AMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 48/96

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN:	**HALF MOON BAY LTD.**	**APPELLANT**
	v.	
	CROWN EAGLE HOTELS LTD.	**RESPONDENT**

Berthan Macaulay Q.C. and Rudolph Francis instructed by Margarette Macaulay for the Appellant

David Henry instructed by Nunes, Scholefield DeLeon and Co. for the Respondent

25th - 29th October, and 10th December, 1999

DOWNER, J.A.

The issue on appeal is whether Langrin, J. was correct in refusing the declarations sought by the appellant Half Moon Bay Ltd. pursuant to Sections 5 and 6 of the Restrictive Covenants (Discharge and Modification) Act (the "Act.") The order of the Court below summarises the issues which were debated with admirable skill by counsel on both sides over five days. Here is the order:

> "It is hereby ordered that:-
>
> 1. The parcel of lands now known as the Rocamora lands, is/not now affected by the Consent Order of Mr. Justice Malcolm dated 3rd day of September, 1974 or by the restrictions imposed in the instrument of transfer No. 220319 dated 12th July, 1966.
>
> 2. Upon a true construction of the terms of Instrument of Transfer No. 220319 dated the

12th day of July, 1966 the restrictions thereby imposed on Certificates of Title registered at Volume 770 Folio 71, Volume 770 Folio 72 (now registered at Volume 1231 Folios 784 and 785) are personal or collateral only and are only enforceable by the original covenantor and covenantee.

3. Costs to the respondent against the applicant to be agreed or taxed." [Emphasis supplied]

It is convenient to start from this Order and work backwards to the evidence and the reasons of Langrin, J. to demonstrate that although the facts were somewhat complex, the answer depends on the true construction to be given to the Instrument of Transfer 220319 dated 12th July 1966. Turning now to the circumstances which gave rise to the order the starting point is the consent order.

The Consent Order of Mr. Justice Malcolm

The Consent Judgment conforms with the principles laid down by Lord Green MR in **Chandless - Chandless v Nicholson** [1948] 2 K.B. 321 at 324 in that expressed on the face of the order is that it is a Consent Order.

"Consent Judgment
Suit No. C.L. 122 of 1971

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMON LAW

BETWEEN HALF MOON BAY LIMITED PLAINTIFF

AND ROSE HALL (DEVELOPERS) LTD.

AND

HOLIDAY INNS OF THE BAHAMAS LIMITED DEFENDANTS

AT THE REVENUE COURT

BEFORE MR. JUSTICE MALCOLM ACTING

THE 3rd day of September 1974."

Then paragraph 4 reads:

> "4. THAT by and with the consent of the parties also agreed and hereby ordered that the covenants contained in paragraphs 2 & 3 of transfer 220319 (as set out in the Affidavit of Mr.B.C.O.'B. Nation filed in this action dated the 22nd of June, 1971 exhibiting his Office copy of the said transfer) be endorsed upon the said Certificates of Title referred in paragraph 1, which shall be transmitted within thirty (30) days of this Order to the Registrar of Titles for that purpose."

That this Order was binding on the parties named must be admitted, whether it binds Crown Eagle is another matter. The next stage in this narrative is to cite the relevant paragraphs of the affidavit of Mr. Brian Charles o'Brien Nation which commenced thus:

> "I BRIAN CHARLES o'BRIEN NATION being duly sworn make oath and say:
>
> 1. That I am a Solicitor of the Supreme Court of Judicature and a member of the legal firm of Nation, Lord & deLisser of Montego Bay in the Parish of Saint James and my true place of abode is at Reading in the Parish aforesaid and my postal address is "Post Office Box 334, Montego Bay.
>
> 2. That I crave leave to refer to the Affidavit dated 28th May 1971 sworn by me and filed in the above Suit relating to the three parcels of land therein shortly described and therein and hereinafter referred to as 'the Rocamora Lands.'
>
> 3. That as Solicitor of the Plaintiff I prepared the Transfer of the Rocamora Lands in 1966 from the Plaintiff to the first named of the above Defendants and subsequently dealt with the said Transfer as set out in my Affidavit aforesaid.
>
> 4. That I have been informed by A.E. Brandon & Co., Solicitors of Kingston and the Town Agents of my firm that they have been informed at the Office of Titles that the said Transfer cannot now be found in that Office.

> 5. That when I prepared the said Transfer I made an office copy thereof which was filed in my office as "2985" (such number now appearing at the top right hand corner of the said office copy)."

Then it concludes thus:

> "6. That I exhibit herewith the said office copy marked for identification with the letter "A" and certify that it is a true copy of the unexecuted and undated Transfer aforesaid which was duly executed by the parties thereto and submitted as an unstamped and unregistered document to Kerr-Jarrett & Co. the then Solicitors for the first named defendant as described in my Affidavit herein on 28th May 1971."

As the covenants are embodied in the Instrument of Transfer No. 220319 dated 12th July 1966 it is essential to set out the instrument. It gives the context of the covenants.

