

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2008/0029

[1] GALLEY BAY INVESTMENT LIMITED

[2] ESLA HOLDINGS LIMITED

Appellants

and

DAWN RUN LIMITED

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins

Chief Justice

The Hon. Mde. Janice George-Creque

Justice of Appeal

The Hon. Mr. Davidson Baptiste

Justice of Appeal [Ag.]

Appearances:

Mr. Dane Hamilton, QC and Mr. D. R. Hamilton for the Appellants

Sir Clare Roberts, QC and Ms. Tracey Benn Roberts for the Respondent

2010: February 8;
March 22.

Civil Appeal – Property Law – restrictive agreements – restrictive covenants – whether parties were properly joined to the proceedings – whether the decision of the learned judge was binding as to there being a change in the character of the neighbourhood – section 97 of the Registered Land Act Cap. 374 of the 1992 Revised Laws of Antigua and Barbuda – costs

The respondent, Dawn Run Limited, owns lands to which certain restrictive agreements are attached. The restrictive agreements provide that only single storey family dwelling houses are to be constructed and prohibit, among other things, commercial business from being carried out on the premises. Dawn Run applied to have the restrictive agreements declared obsolete and discharged on the grounds that there had been changes in the character of the neighbourhood and that its proposed development was likely to benefit the community.

The appellants, Galley Bay and Esla, adjacent land owners whose lands had been subject to commercial development, were joined to the proceedings, it being represented that the same or similar restrictions attached to the appellants' lands. The learned judge found that there had been breaches of the restrictive agreements which amounted to substantial

changes so that the original purpose of the agreements (a high-end residential development) could not be achieved. The restrictive agreements were thus held to be obsolete and were accordingly discharged. Galley Bay and Esla appealed, inter alia, on the grounds that the restrictive agreements did not attach to their lands, and it had not been proved that there were changes in the character of the neighbourhood rendering the restrictive agreements valueless and thus obsolete.

Held: allowing the appeal, setting aside the judgment and awarding costs to the appellants in this court and in the court below:

1. The character of a restrictive covenant or agreement is such that there must be both benefiting land and burdened land. In essence, there must be a mutuality or reciprocity in respect of the restrictive agreements. It is common ground that there is no mutuality or reciprocity of covenants as between the appellants and Dawn Run so that the essential characteristic of a dominant and servient tenement is lacking. The appellants were accordingly improperly joined to the proceedings.
2. The appellants were treated as being privy to, and in breach of, the restrictive agreements. This erroneous factual finding would inevitably have led to a flawed conclusion on the question of whether the restrictive agreements were obsolete. Further, the majority of persons whose lands are subject to the restrictive agreements have had no notice of the proceedings and accordingly have not been heard. In all the circumstances, the declaration that the restrictive covenants were obsolete, and their consequent discharge, cannot stand and must be set aside.
3. The general rule is that an applicant for the discharge or modification of the restrictive agreements must meet the costs, at least up to the stage where the defendant is in a position to decide what course to adopt in respect of the application. Having regard to the fact that the appellants were improperly joined to the proceedings and to the finding that it was not unreasonable for the appellants to have defended the claim, the order for costs made against Galley Bay and Esla in the court below must be set aside.

Re Wembly Park Estate Co. Ltd's Transfer [1968] 1 All ER 457, applied.

JUDGMENT

- [1] **GEORGE-CREQUE, J.A.:** This appeal arises from an application made by the respondent, Dawn Run Limited, to have certain restrictive agreements attaching to parcels of land owned by it declared obsolete, and thereby discharged. The application was made by Dawn Run pursuant to section 97 of the **Registered**

Land Act¹ ('the Act') and brought by way of a fixed date claim. The relevant lands in question owned by Dawn Run are parcels 453 and 454 Block 54-1292A of Five Islands Registration Section.

