Privy Council Appeal No. 31 of 2000

Half Moon Bay Limited *Appellant*

v.

Crown Eagle Hotels Limited *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 20th May 2002

Present at the hearing:-

Lord Nicholls of Birkenhead
Lord Browne-Wilkinson
Lord Millett
Sir Murray Stuart-Smith
Sir Christopher Staughton

*[Delivered by **Lord Millett**]*

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1. The appellants own and operate the Half Moon Hotel at Montego Bay, Jamaica. The respondents own the adjacent Holiday Inn which lies immediately to the west. Both hotels give directly on to a private beach. Between the Half Moon Hotel and the main buildings of the Holiday Inn are three contiguous strips of land of a total area of some 7 acres belonging to the Holiday Inn and known as "the Rocamora lands". They abut the western boundary of the Half Moon Hotel and are in close proximity to cottages belonging to the hotel.

2. The certificates of title to the Rocamora lands are currently registered in the Register Book at Volume 1231 Folios 784 (the strip closest to the Half Moon Hotel) and 785 (the middle strip) and Volume 787 Folio 98 (the strip furthest from the Half Moon Hotel). The present dispute concerns restrictive covenants which affect the Rocamora lands and which were entered into by the respondents' predecessors in title. The question is whether they are still subsisting and enforceable notwithstanding successive

alienations of the Rocamora lands. The covenants in question do not affect the main part of the Holiday Inn.

Title to the Rocamora lands.

3. The Rocamora lands were acquired by the appellants on 1st March 1966 from one Norman Rocamora for the sum of $100,000. Four months later they were sold and transferred to Rose Hall (Developments) Limited ("Rose Hall") for the sum of $125,000. Their Lordships infer from its name that Rose Hall was the company responsible for the construction of the hotel which is now known as the Holiday Inn. The Instrument of Transfer ("the 1966 Transfer") was dated 12th July 1966 and numbered 220319. It contained a covenant by Rose Hall in the following terms:

> "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 [Half Moon] 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)."

When they disposed of the Rocamora lands the appellants were the owners of the Half Moon Hotel and its beach but they did not retain any of the land which they had acquired from Norman Rocamora.

4. Title to the Rocamora Lands was registered in the name of Rose Hall on 30th October 1966. The certificates of title were duly registered in the Register Book at Volume 770 Folios 71 and 72 and Volume 787 Folio 98. According to his evidence the appellants' Managing Director was informed by his solicitors that the covenants in the 1966 Transfer had been entered or notified

upon the relevant certificates of title, but this was not in fact the case.

5. In 1966 the Rocamora lands consisted largely of scrub, but in 1970 or so tennis courts were built on the land registered in Volume 787 Folio 98, that is to say on the part of the Rocamora lands furthest from the Half Moon Hotel.

6. Concerned at this development, the appellants brought proceedings against Rose Hall to enforce the covenants contained in the 1966 Transfer and to restrain the use of the tennis courts on the Rocamora Lands. On 17th March 1971, in order to protect their position in case Rose Hall should part with the Rocamora lands while the proceedings were still pending, the appellants lodged a caveat against dealings with any of such lands. On the same day the Registrar lodged Caveat No. 77113 against the Rocamora lands and made an internal note of the caveat no. 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. As will appear, this direction has never been complied with.

7. On 3rd September 1974 Malcolm J (Ag) made a consent Order in the proceedings. This directed that the covenants contained in the 1966 Transfer should be endorsed upon the certificates of title to the Rocamora lands, and that within thirty days Rose Hall's copies of the certificates should be delivered to the Registrar to enable this to be done. The Order also directed that upon the titles being duly endorsed on the certificates the caveats filed against the titles should be withdrawn.

8. Despite the terms of the consent Order, the covenants were still not entered or notified on any of the certificates of title to the Rocamora lands. It was only much later in February 1997, that is to say after the hearing of the present proceedings at first instance, that any entry of the covenants was made on the Register. The circumstances in which this was done are obscure.

