreement, either by entering particulars of the 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.

[24] Covenants under a scheme of development enjoy no dispensation from the requirement of registration, so that enforceability depends upon due registration against all the purchasers. There must be notice against the burdened title.

[25] While the applicant admits the non-filing of the Deed of Covenant in the land Registry and acknowledges the provisions of section 94, Counsel for the applicant submits that the issue is **“whether a successor in title’s interest is protected by the Register if they have knowledge of the defect in the predecessor’s transfer transaction”**. Counsel takes the position that the respondents had knowledge that they were purchasing lands that were part of a development scheme and of the covenants mentioned above. Further, he states that the evidence shows the Attorney for the vendor discussing with the Attorney for the purchasers how to treat the covenants. Therefore knowledge of the covenants by the Attorney is imputed knowledge to the clients. He cites the case of *Strover v. Harrington*⁷. He also refers the court to a section in **Halsbury’s Laws of Canada – Real Property**, where it states that notice to a lawyer is notice to his or her client; i.e., where a purchaser’s solicitor has received notice of any prior agreement for sale or mortgage that affects the land, in law this is tantamount to the purchaser having the same notice - him or herself.

[26] While the court will not conduct a mini trial, the applicant has not put any evidence before the court which shows a likelihood that, at trial, he could succeed in showing that the respondents had actual notice or that their Attorney received notice of the covenants at the time of purchase. The emails from both the Attorneys for the seller and the purchaser assured the respondents that the land was not covenanted because there were no restrictions noted on the land register.

More importantly, the court has considered the provisions of section 3(1) of the Registered Land Act which provides:

“3 (1) Except as otherwise provided in this Act, no other law and no practice or procedure relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act.”

In the Privy Council case of *Natalie Creque v Cecil Penn*⁸ the Board dealt with the interpretation and application of section 3 of the Registered Land Ordinance of the BVI, which is on all fours with section 3 of the Registered Land Act in Antigua and Barbuda. Lord Walker Stated:

“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”.

⁷⁷ [1988] Ch 390

⁸ UKPC No. 36 of 2005

- [27] In regard to the matter before the court, the rule of equity in regard to the effect of actual and/or constructive notice of covenants at the time of purchase is inconsistent with section 23 of the Registered Land Act. Therefore pursuant to section 3 that rule of equity does not apply to land registered under the Registered Land Act of Antigua and Barbuda.
- [28] In all the circumstances the evidence before the court does not disclose that the applicant has a real prospect of success at trial. Consequently, there is no need to consider the other principles set out in the American Cyanamid Case.
- [29] The application by the Applicant for an interim injunction is therefore denied with cost to the Respondents in the sum of \$3,500.00 to be paid within 14 days.

CLARE HENRY
High Court Judge
Antigua & Barbuda