

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 1 of 1985

BETWEEN:

KENNETH LONG
and
PHYLLIS LONG - Appellants
and
LEON STACKLER - Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Moe
The Honourable Mr. Justice Byron

Appearances: Dr. F. Ramsahoye, S.C., and D. Penn for the Appellants
G. Webster and J. Creque for the Respondent

1991; Jan. 14, 15,
July 1.

JUDGMENT

MOE, J.A.

This appeal concerns the effect of certain restrictive covenants in the titles to various lots of land purchased by the appellants and other persons from the respondent.

The respondent, the registered owner of some 37.78 acres of land situate at Leverick Bay in the Island of Virgin Gorda, had drawn for him by surveyor Berning a plan of development for the land. This plan showed an area for residential lots, and an area for a marina, hotel and beach club including land owners beach areas and land owners dinghy haul out area. On the plan lodged on 19th January, 1970 the latter area is shown as Parcel 36.

Between 1970 and 1972 the respondent entered into five contracts for the sale of lots or parcels of the land to various persons. Each of the agreements for sale contained reservation that parcels 1, 2, 3, 35 and 36 on the Berning plan may be used for hotel or other commercial purposes. During that period three conveyances were executed but none of the deeds of conveyance of the various lots made reference to such reservation. The first transfer was executed on 11th February, 1972.

/In July.....

In July 1973 surveyor Anker draw for the respondent a plan for the subdivision of Parcel 36. Out of this parcel, eleven residential lots were created and sold. on part of the remaining portion which was eventually numbered Parcel 53, a restaurant was built. The first of these residential lots was sold to Robert Anderson on 6th November, 1973. The appellants in October 1976 bought one of the lots which was eventually numbered Parcel 56. They bought another lot Parcel 75 in June 1982 and in May 1984 purchased the lot originally owned by Robert Anderson. There was no reference to the matter of reservation of any part of Parcel 36 for use for hotel or other commercial purposes either in the agreement for sale or in the deed for those sales nor for the sales of other lots except that in the deeds of transfer of three lots portions of the said subdivision of Parcel 36, executed in 1925 there is the statement of entitlement of the purchasers to use their respective lots for commercial purposes. One of those was that numbered Parcel 53 and on which ^{the} restaurant was built.

The appellants claimed that the respondent intended to develop the whole area of 36.7 acres as an exclusive and remote residential district, so represented both orally and in brochures and inserted in the transfers of certain lots, covenants, conditions and restrictions appropriate to such a development. Further that both the respondent and the purchasers of lots were bound by the covenants, conditions and restrictions and entitled to the benefits subject to which the respective purchases were made. That in breach of those covenants, conditions and restrictions the respondent caused, permitted or allowed eight different kinds of infringement of the covenants, etc. In summary the breaches alleged were:-

- 1) Causing or permitting to be constructed on Parcel 53 a restaurant;
- 2) causing or permitting a nuisance arising from excessive noise from the restaurant, and failing to have it abated;
- 3) permitting cruise ships and other vessels docking facilities at the development;
- 4) permitting cruise ships to direct light continuously into the appellants' home destroying their privacy;
- 5) permitting passengers from cruise ships to use Lot 53 to get to the Estate roads on the development;
- 6) failure to.....

- 6) failure to provide adequate sewerage facilities for the restaurant business;
- 7) permitting abandoned vehicles and discarded machinery and garbage to be kept on parcels of land in the area;
- 8) permitting in the area construction of residences other than single family residences.

Thus four of the breaches alleged related to Parcel 53 on which the restaurant business was carried on.

The appellants sought declarations that the area may not be used in the several ways in which the relevant covenants were alleged to have been breached, an injunction restraining the respondent from committing certain breaches, and damages for breach of contract.

The respondent denied all the breaches alleged. He claimed that the appellants acquiesced in the use of Parcel 53 for commercial purposes and delayed too long in bringing action to protect their right.

During the trial a submission on behalf of the appellants was that there was a variation in 1973 of the development scheme put forth by the respondent and the scheme became entirely residential, remaining so ever since. It is not clear if this was a concession by the appellant that the scheme was not entirely residential at its commencement for there seems to be an implication that the scheme was not entirely residential before 1973.

The learned trial Judge accepted that the respondent had a scheme of development for the area but did not agree that the scheme became an entirely residential one. The learned Judge stated "there is no legal instrument in evidence which said that only residences can be built and there is no covenant that no part of Leverick Bay is to be used for commercial purposes. There is no evidence to show that the defendant (respondent) covenanted not to use any part of Leverick Bay for anything other than residential properties. Further there is no covenant between the plaintiffs (appellants) and the defendant (respondent) that the latter would not set aside land for commercial use or that he would only allow land for private residences".