9. In 1990 Rose Hall transferred the Rocamora lands to the Urban Development Corporation ("UDC") by way of exchange. The transfer was not expressed to be subject to any of the covenants in the 1966 Transfer, but despite this it was registered on 28th August and 18th October 1990, and no entry or notification of the covenants was entered on the Register. On 17th December 1990 the certificates at Volume 770 Folios 72 and 71 were cancelled and replaced by new certificates in the name of

UDC at Volume 1231 Folios 784 and 785. The manuscript references to the caveat were struck through on the cancelled certificates and were not reproduced on the replacement certificates, presumably because the effect of the caveat could not survive the transfer to UDC. The reference to the caveat on the certificate at Volume 787 Folio 98 was similarly struck through at the same time.

10. In October 1994 the respondents acquired the land on which the main part of the Holiday Inn was built. On 20th December 1994 they acquired the Rocamora lands from UDC. The transfer was not expressed to be subject to the covenants in the 1966 Transfer. It was registered on 20th January 1995. The entries on the Register contained the words "Subject to Caveat No. 77113" but these words were struck through. The parties are not agreed as to the time when the words were struck through, but the question is not material to the disposal of the present appeal since the caveat had expired on the registration of UDC and continued reference to it on the Register thereafter could have no effect. Were it necessary to resolve the issue then, in the absence of any evidence to the contrary, their Lordships would infer that the words were struck through at the time because it was realised that they were entered in error.

The present proceedings.

11. On 20th February 1995 the appellants commenced the present proceedings against the respondents pursuant to section 5 of the Restrictive Covenants (Discharge and Modification) Act 1960 for a declaration that the Rocamora lands were affected by the covenants contained in the 1966 Transfer and that such covenants were enforceable by the appellants. The respondents subsequently issued their own proceedings for counter-declarations and both sets of proceedings were listed for trial at the same time. At trial it was agreed not to proceed with the respondents' proceedings, and their Lordships need say no more about them.

12. On 18th April 1996 Langrin J dismissed the appellants' application and gave judgment for the respondents. He did so on the grounds (a) that the benefit of the covenants was not expressly annexed to any other land and (b) that they did not enure for the benefit of any other lands. He appears to have treated both questions as questions of construction, so that the second ground of decision was essentially a finding that there was no implied annexation of the benefit of the covenants to any land of the appellants.

13. On 9th February 1997, while the appellants' appeal from the judgment of Langrin J was pending, the covenants in the 1966 Transfer were entered on the certificates of title in the Register Book. The entries must have been made by the Registrar either of his own motion or at the request of the appellants, but there is no evidence as to the circumstances in which they were made. The duplicate certificates, which are normally in the possession of the registered proprietor or his mortgagee, were never put in evidence and have not been shown to their Lordships; but it is unlikely that they contain similar endorsements, since the respondents had no occasion to deliver their certificates to the Registrar in February 1997 and they would obviously have objected strongly to the endorsement of an incumbrance which the trial Judge had only recently declared to be unenforceable. The entries seem to have come as a surprise to the respondents when they discovered them.

14. On 10th December 1999 the Court of Appeal (Downer, Walker and Panton JJA) dismissed the appellants' appeal. They rejected an argument put forward by the appellants that by reason of section 63 of the Registration of Titles Act 1889 ("the 1889 Act") (their Lordships have been told that the reference to section 70 in the judgment of Downer JA was a mistake) a purchaser of land is bound by any covenant which is capable of being registered on a certificate of title whether or not it is in fact registered and whether or not it is capable of binding successors in title to the burdened land. They upheld the Judge's finding that the covenants were unenforceable for want of annexation of the benefit of the covenants to any land belonging to the appellants. Accordingly there was no need for them to consider the state of the Register or make any findings in relation to the entries which had been made since the judgment below.

The transfer to Bass.

15. In 1999 the respondents sold and transferred the Holiday Inn together with the Rocamora lands to Bass Hotels & Resorts (Jamaica) Ltd. ("Bass"). The transfer was registered on the 3rd August 1999. Apart from the entries made on the 9th February 1997, none of the certificates of title contain any reference to the covenants in the 1966 Transfer. With its consent and the agreement of the parties their Lordships have given leave for Bass to be joined as an additional respondent to the appeal.

