IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 1886/2002

BETWEEN	GUL LUCHMANDAS KHEMLANI	1st CLAIMANT
AND	MONICA KHEMLANI	2ND CLAIMANT
AND	AMIDOS LIMITED	1ST DEFENDANT
AND	WARRINGTON WILLIAMS	2nd DEFENDANT
AND	MAUREEN WILLIAMS	3rd DEFENDANT
AND	SUPERONE LIMITED	4th DEFENDANT
AND	PETER MARTIN	5th DEFENDANT
AND	LORNA MARTIN	6th DEFENDANT
AND	BANK OF NOVA SCOTIA JAMAICA LIMITED	7th DEFENDANT

Ms Hillary Phillips Q.C., and Mr. Kevin Williams instructed by Grant, Stewart, Phillips and Company for both claimants.

Mr. Ransford Braham and Ms Catherine Cousins instructed by Livingston, Alexander and Levy for the Defendants

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Heard: 15th, 16th, 17th, 20th, 21st December, 2004; 31st January 2005 and 25th February, 2005

Coram: D. MCINTOSH J

The claimants seek to set aside the consent order made between themselves and the defendants pursuant to claim No. HCV 1857/2003. That consent order was entered by Rattray J on the 29th April, 2004.

Their application is based on the grounds that the covenants endorsed on the Certificate of Title, registered at Volume 996 Folio 253 were not properly imposed thereon and that at the time of the making of the consent order all parties in this claim who were also the parties in claim No. HCV 1857/2003, were mistaken as to the imposition and enforceability of the said covenants.

At the start of the hearing the claimants sought to amend their claim. This was refused as the amendments sought did not comply with the Civil Procedure Rules 2003.

There was cross-examination of Gul Khemlani, first claimant and of Dr. Harding and Warrington Williams for the defendants.

BASIC FACTS

(a) The claimant are the registered proprietors of land registered at Volume 996 Folio 256 of the Register Book of Title (lot No. 258 of the Register Book of Title (lot No. 87).

(b) The first defendant is the registered proprietor of land registered proprietors of land registered at volume 996 Folio 260 of the

Registered Book of Titles (lot No. 89).

(c) The second and third defendants are the registered proprietors of land registered at Volume 996 Folio 260 of the Register Book of Titles (lot No. 89).

(d) The fourth defendant is the registered proprietor of property registered at Volume 996 Folio 261 of the Register Book of

(e) Titles (lot 90).

(f) The fifth and sixth defendants are the proprietors of land registered at Volume 996 Folio 254 of the Register Book of Titles (lot 83).

(g) The seventh defendant is the registered proprietor of property registered at Volume 998 Folio 260 of the Register Book of Titles (lot 133).

(h) The claimants' land and the defendants' land were formerly part of land registered at Volume 579 Folio 3 of the Register Book of Titles which was previously owned Reginald Cluer. Land registered at Volume 579

Folio 3 the Register Book of Titles is hereafter referred to as "the development land".

In or about 1963 Reginald Cluer, being the owner of the development land, laid the development land out into lots and subdivided same. The lots are set out in the Deposited Plan bearing No. 2573. That Mr. Cluer pursuant to an Instrument directed to the Registrar of Titles obtained splinter titles or

Certificate of Titles for eighty lot which include the claimants' and defendants' land. The Instruments by which the titles for the eighty lots were obtained is dated 21st May 1993 and bears Miscellaneous Number 25445 given to it by the Registrar of Titles. It was by this Instrument that Mr. Cluer directed the Registrar of Titles to endorse the restrictive covenants set out on the Title for each of the eighty (80) lots were duly issued by Registrar of Titles and pursuant to the request or direction of Mr. Cluer the restrictive covenants as set out in the Instrument are endorsed on each title for the eighty lots and the titles exhibited to the documents in this matter for the defendants and the claimants are but a sample of these titles with the said endorsement.

In or about July 2003 the defendants became aware that the claimants were carrying out construction on the claimants' land. The defendants were of the view that the claimants were building on the claimants' land in breach of restrictive covenant, particularly restrictive covenant No. 9 which prohibits construction of more than one dwelling house on the premises.

Consequent on this discovery the defendants instructed their attorneys-at-Law, Livingston, Alexander & Levy, to file an action against the claimants seeking certain declarations including declarations that the defendants are entitled to benefit of the restrictive covenants and that the claimants and the claimants' land were bound by the restrictive covenants and a declaration that the claimants were acting in breach of the

restrictive covenants and also seeking a permanent injunction to restrain the claimants from acting in breach of the said restrictive covenants. **[See pages 217 to 271 of the main bundle for Claim Form and Particulars of Claim].** In addition, an application was made to the Honourable Mr. Justice Reid for an interlocutory injunction to restrain the construction of the offending structures until the trial of the claim **(pg. 283-287 of the main bundle].** This interlocutory injunction was granted by Mr. Justice Reid on 12th December 2003. The claimants filed an Appeal in the Court of Appeal against the Order of Mr. Justice Reid but the appeal was eventually withdrawn on 29th March 2004. The claim brought by the defendants against the claimants was set for trial in the Supreme Court on 29th, 30th June and 2nd July 2004 and pre-trial review was set for 29th April 2004 **(para. 15 Affidavit of Oswald Harding, p. 212 of the main bundle].**

Prior to date set for the pre-trial review the parties, through their Attorneys-at-Law, negotiated a settlement and this settlement is encapsulated and set out in the Consent Order made before Mr. Justice Rattray on 29th April 2004 **[pg. 56 of main bundle].**

THE CLAIMANTS SUBMISSION

The Claimant's submitted that an operative mistake, sufficient to vitiate a contract, may arise from ignorance or a misconception/misapprehension of the relevant facts/law at the material time the contract was made.

SEE: HALSBURY LAWS OF ENGLAND (4th EDITION) VOLUME 32, paras. 6 and 7.

In such circumstances, where the court finds that there is an operative mistake, common between all the parties, the court ought to treat the ensuing contract as having never been made and set aside the same.

SEE: GALLOWAY - V- GALLOWAY (1913 – 1914) 30 T.L.R. 531 at 532 Per Ridley J. It is clear from **EXHIBIT GLK-8 (page 56 of the Record)** that the Consent Order is premised on the parties' beliefs that the covenants are enforceable. If this Honourable Court finds otherwise, the basis of the Consent Order would cease to exist in law and fact and as such, it is submitted, must be set aside.

A Consent Order, even one in an executed form where at least one party to the order has acted upon its terms and provisions may be set aside on any justifiable ground. **Per Lindley L.J in HUDDERSFIELD BANKING COMPANY LIMITED -v- LISTER 7 SON LIMITED at 280 – 282 and Vaughn Williams J at 276.**

A Consent Order evidences a contract between the parties and it is to be subject to all the ordinary principles of Contract Law. **SEE: SUPREME COURT PRACTICE 1988 – Para. 4608.** The claimants submit that the law is very clear that where there is a common mistake which fundamentally and radically changes the agreement between the parties to the extent that had the parties known of the mistake beforehand they would not have

entered that agreement, the common mistake is operative to void the agreement.

SEE: BELL –v- LEVER BROTHERS LIMITED [1932] A.C.

ASSOCIATED JAPANESE BANK LIMITED –v- CREDIT DU NORD LIMITED [1989] 1 W.L.R. 255 at 268 – Letter E and 269 Letters B – D. COOPER – v – PHIBBS (1867) LR 2 HI. 149

SCOTT – v – COULSON (1903) 2 Ch .249

NORWICH UNION FIRE INSURANCE SOCIETY LTD –v- WILLIAMS H. PRICE [1934] ALL E.R. Rep. 352

The circumstances that led to the Consent Order, were that the following state of affairs, factual and legal, were assumed to exist (erroneously) that is:

i. That all the parties were derived from a common vendor and cut from a common miscellaneous instrument; and

ii. The covenants endorsed on all the Certificates of Title were legally imposed, properly annexed to the lands and that the benefits and burdens ran with the lands.

In those circumstances it was reasonable to believe that the covenants burdened the claimants' land and enured for the benefit of the defendants' lands.

There is no doubt that on the 29th April, 2004 and the days leading up thereto, all the parties in Claim No. 2003/H.C.V. 1857 were of the view and did so believe that the covenants appearing on all the Certificates of Titles to the parties' respective properties were properly imposed and that the

burden and benefits were properly annexed and run with the land. If this Honourable Court finds that these covenants were not properly imposed, especially on the claimants' land, then the Consent Order in Claim No. 2003/H.C.V 1857 was based on a fundamental misconception, sufficient to ground a mistake in law and fact, which entirely vitiates the said Consent Order and in those circumstances, the Consent Order must be set aside.

If the Court finds that the covenants were not properly imposed on the parties' land and/or that there was no building scheme in existence at the time when the first transferees acquired title to their respective parcels of land, then of necessity, the court must find that on or about the time of the Consent Order the parties were labouring under a mistake which was the essence of the contract. The claimants submit that if the court finds that there was such a common mistake at the material time, that mistake must be taken to be fundamental and will vitiate the entire contract. As Lord Atkin noted in **BELL –V- LEVER BROTHERS LIMITED (Supra) at p. 218 (dicta approved by Steyn J. in Associated Japanese Bank Limited –v- Credit du Nord (supra).** A common mistake which will affect assent is one where the parties assumed the existence of some essential element without which the contract would be radically different from that into which the parties entered.

Had the parties known that the covenants were not legally enforceable then the Consent Order would not have been entered into at all as the defendants in this claim would have had no basis in law or fact to

dictate to the claimants the terms under which they could use their property. More fundamentally, the defendants would not have had any locus standi to commence and continue claim No. 2003/H.C.V. 1857.

Notwithstanding any position that is taken with regard to 1st,4th,5th,6th and 7th defendants, the claimants submit that the mistake as to the inclusion of the 2nd and 3rd defendants among the land owners whose title was derived from Miscellaneous Instrument 25445 and thus persons allegedly entitled to the benefits of the covenants endorsed on claimants' Certificate of Title was a fundamental mistake of fact and/or law and one that goes to the very heart of the Consent Order as it relates to those defendants. As a consequence, it is submitted that the relief prayed for as against those defendants should be granted ex debitio justitiae.

Despite the contention of the 2nd defendant that he was not mistaken as to whether the covenants were legally enforceable, the claimants submit that this position is untenable. If the 2nd defendant knew that his land was not apart of Miscellaneous Instrument 25445 and that he thus could not claim that the covenants allegedly enured for the benefit of his land, and this material fact was not disclosed to the claimants before the Consent Order was made, then at its highest the actions of the 2nd and 3rd defendants could amount to a unilateral mistake and provide a further ground for a declaration that as between these defendants and the claimants, the Consent Order is a nullity.

Consent Order –v- Compromise

The claimants submit that to properly appreciate the application to set aside the Order dated 29th April 2004 a distinction must be drawn between a Consent Order, properly so called, and a compromise. The claimants submit that **EXHIBIT GLK-8** is a Consent Order and not a compromise.

A compromise which brings an end to pending or threatened litigation is an agreement between the parties to settle their dispute, such agreement being based on the existence of questions of doubt being harboured by all parties. That is, the parties are unsure as to the likely outcome of the litigation should the same continue to finality and would not wish to be saddled with an adverse ruling which may extinguish all positions formerly enjoyed. **SEE: HUDDERFIELD BANKING COMPANY LIMITED –v- HENRY LISTER & SON LIMITED [1895] 2 Ch. 273 at 285 per Kay L.J.**

On the face of the documents and/or pleadings which were filed in Claim No. 2003/H.C.V. 1857 there was no doubt whatsoever as to position taken by the parties. The defendants in this claim (the claimants in Claim No. 2003/H.C.V. 1857) always acted throughout in a manner indicative of their having a concrete right to the benefit of the covenants endorsed on the claimants' Certificate of Title. It was in pursuit of that alleged concrete and definitive right that the defendants obtained the Interlocutory Injunction in

Claim No. 2003/H.C.V. 1857. The tenure of the Consent Order **(EXHIBIT GLK-8)** does not indicate the existence of any doubtful rights on the part of the defendants. That Order is buttressed on the defendants having a firm right to the benefit of the covenants which they are ensuring that the claimants observe. In those circumstances, it is submitted there was no compromise, but a Consent Order akin to an ordinary contract which was made under a fundamental common mistake which vitiates that Consent Order.

