[2023] JMCA Civ 16

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P (AG)
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE BROWN JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2020CV00010

BETWEEN	**MARTIN LYN**	**1ST APPELLANT**
AND	**MELISSA ELIZABETH LYN**	**2ND APPELLANT**
AND	**MARTYN MAXWELL LYN**	**3RD APPELLANT**
AND	**SARAH CHIH-JEN HSIA**	**1ST RESPONDENT**
AND	**MARVIN GORDON HALL**	**2ND RESPONDENT**
AND	**HENDERSON EMANUEL DOWNER**	**3RD RESPONDENT**
AND	**MARCOS HANDAL**	**4TH RESPONDENT**
AND	**UNA PEARL WITTER**	**5TH RESPONDENT**
AND	**BRENDA ROSE FRANCIS**	**6TH RESPONDENT**

Michael Hylton QC and Ms Timera Mason instructed by Hylton Powell for the appellants

Emile Leiba, Mrs Julianne Mais-Cox and Ms Chantal Bennett instructed by DunnCox for the respondents

22 March 2022 and 31 March 2023

MCDONALD-BISHOP P (AG)

Introduction

[1] The case that has given rise to this appeal is an example of the disturbing and unacceptable feature of the construction industry in Jamaica, where land developers commence construction on lands, encumbered by restrictive covenants, before obtaining an order from the court for modification or discharge of the covenants, as they are obliged to do, under the Restrictive Covenants (Discharge and Modification) Act.

[2] These proceedings emanated from two claims brought in the Supreme Court concerning a multiple-family residential development ('the development') constructed by the appellants, Martin Lyn and his children, Melissa Elizabeth Lyn and Martyn Maxwell Lyn ('the Lyns'), in the area of the Corporate Area known as "The Golden Triangle". The first claim (2017HCV02997) was filed by the Lyns seeking modification of restrictive covenants encumbering the land on which the development is constructed ('the Lyns' claim'). The second claim (2018HCV02906) was brought by the respondents, Sarah Chih-Jen Hsia ('Ms Hsia'); Marvin Gordon Hall ('Mr Hall'); Henderson Emanuel Downer ('Mr Downer'); Marcos Handal ('Mr Handal'); Una Pearl Witter ('Ms Witter'); and Brenda Rose Francis ('Ms Francis'), objecting to the modification of the restrictive covenants and seeking, among other things, an order for demolition of the offending development ('the respondents' claim').

[3] The Lyns failed in their claim to have the restrictive covenants modified, while the respondents succeeded in obtaining the demolition order in respect of the offending development. Aggrieved by that outcome, the Lyns have approached this court in their bid to have the decision of the Supreme Court set aside. The gravamen of their complaint is that the decision of the Supreme Court is erroneous as the respondents are not the beneficiaries of the restrictive covenants affecting the land on which the development is constructed and so the respondents lack the legal standing to enforce them.

The parties

[4] The Lyns are the registered proprietors of land described as part of Vale Royal in the parish of Saint Andrew being the Lot numbered Three, Block P on the plan of Vale Royal deposited in the Office of Titles on 1 November 1927 and comprised in certificate of title registered at Volume 394 Folio 3 of the Register Book of Titles. It is part of lands comprised in certificate of title registered at Volume 283 Folio 92 of the Register Book of Titles and bears the civic address, 18 Upper Montrose Road, Kingston 6 (the Lyns' land').

[5] The respondents are owners of neighbouring lands ('the respondents' lands'). The 1st and 2nd respondents, Ms Hsia and Mr Hall, are the registered owners of land described as Lot numbered Nine Block X on the plan of Vale Royal deposited in the Office of Titles on 1 November 1927 and comprised in certificate of title registered at Volume 331 and Folio 80 of the Register Book of Titles, being part of the land comprised in certificate of title registered at Volume 283 Folio 92. Its civic address is 7 Upper Montrose Road, Kingston 6. ('the Hsia/Hall land').

[6] The 3rd respondent, Mr Downer, is the registered proprietor of land described as part of Vale Royal in the parish of Saint Andrew being the Lot numbered Two Block S on the plan of Vale Royal deposited in the Office of Titles on 1 November 1927 and being the land comprised in certificate of title registered at Volume 1141 Folio 151 of the Register Book of Titles formerly registered at Volume 350 Folio 90. The civic address is 3 Upper Montrose Road, Kingston 6 ('Mr Downer's land').

[7] The 4th respondent, Mr Handal, is the registered proprietor of land described as Lot numbered Four Block Q on the plan of Vale Royal deposited in the Office of Titles on 1 November 1927 and comprised in certificate of title registered at Volume 1416 Folio 459 of the Register Book of Titles with civic address, 4 Upper Montrose Road, Kingston 6 ('Mr Handal's land'). The land was formerly registered at Volume 353 Folio 95.

[8] The 5th respondent, Ms Witter, is the registered proprietor of land described as part of Vale Royal in the parish of Saint Andrew being Lot numbered One on the plan of

No 5 Upper Montrose Road, deposited in the Office of Titles on 21 June 1979 and comprised in certificate of title registered at Volume 1155 Folio 636, being part of the land comprised in certificate of title registered at Volume 353 Folio 66 of the Register Book of Titles. The civic address is 5A Upper Montrose Road, Kingston 10 ('Ms Witter's land').

[9] Ms Francis, the 6th respondent, is the registered proprietor of land described as Lot numbered Eight Block X on the plan of Vale Royal deposited in the Office of Titles on 1 November 1927 and being the land comprised in certificate of title registered at Volume 1304 Folio 981 and formerly at Volume 297 Folio 48 of the Register Book of Titles. The civic address is 1 South Hopefield Avenue, Kingston 6 ('Ms Francis' land').

The background to the claims and the proceedings in the Supreme Court

[10] In April 2017, the Lyns obtained approval from the Kingston and Saint Andrew Municipal Corporation ('KSAMC') to construct a multiple-residence complex on the Lyns' land. This approval was subject to the Lyns making an application to the court for modification of "any relevant restrictive covenants" associated with the land. The Lyns' land was, indeed, subject to five restrictive covenants. The most relevant ones, for present purposes, are covenants 2, 4, and 5 ('the relevant covenants' or 'the covenants'). They read:

> "1. …
>
> 2. Not to subdivide the said land except in accordance with the aforesaid plan or in accordance with a plan approved by the Board under [The Local Improvements Law 1914], in which latter case, none of the lots shall be less than half an acre in area.
>
> 3. …
>
> 4. Only one residence shall be erected on any lot of the said land; such residence together with the buildings appurtenant thereto shall cost not less than Eight Hundred Pounds and shall be filled with proper sewer

installation and no pit closet shall be erected for use on the said land.

5. No building shall be erected within thirty feet of any road and ten feet of any other boundary."

[11] Despite these covenants and the condition laid down by the KSAMC, the Lyns commenced construction on their land, in August 2017, before making an application to the court for the modification or discharge of any of the relevant covenants. It was not until 18 September 2017 that the Lyns filed a fixed date claim form in the Supreme Court seeking to modify the relevant covenants in these terms:

"2. The land above described shall not be subdivided save and except into lots for the erection of Townhouses and or apartments in accordance with the statutory approvals.

4. No building other than Townhouses and or apartments with the necessary outbuildings appurtenant thereto shall be erected on the said land and such buildings shall be used for no other purpose other than for private residential use.