The benefit of the covenants.

16. Their Lordships would begin by observing that the appellants are the original covenantees. As such, they are plainly entitled to the benefit of the covenants. Annexation is relevant only where the party who is seeking to enforce the covenant is a successor in title of the original covenantee. The benefit of a contract is assignable both at law and in equity, and a plaintiff who is not the original covenantee may nevertheless be able to enforce it if he can show that he has become entitled to the benefit of the covenant. This he may do by showing (i) that he is an express assign of the benefit of the covenant; or (ii) that he is an express assign of the land to which the benefit of the covenant has been annexed either expressly or by necessary implication; or (iii) that the covenants were imposed as part of a building scheme. Annexation of the covenant to land of the covenantee thus permits a successor in title of the original covenantee to enforce the covenant solely by virtue of the transfer of the land to which it has been annexed and without obtaining any separate assignment of the covenant itself. But it is not necessary where it is the original covenantee who is seeking to enforce the covenant. He does not need an assignment of the benefit of the covenant whether with the land or separately. With all due respect, therefore, cases such as *Rogers v Hosegood* [1900] 2 Ch 388 and *Reid v Bickerstaff* [1909] 2 Ch 305 , which were relied upon by the Court of Appeal, are not in point.

The burden of the covenants.

17. 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: *London County Council v Allen* [1914] 3 KB 642.

18. Whether the party seeking to enforce the covenant owns land capable of being benefited by it is a question of fact. It is not to be confused with the different question whether he has the benefit of the covenant. In the case of a successor in title of the original covenantee this may depend on whether the benefit of the covenant has been sufficiently annexed to land so as to pass on a

conveyance of the land without separate assignment, which is a question of construction.

19. The Judge did not make any relevant findings of fact, but their Lordships find it difficult to understand how it could be said that the covenants in question are not capable of benefiting any of the land which forms the site of the Half Moon Hotel. Not only do the Rocamora lands immediately abut on the Half Moon Hotel, but one of the covenants expressly prohibits any beach improvement which is detrimental to the Half Moon Hotel. A covenant in such terms can scarcely be other than beneficial to the Half Moon Hotel.

20. It is, however, not necessary to develop this question further, because their Lordships are satisfied that even if the covenants are capable of benefiting the Half Moon Hotel they are unenforceable for want of entry or notification at the relevant time on the certificates of title in the Register Book.

The registration system.

21. The 1889 Act introduced a Torrens system of land registration to Jamaica. The general features of such a system are very familiar. Title to land and incumbrances 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.

22. The Register Book consists of the original certificates of title, each of which forms a separate folium of the Book. The registered proprietor is given a duplicate of the certificate bearing the number of the volume and folium of the Register Book in which the original is entered: section 55 of the 1889 Act. An instrument purporting to affect land is taken to be registered when it is produced for registration, provided that it is subsequently entered both on the relevant folium and on the duplicate: section 58. There are further provisions to ensure that every entry on the original certificate is matched at all times by a like entry on the duplicate.

23. Their Lordships can content themselves with referring to the following extracts from the 1889 Act (which are reproduced with emphasis added):

every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor ..."

24. The word "incumbrance" is defined by section 3 to 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."

Thus it extends to restrictive covenants which are capable of binding the land in the hands of a successor in title of the covenantor, but not a personal covenant which is binding on the covenantor only.

25. Caveats are dealt with by sections 139 - 143. Section 139 provides that any person with an adverse claim against the land may lodge a caveat with the Registrar forbidding (*inter alia*) the registration of any person as transferee or proprietor of the land unless the instrument of transfer is expressed to be subject to the claim of the caveator. Section 140 provides for notice of the caveat to be given to the registered proprietor, who may if he thinks fit summon the caveator to show cause why the caveat should not be removed. Except in the case of a caveat lodged by the Registrar, every caveat is deemed to lapse upon the expiration of 14 days after notice to the caveator of an application for registration of a transfer or dealing. Section 142 provides that, so long as the caveat remains in force, the Registrar shall not enter a transfer in the Register Book without the written consent of the caveator.