It is clear from the contents of **EXHIBITS WW1** (p. 119 of the Record), **WW2** (p.121 of the Record), **WW3** (p.125 of the Record) and **GLK-8** (p. 56 of the Record) that the parties in Suit 2003/H.C.V. 1857 were not attempting to reach an agreement with regard to the compromise of litigation relating to doubtful rights. Certainly, the tone of all the abovementioned Exhibits are premised on the defendants (in this Suit) having a right to enforce the covenants which all parties must have believed were legally binding on them.

Further even a compromise based on a common mistake may be set aside by the Court where that mistake is operative and so fundamental that it radically changes the premise of the compromise.

SEE: RE ROBERTS [1905] 1 Ch. 704 at 708

BRENNAN –v- BOLT BOURDON & OTHERS [2004] EWCA Civ 1017 at Paras. 11 & 17

Imposition of Covenants on Certificate of Title

In the circumstances of the present case, the only way in which any of the parties would be entitled to the benefit of covenants endorsed on Certificates of Titles exhibited as **GLK-1, GLK-2, GLK-3, GLK-4, GLK-5 & GLK-6** respectively to the claimants' Affidavit filed on the 23rd July 2004 would be if;

(I) The instruments by which the covenants were created and endorsed on the Certificates of Title have proper words of annexation which imposed the covenants and allowed the benefit and burden of the covenants to run with the land and thus bind the original covenantee and all successors-in-title.

(II) all the parties are interested in lands which are the subject of a scheme of reciprocal rights and obligations.

SEE: PRESTON & NEWSOME – Restrictive Covenants Affecting Freehold Land (8th Edition) p. 15)

The covenants endorsed on their Certificates of Titles registered at Volume 996 and Volume 253 of the Register Book of Titles were not properly imposed thereon and thus do not burden the claimants' land and do not enure for the benefit of the defendants' lands as:

I. At the time of endorsement of the covenants on the parties'

Certificates of Title. Reginald Montagu Cluer appeared to have been covenanting with himself.

II. Save and except with regard to the land of the 1st Defendant, the original transfers were not signed by the covenantees;

III. The Instruments of Transfer which purported to impose the covenants lacked proper or any words of annexation;

IV. At its highest the covenants appear to be personal to the original covenantor; and

V. There is no scheme of development in relation to the parties' land and no evidence of any mutuality or reciprocity of obligations.

Covenanting with self

The covenants were endorsed on the Certificates of Title of all the parties' properties in circumstances where Reginald Montagu Cluer appeared to have been covenanting with himself

The only Instrument containing the covenants in their entirety is the Instrument of Surrender **(Exhibit GLK-9 – page 62 of the Bundle)** and this document is only signed by Reginald Montagu Cluer. The claimants further submit that in circumstances where the covenantor and the covenantee are not legally separate individuals, those covenants are void and unenforceable, and further no mutual obligation binding upon any part of the land sufficient to ground a scheme of development is thereby created. There must be a separate and identifiable individual who covenants to bind his land and a separate and identifiable individual who accepts the benefit of those covenants for his land. This is not the situation in this matter and as a consequence the covenants endorsed on the claimants' Certificate of Title are not legally enforceable.

SEE: RIDLEY – v – LEE [1935] 1 CH. 591 at 598 (Para. 2) and 602 (Para 3) – 603 (para. 1) – Per Luxmoore J.

Failure to Sign

In order for the benefit and burden of restrictive covenants to run with the land in Equity, the original covenantee must execute the Deed or instrument by which those covenants were created or were to pass on his own behalf of his heirs, executors, administrators, transferees and assigns. This basic requirement is necessary to demonstrate that the original covenantee has accepted the covenants not only on his behalf, but on behalf of his heirs and

assigns and successors-in-title. The failure to comply with this requirement signifies that the privity of estate which is essential to bind the successors-in-title to the original covenantee is lacking. It must be borne in mind that there is no privity of contract between these successors-in-title and the original convenator or his successors-in-title. Unless the basic requirements of acceptance of the covenants and those words of annexation are indicated, the claimants submit the succcessors-in-title to the original covenantee are no bound by the covenants. The opening words to the covenants endorsed on **EXHIBIT GLK-1, GLK-2, GLK-3, GLK-4, GLK-5 and GLK-6** is not sufficient to cure this deficiency and in these circumstances the imposition of the covenants was flawed from the beginning and do not run for the benefit of any of the defendants' land nor do they burden the claimants' land for the said reasons stated herein.

Personal Covenants

In circumstances where the parties who are claiming an entitlement to the benefit of covenants, where they are not either the original covenantor or covenantee, those parties must demonstrate that the obligation assumed by their predecessor-in-title, with regard to the covenants was not personal to the original covenanting parties.

SEE: KEITH RUTHERFORD LAMB –v- MIDAC EQUIPMENT LIMITED (Unreported) Privy Council Appeal No. 57 of 1997 – Judgment delivered on the 4th February 1999.

In the instant case, it is submitted that on a true construction of all the instruments of Transfer between Reginald Montagu Cluer and the first transferees, no covenants, personal or otherwise were taken or given.

Building Scheme

Covenants may be properly imposed on and run with property in circumstances where that property forms part of a scheme of development or a building scheme. In such circumstances, all parties whose lands form part of the scheme would be entitled to the benefit of the covenants and likewise their respective parcel of land would be burdened by similar covenants in favour of the other lands in the scheme.

According to **Parker J.** in **ELLISTON – v – REACHER [1908]2 CH. 374** there are four (4) basic requirements necessary to establish a scheme of development or building scheme, namely:

I. Title to all the lands which allegedly form part of the scheme must have been derived from a common vendor;

11. The land, then held by the common vendor, or a part thereof, must have been laid out into lots for sale subject to restrictions (which may differ in details in some areas but not

differ in substance or import) intended to be imposed on all the lots. Those restrictions must be consistent only with a scheme of development;

III. The restrictions must have been intended for the benefit of all the lots sold;

IV. Both the claimant and the defendant (in the particular dispute before the court at the material time) or their predecessors-in-title purchased their respective lot from the common vendor on the basis that the restrictive covenants were to enure for the benefit of the others lots in the scheme.

With regards to the claimants and the defendants in this matter there is no scheme of development relating to their respective parcels of land for the following reasons, namely:

I. There is nothing on the face of the evidence before the Court to indicate that at the rate of the original transfers, any of the original transferees knew of the existence of the other transferees and knew that they were purchasing lands subject to obligations/restrictions in favour of those other persons.

II.. The essential words of annexation are missing from all the original Instruments of Transfers,

III. The covenants appears personal to the original covenantor.

In order for a scheme of development to come into existence, each purchaser of the various lots which form a part of the alleged scheme must know at the date of purchase that he is purchasing his parcel subject to covenants and accept that these covenants are in favour of the other purchasers in the purported scheme. The purchaser must also know that similar covenants will be taken from other purchasers in the scheme and that those covenants will enure for the benefit of his lands and that his land will be burdened by similar covenants. A failure to satisfy this requirement is fatal to the existence of a scheme of development coming into existence.

SEE: KEITH RUTHERFORD LAMB –v- MIDAC EQUIPMENT LIMITED (Supra.) - Per Lord Nicholls of Birkenhead at page 3 of the Judgment of the Board

ELLISTON –v- REACHER (Supra)

There is no evidence in this regard to support the existence of a scheme of development. Nowhere in **EXHIBIT GLK-10 (Page 68 of the Record)** is there an indication that Lilla Maud Chang, the first transferee of claimants' property, knew and had accepted that she was purchasing the land subject to covenant which would enure for the benefit of other purchasers and that likewise other purchasers would be asked to accept similar covenants which would benefit the land being sold to Lilla Maud

Chang. Similarly, there is no indication in any of the instruments of Transfers which form **EXHIBITS GLK-12(a),(b),(c),(d) & (e)** that those original transferees were covenanting to burden their lands with covenants for the benefit of other purchasers or that other such purchasers were being asked to burden their lands in favour of other purchasers.

A scheme of development is buttressed on reciprocity or mutuality of obligations amongst the landowners in the scheme. This reciprocity can only come about if the nature and particularities of the scheme is sufficiently disclosed to the initial purchasers and those purchasers are informed and have accepted that their purchases are on the footing that they are assuming and have accepted obligations with regard to other lands in the scheme and that other purchasers have similarly done so. In the absence of this, no building scheme comes into existence.

SEE: REID –v- BICKERSTAFF (1909) 2 Ch. 305 at 319 & 323 – Per Cozens-Hardy M.R. & Buckley L. J respectively.
WHITE –v- BIJOU MANSIONS LTD. [1938] 1 Ch. 351 Greene M.R. at page 362

There is no evidence that any of the predecessors-in-title to any of the parties in this matter were informed of and accepted their purchases on the footing of this reciprocity of obligations. The mere selling of lots by a common vendor (over a period of time) and endorsing several covenants on the

Certificates of Titles relating to the various purchasers is not sufficient to create a building scheme. It is submitted that that is all that is present on the facts of this case. For a building scheme to come into existence, the respective purchasers must actually know the extent of the burden and the extent of the benefit being assumed. There is no evidence before this court to show that the original transferees knew the extent of the benefit and burden they were allegedly assuming at the date of purchase. As a consequence, there is no building scheme with regard to claimants' and the defendants' lands and the covenants endorsed on the Certificates of Titles are not legally enforceable.

SEE: JAMAICA MUTUAL LIFE ASSURANCE SOCIETY –v- HILLSBOROUGH LTD & OTHERS (1989) 38 W.I.R.192

RE WEMBLY PARK ESTATE CO LTD'S TRANSFER, LONDON

SEPHARDI TRUST –v- BAKER [1968] Ch. 491.

REID –v- BICKERSTAFF (Supra) at 319 Per Cozens-Hardy M.R.

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SEE: JAMAICA MUTUAL LIFE ASSURANCE SOCIETY –v-
HILLSBOROUGH LTD & OTHERS (1989) 38 W.I.R. 192.
RE WEMBLY PARK ESTATE CO LTD'S TRANSFER,
LONDON SEPHARDI TRUST –v- BAKER [1968] Ch. 491.
REID –v- BICKERSTAFF (Supra) at 319 Per Cozens-Hardy M.R.

Their mere appearance of the opening words, preceding the covenants, which are endorsed on the Certificates of Title which form **EXHIBITS GLK-1, GLK-2, GLK-3, GLK-4, GLK-5 & GLK-6,** do not per se make the covenants enforceable. Only covenants which are legally enforceable and run with the land, so as to bind not only the original covenanting parties, but all successors-in-title to those parties, can have any effect on a subsequent purchaser are not bound to observe the

covenants, notwithstanding their endorsement on the face of the Certificate of Title.

SEE: HALF MOON BAY LIMITED –v- CROWN EAGLE HOTELS LIMITED (Unreported) Privy Council Appeal No. 31 of 2000 – delivered on 20th May 2002 – Per Lord Millet at Paras. 14 and 16 of the Judgment

The claimants submit that the court is empowered to order expunged on any endorsement wrongly placed upon the title.

HALF MOON BAY LIMITED –v- CROWN EAGLE HOTELS LIMITED (Supra).

In the circumstances of this case, the endorsements relating to the covenants and their opening words were wrongly placed on the title and ought to be expunged in their entirety.

The cross examination of the 1st defendant's representative, Dr. Harding, and the 2nd defendant, reveal that those parties treated the imposition of the covenants as an accepted fact and that there was no doubt as to their enforceability in law. Both accepted readily that they would not have been entitled to endeavour to enforce the covenants if the covenants 2 had not been properly imposed on the relevant Certificate of Title.

Once the court finds that the covenants were not properly imposed and/or that there was no building scheme in existence, the court, we submit, must also find that the common mistake was fundamental and that it vitiates

the Consent Order and that the same ought to be set aside with such consequential relief as is necessary and incidental to the order setting aside Consent Judgment.