5. No Townhouse and or apartments house to be erected on the said land shall be erected at a distance of less than Twenty Feet from any road boundary thereof and eight feet of any other boundary save and except that this shall not apply to the Guardroom, Swimming Pool, Gazebo and Garbage receptacle."

[12] On 27 February 2018, Ms Hsia and Mr Hall were served with a notice of the Lyns' claim. On 7 March 2018, Ms Hsia and Mr Hall filed and served their objection to the modification of the relevant covenants.

[13] Following the filing of that objection, Ms Hsia and Mr Hall, on 31 July 2018, filed a fixed date claim form in which they were joined by the other four respondents. The respondents sought, among other things, a declaration that they are entitled to the benefit of the relevant covenants and an injunction restraining further construction on the Lyns' land until and unless the covenants were modified. On the same date, they also

filed a notice of application for an interim injunction restraining the Lyns from continuing construction or any form of development on their land until further orders of the court. On 5 October 2018, the respondents filed an amended fixed date claim form in which they sought an additional order that the Lyns demolish, forthwith, the structure constructed on their land in so far as it is in breach of the relevant covenants.

[14] On 14 December 2018, the interim injunction was granted in the terms sought by the respondents. The chronology of events shows that by then, the development was almost completed and occupation of it had commenced. There was dispute between the parties in the court below as to whether construction continued after the interim injunction was granted. The Lyns have insisted that construction had not continued after the injunction and sought to establish that to be the true position in this court.

[15] With respect to the two claims, these were heard together (pursuant to an order of the Supreme Court) by a judge of the Supreme Court ('the learned judge'), over several days in July and October 2019. On 21 January 2020, the learned judge delivered her decision with written reasons outlined in her judgment bearing neutral citation number [2020] JMSC Civ 5 ('the judgment').

[16] The Lyns' claim failed. The learned judge refused their application for modification of the restrictive covenants and awarded costs to the respondents.

[17] On the respondents' claim, which succeeded, the learned judge declared that the respondents are entitled to the benefit of the relevant covenants. She granted an order for, among other things, the structure on Lyns' land to be demolished "in so far as it is in breach of the restrictive covenants attached to the Lyns' certificate of title and to convert the structure into a single dwelling residence with appropriate out buildings in a manner to conform with the restrictive covenants". Costs in that claim were also awarded to the respondents.

The appeal

[18] Aggrieved by the decision of the learned judge, the Lyns filed a notice with grounds of appeal on 7 February 2020, seeking to have this court: (1) set aside the orders of the learned judge on both claims; (2) dismiss the respondent's claim; (3) declare that the relevant covenants are only enforceable against the original covenantors; and (4) award the costs of the proceedings in the court below and in this court to them.

[19] However, at the hearing of the appeal, counsel for the Lyns, speaking through Mr Hylton QC, indicated that the grounds of appeal are limited to the decision of the learned judge on the respondent's claim. Queen's Counsel advised that the Lyns would not pursue the appeal from the learned judge's decision on their claim. Therefore, no arguments were advanced in support of that aspect of the appeal. On that basis, the appeal from the Lyns' claim would have to be dismissed given no formal notice of withdrawal was filed. Consequently, the correctness of the learned judge's decision on the Lyns' claim does not fall for this court's determination.

[20] Concerning the appeal from the decision on the respondents' claim, the Lyns have advanced eight grounds of appeal. It is not necessary to set out the grounds for present purposes. It suffices to say, as counsel on both sides have agreed, that the eight grounds of appeal are sufficiently encapsulated in two broad issues, which, essentially, are:

(i) whether the learned judge erred in finding that the respondents are entitled to the benefit of the relevant covenants and could lawfully enforce them (grounds a. – e.); and

(ii) whether the learned judge incorrectly exercised her discretion in ordering the demolition of the structure on the Lyns' land (grounds f. – h.).

Issue (i) – Whether the learned judge erred in finding that the respondents are entitled to the benefit of the relevant covenants and could lawfully enforce them (grounds a. – e.)

[21] It is undisputed that none of the parties had personally entered into covenants with the original vendor of their lands. The Lyns were not the first transferee or original covenantor with respect to the relevant covenants. The same applies to the respondents who are not standing in the position of original covenantees. The respondents are, nevertheless, claiming the benefit of the relevant covenants affecting the Lyns' land.

[22] For the benefit of restrictive covenants to run at law, three fundamental things must be present: (1) the covenants must directly affect the land of the covenantor by controlling its user; (2) the observance of the covenants must directly benefit the land of the covenantee; and (3) the original contracting parties must have intended that they shall run with the land of the covenantee at the date of the covenant. The absence of any of these three things would, invariably, lead to a finding that the covenants are personal and so would not be enforceable by or against third parties.

[23] With regard to the transmission in equity of the benefit of the restrictive covenants to a successor in title, it is necessary that not only must the covenants touch and concern or benefit some dominant land, but also that the benefit was either: (a) effectively annexed to the covenantee's land; (b) expressly assigned to the successor in title of the covenantee's land; or (c) has become enforceable by reason of the presence of a building scheme or a scheme of development ('scheme').

[24] It seems apposite to say from the very outset, that there is no evidence and, indeed, no assertion by the respondents of express annexation of the relevant covenants to their land or express assignment of the covenants to them as successors in title of the original covenantees. The parties have agreed that the primary issue is whether the Lyns' land and the respondents' lands are part of a scheme. If they are, then the respondents would be entitled to the benefit of the relevant covenants and able to lawfully enforce them.

Is there a scheme?

[25] In determining whether the respondents are entitled to the benefit of the relevant covenants, the learned judge principally found and concluded that:

> (1) It is clear there is no dispute between the parties that the restrictive covenants are negative in nature (para. [37] of the judgment).
>
> (2) The registered titles do not indicate that the relevant covenants are for the protection of land retained by the original covenantor (para. [38] of the judgment).
>
> (3) The relevant covenants are not in place for the protection of retained land but rather for the protection of lots created in the subdivision (para. [39] of the judgment).
>
> (4) The respondents are entitled to the benefit of the relevant covenants because "a building scheme/development was created with reciprocal obligations in 1927 when the plan generating the subdivision was deposited" and thus the obligations created "passed to successors in title and are not personal to the original covenantor, but enforceable by the lot holders *inter se*" (para. [47] of the judgment.

[26] The legal position is that there is no inflexible insistence on formal words by which covenants should be imposed within a scheme. The creation of a scheme of reciprocal rights and obligations is a matter of intention that can be manifested in different ways. As such, a scheme can be created by different devices. There are those devices by which covenants are created in an express manner with the intention clearly and expressly spelt out in the wording of the conveyance or other relevant documents. However, even if not expressed, the creation of mutual covenants sufficient to ground a scheme, can be implied from conveyancing documents as well as from extrinsic evidence thrown up in

the surrounding circumstances (see Preston & Newsom, Restrictive Covenants Affecting Freehold Land, 7th edn, page 48).