26. The Registrar may enter a caveat pursuant to the powers conferred on him by section 15. Paragraph (b) of that section requires him to rectify the Register Book by correcting errors and supplying omissions, and provides that:

> "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.*"

Paragraph (c) provides that the Registrar

> "(c) ... 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."

The paragraph is not free from ambiguity, but their Lordships will assume without deciding that the concluding six lines are free standing and are not confined to the case where the caveat is lodged on behalf of the Crown or a person under a disability; and that the Registrar's caveat in the present case was lodged pursuant to this paragraph.

Application to the present case.

27. The appellants had two opportunities to enter the covenants in the 1966 Transfer on the title to the Rocamora lands in the Register Book. The first was in 1966 when they transferred the Rocamora lands to Rose Hall and took the benefit of the covenants. The covenants ought to have been but were not entered or notified on the title at that time. Whether this was due to a failure on the part of the appellants or their solicitors or to an error on the part of the Registrar is not known. By itself this omission was not fatal.

28. The second opportunity arose following the Order of Malcolm J in 1974. Title to the Rocamora lands was still vested in Rose Hall, and still was liable to be rectified pursuant to section 15(b) by the entry or notification of the covenants on the Register Book. Rose Hall was ordered to deliver its duplicate certificate of title to the Registrar in order to allow this to be done. Despite this, no such entry or notification was made before the Rocamora lands were transferred to UDC and UDC was registered as proprietor. This omission was fatal, for UDC obtained title to the lands free from the covenants by virtue of sections 26 and 70; and by virtue of section 71 was not affected by its notice of the existence of the covenants.

29. The circumstances in which UDC came to be registered as proprietor without any entry or notification of the covenants against its title are unclear. 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. This should have alerted the

Registrar sufficiently to protect the appellants; yet the transfer to UDC was registered although it was not made subject to the covenants. In the absence of evidence from the Registrar, it is not possible to determine whether this was the result of a mistake by the Registrar, or was consequent upon the expiry of notice to the appellants pursuant to section 140. It is true that the relevant part of section 140 does not in terms apply to a caveat lodged by the Registrar, but the purpose of his caveat may have been to support the caveat lodged by the appellants, so that the removal of the one would automatically cause the removal of the other.

30. Be that as it may, 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 powers under Section 15(b) the transferee takes free from that interest.

31. 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. 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 without 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.

32. The appellants submit that, while the 1997 entries could not affect the title of UDC or the respondents, they could and did affect the title of Bass, which was registered after the entries were made. Their Lordships cannot accept this submission. Bass obtained title to the Rocamora lands from a registered proprietor which was entitled to them free from the covenants, and it was

entitled to be registered with the title which it had acquired. Thus there was no error or omission in registering Bass as proprietor of the Rocamora lands without reference to the covenants in the 1966 Transfer to which they had long ceased to be subject. If the 1997 entries are still on the certificates in the Register Book, they should be expunged.

33. The appellants placed much reliance on the terms of section 63 before the Court of Appeal, though less before their Lordships. The section is in the following terms:

> "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 ..."

The appellants contend that the section makes no distinction between personal covenants and covenants that run with the land, and that the effect of section 63 is that upon registration of a transfer the land is automatically made subject to the covenants and conditions contained in the instrument of transfer. The appellants also pray in aid section 88 as supporting their construction of section 63.

34. Their Lordships are unable to accept this submission. Section 63 does not make covenants enforceable against the transferee which are not capable of binding the land in his hands; nor does it override the terms of section 70, which renders unenforceable for want of registration incumbrances which are not entered or notified on the Register Book. Section 63 merely operates to prevent the instrument of transfer from having any effect in itself to pass any estate or interest; the estate or interest passes only upon registration, and then what passes is the estate or interest comprised in the instrument "in manner and subject to the covenants and conditions set forth and specified in the instrument", that is to say, to the extent that they are capable of affecting the land in the hands of the transferee. Section 88 is to the like effect; it does not make registrable but unregistered incumbrances binding on the transferee, thereby subverting the purpose of the 1889 Act.

Conclusion.

35. Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of the respondents and Bass before the Board.