DEFENDANTS' SUBMISSIONS

Compromise

It is submitted that the Consent Order made by the Honourable Mr. Justice Rattray on 29th April 2004 constitutes a compromise made in good faith. In the circumstances, the Consent Order ought not to be set aside on the ground of mistake or any other ground.

A compromise is the settlement of a dispute on terms agreed between the disputing parties.

> "Where a claim is asserted by one party which is disputed by the other, they may agree to compromise their dispute on terms mutually agreed between them. Once a valid compromise has been reached, it is not open to the party against whom the claim is made to avoid the compromise on the ground that the claim was in fact invalid, provided that the claim was made in good faith and was reasonably believed to be valid by the party asserting it. Conversely, the claimant cannot avoid the compromise on the ground that there was in fact no defence to the claim, provided that the other party bona fide and reasonably believed that he had a good defence either as to liability or as to amount. In order to establish a valid compromise, it must be shown that there has been an agreement (accord) which is complete and certain in its terms, and that consideration (satisfaction) has been given or promised in return for the promised or actual forebearance to pursue the claim. It is a good defence to an action for breach of contract to show that the cause of action has been validly compromised."
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> *Chitty on Contracts 27th Edition Vol. 1 (Chitty) para. 22-012*

[Item 1B Defendant's Authorities].

A compromise is in essence a contract and the usual elements of contract must be established.

"It has already been noted that compromise is merely an area in which the ordinary law of contract operates. Under the ordinary law an alleged contract will not be upheld unless.

(i) consideration exists;

(ii) an agreement can be identified which is

(iii) complete and certain;

(iv) the parties intend to create legal relation and in some cases;

(v) certain formalities have been observed."

The Law and Practice of Compromise – David Fosket,

page 8

[Item 1C defendants' Authorities]

In order to establish a valid compromise there must have been a dispute which was settled by the agreement embodied in the Consent Order.

"Effects as between the parties"

An unimpeached compromise represents the end of the Dispute from which it arose. Such issues of fact or law as may have formed the subject matter of the original dispute are buried beneath the surface of the compromise. The court will not permit them to be raised afresh in the context of a new action. Bowen L. J. expressed the position thus: 'As soon as you have ended a dispute by a compromise you have disposed of it'.

This principle applies whether or not litigation was commenced in relation to the dispute and whether or not the compromise has been embodied in an order or judgment of the court. Its foundation lies in two aspects of public policy: the need for there to be an end to disputation and the desirability of parties being held to their bargains. Where parties compromise without embodying their agreement in a court order or judgment the latter aspect dominates the picture. Where the compromise is embodied in a judgment or order both aspects are present, the former finding particular expression in a doctrine of res judicata. This doctrine applies to a judgment or order notwithstanding that it is made pursuant to an agreement between the parties.

The effect or effects of an attempt by one party to ignore the existence of compromise (whether embodied in an order or judgment or not) will be considered in due course. One most important aspect of the whole subject of compromise may, however, conveniently be dealt with here. It rises from the need, which may arise subsequent to the making of a compromise, for a court to identify precisely the disputes which the parties have in fact compromised. The end result contemplated by the process of identification is the same whether the court is considering a compromise embodied in an order or judgment or one which is not. There may, of course, be differences in the materials which the court will have available and be prepared to examine for this purpose in each case. There may also, it is submitted, be one important distinction in the effect of the parties neglecting specifically to compromise a matter which could and should have been raised in their disputation.

Where a compromise is effected other than by a consent order or judgment the court will have a variety of material to examine: correspondence between the parties' solicitors may identify the matters in dispute. Where litigation has been commenced and compromised in a way which does not found a res judicata the pleadings may assist in identifying the disputes:

In Knowles v Roberts, the court was concerned to determine the disputes as to water rights which had arisen in a previous action and had been compromised by

the parties. The nature of the court's task was described thus:

> **'... to understand the subject matter [the compromise relates to, to understand the disputes, the alleged right which were in dispute at the time the compromise was made.'**
>
> **' ... it must be seen what were the allegations on both sides on which the agreement to compromise was made.'**

All members of the Court of Appeal emphasized that the correctness or otherwise of the competing allegations were irrelevant. The pleadings in the first action may, perhaps, have been looked at to determine the areas of dispute (or non-dispute), but for no other purpose.

So, too, in cases where a consent order or judgment sets the seal on the compromise of the disputes between the parties, all the available materials will be examined, subject to the rules of the evidence, to determine the disputes so compromised. The pleadings assume perhaps greater significance in these circumstances. However, since the rules as to amendment are fairly liberally interpreted, they may not necessarily be conclusive but will usually afford some guidance. Occasionally, the consent order itself will furnish evidence of the dispute or disputes it resolves. Sometimes the parties will have drawn up a formal agreement which, it was proposed, should be effectuated by a court order. That agreement may be referred to, to determine the extent of the disputes compromised."

The Law and Practice of Compromise by David Fosket pages 47-49.

[Item 1C Defendants' Authorities].

There is no doubt that there was a dispute between the claimants (defendants) and the defendants (claimants) in Claim No. 2003 HCV 1857,and in particular, there was a dispute as to whether the restrictive

covenants endorsed on the Certificate of Title registered at Volume 996 Folio 253 of the Register Book of Titles had been properly imposed and consequently binding. A review of the pleadings and the first Affidavit of Oswald Harding in Claim No 2003 HCV 1857 will serve to demonstrate this contention.

The Particulars of Claim and Amended Particulars of Claim in Claim No. 2003 HCV 1857 (Exhibits OH-1C and OH-1D} of the Affidavit of Oswald Harding), **(pages 238-252, 254-270 of the main bundle)** paragraphs 1-7 state:

> **"1. The claimants are all registered owners of separate and distinct parcels of land part of BILLY DUN in the parish of St. Andrew situated along Hyperion Avenue, Kingston 6 in the parish of St. Andrew and as the registered owners are the persons entitled to the benefit of various Restrictive Covenants endorsed on each Certificate of Title for each parcel of land.**
>
> **2. The defendants are the registered owner of a separate and distinct parcel of land situated along Hyperion Avenue, Kingston 6, in the parish of St. Andrew, the said land is Comprised in Certificate of Title registered at Volume 996 Folio 253 being lot number 82 land part of BILLY DUN in the parish of Saint Andrew also know as number 1a Hyperion Avenue, Kingston 6.**
>
> **3. The various parcels of land owned by the claimant and Defendants were formerly comprised in parent title registered at Volume 579 Folio 3 of the Register Book of Titles in the name of Reginald Montague Cluer, known as land part of BILLY DUN in the parish of St. Andrew.**
>
> **4. The said lands part of Billy Dun in the parish of Saint Andrew comprised in Certificate of Title registered at Volume 579 Folio 3 were subdivided into lots pursuant to a scheme of development in accordance with**

Deposited Plan bearing number 2573 deposited in the office of titles on 25th February 1963.

5. **That upon the subdivision of the land into lots and upon the application of the owner/common vendor Reginald Monague Cluer, Restrictive Covenants were imposed on each lot demarked in the subdivision deposited plan number 2573 by Instrument bearing miscellaneous number 25445 dated 21st May 1963 and duly endorsed on each registered title issued for each lot in the said subdivision of the lands part of BILLYDUN in the parish of Saint Andrew.**

6. **The Restrictive Covenants duly imposed one each lot were intended by the common owner/vendor Reginald Montague Cluer for the benefit of all the lots comprised in the scheme of development/subdivision.**

7. **The said Restrictive Covenants having been endorsed on the registered title for each of the lots, including those of the claimants and defendants, the claimants, the defendants and/or their predecessors in title and all other lot owners are bound by the said Restrictive Covenants."**

In addition, the reliefs sought by the defendants included declarations 1 and 2. In the first place the defendants sought a declaration that they are all entitled to the benefit of the Restrictive Covenants and in the second place the defendants sought a declaration that the claimants and the claimants' premises are bound by the Restrictive Covenants. The validity of Restrictive Covenants was directly put in issue by the defendants in the Particulars of Claims and Amended Particulars of Claim. In the Affidavit of Oswald Harding sworn to on 10th October 2003 and filed in Claim No 2003 HCV 1857 (Exhibit OH-3B) paragraph 10-14, **(pages 292-293 of main bundle)** the defendants expressly stated the factual basis upon which they

contended that the Restrictive Covenants were valid, enforceable and binding on the parties.

The documents referred to by the defendants were referred to on the various registered titles and were available at and from the Registrar of Titles. These documents are largely repeated and exhibited to the Affidavits filed on behalf of the claimants in this claim.

In the Particulars of Claim, the Amended Particulars of Claim and the affidavits filed on behalf of the defendants, the defendants contended that the Restrictive Covenants were valid, enforceable and binding.

The claimants, in their defence filed in Claim No 2003 HCV 1857 stated the following at paragraph 4.

> " **The defendants make no admission to paragraphs 4-7 of the Particulars of Claim."**

Paragraphs 4 – 7 of the Particulars of Claim set out the basis of the defendants' contention as to the imposition of the Restrictive Covenants and the fact that the Restrictive Covenants were in fact binding on the parties. The non-admission by the claimants is equivalent to a denial; it serves to dispute the defendants' allegation and places the burden on the defendants to prove its allegation that the Restrictive Covenants were valid, enforceable and binding. The nature of non-admission in pleadings are discussed in **Pleadings Principles and Practice** by Jacob and Goldrein, pages 121-2 **[Item 1D Defendants' Authorities] :**

> **"Traverse – what is it. A traverse in the defence is a denial of an allegation of fact made in the statement of claim.**

What does a traverse do?

(a) It negates such an allegation

(b) It operates to contradict what is alleged and to put it in issue.

(c) It casts upon the plaintiff the burden of proving the allegations denied.

In principle, there is no reason why the defendant should not put the plaintiff to proof of his whole case. Indeed it is a legitimate and well recognised method of pleading, which on occasion may serve a useful purpose.

Traverse – how? A traverse must be made by a denial or by a statement of non-admission; and it may be made either expressly or by necessary implication.

Every allegation of fact made in a statement of claim, except as to damages, which the defendant does not intend to admit must be specifically traversed by him in his defence. A general denial of such allegations or a general statement of non-admission of them is not a sufficient traverse of them.

Bad pleading: The rule requiring the traverse to be specific applies equally whether by his traverse the defendant 'denies' or 'does not admit'. The refusal to admit must be stated as specifically as a denial, so that the plaintiff will thereby know precisely what is admitted and what is put in issue. Thus, a statement in the defence that 'the defendant puts the plaintiff to proof of the several allegations' in the statement of claim is not a proper or sufficient traverse, nor is it a proper or sufficient traverse for the defendant to plead that he 'does not admit the correctness of the statements set forth in paragraphs 1, 2, 3 and 6 of the statement of claim and requests further proof thereof '.

Denying and not admitting – interactions. There is no difference in effect between *denying* and not *admitting* an allegation. The distinction usually observed is that a party denies any matter which, if it had occurred,

> **would have been within his own knowledge, while he refuses to admit matters which are not within his own knowledge. Sometimes the distinction is simply a matter of emphasis, a denial being more emphatic than a non-admission. In short, a traverse must not be ambiguous or equivocal or evasive. The defendant may, of course, admit one portion of a statement made by the plaintiff and at the same time deny another portion of it, provided he makes it perfectly clear how much he admits and how much he denies. Thus, he may say:**
>
> > **'The defendant admits that he made to plaintiff the representation set out in paragraph 3 of the statement of claim, but denies that he did so falsely or fraudulently or with any intention to mislead the plaintiff as alleged or at all.'**

It is submitted that the validity of the Restrictive Covenants, the enforceability of the Restrictive Covenants and consequently the lawfulness or unlawfulness of the imposition of the Restrictive Covenants were matters in dispute in Claim No. 2003 HCV 1857. This dispute and all others raised in Claim No 2003 HCV 1857 were settled and resolved by the compromise set out in the Consent Order. The agreement made by the parties is clearly set out in the Consent Order. The terms are clear and certain. The issue of the intention to create legal relation is obviously satisfied because the agreement was embodied in a Consent Court Order. All the necessary formalities have been complied with. The Consent Order has been perfected and duly signed by the Judge.