[27] The requirements for establishing a scheme were given full judicial consideration and explanation by Parker J in **Elliston v Reacher** [1908] 2 Ch 374 whose decision was affirmed on appeal in the judgment reported at [1908] 2 Ch 665. At page 384, his Lordship identified four requirements that must be fulfilled before it can be said that a scheme exists. They are enumerated and summarised to be as follows:

(1) The parties must have derived title under a common vendor;

(2) Prior to selling the lands to which the parties are entitled the vendor laid out his estate for sale in lots subject to restrictions intended to be imposed on all the lots, or a defined portion thereof (including the lands purchased by the parties). The restrictions, though varying in details as to particular lots, are consistent and consistent only with some general scheme;

(3) The 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) The parties 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, were 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.

[28] Parker J further noted that once the first three elements are established, the fourth may be readily inferred, provided the purchasers had notice of the facts involved in the

first three elements. However, according to his Lordship, "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" (see page 385 of the report). The common vendor's object in imposing the restrictions, his Lordship said, must be gathered from all the circumstances of the case, including the particular nature of the restrictions.

[29] In keeping with Parker J's formulation, if these four requirements are satisfied, the respondents would be entitled to enforce the restrictive covenants entered into with the common vendor by the Lyns' predecessors in title "irrespective of the dates of the respective purchases".

[30] It should be noted, however, that **Elliston v Reacher** is now viewed by some writers as the 'original approach' to the question of whether a scheme of development exists. Professor Gilbert Kodilinye in his helpful text, Commonwealth Caribbean Property Law, 2nd edition, page 168, for his part, explains it thus:

> "Although the requirements in *Elliston v Reach*er are still considered to be a valuable guide as to the existence or otherwise of a building scheme, there are cases in which schemes of development have been held to exist despite the absence of one or more of these requirements."

[31] What is now viewed as the "modern and less stringent approach" stresses the existence of only two pre-conditions which, once fulfilled, would satisfy the establishment of a scheme of development, regardless of whether the other two **Elliston v Reacher** conditions are fulfilled (see **Baxter v Four Oaks Properties Ltd** [1965] 1 All ER 906 and **Re Dolphin's Conveyance, Birmingham Corporation v Boden and others** [1970] Ch 654) ('**Re Dolphin's Conveyance**'). These two pre-conditions were established by Cozens-Hardy MR and Buckley LJ in **Reid v Bickerstaff** [1909] 2 Ch 305 and approved by the Privy Council in **Jamaica Mutual Life Assurance Society v Hillsborough Limited and others** [1989] 1 WLR 1101 ('**Jamaica Mutual Life v Hillsborough**').

[32] In delivering the opinion of the Board, Lord Jauncey in **Jamaica Mutual Life v Hillsborough**, at pages 1106 – 1107, noted that:

> "It is now well established that there are two perquisites of a building scheme namely: (1) the identification of the land to which the scheme relates, and (2) an acceptance by each purchaser of part of the lands from the common vendor that the benefit of the covenants into which he has entered will enure to the vendor and to others deriving title from him and that he correspondingly will enjoy the benefit of covenants entered into by other purchasers of part of the land. Reciprocity of obligations between purchasers of different plots is essential."

[33] Accordingly, in keeping with the modern and less stringent approach embraced by the Privy Council in **Jamaica Mutual Life v Hillsborough**, there are two essential requirements for proving the establishment of a scheme:

(1) identification of a defined area of land to which the scheme relates; and

(2) evidence that each purchaser of a part of the lands from the common vendor purchased his land with the knowledge that the benefit of the covenants into which he has entered will enure to the vendor and to others deriving title from him and that he, correspondingly, will enjoy the benefit of the covenants entered into by other purchasers of part of the land.

[34] The Lyns did not seek to challenge the learned judge's findings that there is a defined area of land to which the scheme relates. They have accepted that the learned judge had sufficient evidence of the boundaries of the area, and thus it was open to her to have found that there was a certain or ascertainable geographical area satisfying the first requirement for the establishment of a scheme. It is important to note, however, that this requirement is not completely satisfied only by what the vendor has done in defining the area. The Privy Council case of **Emile Elias and Co Ltd v Pine Groves Ltd**

[1993] 1 WLR 305 ('**Emile Elias v Pine Groves**') is instructive in this regard. Citing the dictum of Cozens-Hardy MR in **Reid v Bickerstaff,** concerning this requirement for there to be a defined area, their Lordships opined that it is not sufficient that the common vendor has himself defined the area within which the scheme is operative. According to their Lordships, for there to be the creation of a valid scheme, the purchasers of all the land within the area of the scheme must also know what that area is. There is no issue joined between the parties, in this case, as to whether all the purchasers of the Vale Royal subdivision knew what that area was at the time of purchase.

[35] What has generated debate between the parties is the satisfaction of the second requirement regarding the purchasers' knowledge and intention as it relates to the reciprocity of the burden and benefit of the covenants at the time of purchase from the common vendor.

[36] An attempt will be made to fully dispose of the several specific issues in dispute between the parties within the context of determining whether the second requirement has been satisfied. Each specific issue is examined below against the background of the evidence, the relevant law, and the submissions of the parties.

(i) Whether the restrictive covenants affecting the lands must be the same

[37] In para. [44] of the judgment, the learned judge stated:

> "[44] What is clear from this is, that the relevant lands all come from the same parent title and from a common vendor and are part of the Vale Royal Lands which was subdivided into lots by a plan that was deposited in the Office of Titles on the same day – November 1, 1927. **The lots were subject to the same three restrictive covenants under consideration** which… were for the benefit of all the lots in the subdivision." (Emphasis added)

[38] Mr Hylton contended that the learned judge erred by concluding that the lots were subject to the same restrictive covenants. He argued that the learned judge fell into error because she incorrectly proceeded on the basis that the respondents needed only to show

that their certificates of title and the Lyns' certificate of title had similar restrictive covenants. All the lots in the defined area, Queen's Counsel argued, must be subject to the same restrictive covenants in order to satisfy a finding that there is a scheme.

[39] Queen's Counsel noted, in this regard, that the area which the learned judge found to be a scheme, consisted of 129 lots. Therefore, if one is maintaining that there is a scheme comprising 129 lots, it must be proved that there is reciprocity of obligation and benefit with all 129 lots. This, he said, would require the respondents to produce the certificates of title for all 129 lots instead of the seven they had produced. Mr Hylton further argued that even on an analysis of the seven certificates of title that were before the learned judge, a finding that there was reciprocity of obligation and benefit could not be supported.

[40] In considering Mr Hylton's submission that all 129 titles that form part of the original subdivision of Vale Royal needed to be produced, it is noted that he cited no authority in support of his argument. In the absence of any authority, to this effect, brought to the attention of the court, I would be reluctant to lay down any rule or principle that all certificates of title within an alleged scheme must be produced. Accordingly, I am not prepared to disturb the learned judge's decision on the basis that she was not provided with all 129 titles for the Vale Royal subdivision.

[41] Regarding Mr Hylton's complaint that the covenants must be the same, what the learned judge said is that "[t]he lots were subject to the same three restrictive covenants under consideration". I understand her to be saying that the three covenants for which the Lyns had sought modification were the same on all the certificates of title for the relevant lots. She did not say, as contended by Mr Hylton, that all the restrictive covenants on the certificates of title are the same. However, I do find that the learned judge was incorrect in saying that the relevant covenants are the same. There are differences among them as pointed out by Mr Hylton, even though, in essence and effect, they are substantially geared at addressing the same matters and imposing similar restrictions

regarding subdivision and residential density. Therefore, at highest, they would, for the most part, have been similar rather than "the same".