> "J A M A I C A
>
> TRANSFER UNDER THE REGISTRATION OF TITLES LAW
>
> THIS INSTRUMENT OF TRANSFER is made
>
> this day of 1966 BETWEEN HALF
>
> MOON BAY LIMITED a limited liability company incorporated under the Laws of Jamaica with its registered office situate at Half Moon Hotel in the Parish of Saint James (hereinafter called "the Vendor") of the ONE PART AND ROSE HALL (DEVELOPMENT) LIMITED a limited liability company with its registered office situate at No. 1 King Street in Montego Bay in the Parish aforesaid (hereinafter called "The Purchaser) of the OTHER PART
>
> WHEREAS :
>
> (1) The Vendor is the registered proprietor of the three parcels of land comprised in the Certificate of Title registered at Volume 770 Folio 71; Volume 770 Folio 72 and Volume 787 Folio 98 respectively of the Register

Book of the Office of Titles (hereinafter referred to as "the three parcels") subject to the covenants of a restrictive nature thereon noted but otherwise free from incumbrances.

(2) The Vendor has contracted and agreed with the Purchaser for the sale to the Purchaser of the Vendor's estate and interest in the three parcels at the price of One Hundred and Twenty-five Thousand Dollars (U.S.) (expressed in sterling as hereinafter mentioned) subject to the covenants of the Vendor and the Purchaser hereinafter mentioned."

Turning now to the Instrument it reads:

" NOW THIS INSTRUMENT WITNESSETH

1. In pursuance of the said agreement and in consideration of the sum of One Hundred and Twenty-five Thousand Dollars (U.S.) which for the purpose of stamping and registering this instrument is Forty-four Thousand Six Hundred and Forty-two Pounds Seventeen Shillings and Twopence) now paid by the Purchaser to the Vendor (the receipt whereof is hereby acknowledged) the Vendor hereby TRANSFERS to the Purchaser all its estate and interest in the three parcels."

Then comes the preamble and the covenants:

"2. The Purchaser for itself its successors and assigns as to the three parcels hereby transferred and with intent to bind all persons in whom the three parcels or any part thereof shall for the time being be vested hereby COVENANTS with the Vendor its successors and assigns:

(a) Not to erect on the three parcels or any part thereof any buildings other than single family houses and in any event the three parcels when built upon shall not contain an aggregate of more than twelve houses and no such house shall exceed two storeys in height

(b) No business other than that of renting a house for family occupancy shall be carried on on the three parcels or any part thereof

> (c) No beach improvement shall be effected in relation to the three parcels or any part thereof which shall be detrimental to the beach of the Half Moon Hotel (owned by the Vendor.)"

Then the instrument continues thus:

> "3. The Vendor for itself its successors and assigns hereby COVENANTS with the Purchaser that any person purchasing the three parcels or any part thereof from the Purchaser may have the use of the beach of Half Moon Hotel for bathing (the intent being that such right shall not accrue to or be vested in any subsequent purchaser or any lessee of the three parcels or any part thereof) PROVIDED that access to the said beach shall only be through the main entrance of the Hotel aforesaid.
>
> IN WITNESS WHEREOF the Vendor and the Purchaser have hereunto caused their respective Common Seals to be hereunto affixed in manner hereinafter appearing."

The reception of the Torrens system of land registration in Jamaica was by enacting the Registration of Titles Act 1889 ("Act No. 2") and our case law on this is well known despite suggestions to the contrary. Some of these cases have been before the Privy Council so there is guidance from the highest authority. Moreover there are cases also from other Torrens jurisdictions particularly from New Zealand, Australia Canada and Belize which have also been decided by the Board. A recent case from Belize is **British American Cattle Co. v. Caribe Farm Industries Ltd. (in Receivership) and Another** [1998] 1 W.L.R. 1529. Mr. Henry helpfully cited **The Vol. 1 Law and Practice Relating to Torrens Title in Australasia** 1972 by E. A. Francis. He drew our attention to this passage on page 1:

> "Lord Watson, in an oft-quoted passage from the decision of the Judicial Committee of the Privy Council in **Gibbs v Messer, [1891] A.C. 248, at p. 254,** in relation to the Vic. Act said: 'The main object of the act, and the legislative scheme for the attainment of that object, appear to their Lordships to be equally plain. The object is to save

> persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title."

Then there are the statements of principle by Lord Wilberforce in **Frazer v Walker** [1967] A.C. 569 at 580-581 which runs thus:

> "**II.** Those sections which provide protection to the registered proprietor against claims and proceedings. These are sections 62 and 63. Without attempting any comprehensive or exhaustive description of what these sections achieve, it may be said that while section 62 secures that a registered proprietor, and consequently anyone who deals with him, shall hold his estate or interest absolutely free from encumbrances, with three specified exceptions, section 63 protects him against any action for possession or recovery of land, with five specified exceptions. Subsection (2) of section 63 is a particularly strong provision in his favour: it provides that the register is, in every court of law or equity, to be an absolute bar to any such action against the registered proprietor, any rule of law or equity to the contrary notwithstanding. It is to be noticed that each of these sections excepts the case of fraud, section 62 employing the words "except in case of fraud," and section 63 using the words "as against the person registered as proprietor of that land through fraud." The uncertain ambit of these expressions has been limited by judicial decision to actual fraud by the registered proprietor or his agent: **Assets Co. Ltd. v. Mere Roihi [1905] A.C. 176, 210, P.C.**
>
> It is these sections which together with those next referred to, confer upon the registered proprietor what has come to be called "indefeasibility of title." The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claims to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in