There is consideration for the compromise – the defendants are no longer pursuing Claim No. 2003 HCV 1857, which included a claim for damages for breach of the restrictive covenants.

In addition at paragraph 5 of the Consent Order the defendants expressly agreed not to object to any application the Claimants may make for modification of Restrictive Covenants No. 4 and 8. Dr. Oswald Harding encapsulates the nature of the compromise and the consideration therefore in his evidence under cross examination as follows:

> **"The demolition of the building came as a compromise agreement. We decided to forego our entitlement to the other rights, namely the height of the perimeter wall because the covenant says 4 ½ feet and this wall was well beyond that. The main house was too near to the center of the road. The covenant requires it to be 50 feet from the roadside. This house, in my view, was nearer. The swimming pool was too close to the boundry line. The house was too near to the rear boundry. We objected to the second structure being built but agreed to forego the other breaches if the second building was demolished."**

The consideration on either side need not be equal, and it is submitted that there is in fact consideration in this matter. See **Margaret Brennan v Bolt Burdon and ors [2004] EWCA (Civ)** pages 8, 10 and 13 **[Case 1E Defendants' Authorities].**

In any event, there is no challenge by the claimants that the essentials of a contract do not exist in relation to Consent Order. The

claimants have affirmed the existence of a contract but say it ought to be set aside because of an alleged mistake.

It is submitted that a compromise will not be set aside on the basis that one or more of the claims/contentions made prior to the compromise are valid whether in law or fact. Warrington J. in **Holsworthy Urban Council v Holsworthy Rural Council [1907] 2 Ch 62/73 [Case 1F Defendants' Authorities]** stated the principle as follows:

> **"It is no ground for setting aside a compromise that the claims or one of the claims made by one of the parties was not well founded in law provided that it was put forward bona fide."**

The principle also appears to be properly set in **The Law & Practice of *Compromise*** pages 6-7 **[Item 1C of the Defendants' Authorities]** :

> **"A dispute when formed may involve questions of law or fact or a combination of both. The disputation may be conducted orally or by correspondence without litigation or, of course, in the context of litigation.**
>
> **The assertions and denials comprising the dispute do not have to have any foundation in fact or in law provided they are made in good faith. If a party to a compromise attempts to escape its consequences by alleging that the claim had no legal or factual foundation the court will decline to investigate such an allegation. In many cases, for example, a plaintiff will allege the fact of defendant's negligence which the defendant denies. The law does not permit a defendant who has compromised a plaintiff's claim for damages based on alleged negligence subsequently to pursue an allegation that he was not in fact negligent for the purposes of avoiding the compromise. Not infrequently, in cases between landlord and tenant, the tenant will seek to claim damages for the failure of the landlord to effect certain external repairs in breach of an alleged or**

implied covenant to that effect. In many situations no such covenant is implied by law and yet the landlord might, for example, reduce his own claim for arrears of rent against the tenant because of the tenant's claim. He would not be permitted subsequently to allege that because the tenant's claim was unfounded in law, the compromise of the rent claim should be set aside.

A want of good faith in the assertion of a claim or the maintenance of a denial, in circumstances where there is no foundation in fact or law to support them, may operate to invalidate a compromise founded thereon. It would seem that provided a claimant believes he has a right to make the claim he asserts, even if he has little confidence in its ultimate success ,a compromise of it is valid. If, on the other hand, he makes a claim which he knows to be unfounded and derives an advantage from its compromise, his conduct will be considered fraudulent and the compromise invalidated. In the former case the compromise will be upheld even if the party against whom the claim is made believes that it has no foundation. By compromising it he puts an end to troublesome litigation. In the latter case, however, if the lack of foundation of a claim is known by the other party, any agreement purporting to be based upon it cannot truly be said to be a compromise since no real dispute as such exists. The legal effect of such an agreement will often arise in connection with third party rights. As between the parties it may be operative."

It is submitted that the House of Lords in ***Kleinwort Benson Ltd*** ***1998 4 AER*** **514 [case 1G Defendants' Authorities]** page 564; expressly approved the principle that a compromise will not be set aside on the ground of mistake. Lord Hope of Craighead stated at page 564;

"Then there is the defence that the money was paid as, or as part of, a compromise. Brennan J in the same case said: [(1992) 175 CLR 353 at 395] that, where acclaim is satisfied by accord and satisfaction, a

payment made in satisfaction is made in discharge of an obligation created by the accord: it is unaffected by any mistake as to the validity of the compromise. That must be so, irrespective whether the mistake is as to the facts or the law regarding its validity. In Hydro Electrical Commission of Township of Nepean v Ontario Hydro (1982) 132 DLR (3d) at 218 Dickson J said that there was a head of public policy which recognized that there was a need to preserve the validity of compromises freely entered into with advice. I think that it is possible to find a more principled basis for the defence, as Brennan J has suggested. But my main point is that it is available irrespective of the nature of the mistake."

A similar position was taken by Brennan J in **David Securities Pty Ltd v Commonwealth Bank of Austria [1992] 175 CLR 353 at page 395** where his Lordship said:

"When a claim is settled by accord and satisfaction, a payment made in satisfaction is made in discharge of an obligation created by the accord. It is unaffected by any mistake as to the validity of the claim compromised."

See Also Stewart v Stewart (1840 – 1840 7 ER 940.

Compromise are contracts set apart. They are special policy considerations which favour the resolution of disputes and bringing those

disputes to finality once and for all. Consequently, where a contract of compromise has been established, the Court will not set aside the compromise because of mistake or based on the fact that a party is of the view that he made a bad bargain. If the consent order does not amount to a compromise but merely a contract between the parties, all contractual principles may be applicable, but this is not the case when dealing with compromises.

It is submitted that the issue of lawful imposition of the covenants was in dispute, and that this dispute along with others were compromised and settled by virtue of the consent order. There were give and take between the parties, as follows:

i. The defendants gave up their claim relating to breach of distance covenants and their claim for damages for breach of restrictive covenants;

ii. The claimants agreed to demolish the second building that the defendants contended breached the restrictive covenants.

It is submitted that this give and take is no less than that which was found to have existed by the Court of Appeal in **Margaret Brennan v Bolt Burdon & ors [2004] EWCA Civ 1017 {29th July 2004}. [Case 1E Defendants' Authorities; *see paragraphs* 33 and 34].**

In the premises it is submitted that this claim ought to be dismissed on the basis that there is a valid compromise

MISTAKE

If your Lordship is of the view that a compromise has not been established, your Lordship would then be required to consider whether the Consent Order ought to be set aside due to mistake.

In order to succeed in their attempt to set aside the Consent Order on the ground alleged, the claimants are obliged to establish a mistake as is defined by law.

In text, ***Chester, Fifoot and Furmston' Law of Contract, Thirteenth Edition*** page 235 **[Item 2A Defendants' Authorities],** three possible types of mistake are identified, namely common mistake, mutual mistake and unilateral mistake.

Common mistake is said to occur when both parties make the same mistake, that is to say each knows the intention of the other but each is said to be mistaken about some underlying or fundamental fact.

Mutual mistake is said to occur when the parties misunderstand each other. One party may intend to sell a particular type motorcar while the other party intends to purchase another type.

Unilateral mistake is said to occur when only one of the parties is mistaken, e.g. if one party intends to purchase a particular original picture or drawing while it turns out that the other intended to sell only a copy.

> "In common mistake, both parties make the same mistake. Each knows the intention of the other and accepts it, but each is mistaken about some underlying and fundamental fact. The parties, for example, are unaware that the subject matter of their contract has already perished.

> In mutual mistake, the parties misunderstand each other and are at cross-purposes. A, for example, intends to offer his Ford Sierra car for sale, but B believes that the offer relates to the Ford Granada also owned by A.
>
> In unilateral mistake, only one of the parties is mistaken. The other knows, or must be taken to know, of his mistake. Suppose, for instance, that A agrees to buy from B a specific picture which A believes to be a genuine Constable but which in fact is a copy. If B is ignorant of A's erroneous belief, the case is one of mutual mistake, but, if he does not its a unilateral mistake.
>
> When, However, the cases provoked by these factual situations are analysed, they will be seen to fall, not into three, but only into two distinct legal categories. Has an agreement been reached or not? Where common mistakes is pleaded, the presence of agreement is admitted. The rules of offer and acceptance are satisfied and the parties are of one mind. What is urged is that, owing to a common error as to some fundamental fact the agreement is robbed of all efficacy. Where either mutual or unilateral mistake is pleaded, the very existence of the agreement is denied. The argument is that, despite appearances, there is no real correspondence of offer and acceptance and therefore the transaction must necessarily be void.
>
> The type of problem is thus presented by common mistake, and a second by mutual or unilateral mistake. But the distinction between these two latter forms of mistake is still important. Though the problem they pose is the same, the method of approach to it differs. If mutual mistake is pleaded, the judicial approach, as is normally the case in contractual problems, is objective; the court, looking at the evidence from the standpoint of a reasonable third party, will decide whether any, and if so what, agreement must be taken to have been reached. If unilateral mistake is pleaded, the approach is subjective; the innocent party is allowed to show the effect upon his mind of the error in the hope of avoiding its consequences."

On the facts alleged by the claimants, the claimants are trying to bring themselves within the rubric of what the learned authors of the text

have defined as common mistake. They accept that a Consent Order has been made but it appears that they are contending that there was a mistake as to some underlying or fundamental situation, in this case, that the Restrictive Covenants were properly imposed and are in fact enforceable.

The applicable principles are largely set out in two authorities. These are **Bell and Anor v Lever Brothers Limited and Ors [1932] A. C. 161 [Case 2B Defendants' Authorities]** and **Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd the Great Peace [2002] 4 All ER 689 [Case 2C Defendants' Authorities].**

The basic facts of **Bell's** case are that Bell and his companion were employed to the respondents, Lever Brothers Limited. Lever Brothers were desirous of being relieved of the contracts of employment made between itself and Bell and his companion. In order to obtain this release, Lever Brothers paid to Bell and his companion a substantial sum, approximately $30,000 for the consensual release of the contracts. Subsequent to the payment of the sum of $30,000.00 Lever Brothers discovered that Bell and his companion were at some point in time in breach of the contract of employment that Lever Brothers would therefore be entitled to set aside the contract of employment and dismiss Bell and his companion without any payment whatsoever. Lever Brothers sought to set aside the agreement under which the $30,000.00 was paid to Bell and his companion which secured the discharged of their contract of employment contending that

there was a mistake insofar as they were unaware of the breach of the original contract by Bell and his companion.

The House of Lords, by majority, declined to set aside the contract on the grounds of mistake. Lord Atkin, in his Judgment reaffirmed the general principle that it is of paramount importance that contracts should be observed and that where the parties honestly complied with the essentials for the formation of a contract, they should be held bound by it and they must rely on provisions in that contract to protect them from unknown facts (page 222 – 224).

Lord Atkin was clearly of the view that in order for common mistake to avoid the contract [or to bring a contract to an end] the parties so alleging must show that this alleged common mistake created a contract which was different from one agreed to. The identity of the subject matter must be destroyed (pages 223 – 227 of the Judgment).

Lord Thankerton was of the view that in order for this type of mistake to be effective to discharge a contract the party so alleging must show that there was a complete difference in substance in what was supposed to be and the result consequent on the alleged mistake. As his Lordship puts it (page 235) that **"if the only difference is some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding"**. His Lordship continued that that was not sufficient for one party to prove that the misapprehension was what induced them to enter the contract and if he had

known he would not have entered the contract (pages 234 – 236 of the Judgment).

It is submitted even if there was in fact a mistake (which is denied) applying the **Bell & Lever Brothers** case to the facts of the instant case there is not a sufficient mistake in law as to vitiate or set aside the Consent Order.