[42] In any event, the absence of identical restrictive covenants affecting all the lots is not fatal to the establishment of a scheme. As Cozens-Hardy MR stated in **Reid v Bickerstaff**, although the obligations to be imposed within the area must be defined, "those obligations need not be identical". In **Lamb v Midac Equipment (Jamaica) Limited** [1999] UKPC 4 ('**Lamb v Midac**'), Lord Nicholls, similarly, observed that:

> "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." (Emphasis added)

[43] Additionally, in **White v Bijou Mansions Ltd** [1938] Ch 351, at page 362, Greene MR opined that there must be "some common regulations intended to apply to the whole of the estate in the development" but he stated that he would "not exclude the possibility that the regulations may differ in different parts of the estate or that they may be subject to relaxation".

[44] Accordingly, there is no requirement that all the lots in a scheme must be subject to the same or identical restrictive covenants in order to find that there was an intention to impose a scheme of reciprocal obligations and benefits. In the instant case, there are "some common regulations" or "similar covenants" imposing restrictions on the parties' lands, especially regarding subdivision and housing density. Therefore, I do not find the differences in the specific wording of some of the restrictive covenants, noted by Mr Hylton, to be detrimental to the respondents' case that a scheme existed.

(ii) Whether there was a common vendor

[45] The learned judge noted at para. [16] of the judgment that:

> "[16] The evidence in this matter discloses that originally the lands from which the [appellants'] and the [respondents'] lands derive, was a plantation that was sub-divided in the 1920's into large tracts of land and eventually further sub-divided into half acre lots. All the lands in the locale where the relevant lots are located came from a parent title registered at Volume 283 Folio 92 of the Register Book of Titles and were cut off from the parent title with covenants encumbered on the title regarding, among other things, the type of residence allowed on the land."

[46] She further noted that the respondents at trial had traced the history of the parties' lands to successfully establish the requirement that there was a common vendor. The learned judge had regard to that history in para. [27] of the judgment. The evidence shows that the property that was subdivided was first registered to Charles Costa ('Mr Costa') and John Henry Cargill ('Mr Cargill') on 1 November 1927 in certificate of title registered at Volume 283 Folio 92 ('the parent title'). The parent title had five restrictive covenants endorsed on it which are more or less the same as those endorsed on the certificates of title for all the respondents except Ms Witter. There is no evidence or indication on the parent title as to how, by whom and by what means those restrictive covenants came to be endorsed on it.

[47] Mr Costa died in 1940 and Harold Herbert Dunn ('Mr Dunn') became registered joint tenant with Mr Cargill. There was, therefore, a change in ownership of the lands in the subdivision after 1940. The parent title shows that between 1933 and 1950, splinter titles were issued from it. There is no evidence or indication that any purchaser had taken any covenant with any vendor at the time the restrictive covenants were imposed on the splinter titles.

[48] The Lyns' certificate of title is a splinter title. It shows Thelma Morin ('Ms Morin') to be their first predecessor in title, having been registered as proprietor in April 1942.

Given, the contents of the parent title for the Vale Royal subdivision, the death of Mr Costa in 1940, and Ms Morin's registration as owner in 1942, it means the Lyns' land would have had to be transferred from Mr Dunn and Mr Cargill as vendors to Ms Morin as purchaser. This is an inference that is drawn because the original contract of sale and instrument of transfer in relation to Ms Morin were not adduced in evidence.

[49] As it relates to the respondents' land:

(a) Ms Hsia and Mr Hall became the owner of their land (Volume 331 Folio 80) in August 2015 after a series of successive transfers. Their first predecessor in title was Gertrude Rose Hart to whom the certificate of title was issued in February 1938. Again, no contract of sale or transfer documents have been adduced to show from whom the property was purchased. It seems safe to infer, however, that the vendors would have been Mr Costa and Mr Cargill. They would not have been the same as the vendor of the Lyns' land. So even though the Hsia/Hall and Lyns' lands were from the same plan and parent title, technically speaking, the vendors would not have been the same.

(b) Concerning Mr Downer's land (Volume 1141 Folio 151), it was registered in August 1977 in Mr Downer's sole name with no indication of the previous owner. It states, however, that it formed part of the same plan of Vale Royal deposited in the Titles Office in 1927, but it was formerly comprised in certificate of title registered at Volume 350 Folio 90. This title is reflected on the parent title from which the Lyns' land was cut off and shows a registration date in 1939 to Mr Gilbert Russell Laing, who appears to be the first predecessor in title. Therefore, it may be inferred that Mr Downer's predecessor in title would have also purchased his land from the original owners, Mr Costa and Mr Cargill, even though there is no

indication from whom Mr Downer had bought his land. Again, his vendor was not shown to be the same vendor of the Lyns' land.

(c) Mr Handal's land (Volume 1416 Folio 459) also formed part of the same plan of Vale Royal deposited in the Titles Office in 1927. Mr Handal became the owner on 7 December 2007. His land was said to have been lands formerly comprised in certificate of title registered at Volume 353 Folio 95. There is no evidence as to the identity of the vendor but even more importantly, there is no record of this title number on the parent title (even though a portion of the title is illegible). In short, no effort was made by the respondents to connect his certificate of title to the parent title. Consequently, in the absence of evidence, it cannot be said definitively that Mr Handal's predecessors in title had bought their land from the same vendor as the Lyns' original predecessor in title. This is a gap in the respondents' evidence regarding the alleged purchase of all the lands from a common vendor.

(d) Ms Witter's land (Volume 1155 Folio 636) is shown to have been part of the plan deposited in 1927, albeit the lot was shown on a plan deposited on 21 June 1979. It is clear, however, from an examination of the parent title that Ms Witter's original predecessor in title, Mr Victor Gray Williams, was registered as owner in October 1939. Therefore, the inference to be drawn is that the vendor of her land would have been the same as the vendor of the Hsia/Hall and Mr Downer's lands. It would not have been the same as the vendor of the Lyns' land.

(e) Finally, the certificate of title for Ms Francis' land (Volume 1304 Folio 981) shows that the land also formed part of the plan deposited in 1927. The certificate of title in evidence is dated 5

> February 1998, although it is endorsed with mortgages that predated the date of issue. However, the land is described as being formerly comprised in certificate of title registered at Volume 297 Folio 48. An examination of the parent title does not reveal this certificate of title as a splinter title and there is no evidence adduced to establish the original splinter title from which Ms Francis' title would have evolved. Given this evidential deficiency, there is no evidence of the date of first purchase and the vendor from whom the land was purchased. The respondents have not brought evidence to fill this lacuna. So in the end, there is no nexus shown on the evidence between the title for Ms Francis' land and the parent title from which it can be inferred that Ms Francis' land was purchased from the same vendor of the Lyns' land.

[50] The foregoing trace of the history of the lands shows that the learned judge was not correct to find that "[the] description of the lands is the same on all the title [sic] of the [respondents], save for the lot number" (para. [43] of the judgment). She was also not accurate in her finding that "the relevant lands all come from the same parent title and from a common vendor" (para. [44] of the judgment). The evidence did not support those findings, on a balance of the probabilities, because there were unexplained or unresolved gaps in the evidence regarding the history of ownership and devolution of all the lots in question to the parties. Therefore, the learned judge would have had no proven fact from which she could have properly drawn the inference that all the lands of the parties were derived from a common vendor.

