

Privy Council Appeal No. 27 of 1990

Emile Elias and Company Limited

Appellants

v.

Pine Groves Limited

Respondents

FROM

**THE COURT OF APPEAL OF
TRINIDAD AND TOBAGO**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
9TH FEBRUARY 1993

Present at the hearing:-

LORD KEITH OF KINKEL
LORD OLIVER OF AYLMEYTON
LORD GOFF OF CHIEVELEY
LORD BROWNE-WILKINSON
LORD WOOLF

[Delivered by Lord Browne-Wilkinson]

In this case, the appellants seek to enforce against the respondents restrictive covenants affecting a parcel of land which formerly formed part of the St. Andrews Golf Club in Trinidad. Both the appellants' and the respondents' land were part of a small development which took place in 1938 when the then common owner, Maraval Lands Limited ("the company"), sold five parcels of land to four different purchasers, each of the purchasers entering into restrictive covenants affecting the land bought by them. The appellants allege that those covenants are now mutually enforceable between the owners of the lots by reason of a building scheme. Mr. Justice Ibrahim at the trial and, on appeal, the Court of Appeal of Trinidad and Tobago rejected the appellants' claim.

In 1938, the company was the owner of an estate comprising approximately 90 acres which was used exclusively as a golf course for the St. Andrews Golf Club. The majority shareholding in the company was held by the trustees of the golf club. In May 1938 the company laid out a portion of this estate in four building plots. A further survey was carried out on 29th July 1938 as a result of which a plan was prepared showing a private road giving

access to the 4 building lots laid out by the company in May 1938 which were numbered as Lots 1, 2, 3 and 4 respectively ("the general plan"). A further plan was also prepared at the same time showing an additional plot of land contiguous to Lot 4. This plot was not given a number at the time but subsequently came to be referred to as Lot 5.

Between 24th August 1938 and 25th November 1938 all five lots were sold and conveyed to four individuals as follows:

- (a) Lot 4 and Lot 5 were conveyed on 24th August 1938 to Mr. Lenagan. Annexed to this conveyance were the general plan and two further plans showing Lot 4 and Lot 5 respectively.
- (b) Lot 1 was conveyed on 31st August 1938 to Mr. Massy. Annexed to this conveyance were the general plan and a further plan showing Lot 1. Neither plan showed Lot 5.
- (c) Lot 3 was on 31st August 1938 conveyed to Mrs. Deane. Annexed to this conveyance were the general plan and a further plan showing Lot 3. Neither plan showed Lot 5.
- (d) Lot 2 was conveyed on 25th November 1938 to Mr. Deane. Annexed to this conveyance were the general plan and a further plan showing Lot 2. Neither plan showed Lot 5.

Each of the 1938 conveyances contained covenants by the purchasers. The covenants affecting Lots 4 and 5 and Lot 1 were in identical terms as follows:-

"The Purchaser to the intent of binding all persons in whom the said hereditaments shall for the time being be vested but not so as to be personally liable under this covenant after he has parted with the said hereditaments hereby covenants with the Vendor and its assigns as follows:-

- (a) Not to erect on the said hereditaments hereby assured any building other than one dwelling house together with the necessary out-offices thereto.
- (b) Not to discharge or cause to be discharged into the Vendor's concrete drain now being constructed along the road coloured green on the said plan marked 'C' or upon any other part of the Vendor's lands any solid, noxious or insanitary matter or any other matter or thing which may cause any nuisance to the occupiers and/or owners for the time being of neighbouring lands."

It will be noted that, in relation to the conveyance of Lots 4 and 5 to Mr. Lenagan, the effect of such covenant was to restrict him to erecting one dwelling-house on both lots.