The proceedings

- [2] The original claim form filed on 14th April 2008, cited the Registrar of Lands as the only defendant. Although no order was contained in the record, Dawn Run says that when the claim came on for a first hearing the trial judge ordered that surrounding and adjacent land owners be notified of the claim. Dawn Run then issued an amended claim adding an additional six defendants which included the 1st and 2nd appellants, Galley Bay and Esla, respectively.
- [3] It does not appear that at the time the matter came on for trial it was appreciated that save for the 6th defendant, namely one Peter Williams (who took no part in the proceedings whatsoever), the added defendants' lands were not subject to or affected by the restrictive agreements to which Dawn Run's lands were subject. Galley Bay, Esla and the 5th defendant, the Woolford Group Limited, duly acknowledged service and, in essence, opposed the application.
- [4] The learned trial judge in his written judgment found that the purpose of the covenants "intended the area to be an elegant, quiet, high-end development with a uniformity in the height of dwelling houses, free from commercial activity...."; and that there had been breaches of the restrictive covenants to such an extent amounting to substantial changes "so that the original purpose cannot be achieved thus rendering the covenants obsolete."² The learned trial judge also considered that he was entitled to take judicial notice of the fact that Antigua and Barbuda was a tourism based economy, that Dawn Run was seeking to be involved in the economy in this regard, and that this amounted to other circumstances of which account could be taken in deciding whether to discharge the restrictive agreements attached to Dawn Run's lands.

¹ Cap 374 of the 1992 Revised Laws of Antigua and Barbuda

² Para. 61 of the judgment

[5] The trial judge accordingly declared the restrictive agreements obsolete and ordered their discharge pursuant to section 97(1)(a) of the Act by virtue of:

- (1) the changes in the neighbourhood; and
- (2) other circumstances of the case which the court deems material, namely, the benefit which is likely to accrue to the community as a whole or part of it by the development of parcels 453 and 454 by the claimant (Dawn Run).³

[6] The learned trial judge also awarded costs against Galley Bay, Esla, and the Woolford Group in the sums of \$10,000, \$7,000 and \$5,000, respectively. Galley Bay and Esla, being dissatisfied with the trial judge's decision, appealed. The Woolford Group has not.

The grounds of appeal

[7] Galley Bay and Esla raised six grounds of appeal as follows:

- (1) The learned judge erred in law or misdirected himself when having concluded at paragraph 35 of his judgment that the objective of the restrictive covenants was that of an elegant, quiet and high end development, free of commercial activity, he failed to dismiss Dawn Run's application on the ground that Dawn Run had failed to show that there had been so complete a change in the character of the neighbourhood that there is no longer any value left in the restrictions.
- (2) The learned judge erred in law and on the evidence in his findings that Galley Bay Hotel was a negative disobedience ab initio of the restrictive agreements in that it was no moment to say that the hotel was part of the of the original plan of the area.

³ Order of the learned judge at para. 71 of the judgment

- (3) The learned judge erred in law and or misdirected himself on the applicable principles established in the leading authorities to wit: **Re Ghey's Application**⁴; **Re Truman, Hanbury, Buxton & Co's Application**⁵; **Stannard v Issa**⁶ vis-à-vis their application to the evidence adduced to the court.
- (4) The learned judge erred in law and or misdirected himself when he concluded that the restrictive agreements should be discharged because of changes in the neighbourhood.
- (5) The learned judge erred in law and misdirected himself in concluding that the benefit which was likely to accrue to the community as a whole in light of the economy of Antigua and Barbuda being based on tourism and tourism services was a material ground and a basis for concluding that the restrictive agreements should be discharged.
- (6) The learned judge erred in law in ordering the appellants to pay costs.

The arguments on appeal

- [8] In my view, grounds 1 to 5 can be conveniently combined, the central plank being whether the judge on the evidence, on a proper application of the legal principles could arrive at the conclusion that the restrictive agreements had been rendered obsolete and ought to be discharged. Before considering that aspect of the matter however, based on the skeleton arguments on both sides, an overarching question has been raised the answer to which, in my view, may be dispositive of this appeal. That is, as the appellants put it, whether they had been properly joined to the proceedings or alternatively, as Dawn Run has put it, whether the appellants had locus standi in the proceedings.