[51] Accordingly, the respondents who have raised the issue that they are entitled to the benefits of the relevant covenants by virtue of a scheme would have failed on this limb. Once there is no common vendor, there cannot be a scheme.

[52] In any event, even if I am wrong, and there was, indeed, a common vendor, the cases have made it clear that the mere fact that land is divided into lots and sold by a

common vendor with similar covenants is not conclusive that a scheme exists. As Cozens-Hardy MR said in **Reid v Bickerstaff** at page 319:

> "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."

So too, in **Lamb v Midac**, Lord Nicholls noted that:

> "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**." (Emphasis added)

[53] Therefore, though the learned judge found that the Lyns' land and the respondents' lands were bought from a common vendor and that the same relevant covenants were imposed on each lot, she had to go further, as she did, to examine whether there was evidence of an intention to create a scheme of reciprocal obligation and benefit. I will now do the same.

(iii) Whether the common vendor had an intention to establish a scheme

[54] The intention of the common vendor to establish a scheme of reciprocal benefit and obligation is the third **Elliston v Reacher** requirement. Under the modern approach, however, it seems the absence of this requirement is not fatal to the establishment of a scheme. Regarding the requisite intention of the common vendor, Parker J in **Elliston v Reacher**, at page 384, opined:

> "…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…"

[55] Inspired by the reasoning of Parker J in **Elliston v Reacher**, counsel for the respondent, through Mr Leiba, maintained that an intention to create reciprocity or mutuality of obligation and benefit can properly be inferred from common restrictive covenants. Counsel relied on the nature and wording of the relevant covenants to rebut the assertion of counsel for the Lyns that the only evidence as to the vendor's intention is that of the Lyns' expert that the covenants were imposed to satisfy conditions of approval. According to Mr Leiba, there was no evidence in the court below that the common vendor owned neighbouring lands, which the restrictive obligations could be said to protect, and none was adduced by the Lyns. The learned judge also concluded that there was no evidence that any land was retained by the common vendor for which the covenants were intended and so they must have been intended for the benefit of all the lands being sold.

[56] The authorities have posited that the best evidence of what was intended would naturally come from the common vendor himself who, if available, could be called to give evidence of his intention or persons closely involved with the transactions at the time of sale could also furnish it. In this case, there is no such evidence available as the first sale of the lots was done approximately 90 years ago. Indeed, there is no clear indication of who the vendors were in respect of some of the relevant lands at the various times they were sold to the parties over the years up to 2007. The contracts of sale and instruments of transfer relative to the lots have not been produced. There is no evidence of advertisement of the lots. In short, neither side had produced any evidence before the learned judge that could point to the direct intention of the common vendor or any vendor (for that matter) when the lots were being sold.

[57] Therefore, any conclusion of the likely intent of a common vendor would have had to be derived from reasonable inferences drawn from an examination of all the available documentary evidence and all the surrounding circumstances disclosed on the evidence that was before the learned judge. Unfortunately, all before the learned judge, of some materiality to the case, were: (a) the deposit plan of 1927 for the Vale Royal subdivision

that had no covenants or conditions endorsed on it; (b) the parent title for the Vale Royal subdivision with (what appears to be) five restrictive covenants endorsed on (which were not identical to those on the splinter titles); and (c) the certificates of titles for the parties' lands with similar restrictive covenants and the transfers to the relevant proprietor endorsed on each of them. There is nothing indicative in these documents of the intention of a common vendor to create a reciprocal scheme of benefit and burden, which was to bind original covenantors and their successors for the benefit of original covenantees and their successors.

[58] In **Re Dolphin's Conveyance**, Stamp J helpfully reiterated that (page 661 of the report):

> "It is trite law that if you find conveyances of the several parts of an estate all containing the same or similar restrictive covenants with the vendor, that is not enough to impute an intention on the part of that vendor that the restrictions should be for the common benefit of the vendor and of the several purchasers inter se: for it is at least likely that he imposed them for the benefit of himself and of the unsold part of the estate alone."

[59] The learned judge had concluded that she was satisfied that the vendor did not retain any land for himself for which the benefit was intended. The evidence from which the learned judge would have made such a finding is not readily apparent in the absence of evidence illustrating what had occurred on or around the time of partition and sale of lots in the subdivision between 1933 and 1950 (final transfer on the parent title). The fact that there was a change of ownership of the subdivision upon the death of one of the first joint owners in 1940 shows that lots must have been retained even after 1940 up to, at least, 1942 when Mrs Morin, the Lyns' predecessor in title, was registered as the owner of the Lyns' land. Also, the parent title shows that up to 1950, eight years after the transfer to Mrs Morin, lots were still being cut off from the subdivision and the parent title splintered. Therefore, it cannot be said, with any degree of conviction, that at the time the covenants were imposed on any of the parties' lands, there was no land retained by the vendor. This, therefore, could not have been a proper foundation on which to base

a conclusion that the common vendor intended to benefit only the lands he was selling and no land retained by him. It must be admitted, however, that even if the common vendor intended to benefit land retained by him, a scheme could still have been intended provided he also intended for the covenants to benefit the other lots sold by him. The endorsements on the exhibited certificates of title, standing alone, have not unequivocally established the intention of the vendor, one way or the other.

[60] In any event, even if it is accepted that the intention of the common vendor to establish a community of reciprocal obligation and benefit was sufficiently proved by the respondents, the learned judge would still have had to go further with her analysis; and, again, she correctly did so. She had regard to the second most important requirement regarding the knowledge and intention of the purchasers of the lots in the subdivision at the time of partition for sale. Accordingly, the remaining question is whether she erred in her conclusion regarding this final requirement.

(iv) The knowledge and intention of the purchasers inter se

[61] Following the lead of the Privy Council in **Jamaica Mutual Life v Hillsborough**, and the cases cited in it, there must also be evidence that at the time of partition of the defined area for sale, there was:

> "an acceptance by each purchaser of part of the lands from the common vendor that the benefit of the covenants into which he has entered will enure to the vendor and to others deriving title from him and that he correspondingly will enjoy the benefit of covenants entered into by other purchasers of part of the land."

[62] With respect to whether there was evidence of an intention or acceptance by each purchaser to be part of the alleged scheme, Mr Hylton relied on the cases of **Jamaica Mutual Life v Hillsborough**, **Lamb v Midac** and **Hugh Small v Oliver & Saunders (Development) Ltd** [2006] EWHC 1293 (Ch) ('**Hugh Small v Oliver & Saunders**') in support of his arguments. He submitted that direct evidence must be adduced to show that the original purchasers of the lots had accepted that they had an obligation

enforceable not only by the vendor but those deriving title from the vendor and that each purchaser knew that purchasers of the other lots had entered into, or would enter into, similar covenants. Mr Hylton submitted that in the absence of such evidence, there is a lack of material from which an intended reciprocity of obligation and benefit among all purchasers can be inferred. Queen's Counsel maintained that a scheme will not be implied merely from the existence of a common vendor and common covenants.

[63] Mr Hylton argued further that the learned judge was plainly wrong to conclude, as she did at para. [44] of the judgment, that by virtue of the endorsements of the covenants on the certificates of title, "the original purchasers had notice of the covenants and, *ipso facto*, took subject to them and intended to be bound by them". He submitted that on the evidence that was before her, the learned judge ought to have found that the respondents had failed to prove that all the purchasers of lots in the scheme intended to be bound by a scheme of mutual obligation for the benefit of all purchasers.