/With regard.....

With regard to the other breaches claimed, the learned Judge found allegation (2) not established. She held it was not the business of the Court to interfere with the docking of cruise ships which occurs below high water mark; that the direction of light from cruise ships into the appellants' property did not amount to an invasion of privacy; that passengers from cruise ships were entitled to use the estate roads in the same way and to the same extent as members of the public; that there was a break in the sewerage lines and an alternative system installed with the help of the first-named appellant - at times stench from the system is overpowering but all that could be done toward the odour had been done; that allegation (7) was not established. The learned Judge found not one shred of evidence or proof of any damage or severe loss to the appellants.

The appellants' grounds of appeal were (i) that the documentary evidence and registered titles amply supported and justified the claim by the appellants that their land was part of a residential scheme and that a commercial development and undertakings carried out or authorised by the respondent to be carried out within the development violated and/or contravened the relevant covenants in the titles which the respondent passed to the appellants and to other persons who purchased lots in his development at Leverick Bay on the Island of Virgin Gorda in the British Virgin Islands.

(ii) The judgment of the High Court was unreasonable having regard to the evidence.

In all relevant deeds of conveyance involved in the scheme of development from its commencement there is the following clause:-

"3. For the benefit and protection of all other land now or formerly or hereafter comprised in the subdivision and each and every part thereof (other than the transferred land) and with the intent and so as to bind so far as may be the transferred land and each and every part thereof into whosoever hands the same may come, the transferees and those desiring title under the transferees will subject to the provision of Clause 1 hereof at all times hereafter observe and perform the covenants, restrictions and stipulations set out in the Schedule hereto, but so that the transferees shall not be liable for breach of this covenant occurring on or in respect of the transferred land or any part thereof after the transferees shall have parted with all interest therein."

Then in the Schedule to the Deed there is a paragraph as follows:-

/"(a) The.....

"(g) The transferred land shall be used for a private single family residence, including each customary appurtenances as a garage, a guest apartment or guest house and servants' quarters, and such residence shall consist of not less than 900 square feet under roof and shall not be used as a commercial guest house or for any other commercial purpose whatsoever. This restriction shall not prohibit the transferees from letting, leasing or renting any residence to any tenant who shall occupy the said premises for a private, single family residence only and no other purpose. No portion of the residential structure and appurtenances thereof including roof overhang, shall be built closer than ten (10) feet to any parcel boundary or to any road abutting on the transferred land PROVIDED that an owner of two (2) or more adjacent parcels, shall not be subject to this restriction as to common boundaries of such adjacent parcels."

The appellants' position is that by virtue of their documents of title the purchasers of the various lots have the right to insist that all other land in the subdivision or the scheme of development is to be used for residential purposes. Only five purchasers were affected by the respondent's reservation as to use of certain lots including Lot 36 for hotel or other commercial purposes as contained in the relevant Agreements for sale but even as far as those five were concerned although the respondent had the right to so use, he was not obliged to do so. Counsel's submission is that from the time the first lot was sold, the whole scheme "bit", i.e. as I understand him, became a residential development and the respondent couldn't sell any parcels of the development for commercial purposes. He stressed there is no deed by which the respondent reserved the right to use a portion or any lot of the development for commercial purposes. He submitted further that the respondent having got the Anker plan drawn in 1973 for a subdivision of lot 36 into residential lots and by selling such lots without making a reservation that a part may be used for commercial purposes, he (a) either varied his right to use a part of the lot for commercial purposes, or can be held to his covenants by purchasers of lots except those who may have signed with a reservation included in their documents of title. Consequently in causing or permitting Parcel 52, a part of former Lot 36, to be thereafter used for commercial purposes the respondent was in breach of his covenant.

Counsel for the respondent submitted that the scheme of development came into being in 1971 and there was abundant evidence on which the learned trial Judge could have come to the conclusion

/that it.....

that it was a residential development which permitted certain commercial activities. He made reference to the Berning plan which showed areas reserved for commercial purposes. Further, he submitted, there was sufficient evidence on which the learned Judge could have come to the conclusion that the respondent did not abandon his intention to carry out commercial development. He referred to the Schedule in an Agreement of 1979 showing intention to use a part for commercial purposes, and to advertisement in a Magazine dated August/~~September~~ 1975 showing similar intention. He was strong in his contention that the learned Judge was entitled as a matter of Law to have regard to all the evidence and consider all the circumstances in the case, not only the documentary evidence, in order to decide what was the intention of the respondent.