> provisions of this Act; but in the correction of any such error he shall not erase or render illegible the original words, and he shall affix the date on which such correction was made or entry supplied, and initial the same; and every error or entry so corrected or supplied shall have the like validity and effect as if such error had not been made or such entry omitted; except as regards any entry made in the Register Book prior to the actual time of correcting the error, or supplying the omitted entry."

Sub section (c) states:

> "(c) He shall, upon the direction of a Referee or when it shall appear to him necessary, lodge a caveat on behalf of Her Majesty, or on behalf of any person who shall be under the disability of infancy, coverture, lunacy, unsoundness of mind or absence from Jamaica, to prohibit the transfer or dealing with any land belonging or supposed to belong to any such person, and also to prohibit the dealing with any land in any case in which it shall appear that an error has been made by misdescription of such land, or otherwise, in any certificate of title, or in any instrument, or for the prevention of any fraud or improper dealing."

It is against this background that the caveat by the Registrar of Titles must be considered. Here it is:

> **"CAVEAT BY THE REGISTRAR OF TITLES**
>
> WHEREAS it has been made to appear to me that Transfer No. 220319 is subject to restrictive covenants but no note thereof was made in the Certificates of Title registered at Volume 770 Folio 71, Volume 770 Folio 72 and Volume 787 Folio 98
>
> NOW THEREFORE in exercise of the power conferred on me by Section 14 (c) of the Registration of Titles Law and of every other power hereunto enabling I DO HEREBY LODGE this Caveat forbidding all dealing with the lands unless the Instrument submitted is subject to the restrictive covenants.

> personam. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him. "

Then His Lordship continues thus:

> **"III.** Those sections which state the effect of the certificate of title. The principal section on this subject is section 75. The certificate, unless the register shows otherwise, is to be conclusive evidence that the person named in it is seised of or as taking estate or interest [sic] in the land therein described as seised or possessed of that land for the estate or interest therein specified and that the property comprised in the certificate has been duly brought under the Act. This section is of a similar character to those last discussed; it creates another - a - probative - aspect of "indefeasibility," nonetheless effective, though, as later provisions show, there are means by which the certificate may be cancelled or its owner compelled to hold it upon trust or to deliver it up through an action in personam."

The latest reported case where it was decided that the principles embodied in **Frazer v Walker** are applicable to Jamaica was **Gardener v Lewis** [1998] 1 W.L.R. 1535.

The Registrar of Titles who is always an Attorney-at-Law, has important statutory powers. Relevant to this case are the powers stated in Sec. 15. The material part reads:

> "15. The Registrar may also exercise the following powers and duties, that is to say -
>
> (a) He may administer an oath, and may take and receive the declaration of any person voluntarily making the same (in this Act called a statutory declaration)."

Then 15 (b) which has a retrospective effect reads:

> "(b)He shall correct errors in the Register Book, or in entries made therein, or in duplicate certificates or instruments, and may supply entries omitted to be made under the

GIVEN under my hand and the Seal of the Office of
Titles this 29th day of March, 1971.

E. L. MILLER
Registrar of Titles."

An important point to note, is that neither in the Instrument of Transfer nor in the caveat by the Registrar is there any indication of the estate which will benefit from the restrictive covenant.

There is now registered on one of the Titles of the three parcels transferred to Crown Eagle Hotels by transfer No. 220319 the relevant negative covenants which are in issue in this case. It was admitted in these proceedings pursuant to Rule 18(2) of the Court of Appeal Rules 1962 without any objection from the respondent. It is now appropriate to refer to the declaration sought in the Court below and to ascertain if the orders made were correct.

Before turning to those proceedings it is helpful to cite two definitions from Sec. 3 of the Registration of Titles Act (Act No. 2). They are:

> "incumbrance" shall include all estates, interests, rights, claims and demands, which can or may be had, made or set up, in, to, upon or in respect of the land adversely and preferentially to the title of the proprietor: and,
>
> "instrument" shall include a conveyance, assignment, transfer, lease, mortgage and also creation of an easement.

It is also important to emphasise that the law on Restrictive Covenants preceded the Registration of Titles Acts. [See **Tulk v. Moxhay** (1848) XLVIII ER 1345] and there was nothing in the equitable doctrines stated in that case or the evolving law on the subject which is inconsistent with Act No. 2: [See Section 2].

(a) What was sought below?
(b) What was awarded and why?