[64] Pointing to paras. [38], [39], [42], [45] and [46] of the judgment, Mr Leiba submitted, in response, that the learned judge correctly had regard to the language of the relevant covenants, which are consistent with the existence of reciprocal restrictions intended to benefit and burden the lots within the scheme. He argued that **Jamaica Mutual Life v Hillsborough** could not be used to support the contention of the Lyns as an examination of the parent title in the instant case reveals that instruments of transfer for each and every parcel of land from it contained restrictions. He argued that these restrictions were clearly for the benefit of all the lots and that the Lyns purchased their land with full knowledge of these restrictions.

[65] Counsel also argued that the facts of **Lamb v Midac** could not aid the Lyns as there is no language on the material in this case from which it may be inferred that the restrictions were imposed for the common vendor's own benefit. Mr Leiba also submitted that the Lyns' reliance on **Hugh Small v Oliver & Saunders** is misplaced because the case is distinguishable.

[66] There is no direct evidence of execution of deeds of covenants pointing to express undertakings of mutual rights and obligations (a) between the original common vendor and any person from whom he obtained title; (b) between the common vendor and the original purchasers; and (c) the purchasers among themselves. Additionally, as already found, there was no formal instrument of transfer or other conveyancing documents adduced in evidence illustrating the terms of the transfers of the lots in question to the original and successive purchasers. The notations on the parent title of the various splinter titles show that conditions were attached to each transfer. However, if the purchasers were to have examined the parent title, the terms of the conditions are not detailed on the parent title for every purchaser to see what is contained in each instrument of transfer for all the lands. The most they would have been able to see from the plan is that each transfer to purchasers before them was done by the vendor, subject to conditions. There was nothing to show at the time, what the exact terms of the conditions were and that future purchasers would be subject to the same or similar conditions.

[67] However, although direct evidence would have been ideal, its absence is not fatal to the finding of a scheme of development. It is well settled that in the absence of such proof, the court may look at extrinsic evidence and the circumstances surrounding the original purchases (see **Jamaica Mutual Life v Hillsborough**). Additionally, it was stated in **Elliston v Reacher** that if it is found that the certificates of title were derived under a common vendor and that it was the intention of the common vendor to create a scheme of mutual obligations and benefits, then once the original purchasers had notice of these facts at the time of purchase, it may be inferred that the purchasers bought the lots on the common footing that they would be mutually bound by the covenants as well as mutually entitled to enforce them.

[68] The learned judge did not express a finding that there is evidence to prove that at the time of purchase by the parties' predecessors in title, they knew that they were buying from a common vendor who had the intention to create a scheme of mutual obligation

and benefit. On the strength of the authorities, it is knowledge and acceptance of these facts, and not simply the notification of covenants on each title, which may properly give rise to the inference of acceptance by all the purchasers from a common vendor of mutual burden and benefit and their acceptance to be mutually bound.

[69] Instead of making a finding on the matters above, the learned judge concluded that there was knowledge on the part of the purchasers and "reciprocity of obligation when the covenants were endorsed on the title". In arriving at that conclusion, the learned judge had regard to what she stated was the wording of the covenant concerning the number of residences permitted on the lands (paras. [45] and [46] of the judgment). At para. [45], she noted that the covenant states:

> "Only one residence shall be erected **on any lot of the said land** and such residence together with the buildings appurtenant thereto shall cost not be less than eight hundred pounds and shall be fitted with proper sewer installation and no pit closet shall be erected for use on the said land." (Emphasis added)

Then, at para. [46], she observed:

> "The wording of this covenant is similar in all the titles of the [respondents] and the [Lyns]. The use of the words '**on any lot of the said land**', to my mind denotes that **the framers of the covenant** intended all the lot owners to observe this covenant for their mutual benefit, namely to create a homogeneous community with similar housing infrastructure. This homogeneity could only be maintained if all owners honoured this obligation reciprocally." (Emphasis added)

[70] Regrettably, I cannot entirely agree with the analysis and findings of the learned judge on this issue. Firstly, the learned judge's analysis points to a finding of what the 'framers' of the covenant intended. Although she has not expressly stated to whom she is referring as the 'framers', this is not taken to mean the purchasers in the subdivision because the purchasers would not have framed the covenants. There is nothing to indicate that any of the purchasers were involved in the drafting of them. Restrictive covenants were already endorsed on the parent title before the lots were sold to the

parties or their predecessors in title and the covenant regarding housing density was not endorsed on the parent title (understandably so). It must have been the original vendor of lots in the subdivision in 1933 who had imposed the relevant covenant regarding housing density. There is no evidence of the input of any purchaser regarding the imposition of the covenants.

[71] Therefore, from the reasoning of the learned judge, it may be safely argued that she rested her conclusion on what the "framers" of the covenant desired - "a homogeneous community with similar housing infrastructure" and that "the homogeneity could only be maintained if all the owners honoured this obligation reciprocally". This reasoning has only taken into the account the desire of the vendor and the need for the purchasers to honour the obligations imposed by the vendor arising from that desire. There is no account taken of the need for there to be acceptance by the purchasers of the obligation and benefit as among themselves. The intention or desire of the vendor is not enough. Therefore, the finding regarding the desires of the framers of the covenant and the need of the purchasers to uphold the vendor's desire for homogeneity would not have been sufficient to ground the necessary element of reciprocity that is required for the establishment of a scheme.

[72] Secondly, the wording of the covenant that the learned judge cited in para. [46] of the judgment was not similar in all the respondents' certificates of title. It suffices to say at this juncture that the words "any lot of the said land" is found in all the respondents' certificates of title except Ms Witter's. It is either covenant 4 or 5 in those certificates of title.

[73] The wording of that covenant unequivocally means any lot of the land comprised and described in the particular certificate of title to which the covenant applies. This is clear from the wording of covenant 1 of the certificates of title of five of the respondents. On each of the five certificates of title, covenant 1 starts either with the wording "not to erect on the land above described…" or "not to erect on the land above described (hereinafter called 'the said land')…". Thereafter, reference is made throughout the

restrictive covenants to "the said land". So, where the words, "the said land" appear in those certificates of title, they mean the same land described in the preceding section of the certificate of title. The wording cannot be stretched to mean any other land in the Vale Royal subdivision, which would include the land of any other party in this case.

[74] Similarly, the certificates of title for the Lyns' and Ms Francis' lands refer to "the said land" in covenant 1, but unlike the preceding five certificates of title noted above, there is no express indication in brackets that "the land above described" will thereafter be referred to as the "said land". However, the certificate of title for each lot (as in the case of all the others exhibited), clearly shows that "the said land" is the land described in the particular certificate of title and to no other land in the larger subdivision of which the land forms a part. So, as in the preceding five certificates of title, there is no cross-referencing to any other land in the subdivision or, more specifically, any land of the parties to the claim.