The restrictive covenants entered into in relation to Lots 3 and 2 were rather different. They read as follows:-

- "(a) Not to erect any building other than one detached dwelling house either with or without all such outbuildings and garage as shall be necessary and/or convenient on the said plot of land hereby granted or any part thereof.
- (b) Not to use any messuage or other building to be erected on the said plot of land hereby granted or any part thereof for any other purpose than that of a private dwelling house only and not to do or suffer on the said plot of land or any part thereof or in or upon any building to be erected thereon anything which shall be a nuisance to the Company or its assigns or the persons or person for the time being owning or occupying any of the land adjacent to or in the neighbourhood of the said plot of land hereby granted.
- (c) To cause proper and efficient grease traps to be constructed and maintained at the outlet of all drains which may be constructed on the said plot of land by the Purchaser such grease traps to be constructed of such material and in such manner as will be sufficient to prevent the discharge into the Company's road drain now being constructed near to and along the eastern boundary of the said plot of land of any solid noxious or insanitary matter."

Apart from the differences in wording between these two sets of covenants, there are the following distinctions of substance between the covenants affecting the different plots. First, although Lots 1, 2 and 3 were allowed one house per plot, Lots 4 and 5 were subjected to a covenant not to erect more than one house on the two combined plots. Second, Lots 4, 5 and 1 were not subject to any covenant restricting the user of the dwelling-house once erected, whereas Lots 3 and 2 were subject to such a covenant. Third, Lots 4, 5 and 1 contained no general covenant restricting user which caused a nuisance to neighbouring lands, whereas Lots 3 and 2 were so subject.

In 1939 Mrs. Deane conveyed Lot 3 to Mr. Blair. The conveyance contained a covenant by Mr. Blair with Mrs. Deane "and also a separate covenant with every owner of the lands in the vicinity of the lands hereby conveyed who might be prejudicially affected by a breach or a non-observance of any of the special stipulations set out in the Schedule hereto". The Schedule contained covenants to the same effect (though not in identical terms) as those contained in the 1938 conveyance of Lot 3.

Down to March 1948, there was no further change in the ownership of any of the lots. It appears that in 1948 Mr. Lenagan, having built one house on Lot 4, wished to build another house on Lot 5, but was precluded from doing so by the covenant in the 1938 conveyance. In those circumstances, a Deed dated 25th March 1948 was executed. The parties to the 1948 Deed were the company and the four owners of the lots. The Deed recited the 1938 conveyances and the covenants against erecting more than one dwelling-house. It further recited that the company and the owners of Lots 1 to 3 had, at the request of Mr. Lenagan, "agreed to release the restrictive covenant contained in the Lenagan Conveyance to the extent only and in the manner hereinafter appearing". The 1948 Deed then contained a release of the covenants affecting Lots 4 and 5 granted by the company and by each of the owners of Lots 1 to 3 so as to permit the erection of one dwelling-house on Lot 5. It also contained the following clause:-

"Save as hereinbefore provided, nothing herein contained shall be deemed to release any of the parties hereto or their successors-in-title from any of the obligations imposed upon them under the several Deeds of Conveyance hereinbefore referred to or any of them."

Since the appellants do not claim to be entitled to enforce the covenants otherwise than under a building scheme established in 1938, the later devolution of the title to the various lots is immaterial. The appellants are now the owners of Lot 3 and the respondents the owners of Lot 1. The respondents threatened to build on Lot 1 in breach of the covenant not to erect more than one dwelling-house. In these proceedings the appellants seek to enforce the covenant against the respondents.

The question is whether, in equity, the appellants as owners of Lot 3 have obtained the benefit of the restrictive covenant entered into by the respondents' predecessor in title, Mr. Massy, when he purchased Lot 1 in 1938. Since there is no privity of contract or estate between the appellants and the respondents, no chain of assignments of the benefit of the covenants to the appellants and the words in the 1938 covenants were not apt to annex to Lot 3 the benefit of the covenants restricting Lot 1, the appellants can only succeed if they can establish that the covenants are mutually enforceable under a building scheme established in 1938.