The following declarations were sought:

> "1. That the Land Registered in the Book of Register of Titles at (1) Volume 770 Folio 71 (2) Volume 770 Folio 72 (3) Volume 787 Folio 98 are affected by the Restrictions referred to in the Consent Order of Mr. Justice Malcolm dated the 3rd day of September 1974 in Suit C.L. 122 of 1971 and the affidavit of B.C. O'B Nation dated the 22nd of June 1971 referred to therein with Exhibit, which are marked "HS11 (a)" and "HS11(b)" (in the affidavit of Heinz Simonitsch, sworn on the 17th February 1995 in support of this Motion.
>
> 2. That the said Restrictive Covenants are enforceable by the Applicant herein HALF MOON BAY LIMITED;

The means by which the appellant sought the above declarations was Sec. 5 of the Act. That section reads as follows:

> "5. The Supreme Court shall have power on the application by motion of the Town and Country Planning Authority or any person interested -
>
> (a) to declare whether or not in any particular case any freehold land is affected by a restriction imposed by any instrument; or
>
> (b) to declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restrictions thereby imposed and whether the same is enforceable and if so, by whom."

Since Half Moon Bay as the original covenantee is a person interested then Mr. Macaulay's submission was that the declaration sought, ought to be granted pursuant to Sections 63 and 70 of Act No. 2. As Section 70 is so important to the appellant's case it is imperative to set it out at this stage. Section 70 reads:

> "70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall except in case of fraud, hold the same as the same may be described or identified in the certificate

> of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser:
>
> Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations, and to any public rights of way, and to any easement acquired by enjoyment or user or subsisting over or upon or affecting such land, and to any unpaid rates and assessments, quit rents or taxes, that have accrued due since the land was brought under the operation of this Act, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument." [Emphasis supplied]

Much stress was placed on the emphasised words by counsel for the appellant. Although a restrictive covenant is an incumbrance it is case law as developed by courts of equity that determines the scope and limits of restrictive covenants generally and, in particular as regards this case, who can enforce them.

Perhaps Sec. 63 of Act No. 2 since it specifically mentions covenants should also be cited in full to do justice to submissions on behalf of the appellant. It reads:

> "63. When land has been brought under the operation of this Act, no instrument until registered in manner herein provided shall be effectual to pass any estate or interest in such land, or to render such land liable to any mortgage or charge; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in manner

> and subject to the covenants and conditions set forth and specified in the instrument, or by this Act declared to be implied in instruments of a like nature; and should two or more instruments signed by the same proprietor, and purporting to affect the same estate or interest, be at the same time presented to the Registrar for registration, the Registrar shall register and endorse that instrument which shall be presented by the person producing the certificate of title." [Emphasis supplied]

It was contended on behalf of the appellant that the plain words of this section ought to be the basis on which the covenants embodied in the Instrument of Transfer No 220319 dated 12th July 1966 could be enforced. Such a submission ignores the purpose of Act No.2 as enunciated by Lord Watson in **Gibbs v Messer** supra. It was not the purpose of Act No. 2 to revolutionise covenants. It was to provide for the registration of such covenants on the Certificate of Title. Those attorneys-at-law who specialise in transfers and conveyances must be aware of which covenants run with the land and so are recognised by courts exercising an equitable jurisdiction.

There were two motions before Langrin, J. Here is how he treated them:

> "The respondent, Crown Eagle Hotels Limited has also filed application in Suit No. E.418 under Section 5 of the Restrictive Covenants (Discharge and Modification) Act seeking a declaration that the said covenants are personal only and therefore do not run with the land."

Then the learned judge continued thus:

> "Both motions were consolidated but the parties agreed to proceed with Suit No. ERC.63 of 1995. This motion was filed on the 20th February, 1995."

Another preliminary matter which must be dealt with is the scope and effect of Sec. 6 of the Act. That section reads:

> "6. An Order may be made under this Act notwithstanding that any instrument which is alleged to impose the restriction intended to be discharged, modified, or dealt with may not have been produced to the court , or the Judge in Chambers, as the case may be, and

> the court or Judge may act on such evidence of that instrument as the court or Judge may think sufficient."

In this regard the following, proper statement was made by Langrin, J:

> "In both applications before the Court the instrument of transfer No. 220319 dated 12th July 1966 which imposed the restrictions cannot be located by the Office of Titles as a result of which the applicant relies on Section 6 of the Act which empowers the Court to act on such evidence of that instrument as the Court thinks sufficient to make the Order. In the instant case the covenants and the applicable words are clearly evidenced in other documents before the Court and so in all the circumstances the Court will act on it to determine the vital issue in the case."

The significance of this provision is that it contemplates that the restriction may not be endorsed on the Register Book of Titles so although the Torrens System applies in Jamaica a search may have to be made to ascertain the relevant encumbrances. Such a situation envisages that the equitable and common law principles relating to restrictive covenants will have considerable bearing on the issues raised in this case.

Another appropriate finding was that His Lordship identified the three parcels of land as a corridor between the appellant and the respondent. Here is how His Lordship put it:

> "Crown Eagle Hotels Limited is therefore the owner of the Main Hotel and the Rocamora LANDS which adjoin the hotels. Half Moon Bay Limited operates a Hotel on property which adjoins the Rocamora Lands."