[75] A second reason the meaning of the phrase "any lot of the said land" cannot be taken as referring to any lot in the Vale Royal subdivision is the wording of covenant 2 on six of the relevant certificates of titles, including the Lyns'. As already indicated (but which I find it necessary to repeat), covenant 2 on the certificates of title for all the lots, except Ms Witter's, reads:

> "2. Not to subdivide **the said land except in accordance with the aforesaid plan or in accordance with a plan approved by the Board** … in which latter case, **none of the lots** shall be less than half an acre in area." (Emphasis added)

[76] The emphasised portions above clearly show that the covenant does not preclude subdivision of the relevant land but indicates how the subdivision must be done and if done, the size of the divided lots should not be less than half an acre. Therefore, the covenant treating with housing density has taken into account the possibility of subdivision of the lots to which it applies. This would mean that the land comprised in the particular certificate of title (which is the land being referred to and no other) can

have more than one lot if subdivision approval is granted in the manner allowed by covenant 2. The covenant highlighted by the learned judge, therefore, means if the land is subdivided, in accordance with covenant 2, only one residence must be on each divided lot. It follows too that if no subdivision is granted, only one residence must be on the undivided lot.

[77] There is no similar covenant endorsed on Ms Witter's land that refers to "any lot on the said land" affecting that land. Covenant 3 on the certificate of title for that land simply states: "[t]he said land shall not be subdivided". This unquestionably shows that reference to "any lot on the said land" in the other parties' certificates of title, is in relation to their lands that could be subdivided and not Ms Witter's land. Ms Witter's land, itself, was the result of the subdivision of another lot shown on the parent title.

[78] Accordingly, the reference to "any other lot", in five of the respondents' titles as well as the Lyns' title, does not convey any notion of the reciprocity of obligation and benefit on the part of the purchasers, as among themselves, which is essential for the establishment of a scheme. In my view, nothing of value or materiality for the resolution of the dispute between the parties turns on the wording of the covenant emphasised by the learned judge. In short, the covenant does not import the requisite acceptance of reciprocity, among the purchasers inter se, needed for the creation of a scheme.

[79] In considering the contention of the respondents that there is enough evidence from which the reciprocity of obligation and benefit may be properly inferred, I have taken guidance, once again, from **Jamaica Mutual life v Hillsborough** and **Lamb v Midac**. It seems useful, at this point, to provide a brief insight into the reasoning of the Privy Council in **Jamaica Mutual Life and Hillsborough** to more fully demonstrate the nature of the evidence required to establish this second crucial requirement. For expediency, the succinct and accurate summary of the facts of this case is adopted, with slight modification, from Professor Gilbert Kodilinye in Commonwealth Caribbean Property Law at page 169.

[80] In that case, the applicant's and the first and second objectors' predecessors in title had purchased their lands from common vendors. The lands were encumbered with restrictive covenants not to divide the land into lots of less than one acre each and not to carry on trade or business on it. The instruments of transfers did not annex the benefit of the covenants to any land retained by the common vendors, nor was there any subsequent assignment of the benefit of the covenants to any of the objectors' predecessors in title. The third and fourth objectors were purchasers of neighbouring land subjected to the same restrictions. The applicant, being desirous of developing its land as a multi-unit residential complex brought an application under section 5 of the Restrictive Covenants (Discharge and Modification) Act 1960 for the court to determine whether its land was affected by the restrictions and as to whether and by whom the restrictions were enforceable.

[81] The Privy Council found that no scheme existed so that the covenants in the applicant's title ran with the land for the benefit of the objectors and their successors in title. In arriving at that conclusion, the Privy Council noted these salient facts:

(a) There was nothing in the instruments of transfer to the purchasers to suggest that the vendors were selling off a number of lots as part of a scheme;

(b) There was no indication that the purchasers had assumed obligations to any persons other than the vendors or had acquired the benefit of obligations incurred by other persons;

(c) There was no evidence as to whether the sales of the lots were advertised; and

(d) There was no evidence as to what, if any, representations were made by the vendors to the purchasers at the time of sale.

Their Lordships then opined:

> "In the absence of any such extraneous evidence the terms of the instruments of transfer alone [fell] far short of what is required to establish community of interest or reciprocity of obligation between purchasers… to imply 'a building scheme from no more than a common vendor and the existence of common covenants' would be going much too far."

[82] Earlier, in **Lamb v Midac**, the Privy Council had observed that:

> "…**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." (Emphasis added)

[83] In **White v Bijou Mansions Ltd**, Greene MR, similarly, opined at page 362:

> "There are certain matters which must be present before it is possible to say that covenants entered into by a number of persons, not with one another, but with somebody else, are mutually enforceable… **The material thing I think is that every purchaser, in order that this principle can apply, must know when he buys what are the regulations to which he is subjecting himself, and what are the regulations to which other purchasers on the estate will be called upon to subject themselves**. Unless you have that, it is quite impossible in my judgment to draw the necessary inference, whether you refer to it as an agreement or as a community of interest importing reciprocity of obligation." (Emphasis added)

[84] Having considered the various authorities cited above, and having stepped back and looked at the matter generally (as the Privy Council did in **Emile Elias v Pine Groves**), I have seen nothing in the evidence presented before the learned judge from which a court could properly infer the existence of an agreement importing reciprocity of obligation and benefit needed for the establishment of a scheme. The mere endorsements of the relevant covenants on the parent title for the Vale Royal subdivision and on the

parties' certificates of title, standing alone, are insufficient to satisfy this criterion. Therefore, the absence of crucial evidence satisfying this fundamental requirement would have been fatal to the respondents' case in the court below as it is to their case on appeal.

[85] In the result, I find that the learned judge would have erred in her conclusion that there was evidence of reciprocity of obligation and benefit on the part of the purchasers as between them and a common vendor and as among themselves that would support a finding that a scheme exists. The appeal would, therefore, succeed on these grounds.

[86] However, the learned judge had gone further to find that a scheme existed on other grounds, which warrant the attention of this court. This aspect of the judge's findings will be briefly addressed.

(v) Whether other factors provide sufficient evidence of the existence of a scheme

[87] The learned judge had also buttressed her conclusion that there was a scheme by "other factors", which, in her view, were (a) the opinion of the Lyns' expert witness that the respondents are entitled to the benefit of the covenants; (b) the initial evidence of Mr Martin Lyn that the respondents were entitled to the benefit of the covenants; and (c) the case of **Sagicor Pooled Investment Funds Limited v Robertha Ann Matthies and others** (unreported), Supreme Court, Jamaica, Claim Nos 2008HCV3060, 3061 & 3062, judgment delivered 7 September 2011 ('**Sagicor Pooled Investment**'). In that case, it was decided by the Supreme Court and upheld by this court (neutral citation [2017] JMCA Civ 35) that "registered proprietors of Upper Montrose Road are entitled to the benefit of the covenants".

[88] It seems safe to say that once the requirements laid down by law for the establishment of a scheme are not satisfied, as found above, it would be contrary to law to hold that a scheme exists by virtue of the three factors identified by the learned judge. In any event, even if other factors could be relied on to prove the existence of a scheme, those the learned judge identified were of no evidential value, whether standing alone or collectively. The question of whether the respondents were entitled to the benefit of the

covenant was, ultimately, a legal one that could not have been resolved by anyone but the learned judge after a consideration of the issues, the evidence and the circumstances of the case before her.

[89] Therefore, the opinion of the Lyns' expert, the statement of Mr Martin Lyn and the pronouncements of the courts in the case of **Sagicor Pooled Investment** would have been irrelevant considerations. Accordingly, as submitted on behalf of the Lyns, and for the reasons they advanced in their submissions, the learned judge would have erred in finding a scheme on the basis of these three factors.

