CA. Restrictive Covenants (Discharge and Modification) Act, s5
Appeal from order of Judge refusing declaration that restrictive
covenants did not affect a parcel of land —
whether covenants personal and did not run with land —
whether any express assignment of covenant — whether person
other than original covenantee could obtain benefit of
covenant;
On facts covenants not personal and were enforceable —
appeal dismissed.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 9/86

LB Appeal Allowed by Priv Council 24/7/89

✓ comp.

COR: The Hon. Mr. Justice Kerr, P. (Ag.)
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

Cases referred to
Marten v Flight Refuelling Ltd (1962) 1 Ch 115
Rogers v Hosegood (1900) 2 Ch 388
Re Union of London and Smith's Banks Ltd's Conveyance (1933) 1 Ch 611
Ellison v Reacher (1908) 2 Ch 374.

JAMAICA MUTUAL LIFE ASSURANCE CO. LTD.

v.

HILLSBOROUGH LIMITED & OTHERS

Appd Allowed Priv Council 24/7/89

Hugh Small, Q.C., & Michael Hylton for appellants

Respondents not represented.

14th, 15th & 16th October, 1986 &
20th January, 1987

CAREY, J.A.:

The appellants, in proceedings under Section 5 of the Restrictive Covenants (Discharge and Modification) Act, sought a declaration that restrictive covenants imposed by an instrument of transfer (numbered 121689) dated 6th August, 1956 in respect of a parcel of land known as 13a Norbrook Road, and owned by them, were now unenforceable by anyone and did not affect the said parcel of land.

In a judgment which occupied a protracted period of parturition, and regretably did not provide us with the benefit of his views on the issues involved in this somewhat difficult area of law, Malcolm, J., by an order dated 14th February, 1986 refused the declaration sought. He held that the covenants were not personal and were enforceable.

I would preface my own observations on the principles applicable by chronicling the conveyancing facts in respect of the lands of which the appellants and respondents are the registered proprietors, and as regards the restrictive covenants imposed thereon. So far as 13a Norbrook Road is concerned, it originally formed part of a larger tract of land, some 1551 acres, registered at Volume 89 Folio 45 in the names of Harold Herbert Dunn, Richard Farewell Williams, Gladys May Farquharson and George Forbes Milne and described as "part of Constant Spring Estate in the parish of St. Andrew", the transfer showed the imposition of certain restrictions of which the material clause numbered (a), provided as follows:

> "(a) THE LAND the subject of this Transfer shall not be sub-divided into smaller lots for a period of seven years from the Twenty-fourth day of September One thousand nine hundred and fifty-four and after such time has expired shall not be sub-divided into Lots of less than One acre each."

There is no evidence before us as to intervening transfers in relation to this parcel of land but by virtue of a transfer registered on 24th August, 1981, the present appellants became registered proprietors of the parcel of land. At that time, it was also clear, that the land was subject to the same restrictions imposed originally except that by then, the seven (7) years had elapsed with the result that the covenant restricting sub-division into lots of less than one acre each had become effective.

As to Hillsborough Limited, the parcel of land (shaded blue on the diagram submitted with our papers) of which they are the registered proprietors, also formed part of the same larger plot to which I have already referred, as owned by Harold Herbert Dunn and others. In 1956 the original transferors transferred two portions of this larger plot to Cecil Boswell Facey who in turn transferred one of

these plots to Millbrook Limited who in turn transferred that plot to its present owners, Hillsborough Limited. I do not think there is any dispute that this plot was transferred subject to the restrictive covenants endorsed on the title thereto.

With respect to the plot of land of which Robert Bolt is the registered proprietor (that shaded green on the diagram submitted) that also formed part of the 1551 acres to which reference has already been made. In 1970, Cecil Boswell Facey transferred a portion of this land to Sir Phillip Sherlock and his wife and they in turn transferred the said land to its present owner. The restrictive covenant as to sub-division of the land still touched and concerned the land. Finally, I come to the plot owned by Royal Bank Trust Co. of Jamaica Limited. Again that plot was also a part of the larger tract owned by Harold Herbert Dunn and others who in 1952 transferred some 65 acres to Cecil Alexander DeLisser. He in turn sold the land to B.J. McManus in 1954. He sub-divided the plot into 14 lots, one of which, lot 8, was transferred to the present proprietors. At all stages of the transfer, the transferees took subject to the restrictive covenants endorsed on the titles.

Mr. Small submitted that when the transfers were made, there were no words of annexation. The result of that failure was that the covenants amounted to no more than personal covenants and accordingly did not run with the land. There was further, he submitted, no express assignment of the benefit of the covenants nor were the covenants made expressly to run with the land and accordingly, a person who was not the original covenantee could not obtain the benefit of the covenant. The exception to this principle would be the creation of a building scheme but there was no evidence of such development on the facts in the instant case.