The contract as between the parties remains the same. In substance it is not different, there is no substantial changes as between what was originally contracted for and what indeed they are now contending. The position is put beyond doubt when the **Great Peace** is considered along with **Bell and Lever Brothers.**

The **Great Peace** succinctly encapsulated the import and effect of **Bell and Lever Brothers** and clarified subsequent authorities including **Solle v Butcher** which may have cast doubt on the effect and import of the **Bell and Lever Brothers.**

The facts only need to be mentioned in a cursory fashion. The services of a salvage vessel were retained to assist in the rescue of a distressed vessel. The party that retained the salvage vessel was of the mistaken view that the salvaged vessel was closer to the distressed vessel than it really was. An application was therefore made relying on this fact to set aside the salvage contract. Their Lordships indicated that there was no difference between the law of common mistake at common law and in equity and affirmed that the law was properly set down in the **Bell and**

Lever Brothers case. Lord Phillips, MR, using the law of frustration as a foundation in order to properly interpret the law of common mistake held at pages 708 – 9 that in order for a common mistake to have the effect of avoiding a contract, five elements must be present.

(1) There must be as common assumption as to the existence of a state of affairs;

(2) there must be no warranty by either party that the state of affairs exist;

(3) The non-existence of the state of affairs must not be attributable to the fault of either party;

(4) Non-existence of the state -of -affairs must render the performance of contract impossible;

(5) the state of affairs may be the existence or a vital attribute of the consideration to be provided or circumstances which subsist if performance of the contractual adventure is to be possible.

"If one applies the passage from the judgment of Lord Alverstone CJ in Hobson v Pattenden and Co. (1930) 19 TLR 186, which we quoted above to a case of common mistake, it suggests that the following elements must be present if common mistake is to avoid a contract: (i) there must be a common assumption as to the existence of a state-of-affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must be attributable to the fault or either party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; (v) the state-of-affairs may be the existence, or a vital attribute, of the consideration to

be provided or circumstances which must subsist if performance of contractual adventure is to be possible."

On the five-fold test enunciated in the **Great Peace**, the claimants, it is submitted have failed to establish a common mistake. The parties have in fact assumed that the restrictive covenants are enforceable and indeed the defendants are still contending that these restrictive covenants are enforceable. But there is no evidence or allegation that the defendants warranted their enforceability. In any event this issue has not been pleaded. In relation to the first ground, it could be argued that the parties assumed the enforceability of the restrictive covenants. The second ground of the five-fold test is inapplicable. The third ground will be discussed separately.

The fourth ground of the five-fold test, that is to say, **"the non-existence of the state-of-affairs must render performance of the contract impossible"** has not been established by claimants.

The elements of the consent agreement, notwithstanding the alleged unenforceability of the Restrictive Covenants, are capable of performance. The building can be demolished by the claimants or failing that, by the defendants as provided for by the provisions of the consent order. The claimants can in fact seek modification of the distance covenants, which the defendants say they will not insist should be compiled with and would not object to any application for modification. The perimeter wall has in fact been painted and dealt with already, in accordance with the Consent Order

and the cost of $300,000 has already been paid. There is therefore no issue of impossibility of performance as required by the five-fold test.

It is to be noted that in **Brennan v Bolt Burdon,** a case dealing with a compromise embodied in as Consent Order, Lord Justice Maurice Kay applied the **Great Peace** case including test number 4 of the five-fold test set out in **Great Peace.** For example, at paragraph 17, page 7 of the Judgment, his Lordship said:

> **"17. It is apparent from my somewhat meandering survey of the authorities that principles have been developed which may impact on the present appeal but that different principles have been articulated in different types of case, sometimes without cross-reference to each other. For example, *Kleinwort Benson,* a seminal case on mistake of law, was not cited or referred to in Ali, which was decided on construction but perhaps also had the potential for consideration on the basis of a mistake of fact and law. Huddersfield Banking is helpful on the subject of the vitiation of compromises and consent orders but predates the step change in relation to mistake of law. What principles relevant to the resolution of the present appeal can be extracted from these rather diverse authorities? In my judgment, the following propositions emerge ...**
>
> (4) **For as common mistake of fact or law to vitiate a contract of any kind, it must render the performance of the contract impossible {*The Great Peace*}."**

There is also a further reference to the Great Peace at paragraph 22 page 8 of the Judgment.

Mr. Justice Bodey applied the Great Peace {paragraph 38 - 39, pages 11-12} although he did not expressly refer to the five-fold test. Lord

Justice Sedley wondered whether the fourth of the five-fold test set out in the **Great Peace** required modification when dealing with a mistake of law {paragraphs 57-60, page 14).

From the language of Sedley L. **J**. {paragraph 60) it is clear that he was not being conclusive, he said that 'a different test may be necessary'. In any event the doubts of Sedley LJ would not be sufficient to modify the effect of the **Great Peace** in light of the fact the other two Lord Justices did not agree and such a modification would be in conflict with **Bell v Lever Brothers.** In any event Sedley L. **J** purported modification is inapplicable to the facts of the instant case. There is no mistake of law, that is to say, this is not a situation of the law being understood by both parties to be one thing and subsequently declared to be another by the Court, that would be a genuine mistake of law (see **Kleinwort Benson** and **Brennan v Bolt Burton).** At best what the claimants can allege is that they misapplied the well-known principles.

In relation to the fifth requirement, that is to say, **"the-state-of affairs may be the existence, or vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible",** is similarly inapplicable since it is already established that the Consent Order can be carried out without any requirement for the covenants to be enforceable.

MISTAKE – THE FAULT OF THE CLAIMANTS

It is submitted that the claimants had available to them prior to the making of the Consent Order, the material upon which the claimants or their Attorneys-at-Law could have determined whether or not the Restrictive Covenants were or were not validly or properly imposed. These material are as follows:

(1) on the Certificate of Title for the claimants land, Volume 996 Folio 253 [page 25 of the main bundle], the restrictive covenants are endorsed on the front of the title and was so endorsed before the first transfer by Reginald Cluer;

(2) the transfer to Lilla Maud Chang is endorsed on the title for the claimants' land. The endorsement reads as follows:

"Transfer No. 211759 dated 10th and registered on 12th November 1965 from the above Reginald Montague Cluer of all his estate in the land comprised in this certificate to Lilla Maud Chang of St. Andrew, housewife. Consideration money $2,952."

(3) A copy of the title for claimants' land was exhibited to the Affidavit of Oswald Harding sworn to on 10th October 2003 which was filed in Claim No 2003 HCV 1857 and in addition, the claimants ought to have had a duplicate Certificate of Title. In any event, the Certificate of Title is always available at the Registrar of Titles.

(4) The claimants were aware that the first transfer was made to

Lilla Maud Chang. The transfer was sufficiently identified in the endorsement on the title for the Khemlani premises and it would have been simple enough for the claimants or their advisors to examine and construe the said transfer.

(5) The fact that Reginald Cluer subdivided his land into lots and the lots are set out on the Deposited Plan [page 312 of the main bundle] were similarly well known to the claimants. In fact, the Deposited Plan is exhibited to the Affidavit of Oswald Harding. Further, the deposited plan is identified on the title for the Khemlani land and referred to as the plan of Billy Dunn aforesaid deposited in the Office of Titles on 25th February 1963. The document referred to either as the instrument of surrender or a letter pursuant to which the titles for the eighty lots were issued and the Restrictive Covenants imposed was similarly exhibited to the Affidavit of Oswald Harding and is in any event available to the claimants from the Registrar of Titles.

It is submitted that the claimants had notice of all endorsements and matters which appeared on Certificates of Title. Further, the claimants have a duty to search the Register consequent on any document or matter appearing on the Certificate of Title. The claimants are therefore required to search for and refer to any miscellaneous instruments and other references appearing on their Certificates of Title. Support for these submissions can

be found in the Australian High Court decision of **Bursill Enterprises Pty Ltd. v Berger Bros. Trading Company Pty Ltd [1971] 124 CLR 73, 78 - 80 and 93 – 94.** The provisions of **section 76** of the **Registration of Titles Act** which permit the inspection of the Register and authorizes the Registrar of Titles to provide copies of documents specified is in support of this submission .

Prior to the Consent Order the status of the second and third defendants' property, lot 89, was clear from the miscellaneous instrument 25445. As to whether these documents had the effect of properly imposing the covenants on claimants' land and/or the lands referred to in the miscellaneous instrument 25445, would have been clear and obvious to all including the claimants and then claimants' Attorneys-at-Law.

The transfers numbered 305885, 324378, 345908, 450007, and 1210300 are all noted on the registered title for claimants' land and information concerning same were available to the claimants' prior to the Consent Order and were available at the Registrar of Titles. A determination as to the validity of Restrictive Covenants could therefore have been made prior to the Consent Order.

In the circumstances, and in light of the documents and material available to the claimants, the claimants' contention that they made a mistake as to whether or not the restrictive covenants were properly endorsed and enforceable, is without merit and to the extent, if any, which is denied, that they made a mistake it is entirely their fault.

It is their responsibility to acquaint themselves with the material and to seek the necessary legal advice prior to the making of the Consent Order. Any adverse results generated by their failure to do so must be visited upon the claimants themselves. The claimants cannot rely on their own fault as a ground constituting a mistake . This principle was approved in **Associated Japanese Bank (International) Ltd v Credit Du Nord S.A. [1989] 1 WLR 255 [case 2D Defendants' Authorities]** :

> **"What happens if the party, who is seeking to rely on the mistake , had no reasonable ground for his belief? An extreme example is that of the man who makes a contract with minimal knowledge of the facts to which the mistake relates but is content that it is a good speculative risk.**
>
> **In my judgment a party cannot be allowed to rely on a common mistake where the mistake consists of a belief which is entertained by him without any reasonable ground for such belief ...**
>
> **That is not because principles such as estoppel or negligence require it, but simply because policy and good sense dictate that the positive rules regarding common mistake should be so qualified. Curiously enough this qualification is similar to the civilian concept where the doctrine of error in substantia is tempered by the principle governing culpa in contrashendo. More importantly, a recognition of this qualification is consistent with the approach in equity where fault on the part of the party adversely affected by the mistake will generally preclude the granting of equitable relief:** *Solle v Butcher [1950] KB 671, 693."*

This principle is similarly supported in the Australian case of **McRae v Commonwealth Disposals Commission [1951] 84 CLR 377/408 [Case 2E Defendants' Authorities].** The latest affirmation of this principle is to be found in the **Great Peace** case where his Lordship said:

> **"That the alleged mistake must not be attributable to the fault of either party."** See pages 708 – 709 of the case.

On this ground as well, this application ought to be dismissed.

THE CLAIMANTS ACCEPTED THE RISK OF THE INVALIDITY OF THE RESTRICTIVE COVENANTS

It is submitted that the claimants in entering the Consent Order accepted the risk that the Restrictive Covenants may prove to be unenforceable, and in such circumstances the claimants will not be permitted to resile from the Consent Order {see **The Great Peace** pages 710 - 711; **Brennan v Bolt Burdon and Others,** pages 8 - 9, para. 22, page 11, para. 39}. In the instant case, not withstanding the fact the claimants had five Attorneys-at-Law, and not the fact that the trial of the claim 2003 HVC 1857 was scheduled for approximately two months from the date of the Consent Order, and notwithstanding the fact that all relevant facts were available to the claimants prior to the consent order, the claimants initiated settlement discussions and entered the Consent Order. The claimants therefore accepted the risk of the possible invalidity of the Restrictive Covenants and chose to proceed nonetheless.

In the circumstances, the claimants ought not to be permitted to resile from the Consent Order.