⁴ [1957] 3 All ER 164

⁵ [1956] 1 QB 261

⁶ [1987] AC 175 (PC)

Parties to the restrictive agreements

- [9] I do not consider it necessary for the purpose of considering proper joinder or locus standi, that there be a recital of the restrictive agreements which Dawn Run sought to discharge. The more critical question is whether Galley Bay's and Esla's lands benefited from or were burdened by the restrictive agreements (whatever they stated) to which Dawn Run's lands were subject. Counsel on both sides agree on this principle: that the character of a restrictive covenant is such that there must be both benefiting land and burdened land.⁷ In essence, there must be a mutuality or reciprocity in respect of the restrictive agreements. Counsel for the respondent accordingly refer to the appellants as officious bystanders.
- [10] Counsel for the appellants set out in his skeleton arguments and also in his oral submissions before the court that Galley Bay's lands are not subject to the restrictive agreements in respect of which Dawn Run's lands are subject. Esla's lands are also not subject to the restrictive agreements to which Dawn Run's lands are subject. Counsel then posed the question: how and why were the appellants and the other defendants whose lands were not subject to the restrictive agreements to which Dawn Run's lands were subject, joined as defendants to the proceedings before the trial judge. He submitted that from the evidence adduced before the trial judge it had not been established, in essence, that there had been any mutuality or reciprocity of covenants as between the appellants' lands and the subject lands of Dawn Run.
- [11] It would appear that when the matter progressed through the trial both sides proceeded on the erroneous basis that the appellants, given the physical proximity of their lands to Dawn Run's, were persons likely to be affected by a decision discharging the restrictive agreements. At that stage, no serious thought appears to have been given as to the legal bases on which such mutuality of interests rested. The decision as to whom to join as defendants or whom they considered

⁷ See Rouff & Roper, "The Law and Practice of Registered Conveyancing" pp. 800-805; Cheshire Modern Law of Real Property pp. 540-542

to be the persons who may be affected by Dawn Run's application to discharge the restrictive agreements was taken by Dawn Run. It is common ground however, that there is no mutuality or reciprocity of covenants as between the appellants and Dawn Run. In short, the essential characteristic of a dominant and servient tenement is lacking. Accordingly, as Dawn Run puts it, the appellants were officious bystanders and as the appellants contend, they were improperly joined to the proceedings. This leads inexorably to the question as to the binding effect of the substantial factual findings of the trial judge to the effect that the changes in the character of the neighbourhood and the interest of the community of Antigua and Barbuda as a tourist based economy rendered the restrictive agreements obsolete and required them to be discharged. I now turn to consider this question.

The binding effect of the judgment

- [12] It is trite law that a judgment may only be of legally binding effect on those with an interest whether positively or negatively in the subject matter thereof. In this case, if Dawn Run's application was refused, it could be of no moment to the appellants. Similarly, the same having been granted is of no moment to the appellants. They are simply not parties having an interest in the matter, there being no privity of contract or estate. Accordingly, the only proper conclusion based on the arguments of both sides, though approached differently, is that there being no legal basis for the joinder of the appellants, then it must follow that they were improperly joined.
- [13] Counsel for the appellants contend that if they were improperly joined as parties then the very underpinnings of the learned trial judge's judgment becomes otiose. Given the common positions on this appeal, the issue whether the findings made by the trial judge may be considered to be binding and effective for the purposes in respect of which the application for the discharge of the restrictive agreements were made by Dawn Run warrants consideration.