Conclusion on issue (i)

[90] After an examination of the issue as to whether a scheme is proved to exist, it is agreed among the parties that there was a defined area required for the development of a scheme. This was not an issue on appeal. I conclude, however, on the totality of the evidence that the respondents had failed to adduce sufficiently cogent evidence that all the parties or their predecessors in title acquired their lands from a common vendor. Flowing from this, it is also equivocal whether, even if there was a common vendor, he had an intention to impose a scheme of mutual obligations and benefit among the purchasers rather than only for the benefit of land retained by him at the time of partition.

[91] But even if those matters had been proved, and I am wrong to find to the contrary, the evidence, nevertheless, failed to point to the requisite element of mutual reciprocity of obligation and benefit among the purchasers themselves, as explained by the authorities, which is necessary for the existence of a scheme. More particularly, there is no direct evidence and no evidence from which it could be inferred that the original purchasers had known and accepted at the time of the partition of the land for sale that they had an obligation enforceable not only by the common vendor but those deriving title from him (including other purchasers) and that each purchaser knew and accepted that purchasers of the other lots had entered into, or would enter into, similar covenants with the common vendor and among themselves.

[92] Consequently, I would hold that the learned judge erred in finding that there was a scheme by which the relevant covenants would have burdened the Lyns' land for the benefit of the respondents' lands. The respondents would have failed to produce sufficient evidence to prove their claim, on a preponderance of the probabilities, that they are the beneficiaries of the covenants and entitled to enforce them. Accordingly, the evidence provided in the court below would have fallen short of the requisite standard of proof and so, the Lyns succeed on this aspect of the appeal.

Issue (ii) – Whether the learned judge incorrectly exercised her discretion in ordering the demolition of the structure on the Lyns' land (grounds f. – h.)

[93] Having concluded that the learned judge erred in her finding that a scheme had been established and that the respondents are beneficiaries of the relevant covenants, the issue regarding the demolition of the structure would automatically be determined, without more. There would have been no legal basis on which the learned judge could have made the demolition order at the instance of the respondents, because they would have had no legal standing to enforce the relevant covenants. Therefore, they would not have been entitled to that relief. So, even though the Lyns are clearly in breach; unfortunately, the respondents do not have the legal standing to obtain the orders they sought in their claim to remedy it.

[94] In concluding on this issue, the court is guided by the standard of review of the exercise of the discretion of a judge at first instance as enunciated in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042. At page 1046, Lord Diplock stated, in part:

> "On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court… is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law

> or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong on by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it."

[95] In **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, this court, endorsed and applied these principles at para. [20] of the judgment, where Morrison JA (as he was then) stated:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference – that particular facts existed or did not exist – which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[96] Although the instant case did not involve an interlocutory application before the learned judge, the principles are applicable, nevertheless, in so far as the decision to order the demolition of the building was based on the exercise of her discretion. The standard of review is, therefore, applied and it is concluded that the learned judge erred in the exercise of her discretion because it was based on some errors of law, misunderstanding of the evidence, and inferences that particular facts existed that are shown to be demonstrably wrong. In those circumstances, the intervention of this court would be justified and the order for demolition would have to be set aside.

[97] However, before disposing of the appeal, I find it irresistible to note a few observations in the light of the conduct of the Lyns in undertaking the construction in breach of the covenants despite the conditional approval given to them by the KSAMC. I make bold to say that had it been found that the respondents were entitled to the benefit of the covenant, there is a strong possibility that the court might have treated differently

with the question of the exercise of the learned judge's discretion given the applicable standard of review.

[98] In **Wrotham Park Estate Company v Parkside Homes Ltd** [1974] 2 All ER 321 ('**Wrotham Park Estate**'), Brightman J, upon being confronted with the question of whether demolition of a housing complex should have been ordered and deciding that such an order was not appropriate in the circumstances of that case, nevertheless, gave this admonition, that I would adopt:

> "…**the fact that these houses will remain does not spell out a charter entitling others to despoil adjacent areas of land in breach of valid restrictions imposed by the conveyances. A developer who tries that course may be in for a rude awakening**." (Emphasis added)

[99] The Lyns could have easily been one of those developers "in for a rude awakening" had the outcome of the appeal been different.

Disposal of the appeal

[100] Despite what I would view as the Lyns' blatant disregard for the law in constructing their development in breach of the restrictive covenants affecting their property, this court has no option but to allow the appeal from the respondents' claim, in the face of the applicable law. This inevitably means that the orders of the learned judge made on the respondents' claim must be set aside. It follows too that the respondents' claim will have to be dismissed by this court, given that the learned judge ought to have made that order in the light of the evidence.

[101] The Lyns have asked for a declaration that the relevant covenants are personal to the original covenantor. I would refuse to grant such a declaration as there is no existing claim before the court in relation to which such a declaration may properly be made. The respondents' claim did not include any application for such a declaration and given that the claim is dismissed, no declaration can be made on it. The appeal from the decision on the Lyns' claim, having not been pursued at the hearing, that aspect of the Lyns'

appeal should stand as dismissed. Therefore, the Lyns have no subsisting claim upon which any remedy, such as the declaration sought, may lawfully be given by this court. Furthermore, this case fails because of insufficiency of evidence and the operation of the incidence of the burden and standard of proof. Against this background, I believe this court should refrain from making any definitive declaration, which was never sought by the Lyns' on any claim in the court below.

[102] As it relates to the costs of the proceedings emanating from the respondents' claim in the court below, I am inclined to hold that the respondents should pay the costs of those proceedings in keeping with the general rule, costs follow the event. As it relates to the appeal, I would propose that each party should bear its own costs, given all the circumstances, including the fact that the respondents would be entitled to costs on the appeal from the decision on the Lyns' claim, while the Lyns would be entitled to costs on the appeal from the respondents' claim.

[103] However, before a final costs order is made, I propose that the parties be invited to make submissions on the incidence of the burden of costs within 28 days of the order of this court, failing which the orders proposed above should be made.

[104] I propose that the foregoing orders be made as the final orders of the court in disposing of the appeal.

SIMMONS JA

[105] I have read, in draft, the judgment of McDonald-Bishop P (Ag). I agree with her reasoning and conclusion, and there is nothing I could usefully add.

BROWN JA (AG)

[106] I, too, have read the draft judgment of McDonald-Bishop P (Ag) and agree with her reasoning and conclusion. I have nothing useful to add.

MCDONALD-BISHOP P (AG)

ORDER

1. The appeal from the decision of the Supreme Court made on 21 January 2020 on Claim No 2017 HCV02997 (the Lyns' claim) is dismissed.

2. The order of the Supreme Court made on the Lyns' claim is affirmed.

3. The appeal from the decision of the Supreme Court made on 21 January 2020 on Claim No 2018 HCV 02906 (the respondents' claim) is allowed.

4. The orders of the Supreme Court made on the respondents' claim on 21 January 2020 are set aside.

5. The amended fixed date claim form filed by the respondents on 5 October 2018 is dismissed.

6. Costs of the proceedings in the Supreme Court on the respondents' claim to the Lyns to be agreed or taxed.

7. Each party to bear its own costs of the appeal from both claims unless within 14 days of the date of this order, the party seeking a different order as to costs files and serves written submissions for a different costs order to be made. Any responding party is to file and serve written submissions within 14 days of service on them of the submissions of the party seeking costs.