SUMMARY OF THE PRESENT LAW OF COMMON MISTAKE

The present state of the law of common mistake is usefully and properly encapsulated in the following passages of **Common Mistake: Theoretical Justification and Remedial Inflexibility** an article published in the **Journal of Business Law** as follows {pages 13-14}:

> **"The decision of the Court of Appeal in 'Great Peace Shipping' envisages an extremely limited doctrine of mistake with an inflexible remedy. The operation of the doctrine is unlikely to arise for two reasons which can be linked: first, the courts will give prominence to party autonomy and will seek to give effect to any contractual allocation of risk between the parties. This may mean interpreting an express term so that it imposes the risk of the event in question on one of the parties to the contract or implying a term to this effect. The greater the willingness of the courts to imply such an assumption of risk from the circumstances, the more limited the scope for application of a common law doctrine of mistake. Secondly, the decision in 'Great Peace Shipping' confines the operation of the doctrine to the limited interpretation adopted by the House of Lords in Bell v Lever Bros., namely to instances where the terms are impossible to perform or the impossibility renders the contract terms or purpose essentially different from that which was envisaged. It is clear, however, that a very narrow interpretation of "essentially different" must be adopted in the light of the examples given by Lord Atkin in Bell v Lever Bros., that did not satisfy this test. In addition, given the development link with the frustration doctrine which was expressly recognized by Lord Phillips in Great Peace Shipping, the concepts of forseeability and blame have been recognized as relevant to the evaluation of impossibility.**
>
> **The narrow interpretation of the doctrine is explicable against the background of its theoretical development and the nature and inflexibility of the remedy in those circumstances where the operation of the doctrine is**

justified. Such a narrow doctrine of mistake may be no bad thing in the context of achieving commercial certainty and protecting third parties and may simply amount to recognition of the context in which such mistakes arise. For example, Atiyah argues that the real problem here is that the factual scenario exists at the date of the contract and is therefore more likely to be ascertainable by the parties or, at least, foreseeable when compared to subsequent impossibility. In particular, he considered that:

> 'Mistakes are rarely regarded as sufficiently fundamental or basic to invalidate a contract, perhaps because the courts feel that one or other of the parties could have discovered the pre-existing facts, and partly because the courts dislike holding apparent contracts to be inoperative'.

Atiyah also recognizes that the practical outcomes of declaring a contract void, especially where there has been any performance, is that "serious practical difficulties can arise in adjusting the rights of the parties." There is therefore an inbuilt incentive to take the resolution of this legal dilemma outside the scope of the doctrine of mistake, other than in extreme cases, and deal with the parties' positions by construing the contact as containing an allocation of risk. Fortunately, it is also the case that a "fundamental" mistake ought, for the reasons given by Atiyah, to be quickly discovered in practice so that any contractual performance should be minimal.

The result in Great Peace Shipping was undoubtedly correct: the location of the ship was crucially important to the defendants and the inference is that they should therefore have insisted that the claimants made some categorical statement as to its position. The clear implication is that a commercial contract will not be upset where one or other party fails to address issues of risk allocation concerning reasonably foreseeable pre-contract circumstances. The foregoing analysis does not detract from the expressed basis for the decision that the contract (or its purpose) was not impossible of performance. This conclusion was reinforced by the

> **fact that the defendants did not appear to regard it as immediately fatal that the GP was not in the anticipated position since they failed to cancel the charter until they had secured the services of another vessel."**

IS THERE REALLY A GENUINE MISTAKE AS TO A FACT OR LAW?

There can be no question that the law relating to the imposition of Restrictive Covenants in a scheme of development has been clearly set out in the authorities for the last fifty (50) years or more. The statement of law on this topic is clear and unambiguous. There has been no change of law subsequent to the Consent Order.

In relation to the facts on which the defendants relied to establish the building scheme these were clearly set out by the defendants prior to the Consent Order. It appears that if there is a mistake at all, it amounts to a mistaken opinion as to whether the law when applied to the facts would support the creation of a scheme of development with the resultant lawful imposition of the Restrictive Covenants. If the claimants were uncertain as to this position they could have left the issue to be determined at a trial which was scheduled for two months after the Consent Order was made. They chose not to do so. It is submitted that a mistaken opinion which is not induced by the defendants is not actionable. A mistaken opinion is not a mistake contemplated by law.

This is the position Lord Denning and the English Court of Appeal took in ***Sylvia Cooper (formerly Priece) v Anthony Priece*** (unreported December 12, 1973) **[Case 2F Defendants' Authorities].** In that case

both parties, taking into consideration the condition of a dwelling house particularly the damp conditions, came to an opinion as to the value and entered into an agreement based on that value. It turned out that the value was considerably more and the Appellant sought to set aside the agreement on the basis of a mistake, this effort failed.

The Court was of the view that a mistaken opinion could not form the basis of a mistake at law (see pages 3-6 of the Judgment). Finally on this aspect, reference is made to the universal principle as stated in ***Lever Brothers*** and as stated in ***Anson's Principles of the English Law of Contract (1923)*** **[Item 2G Defendant's Authorities]** page 162.

> **"The cases in which mistake affects contract are the rare exceptions to an almost universal rule that a man is bound by an agreement to which he has expressed a clear assent, uninfluenced by falsehood, violence or oppression. If he exhibits all the outward signs of agreement the law will hold that he has agreed."**

It is submitted that the claimants have failed to establish any exception to the general rule. They have failed to establish any mistake recognized by law.

THE CLAIMANTS' MISAPPREHENSION

The claimants have contended in their affidavits and submissions that in order for Restrictive Covenants to be valid and effective, specific

words ought to be used in a Deed or document whereby it is declared that it is the intention to bind the vendor and purchasers, their heirs, successors and assigns, or some similar words.

It is submitted that the claimants' contention demonstrates a confusion as to the law relating to the imposition of Restrictive Covenants generally. It is well settled that Restrictive Covenants which run with the land may be imposed in one of three ways:

(a) by annexation

(b) by assignment; and

(c) by the creation of a building scheme, or scheme of development.

The legal requirements for each method is different, and the requirement for the imposition of Restrictive Covenants by way of annexation or assignment on the one hand are fundamentally different from the requirements for the creation of building schemes. In relation to the imposition by way of assignment or annexation, proper words of annexation are required or words indicating the intention for the covenants to run with the land are required. The words must be expressed in the conveyance; otherwise the covenants would be rendered personal and would not run with the land. On the other hand, in building schemes, these words are not required and their absence will not invalidate the existence or proper imposition of the covenants, provided that all the specific requirements for the creation of a building scheme set out hereunder are established.

It is submitted that the common law created building schemes in order to ameliorate the stringency of the requirements for the imposition of Restrictive Covenants either by annexation or assignment. In this regard see ***Preston 7 Newsom Restrictive Covenants Affecting Freehold Land 8th Ed. Pages 15, 19-23, 38-46.***

In the premises, the claimants are wrong in urging that for the imposition of restrictive covenants by way of building schemes, either Deed or specific words are required.

THE COVENANTS ARE LAWFULLY IMPOSED

In any event it is submitted that the Restrictive Covenants are in fact properly imposed by virtue of a scheme of development and are in fact binding upon the claimants and defendants and all other lot owners in the said scheme of development. It is apparent, from the affidavits filed in support of the claimants' application, particularly paragraphs 21, 22, and 23 that the claimants are of the view that in order for covenants to be properly imposed in a scheme of development there need be a deed, a transfer or some other document which the common vendor and the original purchasers execute agreeing to the imposition of the covenants and indicating expressly that the covenants run with the land and that the covenants are for the benefit of all the lot owners.

It is submitted that this view of the law as posited by the claimants is erroneous. The Court will make a decision, based upon documents, if there

are documents, but in the absence of documents, the Court will review the circumstances surrounding the development and sale of the subject property. If it is clear on this material that the common vendor intended to impose the Restrictive Covenants as a common law in a scheme of development, the Court will uphold the scheme and permit the covenants to bind all the lot owners, whether they be the original purchaser or purchased subsequently. A review of the authorities will demonstrate this position.

In ***Elliston v Reacher 1908] 2 Ch. 374 [Case 3A of Defendants' Authorities]*** Lord Parker, having reviewed the previous authorities sets out what, in his view, are the principles governing the establishment of a scheme of development. These are:

(a) that both the claimant and the defendant derive title under a common vendor;

(b) that the common vendor before selling the land to which the claimant and the defendant are entitled, laid out his estate or defined portions of that estate in lots, subject to restrictions, imposed on all the lots. The restrictions may vary in detail in respect of each lot but must be consistent only with some general scheme of development;

(c) the restrictions were intended by the common vendor to be for the benefit of the lots to be sold;

(d) that both the claimant and the defendant or their predecessors in title purchased their lot from the common vendor on the

understanding that the restrictions subject to which the purchases were made for the benefit of the other lots in the scheme.

His Lordship took the view that if these four points were established, then in his view a scheme of development had been created and the Restrictive Covenants would be enforceable. In any event if the first three requirements are established, the fourth requirement would be readily assumed. It is to be noted that his Lordship expressly took the view that the vendors' intention is imposing the covenants, that is to say, whether or not they were imposed for the benefit of all the lots intended to be sold were to be gathered from all the circumstances of the case including the nature of the restrictions. His Lordship said that if the restrictions were calculated to enhance the value of the lots for sale, it would be an easy inference that the vendor intended the restrictions for the benefit of all the lot owners. His Lordship also took the opportunity to dispel the view that the basis of the creation of the Restrictive Covenants in a scheme of development rests upon an implicit contract between the common vendor and the purchasers in the scheme of development. His Lordship held that where the four points set out above were established, the establishment of the Restrictive Covenants and their enforceability rest in equity on the reciprocity of obligations which are contemplated by each party at the time of his own purchase.

"In my judgment, in order to bring the principles of *Renals v Cowlishaw* (1) and *Spicer v Martin* (2) into

operation it must be proved (1) that both the plaintiffs and the defendants derive 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 as 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 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 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 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. It is also observable that the equity arising out of the

establishment of the four points I have mentioned has been sometimes explained by the implication of mutual contracts between the various purchasers, and sometimes by the implication of a contract between each purchaser and the common vendor, that each purchaser is to have the benefit of all the covenants by the other purchasers, so that each purchase is in equity an assign of the benefit of these covenants. In my opinion the implication of mutual contract is not always a perfectly satisfactory explanation. It may be satisfactory where all the lots are sold by auction at the same time, but when, as in cases such as *Spicer v Martin* (1), there is no sale by auction, but all the various sales are by private treaty and at various intervals of time, the circumstances may, at the date of one or more of the sales, be such as to preclude the possibility of any actual contract. For example, a prior purchaser may be dead or incapable of contracting at the time of as subsequent purchase, and in any event it is unlikely that the prior and subsequent purchasers are ever brought into personal relationship, and yet the equity may exist between them. It is, I think, enough to say, using Lord Macnaghten's words in *Spider v Martin* (1) that where the four points I have mentioned are established, the obligation which is in fact contemplated by each at the time of his own purchase."

(Page 384-5)

In **Reid & Bickerstaff 1909 2 Ch. 305 [Case 3B Defendants' Authorities}** the Master of the Rolls, Lord Cozens-Hardy in considering the essentials for the creation of a building scheme was of the view that there must be a defined area within which the scheme is operative and that the obligations, that is to say the Restrictive Covenants which are relevant to the defined area should also be defined. He held that those obligations need not be identical. He was of the view that the purchasers had to have

had notice of these Restrictive Covenants that were to be applicable within the defined area:

> **"The case of the plaintiffs rests upon two alternative propositions, either of which, if established will entitle them to the relief they claim: (1) There was a building scheme affecting the estate of the common vendors, and each purchaser to conform to and obey the provisions of the scheme, which included the restrictive covenant in question. (2) Apart from any building scheme the plaintiffs or some of them, are entitled to the benefits of the restrictive covenants which are entered into with the common vendors their heirs and assigns, they being assigns of the land for whose benefit the covenants were entered into. Different considerations apply to these two propositions, and it will be convenient to deal with them separately. (1) What are some of the essentials of a building scheme? 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. Not only must the area be defined, but the obligations to be imposed within that area must be defined. Those obligations need not be identical. For example, there may be houses of a certain value in one part and houses of a different value in another part. A building scheme is not created by the mere fact that the owner of an estate sells it in lots and takes varying covenants from various purchasers. There must be notice to the various purchasers of what I may venture to call the local law imposed by the vendors upon as definite area. *Keates v Lyion* (1), *Martin v Spicer* (2) *Osbourne v Bradley* (3) and *Elliston v Reacher* (4) seem to me to bear out what I have said."**
>
> **[Reid & Bickerstaff 1909] 2 Ch. 319**

In ***Baxter and Oors v Four Oaks Properties Limited [196[]*** **Ch. 816 [Case 3C Defendants' Authorities]** it was expressly held that there

is no need for any deed of mutual covenant in order to establish a scheme of development. Lord Justice Cross at page 826 said:

> **"The view taken by the courts has been rather that the common vendor imposed a common law on a defined area of land and that whenever he sold a piece of it to a purchaser who knew of the common law, that piece of land automatically became entitled to the benefit of, and subject to the burden of, the common law. With the passage in time it became apparent that there was no particular virtue in execution of a deed of mutual covenant – save as evidence of the intention of the parties – and what came to be called 'building schemes' were enforced by the courts if satisfied that it was the intention of the parties that the various purchaser should have rights inter se, even though no attempt was made to bring them into direct contractual relations."**
>
> **Baxter and Ors Four Oaks Properties Limited [1965 Ch. 826].**

This case makes it clear that so long as the intention is clear, there need not be any particular type of documentation although there may be a deed as well as there may not be so long as the intention is clear that the common vendor intended to create a scheme of development (see pages 825-828 of the Judgment).