The requirements which have to be satisfied in order to establish such a building scheme were explained by Parker J. in *Elliston v. Reacher* [1908] 2 Ch. 374. Although there have been certain developments in the law since that date, none of the later developments bear on the present case. 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 plaintiffs 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 dates of the respective purchases. I may observe, with reference to the third point, that the vendor's object in imposing the restrictions must in general be gathered from all the circumstances of the case, including in particular the nature of the restrictions. If a general observance of the restrictions is in fact calculated to enhance the values of the several lots offered for sale, it is an easy inference that the vendor intended the restrictions to be for the benefit of all the lots, even though he might retain other land the value of which might be similarly enhanced, for a vendor may naturally be expected to aim at obtaining the highest possible price for his land. Further, if the first three points be established, the fourth point may readily be inferred, provided the purchasers have notice of the facts involved in the three first points; but if the purchaser purchases in ignorance of any material part of those facts, it would be difficult, if not impossible, to establish the fourth point."

For the appellants, Mr. Fitzpatrick, in his most able and persuasive argument, submitted that these requirements were satisfied in the present case. Lots 1 to 5 all belonged to a common vendor, the company, from whom the appellants and respondents both derive title. The company laid out Lots 1 to 5 for sale in lots. The restrictions affecting all the lots, though not identical, only varied in detail. The obvious advantage of the covenants to each of the purchasers of a lot indicated that they were intended to be mutually enforceable. This

indication is much reinforced by the 1948 Deed to which the company and three out of the four original purchasers were parties, which was drafted on the basis that not only the covenantee, the company, but also the owners of Lots 1 to 3 were entitled to enforce the covenants against Lots 4 and 5. Further, Mr. Fitzpatrick submitted that since all the original purchasers, and Mr. Blair when he purchased Lot 3 in 1939, were members of or associated with the golf club, they would have been fully conversant both with the area of the land which was to be sold and the intentions of all the parties in entering into the covenant. Therefore the third and fourth requirements of Parker J. were satisfied.

The Court of Appeal held that, apart from the requirement of derivation of title from a common vendor and the laying out of the land in lots, none of the requirements laid down by Parker J. were satisfied. It is convenient first to concentrate on the second of those requirements.

Was the area of the scheme defined?

The rationale for the requirement that the area of a scheme should be defined is explained in *Reid v. Bickerstaff* [1909] 2 Ch. 305 by Cozens-Hardy M.R. at page 319:-

"In my opinion there must be a defined area within which the scheme is operative. Reciprocity is the foundation of the idea of a scheme. A purchaser of one parcel cannot be subject to an implied obligation to purchasers of an undefined and unknown area. He must know both the extent of his burden and the extent of his benefit."

This shows that it is not sufficient that the common vendor has himself defined the area. In order to create a valid building scheme, the purchasers of all the land within the area of the scheme must also know what that area is.

In this case there was one plan, the general plan, which was attached to all four 1938 conveyances, but this plan did not show Lot 5. If therefore Lot 5 falls to be treated as part of the designated scheme area, it has not been proved that in 1938 the purchasers of Lot 1, 2 and 3 were aware of that fact. Mr. Fitzpatrick suggested that it could be inferred from the fact that all the purchasers were associated with the golf club and, by the time of the 1948 Deed, were aware of Lot 5, that they were so aware in 1938. Their Lordships feel unable to attach to any such inference sufficient probative force to reach an affirmative conclusion that all the purchasers of the lots in 1938 knew that Lot 5 was included. If Lot 5 was to be part of a scheme area giving rise to mutually enforceable obligations between all the lots, it would surely have been shown on the plan annexed to each of the conveyances.

In the view of the Board, if there was any intention to create mutually enforceable rights in a scheme area, Lot 5 must have been part of that area. It was sold at the same

time as Lots 1 to 4 and was subjected to the same covenants as affected Lot 4 and Lot 1. It is entirely incredible that there was any intention to create rights which would be mutually enforceable between the owners of Lots 1, 2, 3 and 4 but not enforceable by and against the owner of Lot 5.