There is the evidence to support this important finding. It comes from Geoffrey Messado a director of the respondent:

> "3. The Registered Proprietor of the lands comprised in Certificates of Title registered at Volume 814 Folio 21 and Volume 979 Folio 136 on which the main buildings housing the Holiday Inn Hotel are erected is **CROWN EAGLE. CROWN EAGLE** acquired the property from **ROSE HALL (H.I.) LIMITED** (hereinafter referred to as **"ROSE HALL")** in 1994 (these lands are hereinafter referred to as the **"MAIN HOTEL").** The Certificates of

> Title in respect of the **MAIN HOTEL** were transferred to **CROWN EAGLE** on the 19th October 1994. I exhibit hereto marked "A" and "B" for identity copies of the said Certificates of Title.
>
> 4. The lands which adjoin the **MAIN HOTEL** and which are the subject of this application are known as the **ROCAMORA LANDS** and are comprised in three Certificates of Title registered at Volume 1231 Folios 784 and 785 (formerly Volume 770 Folios 72 and 71 respectively) and Volume 787 Folio 98. **CROWN EAGLE** also acquired the **ROCAMORA LANDS** in 1994. I exhibit hereto "C", "D" and "E" respectively copies of Certificates of Titles at Volume 1231 Folio 785 and Volume 787 Folio 98. I also exhibit hereto marked "F" and "G" respectively copies of the cancelled Certificates of Title registered at Volume 770 Folio 71 and 72."

Then after giving a history of the transfer the Director of the respondent continues thus:

> "7. The **ROCAMORA LANDS** adjoin the Half Moon Hotel operated by **HALF MOON** and the land comprised in Certificate of Title registered at Volume 1231 Folio 784 immediately adjoins **HALF MOON.** The lot next to it is registered at Volume 1231 Folio 785 and the lot which is the farthest from **HALF MOON** is registered at Volume 787 Folio 98 and is the lot on which a tennis court, a basketball court, a small concrete building and related equipment has been located since 1970. There is also a small area of registered land which is underwater in respect of all three parcels and as a result the actual shoreline of the **ROCAMORA LANDS** does not conform with the boundaries on the registered titles. I exhibit hereto marked "H" a copy of a plan prepared by Richard Haddad Commissioned Land Surveyor dated the 22nd August 1994 showing the various lots making up the Hotel site. The Applicant is not aware of the registered owner of the lands on which the **HALF MOON HOTEL** is operated."

The relevant plan prepared by Richard Haddad is at page 150 of the Record.

Supporting evidence is to be found in the affidavit of Heinz Simonitsch for the appellant in the following paragraphs:

> "2. That in 1966 the Applicant transferred to Rose Hall (Developments) Limited three parcels of land respectively comprised in Certificates of Title registered at Volume 770 Folio 71, Volume 770 Folio 72 and Volume 787 Folio

> 98 of the Register Book of Titles. The negotiations preceeding the sale by the Applicant, had been conducted for Rose Hall (Developments) Limited, by one JOHN ROLLINS, who was the largest shareholder of that Company, and who had agreed to accept as a condition of the sale, certain restrictive covenants, hereinafter mentioned.
>
> 3. That the said three parcels of land are collectively commonly known and are hereinafter referred to as the Rocamora Lands."
>
> 4. That the Rocamora Lands abut on the western boundary of the lands of the Plaintiff (which form part of the hotel aforesaid) and in near proximity to cottages belonging to the said hotel."

In a further affidavit the said Heinz Simonitsch states:

> "6. In answer to paragraph 7 of "GM", the Half Moon Hotel is situated on lands comprised in Certificate of Title registered at Volume 1159 Folio 987."

The reasoning on which Langrin J. based his decision to refuse the declarations sought was based on the following passages in his judgment. The first runs thus:

> "Mr. Gordon Robinson, on behalf of Crown Eagle Hotels Limited with his usual clarity and skill submitted that having regard to the words used to impose the covenants, the covenants in question are personal or collateral covenants and do not run with the land as:
>
> (a) the benefit of the covenant was not expressly annexed to any land.
>
> (b) the covenants were not made with the Respondent Half Moon Bay Limited as the owner of any particular parcel of land and those claiming under them as owner of any particular parcel of land to be benefitted and,..."

Then His Lordship stated as follows:-

> "For the applicant to succeed in obtaining the declarations sought I am required to be satisfied that the applicant is entitled to the benefit of restrictions purportedly running with the servient land."

Further explaining his reasons Langrin, J. continues thus:

> "A Restrictive Covenant cannot run with the land and thereby bind persons not parties to the original covenant, unless it is for the benefit or protection of land and if it is not, such covenants are generally referred to as personal covenants. Some covenants though having a close connection with land and which are in fact capable of running with land may not run with the land in a particular case because no proper words of annexation were used when the covenants were being imposed. Thus although a covenant may be capable of running with land and in a particular case be intended by the parties to run that intention may not be achieved. The benefit of a covenant is said to be annexed to a parcel of land in any case where it is entered into for the particular benefit of such land and apt words used to attach it to the land. See **Preston and Newsome** 3rd Edition p.13: **Restrictive Covenants."**

Two further passages illustrate the reasoning of the learned judge:

> "Annexation involves a process whereby the original parties to the covenant demonstrate an intention through the words used in the covenant to attach the benefit to the land. Such wording requires clear manifestation of an intention because the effect of annexation is to attach the benefit to the land."

