

Keith Rutherford Lamb

Appellant

v.

Midac Equipment Limited

Respondent

FROM

THE COURT OF APPEAL OF JAMAICA

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

Delivered the 4th February 1999

Present at the hearing:-

Lord Slynn of Hadley
Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Hope of Craighead
Lord Millett

[Delivered by Lord Nicholls of Birkenhead]

The appellant, Mr. Keith Lamb, lives in an apartment in a residential block constructed on part of the property known, or formerly known, as 9 Merrick Avenue, Kingston 10. He has lived there since 1972. On the other side of the road, diagonally opposite, the respondent company, Midac Equipment Limited, carries on a garage and repair shop business at 10 Merrick Avenue. For the past twelve years Mr. Lamb has been seeking to stop this business use, on several grounds: breach of planning legislation, nuisance (Mr. Lamb claims his health and the health of his wife have been seriously damaged by fumes and gases coming from no. 10), and breach of restrictive covenant. This appeal, on which Midac was not represented before their Lordships, concerns the last of these grounds of attack.

The relevant conveyancing history is shortly stated. Early in 1947 Frank Watson divided five acres of land owned by him into thirteen plots. Between about March and November 1947 he sold these lots to twelve purchasers. Lot no. 9, now known as 10 Merrick Avenue, was sold to Mary Christie. After intervening transfers this property was bought by Midac in 1979. Lot no. 1, subsequently known as 9 Merrick Avenue, was sold to Hubert Lowe and his wife, and this lot, again after intervening transfers, became vested in Mr. Lamb.

It seems likely that on the sale of each plot in 1947 the purchaser entered into a number of covenants with the vendor Frank Watson, in similar form. In the transfer to Mary Christie, the predecessor in title of Midac, Mary Christie covenanted with Frank Watson in these terms:-

“And the said Mary Connelley Christie covenants with the said Frank Merrick Watson his heirs executors administrators transferees and assigns to observe the restrictive covenants set out in the Schedule hereto.”

The scheduled restrictions included a restriction to the effect that the land being transferred was to be used for residential purposes only. This is the restrictive covenant relied on by Mr Lamb in these proceedings.

Mr. Lamb was not the original covenantee, nor was the benefit of the covenant expressly assigned to him. Accordingly, to enable him to enforce this covenant he must show *either* that the benefit of the covenant was attached ("annexed") to lot no. 1 when the covenant was first entered into by Mary Christie in 1947, so that it passed automatically to successive owners, *or* that the covenant was entered into as part of a scheme of development. Moreover, Midac was not the original covenantor. So, Mr. Lamb must also show that the covenant was not just personal to Mary Christie, the original covenantor, but the burden was attached to lot no. 9, so as to pass to successive owners. Langrin J. held that Mr. Lamb failed to show annexation of the benefit or the existence of a building scheme. On appeal, the Court of Appeal (Carey J.A., Gordon J.A. and Patterson J.A.) reached the same conclusion.

It is convenient to consider first the building scheme point, because this possibility is suggested by the facts already mentioned, namely, the division of the land of the common vendor into a number of plots, and the sale of the plots subject to similar restrictive covenants. The essence of a scheme of development is reciprocity of obligation and benefit: each purchaser from the common vendor was intended to be subject to similar obligations, and each was intended to have the benefit of the obligations entered into by his fellow purchasers. This is now well established law: see, for instance, *Reid v. Bickerstaff* [1909] 2 Ch 305. The existence of this intended reciprocity is a matter for proof by evidence, having regard to the circumstances of each case. Proof, as here, of the division of land by a common vendor into several lots, and the taking of similar covenants from each purchaser, goes some way towards the desired goal. By itself, however, this evidence is insufficient. It leaves open the possibility that the common vendor took the covenants, not for the benefit of the purchasers of the several plots, but for his own benefit. He might, for instance, be the owner of neighbouring land. In the present case this possibility cannot be dismissed as a fanciful imagining. The plan attached to Frank Watson's certificate of title relating to the five acres suggests that the remaining part of no. 17 Waterloo Road, abutting onto the five acres, also belonged to Frank Watson.

Against this background the difficulty confronting Mr. Lamb's claim is the paucity of evidence about the circumstances of Frank Watson's sale of his five acres in 1947. It seems probable that a map showing the proposed subdivision into lots was deposited with the Council of the Kingston and St. Andrew Corporation, and approved by the council, under the Local Improvements Act. There is evidence of the sales of all the lots in 1947, the prices paid and the names of the purchasers. It is also clear that Mary Christie, and presumably each of the purchasers, knew she was buying a plot of land in a defined area laid out in lots. But there is no evidence, such as might be provided by a contract of sale, from which a court could properly infer that each purchaser knew that purchasers of the other lots had entered into, or would enter into, similar covenants. The absence of this evidence is fatal to Mr. Lamb on this part of his case. In the absence of such evidence there is a lack of material from which intended reciprocity of

obligation and benefit between all the purchasers can be inferred.

The alternative basis for Mr. Lamb's claim, that the benefit of Mary Christie's covenant is now vested in him, is that this benefit was annexed to lot no. 1 by the terms in which the covenant was made. This raises a question of interpretation of the covenant: was the language apt to show an intention that the benefit of the covenant should be annexed to the other twelve plots or, at any rate, the other plots not already sold? The covenant was not expressed to be made for the benefit of land identified by the covenant itself. As already noted, the covenant was made by Mary Christie with Frank Watson "his heirs, executors, administrators, transferees and assigns". The reference to heirs, executors, administrators and assigns is consistent with the covenant being intended for the benefit of Frank Watson himself, as distinct from specific property. Before their Lordships, although apparently not in the courts below, reliance was placed on the reference to "transferees". This, it was submitted, showed an intention to benefit land: transferees must be a reference to the transferees of land, and the covenant was expressed to be made with these persons as well as Frank Watson's personal successors.

Their Lordships are inclined to doubt whether this expression ("transferees"), standing in conjunction with a reference to the covenantee's personal successors but otherwise alone and without elaboration, can be taken to evince an intention to annex the benefit of the covenant to land. But even if it can be so taken, the difficulty confronting Mr. Lamb is showing that lot no.1 was part of the land intended to be benefited. There is too much uncertainty to know for whose benefit the covenant was taken. On this short ground, the alternative basis for Mr. Lamb's claim must also fail.

For these reasons their Lordships agree with Langrin J. and the Court of Appeal that Mr. Lamb has not established that the benefit of the relevant covenant is vested in him. Accordingly it is unnecessary to consider whether Midac's land is burdened with the obligations of this covenant. Their Lordships will humbly advise Her Majesty that this appeal should be dismissed.