EFFECT OF THE AGREEMENTS FOR SALE

It seems to me necessary to decide first the effect of the reference to reservation for commercial use in the five agreements for sale signed between 1971 and 1973. It is trite law that where there is an agreement for the sale of land which is carried out by the execution of a deed, the real contract between the parties is to be found in the deed. In *Tesbay v Manchester, Sheffield and Lincolnshire Railway Company* (1883) 24 Ch. D. 572 an agreement for the sale of land to a Railway Company which contained a reservation to the vendor of a right of access over the land to other lands was not admitted to import the reservation into the conveyance. The matter is adequately stated by Cozens-Hard M.R. in *Milbourn v Lyons* (1914) 2 Ch. 231 at p. 240 when he said, "speaking generally, it is perfectly clear that when you have a conveyance which expresses the final concluded deliberate terms of the contract between the parties, you cannot affect or alter that by reference to the antecedent contract". In my view therefore the rights and obligations between the appellant and respondent must be looked for within the four corners of the relevant deeds of transfer.

EFFECT OF RESTRICTIVE COVENANTS

The parties are agreed that a scheme of development was created. There is a line of cases which is in support of the statement that the very essence of every scheme of this kind is that it means that each lot, into whosoever hands it comes, shall be subject in either case to the burden and have the benefit of the restrictive covenant. Vide Cozens-Hardy M.R. in *Elliston v Reacher* (1908) 2 Ch. 665 at

page 673. A common intention of the respondent and the appellant and other purchasers that the various purchasers from the respondent would have the benefit of the restrictive covenants taken from each of them is inferred from the existence of the scheme of development. In such a case as Cross J. pointed out in his judgment in *Baxter v Four Oaks Properties Ltd.* (1965) Ch. 816 at p. 825: "For well over 100 years past where the owner of land deals with it on the footing of imposing restrictive obligations on the use of various parts of it as and when he sells them off for the common benefit of himself (in so far as he retains any land) and of the various purchasers inter se, a court of equity has been prepared to give effect to this common intention notwithstanding any technical difficulties involved."

TYPE OF DEVELOPMENT

An essential feature of a scheme of development is that as soon as the first disposition under the scheme is made, the scheme crystallises and all the land within the scheme is bound. This was made clear by Megarry J. in *Brunner v Greensdale* (1970) 3 W.L.R. 891 at p. 900. The appellants' contention is that by virtue of the first deed executed in the scheme (which was on 11th February 1972) the scheme crystallised into a residential development. I understand a similar contention is advanced in relation to the first disposition of the lots carved out of Parcel 36. This was to Robert Anderson in November 1973. I do not think it necessary to consider the matter in the light of two different developments. I regard the subdivision of Lot 36 as but a part of the scheme of development commenced in 1972.

The common intention of the parties as shown by the relevant deeds of transfer and the scheme that crystallised on the sale of the first lot to Robert Anderson in February, 1972 lead to the conclusion that a residential development was created by the respondent. By the applicable law he himself was bound by the covenants of the scheme and no plot could be disposed of by him without requiring the purchaser thereof to enter into the covenants of the scheme.

I would hold therefore that the respondent was in breach of the covenants of the scheme of development when he sold and permitted commercial enterprise to take place on Lot 52.

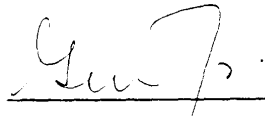
However the learned Judge found that the appellants had no legal objection in the building and opening of the restaurant at the time. There was evidence that the appellants were residing at

/Leverick Bay.....

Leverick Bay during the construction of the restaurant on Parcel 53. The first-named appellant even advised on construction methods. The appellants advised on and helped in the publicity of the facility. They attended the opening of the restaurant and were quite often in it. What we therefore have is this: The appellants claim their right not to have commercial activity on any lot in the development including Lot 53. Knowing that to be their right yet they assisted the respondent in dealing with Lot 53 in a manner inconsistent with that right. There was sufficient evidence before the Court to support the conclusion that the appellants acquiesced in the very breach against which they now complain. The decision to decline the grant of the declaration that the area may not be used for commercial purposes would have to stand.

The second ground of appeal was wide in terms but no argument was directed against the other specific findings of the learned Judge and there is no reason to interfere.

In the circumstances the appeal must be dismissed, with costs to the respondent.



 G.C.R. MOE,
 Justice of Appeal

 L.L. BROTHAM,
 Chief Justice



 C.M.D. RYAN,
 Justice of Appeal