[14] As stated earlier, the only person named as a defendant and whose land was affected by the restrictive agreements was the 6th named defendant, Peter Williams⁸. He did not acknowledge service and took no part in the proceedings whatsoever. The Record showed however a number of parcels held by other land owners which are subject to the restrictive agreements.⁹ Counsel for the appellants submits that over 90% of these persons had no notice of the proceedings and accordingly have not been heard. Section 97 of the Act states as follows:

“97. The Court shall have power, on the application of any person interested in land affected by an easement, restrictive agreement or profit by order wholly or partially to extinguish or to modify any such easement, restrictive agreement or profit (with or without payment by the applicant of compensation to any person suffering loss in consequence of the order), on being satisfied -

- (a) that, by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Court deems material, the easement, restrictive agreement, or profit ought to be held to be obsolete; or
- (b) that the continued existence of the easement, restrictive agreement or profit impedes the reasonable user of the land for public or private purposes without securing practical benefits to other persons or, as the case may be, will, unless modified, so impede such user; or
- (c) that the proposed discharge or modification will not injure the person entitled to the benefit of the easement, or restrictive agreement or profit.”

This provision clearly contemplates the application of the principles of natural justice. Further section 161 of the Act is in the following terms:

“161. Any matter not provided for in this Act or in any other written law in relation to land, leases and charges registered under this Act and interests therein shall be decided in accordance with the principles of justice, equity and good conscience.”

[15] Given what has transpired in this case can it be said that the decision arrived at accords with the above stated principles where the bulk of the land owners who

⁸ The Registrar of Lands was joined as a party solely for the purpose of carrying into effect any order made by the court as to notations of the Land Registers of the affected parcels.

⁹ Record of Appeal, pp. 336 to 364

are properly affected thereby were not made aware of the proceedings? I think not.

[16] This apart, there is the further troubling aspect of the matter which is that the very factors which may have been taken into account in arriving at the conclusion that breaches of the restrictive agreements had occurred and the further conclusion that there had been changes in the character of the neighbourhood may of themselves have been grounded on an erroneous factual basis. For example, in the amended statement of claim it is asserted by Dawn Run that the appellants and those defendants named are the adjoining or surrounding land owners and their lands were all subject to the restrictive covenants and thus may be affected by the order extinguishing the restrictive agreements.¹⁰ The relevant restrictive agreements are reproduced in part:

- “(a) Only one single family dwelling house of a minimum value --- shall be erected on any one Lot.
- (b)
- (c) No building other than a 1-storey or split level building shall be erected on any lot.
- (d) Subject to the approval of the appropriate authority all electricity, telephone and water lines shall be laid underground.
- (e)
- (f)
- (g) No commercial business shall be carried on the premises.
- (h)
- (i) No signs, billboards, or advertisement matter of any kind shall be posted on the premises.”

[17] At paragraph 5 of the amended statement of claim Dawn Run pleads as follows:

“The previously mentioned restrictive agreement has been in place from in or around 1976. However with the passage of time, the other surrounding land owners who have had the same or similar restrictive agreements registered against their lands, have had the restrictive agreements released by agreement or have simply been in clear and open breach of the agreement.”

¹⁰ At paras. 2 and 3 of amended statement of claim; Record of Appeal, pp. 101

There then followed at paragraph 6 the following:

“The other surrounding lands now have built on them a hotel, restaurant, commercial cottages and villas and other high end development. More specifically, directly in front of the Claimant's (Dawn Run) lands is Galley Bay Hotel and behind is Chez Pascal Restaurants coupled with apartments. To the left of the Claimant's land are the Galley Bay villas and other commercial cottages.”

As it relates to the restrictive agreements the obvious inference to be drawn from these pleadings is that Galley Bay and Esla, (Galley Bay in particular) are in breach of the restrictive agreements.

[18] At paragraph 45 of his judgment the trial judge found as follows:

“In the case at bar, whether by way of simply ignoring the restrictive agreements or removal by agreement; there have been developments which fly in the face of the restrictions outlined above. Indeed it is common ground that the first defendant [Galley Bay] operates a 98 room inclusive hotel and the plant was recently extended by the addition of 8 two storey buildings and an additional restaurant... On the whole there is an abundance of commercial activity, including a 50 seat restaurant, owned and operated by the fifth defendant.”