It is to noted as well that in **Baxter's** case, the vendor did not set out his land into lots – he was prepared to sell such portion of his land as a purchaser may require from time to time but Lord Justice Cross held that this fact by itself did not prove that a scheme of development was not created.

It is submitted that on the authorities there is no requirement for the scheme to be created in a specific way, that is, by deed or specific transfer, which is signed by all the parties or the prospective purchasers or containing certain words or formulation. The case of **Nottingham Patent Brick and Tile Company v Butler [1885] 15 Q.B.D. 261 [Case 3D Defendants' Authorities]** and the passage of Mr. Justice Wills at pages 268-270.

> **"The principle which appears to me be deducible from the cases is that where the same vendor selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold without putting himself under any corresponding obligations, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchaser of the other plots of land from the vendor cannot claim to take advantage of them if they are in court for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them inter se for their own benefit.**
>
> **Where, for instance, the purchasers from the common vendor have not known of the existence of the covenants, that is a strong, if not a conclusive, circumstance to show that there was no intention that they should enure to their benefit. Such was the case in *Keates v Lyon* (1) *Master v Hansard* (2) and *Renals v Cowlishaw* (3). But it is in all cases a question of intention at the time when the partition of the land took place, to be gathered, as every other question of fact, from any circumstances which can throw light upon what intention was: *Relans v Cowlishaw.* (4) One circumstance which has always been held to be cogent evidence of an intention that**

> the covenants shall be for the common benefit of the purchasers is that the several lots have been laid out for sale as building lots, as in *Mann v Stephens* (5); *Western v Macdermot* (6); *Coles v Sims* (7) ; or, as it has been sometimes said, that there has been 'a building scheme:' *Renals v Cowlishsaw.* (8) In some instances the exhibition to intending purchasers of a plan embodying such a scheme has been relied upon. Obviously however, this is a mere detail of evidence, and is by no means necessary in order to establish the existence of such a scheme. It appears to me that, where land is put up to auction in lots, and two or more persons purchase according to conditions of sale containing restrictions of the character of those under consideration in the present case, it is very difficult to resist the inference that they were intended for the common benefit of such purchasers, especially where the vendor purposes (as in the present case) to sell the whole of his property. Where he retains none how can the covenants be for his benefits; and for what purpose can they be proposed except that each purchaser, expecting the benefit of them as against his neighbours, may be willing on that account to pay a higher price for his land than if he bought at the risk of whatever use his neighbour might choose to put his property to? Where, therefore, the vendor desires to sell at the auction the whole of his property, the inference is strong that such covenants are for the common benefit of the purchasers; and it seems to me that the strength of this evidence is not diminished by the fact that at the sale a considerable number of the lots may fail to find purchasers."

Nottingham Patent Brick and Tile Company v Butler [1885] 15 Q.E.D. [Case 3D Defendants' Bundle of authorities]. Affirmed on Appeal [1886] 16 QBD 778.

See also Brunner v Green Slade [1971] Ch 993/1003-1006 [Case 3L Defendants' Authorities].

In addition to the cases cited previously, the cases sited below will also demonstrate that there may well be circumstances where a scheme of the vendor and the purchaser whereby the covenants are imposed. If the circumstances surrounding the purchase support the existence of a scheme of development, the Court will hold that a scheme of development is created notwithstanding the lack of development is held to exist and share is no conveyance/document between reference in any conveyance or transfer and the Restrictive Covenants are therefore binding on the parties. Alternatively, there may well be a conveyance or some document setting out the restrictive covenants but there is no indication in that document that the Restrictive Covenants are intended to benefit all the land in the development and/or all the purchasers. In such circumstances if the facts support an intention to benefit all the land and all subsequent purchasers, notwithstanding the absence of such reference, in the conveyance or transfer, a Court will hold that the scheme of development is in fact duly created. In this regard, see ***Re Louis and the Conveyancing Act {1971]*** **1 N.S.W.L.R. 164 [Case 3E Defendants' Authorities],** particularly at pages 178 – 179 and ***Texaco Antilles Ltd v Kernochan and Anor [1973] 2 All ER 118*** **[Case 3F Defendants' Authorities]** at pages 125-126. Please note the case of ***Renals v Cowlishaw {1878]*** **9 Ch. D. 125 [Case 3G Defendants' Authorities]** particularly page 129.

In ***James Allen Cousin and Ors v Howard Charles Grant and Ors [1991] 103 FLR 236*** **[Case 31 Defendants' Authorities]** a plan which

contained covenants was noted on Certificate of Title pursuant to the Unit Plan Act. The proprietor was not a signatory to the plan or covenants thereon but nevertheless a scheme of development was upheld by the Court.

It is submitted that on a review of the authorities, in order to establish a building scheme or a scheme of development it is necessary that there be:

(a) a common vendor;

(b) that there be a defined portion of land, preferably that portion of land should be divided into lots although this does not appear to be a necessity;

(c) there be a set of Restrictive Covenants or restrictions;

(d) it must be the intention of the common vendor that these Restrictive Covenants are for the benefit of the entire or defined area of land; and

(e) the original purchasers must be aware of the restrictions and the fact that they are for the benefit of all the purchasers in the purported scheme. Evidence supporting these matters is to be drawn from the facts and circumstances surrounding the sale to the original purchasers including but not limited to all the documents available and even oral evidence. In this regard it should be recalled that Reginald Cluer obtained all eighty (80) titles in his name with the Restrictive Covenants

endorsed thereon before he transferred the lots to the purchasers.

It is submitted that in the instant case all the criteria for the creation of a scheme of development do in fact exist. In the first place, there is a defined area of land. The land was divided into lots. Titles for eighty lots were obtained pursuant to miscellaneous instrument 25445 and Restrictive Covenants endorsed on titles. Titles for eighty (80) lots were in fact issued in the name of the common vendor and the common vendor thereafter sold and transferred each lot to the purchasers including the claimants' predecessor in title subject to the Restrictive Covenants. Each title contains the endorsement of the covenants as set out in Miscellaneous Instrument Number 25445.

It is reasonable to say that the purchasers, including the claimants' land and the defendants' land expressly indicated that the covenants are for the benefit of the lands which are now or formerly comprised in the parent title registered at Volume 579 Folio 3. In addition, the description of the lot contained in each title expressly refers to the Deposited Plans dated 25th February 1963 which is the Deposited Plans which sets out the eighty (80) lots.

Each of the titles in the scheme contains the following notation:

> **"The land above described {hereinafter called 'the said land'} is subject to the undermentioned Restrictive Covenants which shall run with the land and shall bind as well the Registered Proprietor his, hers or their heirs, personal representatives and Transferees as then Registered Proprietor for the**

> **time being of the said land his hers or their heirs personal representatives and transferees and shall enure to the benefit of and be enforceable by the registered proprietor for the time being of the land or any portion thereof now or formerly comprised in Certificate of Title registered as aforesaid at Volume 579 Folio 3."**

This notation is clear information to the purchasers that the Restrictive Covenants were intended to benefit all the lots in the development, and this point has been upheld in ***Eagling and another v Gardiner [1970] 2 AER 838/845*** **[Case 3H Defendants' Authorities].**

> **"There are in the contract no words expressly providing that the covenants were in favour of any particular part or parts of the Mimms Hall Estate. The restrictions in the transfer, however, are differently worded. The plaintiffs' restrictive covenants are:**
>
> > **'to the intent that such covenants shall enure for the benefit of the remainder of Mimms Hall Estate of the Vendor and as far as possible run with the land.'**
>
> **This clearly shows that the covenants were not just covenants for the benefit of the vendor personally, but of lots. But here {as *Parker J in Elliston v Reacher,* pointed out} the nature of the covenants is such, that if they were for the benefit of some lots, they must also be for the benefit of the lots offered for sale, and likely to enhance the value of those lots. So far therefore, it follows from within the covenant itself, that it is 'an easy inference' that the vendor intended the restrictions to be for the benefit of all the lots."**

It is further submitted that the nature of the Restrictive Covenants particularly 1 and 9, are clearly intended to enhance the value of the lots and in keeping with the principles enunciated in ***Elliston v Reacher*** that, by itself, is a sufficient indication of the vendor's intentions that the

Restrictive Covenants were intended for the benefit of all the lots (see ***Elliston v Reacher***, page 384}.

86. The evidence in the instant case is that the development land was laid out into lots and sold. This fact is also cogent evidence of the vendor's intention {see ***Nottingham Patent Brick & Title v Butler*** page 269}.

The common vendor, Reginald Cluer, when he issued miscellaneous instrument 25445 requesting the delivery of titles for eighty lots and directing that the Restrictive Covenants be endorsed thereon was not in fact purporting to covenant with himself. The document makes no such claim. Mr. Cluer was simply complying with the requirements of Lord Parker's dictum in ***Elliston v Reacher,*** particularly dicum no. 2:

> **"that previously to selling the land to which the plaintiffs and defendants are respectively entitled, the vendor laid out his estate, or defined portion thereof (including the lands purchased by the plaintiffs and the defendants respectively) for sale in lots subject to restrictions intended to be imposed on all lots, and which, though varying in details as to particular lots, are consistent with some general scheme of development."**

This dictum does not require the imposition of the covenants as at the date of the sale either in the contract, transfer or any deed whatsoever. This is to be done prior to any sale. The best way of indicating to the

potential purchasers that land is subject to Restrictive Covenants is to have those covenants endorsed on the title. The vendor could have placed this information on a separate sheet of paper and handed it to each purchaser detailing the covenants and the fact that they similarly apply to the land to be sold. Additionally, the vendor could have indicated by advertisment set up in his sales office or in the press the existence of the covenants and their applicability to the lots and this would have been similarly adequate. Further, the common vendor could have come before the Court and advised that he told each purchaser that they were buying the premises subject to Restrictive Covenants, and that evidence would have been sufficient.

Having provided this information, in the informal ways referred to above, the common vendor in keeping with the provisions of the ***Registration of Titles Act*** would then be required to cause the covenants to be endorsed on the title. The common vendor cannot therefore be placed in a worse position if he caused the titles to be issued in his name with the covenants endorsed on them, and approximately 12 months later, enter into contracts to sell these lands.

The common vendor was not trying to create the scheme of development simply by lodging miscellaneous instrument 25445 as contended by the claimants, but he was seeking to comply with the provisions of the law as declared in ***Elliston v Reacher*** and other cases by laying out his land into lots imposing the covenants on a defined area, notifying all prospective purchasers of his intention to benefit the lands by

these covenants and in this way created the scheme of development. In this regard, the Court's attention is drawn to the 3rd Affidavit of Warrington Williams [page 8 supplemental bundle] pages 8 – 12, and in particular exhibits "WW-2" at page 18, "WW-4" at page 26 and "WW-6" at page 33. This affidavit indicates at paragraphs 3, 4 and 5 that Delroy and Norma Young Chin, Roy and Lenore Saunders and Cecil and Zoe Lopez were original purchasers from the common vendor, and these purchasers expressly declared that when they purchased their lots from the common vendor, they purchased their lots on the basis that ***"this was a high class and exclusive area as the others were of a certain size and there were restrictions as to the number of dwelling houses to be on each lot."*** This is cogent evidence that the original purchasers were well aware of the scheme of development in relation to their lots and other lots.

There is no doubt that the area to which the covenants were applicable was defined. It was in fact defined by a plan and applicable lot numbers.