Accordingly Lot 5 being part of any scheme that could be established and it not having been shown that the purchasers of Lots 1 to 3 were aware of that fact, the requirements of a defined scheme area known to the original purchasers cannot be satisfied.

Lack of uniformity in the covenants.

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 other 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 a 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.

The covenants imposed on Lots 1, 4 and 5 differ in matters of substance from those imposed on Lots 2 and 3. Lots 2 and 3 (in addition to the restriction against erecting more than one dwelling-house) contain a covenant restricting the use of the building when erected to use as a private dwelling-house only. Lots 4, 5 and 1 contain no such restriction on the user. It cannot be realistically supposed that, for example, the purchaser of Lot 2 ever intended to enter into an obligation whereunder the owner of Lot 1 could restrain him from taking lodgers whereas, if Lot 1 were to take lodgers, Lot 2 could not object.

Again, the owners of Lots 2 and 3 entered into a covenant not to cause a nuisance to those occupying lands in the neighbourhood whereas Lots 4, 5 and 1 were not subjected to such covenants. This disparity again militates against the finding of any intention to create a mutually enforceable local law based on reciprocity. Therefore the second of the requirements laid down by Parker J. is not satisfied in the present case.

Generally.

If one steps back and looks at the matter generally, there is no convincing proof that the parties' intention was to produce mutually enforceable covenants. The covenants in the 1938 conveyances were made with the company alone and were not expressed to be made for the benefit of any land not owned (because previously sold) by the company. The company itself as owner of the rest of the golf course had an interest in obtaining the covenants so as to preserve the character of the land retained. The purchasers of Lots 1 to 3 did not know of Lot 5. There is no consistent set of covenants affecting each of the lots. Therefore all the contemporaneous evidence of what the parties intended in 1938 is far from being consistent only with an intention to create a building scheme giving rise to mutually enforceable rights.

The only factor pointing to an intention to create reciprocal rights is the 1948 Deed which may indicate that 10 years later the parties to the 1938 conveyances thought that the covenants were mutually enforceable. Why else were the owners of Lots 1 to 3 joined as parties so as to release the restrictive covenants affecting Lot 5? The trial judge (and possibly the Court of Appeal) thought that the 1948 Deed was not admissible to prove the parties' intention in 1938. The Board do not agree. Later acts of the parties are not admissible for the purpose of construing or altering the effect of a Deed. But where, as in the case of a building scheme, the critical question is whether there was, at a particular time, a particular intention (e.g. to create mutually enforceable rights) and such intention can be proved by direct evidence of intention, the later acts of the parties such as the execution of the 1948 Deed can provide admissible evidence of what was the intention of the parties at the earlier date.

Although the 1948 Deed is admissible, like all other cases in which subsequent acts are relied on, as evidence of an earlier intention, the weight to be attached to that Deed is limited. The 1948 Deed was made 10 years after the 1938 conveyance and memories of what was intended in 1938 may well have dimmed. Moreover, a careful conveyancer advising Mr. Lenagan in 1948 might be in doubt whether or not the owners of Lots 1 to 3 were entitled to enforce the covenants: therefore, he may have obtained from the owners of Lots 1 to 3 a release of the covenants over Lot 5 out of an abundance of caution. In their Lordships' view, the 1948 Deed is not sufficiently unequivocal to prove the existence of the necessary intention in 1938.

At the hearing before the Board, the appellants sought to raise for the first time a new point that had neither been pleaded nor argued below, viz. that the 1948 Deed estopped the respondents from denying that the covenants were enforceable by the appellants. The Board refused leave to raise this point because at the trial it would have been relevant to consider the circumstances surrounding the

execution of the 1948 Deed in order to reach a conclusion whether an estoppel was well founded. The respondents had the opportunity neither to investigate these matters nor to lead evidence on them.

Their Lordships will accordingly dismiss this appeal. The appellants must pay the costs of the respondents before the Board.