Turning to the issue of implications the learned judge said:

> "It may well be true that the vendor owned land adjacent to the Rocamora LANDS which are capable of benefitting or capable of enjoying the benefit of the covenants and it is a fact that the land could be touched and concerned by the covenants. However, notwithstanding this if no apt words were used annexation would fail as a matter of law. Additionally, the applicant did not retain land from a parent title from which the Rocamora Lands were transferred. It acquired the Rocamora Lands independent of its acquisition of any other land which it may have held.
>
> In the final analysis it would seem that there would be no such implication unless:
>
> (a) the covenant is clearly referable to a defined piece of land, and

(b) the parties intended that the benefit should attach to the land, and not merely to the covenantee personally."

Then the learned judge concludes thus:

"For the foregoing reasons I make the following declarations:

1. The parcel of lands now known as the Rocamora Lands is not now affected by the Consent Order of Mr. Justice Malcolm dated the 3rd day of September, 1974 or by the restrictions imposed in the instrument of transfer No. 220319 dated 12th July 1966.

2. Upon a true construction of the terms of Instrument of Transfer No. 220319 dated the 12th day of July,1966 the restrictions thereby imposed on Certificates of Title registered at Volume 770 Folio 71, Volume 770 Folio 72 (now registered at Volume 1231 Folios 784 and 785) are personal or collateral only and are only enforceable by the original covenantor and covenantee.

Because

(a) the benefit was not expressly annexed to any other land.

(b) the covenants imposed did not enure for the benefit of any other lands."

In this Court

The basis of Mr. Macaulay's submission was that the authorities relied on by Langrin, J. did not take into account the provisions of Act No. 2 and in particular Sections 63 and 70. Further he contended that once the incumbrance was endorsed on the title, or ought to be so endorsed, then the titles of the Rocamora lands were to be subject to any qualification that may be specified in the certificate and to such incumbrances as may appear on the folium of the Register Book. Thus it was argued that any purchaser of the Rocamora lands as the respondent Crown Eagle Hotels Ltd.

was bound by the covenants once it had notice of it on the Register. This submission ignores the case law developed by equity both before and after the enactment of Act No 2.

If this Court affirms the order of the Court below there is no need to consider all the grounds of appeal. On this basis it is only necessary to consider ground 6 which reads:

> "6. The learned trial Judge was wrong in law in his basic ruling implied in his Judgment that an Instrument containing restrictive covenant is ineffective in law unless the word "annex" is used in the instrument creating the Restrictive Covenant."

He expanded it in his skeleton argument thus:

> "(a) Whether or not the preambulatory words to the covenants, that is to say page 231.
>
> > 'The purchaser for itself its successors and assigns as to the three parcels hereby transferred and with the intent to bind all persons in whom the three parcels or any part thereof shall for the time being be vested hereby Covenants with the vendor its successors and assigns:'
>
> created a restriction falling within the Restrictive Covenants Act. It is submitted that any restriction attached to the user of any land, subject to the Registration of Titles Act, is enforceable. It is also submitted that it is the statute, that is to say, the Restrictive Covenants Act which should be interpreted free from any glosses or interpolations of English law, however authoritative they may be, although they may be of some assistance in interpreting the relevant Jamaica Statutes. It is also submitted that the Respondents knew, and even if they were ignorant of the covenant, they were and are bound by it." [Emphasis supplied]

In **Jamaica Mutual Life Assurance Society v Hillsborough Ltd. and Others** (1989) 38 WIR 192, Lord Jauncey of Tullichettle in referring to the evolving law of restrictive covenants said at p. 196:

> "In **Renals v Cowlishaw** (1878) 9 Ch D at page 130 Hall V-C said:
>
> > '. . . that in order to enable a purchaser as an assign (such purchaser not being an assign of all that the vendor retained when he executed the conveyance containing the covenants, and that conveyance not showing that the benefit of the covenant was intended to enure for the time being of each portion of the estate so retained or of the portion of the estate of which the plaintiff is assign) to claim the benefit of a restrictive covenant, this, at least, must appear, that the assign acquired his property with the benefit of the covenant that is it must appear that the benefit of the covenant was part of the subject-matter of the purchase.'

This very important passage was anticipated by Lord Cottenham in **Tulk v Moxhay** and His Lordship's words will be referred to directly later to demonstrate the cardinal features of restrictive covenants.