Some of these arguments can, in my view, be shortly disposed of. In the first place, it is not, with respect, altogether clear

why these covenants should be thought to be personal. The conveyancing documents show that the several transferees, for our purposes, covenantors, took subject to the restrictive covenants. All the parties in this case are assignees having obtained title to their respective holdings by purchase. There can be little argument that the covenants are not negative in nature. There appears to be some question as to whether, at the time of the respective transfers when the covenants were taken, that the covenantor retained any land in respect of which protection by the covenants was being imposed. The evidence which has been placed before us in this respect is, in my view, less than clear. Some of the exhibits which are comprised in the record amount to no more than illegible cacography which could, doubtless, have been explained by the respondents who, regretably, are not represented in this Court. But I did not understand Mr. Small to be making an issue of this and I can, therefore, go on to consider whether the benefit of the covenant was expressly annexed to the land or expressly assigned to it.

It was said by Mr. Small that the absence of words of annexation, was fatal to enforceability of the covenant. Annexation is not, however, constituted solely by the use of a prescribed formula. This was made clear by Wilberforce, J., (as he then was) in Marten v. Flight Refuelling Ltd. [1962] 1 Ch. 115 at page 130 where he observed:

> "It is, however, well established by the authorities that the benefit of restrictive covenants can pass to persons other than the original covenantee, even in the absence of annexation, provided that certain conditions are fulfilled."

Farwell, J., in Rogers v. Hosegood [1900] 2 Ch. 388 had made precisely the same point more than a half century earlier when he said at page 396:

> "The Courts have drawn the inference that the parties intended, or in other words the Courts have held on the true construction of the documents that they have contracted, that the covenants shall or shall not run with the land from various circumstances."

In the result, the real question is - not whether the traditional formula - "with intent that the covenant may enure to the benefit of the vendor their successors and assigns and others claiming under them to all or any of their lands adjoining", has been invoked, but rather, one of intention, which it is permissible to ascertain from an examination of the surrounding facts at the time of sale. Indeed, on the authority of Rogers v. Hosegood (supra) it can be said, than when the benefit of a restrictive covenant has been once clearly annexed to one piece of land, there is a presumption that it passes by an assignment of that land, and it may be said to run with the land in equity as well as at law without proof of special bargain or representation on the assignment of land. The covenant in such a case runs with the land because the assignee has purchased something which inhered in, or was annexed ot the land which he bought. See per Collins, L.J., at page 487 in Rogers v. Hosegood (supra).

So far as the appellant's plot of land is concerned, when the original owners sold that land to Maurice Williams Facey and imposed restrictive covenants thereon, their intention clearly was to protect or benefit the land retained in certificate of title Volume 89 Folio 45. It cannot be in dispute that the restrictive covenants thus imposed run with the land and are enforceable without express assignment by the owner for the time being of the land for the benefit of which they were imposed. It would seem to follow that the appellants, as assignees of the original Covenantor's land, are bound by the covenants. The covenants touch and concern their land; Re Union of London and Smith's Bank Ltd's Conveyance [1933] 1 Ch. 611, and were

intended to run with the land.

Alternatively, in my opinion, there is ground for saying that the conveyancing data showed, that the original owners of the land comprised in certificate of title Volume 89 Folio 45, had upon the sale of various plots from this land to various purchasers, imposed covenants with the intention that they were mutually to enjoy the benefit of and be bound by the covenants, in other words, there was a general scheme of development. Ellison v. Reacher, [1908] 2 Ch. 374 the locus classicus on building scheme, requires proof on the following facts:

i. The plaintiff and defendant must both have derived title from a common vendor.

As to this, the present appellants and respondents derive title from a common vendor. The root of title in respect of all the parties in the present case, is certificate of title Volume 89 Folio 45 registered in the names of Harold Herbert Dunn and others which it is not now necessary to repeat.

ii. Previously to the sale of the plaintiff's and defendant's plots, the common vendor must have laid out the estate in lots subject to restrictions which were intended to be imposed on all of them and were consistent only with some general scheme of development, ...

The conveyancing history of, first, all that parcel of land known by the name of Norbrook, secondly, all that parcel of land known as Constant Spring Estate, and thirdly, all that piece of land formerly part of Constant Spring Estate but now known as Retreat, is that this vast estate was prior to the sale to the present parties laid out in lots subject to restrictions which were imposed on them all. The imposition of the restrictions is explicable only on the basis of some general scheme of development.

iii. The common vendor must have intended the restrictions to be for the benefit of all lots sold.

Seeing that substantially the same restrictions were imposed on all the lots sold, then it would seem to follow that the intention was for the benefit of the lots sold. The plots of the parties must have been bought from the common vendor on the footing that the restrictions were for the benefit of the other lots.

iv. The area to which the scheme extends must be clearly defined.

Condition (iii), having been satisfied, then condition (iv) is an inevitable inference to be drawn. As to the last condition, all the instruments or conveyancing documents put before us identify the area of development clearly and no argument was advanced to the contrary.

For these reasons I am satisfied that it was the parties' intention that the various purchasers from a common vendor of parts of a defined area of land should have rights among themselves. In the event, I come to the conclusion that the covenants imposed were not personal to the vendor but are enforceable. The result is that the learned judge's order should be affirmed and the appeal dismissed.

Kerr, P. (Ag.):

I have read the judgment of Carey, J.A., and I am in agreement with his reasoning and conclusions and there is nothing that I can usefully add.

WHITE, J.A.:

I agree with the judgment of Carey, J.A., which is as incisive as it is concise.