It is submitted however that the claimants are not entitled to rely on the absence of a defined area or the fact that the common vendor was allegedly seeking to covenant with himself because these issues were not pleaded in the Fixed Date Claim Form or the Further and Better Particulars supplied by the claimants. The Honourable Mr. Justice Reid on the 27th July 2004 ordered the claimants to "provide particulars of the basis on which the contention is made that the covenants endorsed on the Certificates of Titles

... are not properly imposed ..." These particulars were supplied and are set out at pages 10 – 12 of the main bundle.

The claimants did not rely on either the non-existence of a defined area of land of the alleged attempt of the common vendor to covenant with himself. It is submitted that the claimants are wrong when they contend:

1. that in order to impose covenants by virtue of a scheme of development, there must be a deed, transfer or document whereby the original transferor and transferee agree to impose the covenants; and
2. that in order to impose the Restrictive Covenants by scheme of development there must be a deed, transfer or document in which appears words of annexation indicating the covenants "were created or were to pass on his own behalf and on behalf of his heirs, executors, administrators, transferees and assigns or any such similar words.
3. that in order to impose the Restrictive Covenants by scheme of development the original transferees must sign a transfer or document purporting to impose the Restrictive Covenants.

Warrington and Maureen Williams

It has been brought out in the evidence that the second and third defendants land lot 89, was not referred to in miscellaneous instrument 25445 and the submissions made that the second and third defendants' land was not entitled to the benefit or Restrictive Covenants as a

consequence. This submission is not correct because as stated earlier, the scheme of development was not created by miscellaneous instrument 25445 only. This instrument is only one factor to be taken into account in the entire circumstances of the case. The original vendor's intention is clear and obvious that lot 89 is to be included in the scheme of development when he transferred lot 89 subject to Restrictive Covenants endorsed on the certificate of title [see transfer, pages 331 – 333 of main bundle] and the title for lot 89 was issued pursuant to miscellaneous instrument 25445 [see title for development land pages 52 – 53 of main bundle.

The second defendant in his first affidavit at paragraphs 15 to 16 [see pages 110 – 111 main bundle] states that in his view there must have been an addendum to miscellaneous instrument 25445 which included lot 89. This is not mere speculation because as Mr. Williams says, otherwise the title for lot 89 would not have been issued pursuant to miscellaneous instrument 25445. The fact that this addendum is not available does not destroy what is otherwise a reasonable inference.

95In the circumstances, the second and third defendant are entitled to the benefit of the Restrictive Covenants, being a part of the scheme of development.

THE REGISTRATION OF TITLES

Sections 23, 70, and 88 of the ***Registration of Titles Act*** make the following abundantly clear;

(a) A registered proprietor of land takes his land subject to any encumbrance or qualifications endorsed on the title. Restrictive Covenants are included in the definition of encumbrance.

(b) A new proprietor of land, having been registered, takes his land subject to all liabilities to which the previous proprietor was bound.

The Privy Council in **Half Moon Bay Limited v Crown Eagle Hotels Limited, Privy Council No. 31 of 2000 [Case 3J of Defendants' Authorities]**, summarily sets out the principle at paragraph 21 of the decision as follows:

> **"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 Registrar 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."**

See also paragraphs 22-34.

The claimants or their predecessors in title cannot reasonably say that they were unaware that the original vendor, Reginald Cluer, was selling the lots subject to the Restrictive Covenants endorsed on the titles as is required by law. The land for whose benefit the Restrictive Covenants are imposed is expressly stated on the title. The identification of the Deposited Plan is referred to on the title and the

miscellaneous instrument 25445 which imposed the Restrictive Covenants are identified on the title.

The Transfer (see Transfer to Lilla Maud Chang) is expressly made subject to Restrictive Covenants and Reginald Cluer purports to transfer all his interest contained in the relevant Certificate of Title. The fact that the Transferee did not sign the transfer is of no moment because the Transferee, as a matter of law, is deemed taking the transfer subject to incumbrances and liabilities.

There is no requirement under the **Registration of Titles Act** for transferees to sign transfers. Section 88 of the Act empowers the transferor to transfer his land. Section 92 of the Act requires transfers of land subject to mortgages or charges to be signed by the transferees. There is no such requirement for other transfers.

AN AGREEMENT

In any event, the transfer, when properly read, demonstrates that Lilla Maud Chang had in fact purchased the land pursuant to an agreement and that the land was sold expressly subject to the Restrictive Covenant.

Notwithstanding the earlier submissions, if your Lordship is of the view that in order to establish a building scheme there ought to be evidence of an agreement whereby the original purchaser agreed with the original vendor to be bound by the Restrictive Covenants. It is submitted that on the evidence before the Court there is adequate basis for your Lordship to conclude that there was in fact such an agreement.

The original transfers (Ex. GLK-10 of the First Khemlani Affidavit sworn to on 23rd July 2004, Exs. 14(a) (b) (c) and (d) and Ex. 15) all

expressly refer to the fact that the respective lots were being transferred in consideration of the sums set out in each Transfer. Consideration is clearly being used in a contractual sense. The sums set out in the transfers are the purchase price for each lot. It is safe to infer that the transfers are prepared pursuant to the relevant contracts of sale.

Further on the transfer the transferor describes the property being sold or transferred '**subject only to the Restrictive Covenants endorsed on the Certificate of Title'.**

It is submitted that the transferor is clearly saying that he is selling the land to the purchaser to which the Restrictive Covenants are endorsed on the title. The nature and extent of the Restrictive Covenants are to be gleaned from each title. In addition, the title sets out the land to which the Restrictive Covenants refer and indicate that they are for the benefit of these lands.

In light of the provisions of the transfers it cannot be reasonably alleged that there was no agreement made between the original vendor and the original purchaser whereby the parties agreed to be bound by the Restrictive Covenants. This position is supported by the third Affidavit of Warrington Williams where the words of three original purchasers are that they purchased their lots subject to restrictions.

Further, Lilla Maud Chang, the original transferee of the claimants' land, when she transferred the claimants' land to Robert Lake, expressly transferred the claimants' land subject to Restrictive Covenants. It is submitted that this is cogent evidence of an acknowledgement by Lilla Maud Chang that she purchased the land

subject to restrictive covenants and that she considered these restrictive covenants binding on the land.

The original purchasers were clearly buying land which was subject to the Restrictive Covenants. This is the inescapable inference to be drawn from the transfers. The transfers (Ex. GLK 14 [a]) is somewhat more detailed and provides further strong evidence in support of this submission. The fact that some of the transfers are not signed by the transferee does not undermine this submission.

The original purchaser, having obtained their title pursuant to this transfer, could not now say that there was no contract or that the terms set out in the transfer are not binding on them. The transfer (Ex. GLK 15) is in fact signed by transferee and this in fact supports these submissions.

Further, the transfer is equivalent to conveyance (Deed), (**See Torrens Title in Australasia Francis Vol. 1 p. 249, item 3L of Defendants' Authorities**) and the parties are bound by its contents regardless of whether or not the transferee signed, he is acquiring his land pursuant to the transfer.

It is submitted that from all the circumstances of the case a scheme of development was created and consequently the Restrictive Covenants were properly imposed.

THE CLAIMANTS ARE ESTOPPED

The Defendants also submit that the claimants are now estopped from denying that the Restrictive Covenants were properly imposed. (**The Law Relating to Estoppel by Representation (2nd Ed. Page 116 para. 125).**

THE BURDEN OF PROOF

It is submitted that the burden of proof rests upon the claimants to establish that the Restrictive Covenants are invalid (**Voumard's the sale of Land (3rd Ed) pages 477 and 487, item 3N Defendants' Authorities).** The claimants have failed to surmount the burden placed on them and as a consequence this action ought to fail and the Fixed Date Claim Form dismissed.

COURT

There is no issue that the parties to this action were the same parties who came to a compromise of their suit. This compromise, which was orchestrated by the claimant to this present suit was reduced into writing as the consent judgment entered by Rattray J. in the Claim HCV 1857/2003.

The parties were of the view that they were bound by the covenants endorsed on their respective titles.

Under cross examination Gul Khemlani admitted that he brought this present suit because he wanted to renege on his agreement to tear down the second building partly constructed on his plot of land. This construction is admittedly in breach of the covenants.

At the time the Consent Order was entered and all relevant times the complainant was legally represented. Having decided not to comply with the Consent Order aforesaid, he obtained the genius of Queens Counsel who has submitted that the Consent Order should be set aside on the

grounds of fundamental mistake. That mistake arises from the fact that the covenants were not properly endorsed on the titles.

There is no denying:

1. That the covenants are endorsed by the Registrar of Titles.
2. That all the persons purchasing plots would have notice of the endorsed covenants.
3. That all the parties purchasing land would do so subject to the covenants thereon.

If the covenants were endorsed by the public authority having jurisdiction to do so, then any person having been put on notice who wishes to have same removed or modified should apply to do so as provided by:

See 5 of the Restrictive Covenants {discharge and modification} Act. There is also Practice Direction No SC 2003-1 in respect of Restrictive Covenant Application; published in the Jamaica Gazette Vol. Cxxvl on Thursday 13th February 2003.

These claimants have not done so but instead have sought to argue that the endorsements should not have been on the titles in the first place. This court is of the view that the claimants must fail for the reasons set out above.

However, in deference to the depth of the research done by the attorneys in this matter a closer examination will be made of the issues raised.

Covenants are the means used to control the use of land and are usually of a restrictive nature. They are promises made by Deed and are enforceable as contractual obligations between the original parties.

In the case of Tusk v Moxhay 1849 – 41 ER 1143 it was established that the burden of a restrictive covenant imposes an equitable burden which is enforceable against all successors in title except for a Bona Fide purchaser for value without notice. Equity will enforce the covenant against successors in title by granting an injunction to restrain any breach. This principle was approved and developed in Luker v Dennis – 1877-7 CL227 and Formby v Baker 1903-2 Ch. 539.

A scheme of development comes into existence where land is laid out in plots and sold to different purchasers or leased to different leasees, each of whom enters into a Restrictive Covenant with the common vendor or lessor agreeing that this particular plot shall not be used for certain purposes.

In such a case, the Restrictive Covenants are vital because the whole estate is being developed on a definite plan. It is most important for the development if the value of each plot is not to be depreciated, that purchasers should be prevented from dealing with their land in a manner which would lower the tone of the neighbourhood.

When the existence of development of such a scheme has been established the rule is that each purchaser and his assignee can sue or be

sued by every purchaser and or his assignees for any breach of the Restrictive Covenant.

In such an action for breach, it is immaterial whether the defendant acquired his title before or after the date on which the other party purchased his land.

Restrictive Covenants constitute a special local law for the area over which the scheme extends so both plot owners [purchaser and vendor] become subject to that law, provided that the area and the obligations imposed there on are defined. They all have a common interest in maintaining the restrictions. This community of interest necessarily requires and imports reciprocity of obligations, see – Spicer v Martin 1888-14 A/C 12 and Lawrence v South County freeholds 1939-2 AER – 503.

In a scheme of development, no special formula for annexation is required, since the annexation of the benefits of the covenants to every plot still unsold proves itself from the surrounding facts. The owners of plots sold previously are shown by the facts to be within the benefit of the covenants, even if not expressedly mentioned as convenantees. No unsold plot can later be disposed of by the vendor without his requiring the purchaser to enter into the covenant of the scheme. As soon as the first sale of land under the scheme has been made, the scheme crystallizes and all the land within the scheme is bound. The requirements for the existence of a scheme of development were formulated by Parker J to Elliston v Reacher 1908-2 CL-374 (NB page 385).

In latter cases these requirements were written down (See Baxter v Four Docks Properties 1965-1 AER-906 and the Dolphins conveyance 1970- 2 AER-664).

In this case, the claimants have produced irrefutable evidence that this was a scheme of development in which all the parties to the action are involved. These are:

(a) The plan of Billy Dun which includes all the relevant plots.

(b) All the plots were derived from a common vendor, the late Richard Cluer, a retired judge of the Supreme Court of Jamaica.

(c) There were formal words (unnecessary) of annexation.

For all these reasons the claimants must fail.

This court will dismiss this claim with costs to the defendants to be agreed or taxed. The Court will however grant a Stay of Execution for 30 days hereafter so that the status presently existing remains in case either party wishes to appeal.