Then Lord Jauncey continues thus:

> "In **Rogers v Hosegood** [1900] 2 Ch. 388 at pages 407, 408, Farwell J said:
>
> > 'When, as in **Renals v Cowlishaw,** there is no indication in the original conveyance, or in the circumstances attending it, that the burden of the restrictive covenant is imposed for the benefit of the land reserved, or any particular part of it, then it becomes necessary to examine the circumstances under which any part of the land reserved is sold, in order to see whether a benefit, not originally annexed to it, has become annexed to it on the sale, so that the purchaser is deemed to have bought it with the land. . .'
>
> Both **Renals v Cowlishaw and Rogers v Hosegood** were referred to with approval in **Reid v Bickerstaff** [1909] 2 CH 305 at page 321, where Cozens-Hardy MR in the context of a submission that the benefit of a covenant was annexed to adjoining lands of the vendors said:
>
> > 'As to the second proposition the plaintiffs have a more plausible case, but I think they fail in establishing it. It is plain that they are not assignees of the covenant, of the existence of which they were

> not aware. It is equally plain that there is nothing in the deed of 1840, or in any document prior or subsequent thereto, to indicate that the covenant was entered into for the benefit of the particular parcels of which the plaintiffs are now owners. I cannot hold that the mere fact that the plaintiffs' land is adjacent and would be more valuable if the covenant were annexed to the land suffices to justify the court in holding that it was so annexed as to pass without mention by a simple conveyance of the adjacent land'."

These passages make it clear that the land which is to benefit from a covenant must be specified in the Instrument of Transfer. These passages contain the history of the law on restrictive covenants and counsel who ignores them dares not seek injunctive relief for his client.

There were two passages from the recent case of **Keith Rutherford Lamb v Midac Equipment Ltd.** Privy Council Appeal No. 57 of 1997 delivered 4th February, 1999 which are also instructive as regards the principle that the benefit of the covenant must be annexed to the vendor's land for there to be a valid restrictive covenant. The first passage of the opinion of Lord Nicholls of Birkenhead on page 2 sets out the essential facts thus:

> "It seems likely that on the sale of each plot in 1947 the purchaser entered into a number of covenants with the vendor Frank Watson, in similar form. In the transfer to Mary Christie, the predecessor in title of Midac, Mary Christie covenanted with Frank Watson in these terms:-
>
> > 'And the said Mary Connelley Christie covenants with the said Frank Merrick Watson his heirs executors administrators transferees and assigns to observe the restrictive covenants set out in the Schedule hereto.'
>
> The scheduled restrictions included a restriction to the effect that the land being transferred was to be used for residential purposes only. This is the restrictive covenant relied on by Mr. Lamb in these proceedings'."

The second passage on page 4 gives the reasons for the judgment. It runs thus:

> "The alternative basis for Mr. Lamb's claim, that the benefit of Mary Christie's covenant is now vested in him, is that this benefit was annexed to lot no. 1 by the terms in which the covenant was made. This raises a question of interpretation of the covenant: was the language apt to show an intention that the benefit of the covenant should be annexed to the other twelve plots or, at any rate, the other plots not already sold? The covenant was not expressed to be made for the benefit of land identified by the covenant itself. As already noted, the covenant was made by Mary Christie with Frank Watson 'his heirs, executors, administrators, transferees and assigns'. The reference to heirs, executors, administrators and assigns is consistent with the covenant being intended for the benefit of Frank Watson himself, as distinct from specific property. Before their Lordships, although apparently not in the courts below, reliance was placed on the reference to 'transferees.' This, it was submitted, showed an intention to benefit land: transferees must be a reference to the transferees of land, and the covenant was expressed to be made with these persons as well as Frank Watson's personal successors.
>
> Their Lordships are inclined to doubt whether this expression ('transferees'), standing in conjunction with a reference to the covenantee's personal successors but otherwise alone and without elaboration, can be taken to evince an intention to annex the benefit of the covenant to land. But even if it can be so taken, the difficulty confronting Mr. Lamb is showing that lot no. 1 was part of the land intended to be benefited. There is too much uncertainty to know for whose benefit the covenant was taken. On this short ground, the alternative basis for Mr. Lamb's claim must also fail."

In addition to these authorities cited by Mr. Macaulay Q.C., Mr. David Henry in his closely argued submission cited a case from the home of the Torrens System. **Netherby Properties P-L v Tower Trust Ltd. No. SCGRG-99-239 Judgment No. S 247 [1999] SACS 247 (17th June 1999)** was a case where Perry J made some important pronouncements with regard to restrictive covenants. In paragraphs 31-33 the learned judge traced the history of restrictive covenants thus:

"31. Recognition of the enforceability of restrictive covenants is generally regarded as dating from the decision of the Court of Chancery in **Tulk v Moxhay. (1848) 2 Ph 774, 41 ER 1143.**

In its original formulation by Cottenham LC [2] the basis of the rule was that a subsequent purchaser of land who had notice of a restrictive covenant would be bound in equity to comply with it. As initially formulated, the rule in **Tulk v Moxhay,** as it came to be known, was not based upon the view that such a covenant ran with the land. Rather, it was a question whether, having regard to the contract of sale and the terms of the notice of the restriction on the use of the land attaching to the purchaser, equity would enforce the restriction.