[19] The trial judge then went on to say this:

“Given the nature of the activities on the land of the first, second, fourth and fifth defendants ... in the context of section 97(1) of the Act, it is of no moment to say that there has been only limited deviation from the restrictive agreement. It is equally of no moment to say that the Galley Bay Hotel was part of the original development plan of the area. Rather than being a positive, it is a negative disobedience **ab initio**...”¹¹

[20] What this makes clear, both from the pleaded case and the learned judge's findings, was that the appellants were treated as being privy to the restrictive agreements or at least that there was privity of estate, (in particular, as it relates to Galley Bay) and that they were in breach of the said agreements, when in fact this is not the case in respect of either appellant. In my view, having taken into account purported breaches by the appellants of the restrictive agreements when in fact they were not subject to the restrictive agreements in the first place, would

¹¹ At paragraph 47 of the judgment

have inevitably led to a flawed conclusion on the question of whether the restrictive agreements were obsolete.

- [21] In my view, it follows from the foregoing that the findings of the trial judge and his declaration that the restrictive agreements are obsolete cannot stand. I would set aside his whole order without more. It would be left for Dawn Run to make a fresh application directed to the proper parties should it so wish so that the matter may be properly ventilated in accordance with the principles to which I have alluded at paragraphs 14 and 15 above.

Costs

- [22] The appellants also say that the costs orders against them ought to be set aside. They did not enter upon the proceedings of their own volition. They were joined as parties by Dawn Run, following the order of the court. There is no suggestion that the court order named any specific persons who were to be joined – merely surrounding or adjoining land owners. Dawn Run chose who they wished to join out of the body of land owners. Given the allegations made against the appellants by Dawn Run in its pleaded case, I do not consider it unreasonable for the appellants to have defended the claim. It is not clear from the judgment the basis for the costs award – neither in principle nor quantum. I consider that in a claim such as this where a basis for discharge of the restrictive agreements by the claimant was to show non-adherence by the parties joined, that the claimant would have been under a duty, prior to making such joinder, to ensure that the parties sought to be joined were parties subject to the restrictive covenants.
- [23] On the basis that the appellants were indeed proper parties to the proceedings the usual costs order is for the applicant for the discharge or modification of the restrictive agreements to meet the costs at least up to the stage where the defendant is in a position to decide what course to adopt in respect of the application¹². The rationale for this is readily ascertainable. It is the applicant who

¹² Re Wembley Park Estate Co. Ltd's Transfer [1968] 1 All ER 457 at 464 per Goff J

is seeking a benefit for its lands by the restrictive agreement being removed or modified. Section 97 of the Act contemplates the payment of compensation to the person suffering loss in consequence of the removal.

[24] Here the position is worse. The appellants were not proper parties to the proceedings but were brought in by Dawn Run and matters pleaded against them and pursued at trial painting them as land owners in flagrant breach of the restrictive agreements when, had all due research been conducted, it would no doubt have been appreciated that the alleged breaches cited, in respect of the appellants were not in fact breaches at all (there being no mutuality or reciprocity of covenants as between the appellants and Dawn Run) who were thus wrongly joined as parties. It is not passing strange that Dawn Run, having joined the appellants, is now at pains to point out that the appellants have no locus standi. For this reason the costs orders simply cannot stand and I would order that they be set aside.

Conclusion

[25] The appellants not being proper parties to the proceedings, as accepted by both sides, the judgment for the reasons above given cannot be allowed to stand. Accordingly, I would allow the appeal and set aside the judgment and orders of the trial judge made on 19th December 2008. The appellants shall have their costs below in accordance with the prescribed costs regime pursuant to **CPR** 65.5(2)(b)(iii) and two thirds of the sum so quantified on appeal.

Janice George-Creque
Justice of Appeal

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal [Ag.]