32. Eventually, however, the courts took the view that such a covenant should be regarded as something in the nature of an easement. It was the emergence of that view which precipitated the need to be able to identify land to which the benefit of the covenant attached. A covenant in gross was binding only on the original purchaser.

33. The history of that development is traced by Bray CJ in **Clem Smith Nominees Pty Ltd v Farrelly and Ors. (1978) 20 SASR 227 at 232-237.** In that case, he concluded: **Ibid 235.**

'In my view the law is clear in Australia that the burden of restrictive covenants will only run with the land in equity against a subsequent holder of the land with notice of the covenant when the covenant is entered into for the benefit of some parcel of land, or possibly some interest in land. The burden of the covenant in gross will not so run; such a covenant only binds the original covenantor'."

Then in paragraph 43 the learned judge continued thus:

"43. Bray CJ in **Clem Smith v Farrelly and Ors Ibid 237** answered that question in the following way:

'Whatever may ultimately be held to be the law of England, however, I am of opinion that under the Torrens System it is essential before the burden of a restrictive covenant can be held to run with the land that the land entitled to the benefit of the covenant shall be capable of identification in some way from the registered document containing the covenant or, at least, from other related documents which can be discovered by a search in the Lands

> Titles Office (see **Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd (1971) 124 CLR 73.'**
>
> A prospective purchaser of land subject to a burden should be able to find out by a search whether the covenant is a covenant in gross, which will not be binding on him if he purchases, or a covenant the benefit of which is attached to some parcels of land, which may be binding on him. It was so held by Hudson J in the Supreme Court of Victoria in **In Dennerstein [1963] VR 688** With respect I agree."

It is important to add that Lord Cottenham in his speech in **Tulk v Moxhay** 41 ER 1143 responding to counsel said:

> "If that was so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless."

So from the very beginning of the law on restrictive covenants it was recognised that not only must the covenants run with the land, but that the benefit must be annexed to land which must be identified in the conveyance. This is in accordance with the Privy Council cases cited earlier from this jurisdiction. It was on this foundation that the law restrictive covenants was developed in common law jurisdictions.

It is evident that the draftsman of the Instrument of Transfer did not annex the incidents of the restrictive covenants on the Rocamora lands to the land on which Half Moon Bay is sited. So the covenant was only enforceable by the original covenantee Half Moon Bay Ltd. on the original covenantor Rose Hall Developers Ltd. by virtue of the law of contract. This omission in the Instrument 220319 dated 12th day of July 1996 means that this appeal is bound to fail. It is therefore dismissed. Consequently the order of Langrin J. must be affirmed. Further the agreed or taxed costs must go to the respondent.

WALKER J.A.

I have had the advantage of reading in draft the judgment of Downer J.A. and I am in complete agreement with his reasoning and also with the conclusion to which he has come in disposing of this matter.

The case for the appellant as presented by Mr. MaCaulay Q.C., involved a total reliance on the provisions of Section 63 of the Registration of Titles Act (the "Act") . Section 63 reads as follows:

> "**63.** When land has been brought under the operation of this Act, no instrument until registered in manner herein provided shall be effectual to pass any estate or interest in such land, or to render such land liable to any mortgage or charge; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument, or by this Act declared to be implied in instruments of a like nature; and should two or more instruments signed by the same proprietor, and purporting to affect the same estate or interest, be at the same time presented to the Registrar for registration, the Registrar shall register and endorse that instrument which shall be presented by the person producing the certificate of title".

According to Mr. MaCaulay, section 63 refers to covenants generally and makes no distinction between personal covenants and covenants that run with the land. It followed, he argued, that in the Jamaican context such a distinction does not exist and, therefore, ought not, as a matter of law, to be recognised by the court. He contended that on a proper construction of section 63, a purchaser of land to which the Act applies is, by operation of law, fixed with notice of, and bound by, any covenant that was duly registered, or was registrable, on a certificate of title issued

pursuant to the provisions of the Act. A purchaser of such land took the land subject to such a covenant which, itself, ran with the land. On the basis of this reasoning Mr. Macaulay invited this court to say that the cases of ***Jamaica Mutual Life Assurance Society v Hillsborough Ltd and Others*** (1989) 38 W.I.R 192 and ***Lamb v Midac Equipment Ltd*** Privy Council Appeal No. 57 of 1997, in which judgment was delivered on February 4, 1999, both decisions of the Privy Council, were wrongly decided. Mr. MaCaulay's invitation is unacceptable. It is misconceived and in fact born of judicial heresy. It is clear that section 63 of the Act is concerned with the effect of registration or non-registration of instruments affecting lands falling within the compass of the Act. The section does not speak to the character or scope of a restrictive covenant. The character and scope of such a covenant falls to be determined by reference to such equitable and common law principles as were applied by the Privy Council in the Board's decisions in the ***Lamb*** and ***Jamaica Mutual*** cases (supra) in both of which their Lordships' Board was concerned with ascertaining the true nature of restrictive covenants pertaining to land falling within the ambit of the Act.

PANTON, J.A.

I agree that the appeal should be dismissed.