JUDGMENT 1, 1973

No. 16 of 1971

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF THE BAHAMA ISLANDS

B E T W E E N

TEXACO ANTILLES LIMITED — Appellant

AND

DOROTHY KERNOCHAN and CLIFFORD LOUIS KERNOCHAN — Respondents

CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal from the decision of the Court of Appeal of the Bahamas Islands (Sinclair P. and Bourke J.A., Archer J.A. dissenting) dated the 3rd July 1969, dismissing the appeal of the Appellant from the judgment and order of the Supreme Court of the Bahama Islands, Equity Side (Cunningham Smith J.) dated the 20th May 1968 in favour of the Respondents. p.41

2. In brief summary, the question raised in this appeal is whether the Respondents, who were the Plaintiffs in the action brought in the Supreme Court, are entitled to enforce a restrictive covenant for the benefit of their property over neighbouring property owned by the Appellant. The appeal raises the following main points: (1) whether the Respondents are entitled to the benefit of the restrictive covenant under a building scheme; (2) whether the past unity of seisin of their respective properties has extinguished the restrictive covenant as between the Appellant and the Respondents; (3) whether the burden of the restrictive covenant has passed to the Appellant as regards part of its property; (4) if so, whether the restrictive covenant should be

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enforced by injunction against the Appellant as regards the rest of the Appellant's property (which is admittedly subject to the burden); and (5) whether the proposed use of the Appellant's property as a petrol filling station would, as a matter of construction, involve a breach of the restrictive covenant.

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3. By the Order appealed from, the Respondents were granted an Injunction restraining the Appellant by itself or its servants or agents or otherwise from building or permitting to be built on its property a gas station or public garage or from carrying on or permitting to be carried on thereon the business of a gas station or public garage or any other trade or business in breach of the restrictive covenant.

4. The Appellant and the Respondents both derive to their respective properties through a common owner, W. E. Brown Land Company Limited (hereinafter called "the Brown Company"). In February 1925 the Brown Company caused a lotted plan (hereinafter called "the Lotted Plan") to be prepared showing certain lands then owned by it and known as Westward Villas Subdivision and First and Second Addition Westward Villas (hereinafter called "the Subdivision") divided into 18 Blocks. Each of the Blocks was shown laid out in individual numbered lots. The northern half of Block 3 of the Subdivision includes Lots 13 to 18 inclusive, which comprise the Appellant's property. The southern half of Block 3 includes Lot 39 and one-half of Lot 40, which comprise the Respondents' property and upon which their house is built. The Lotted Plan was lodged in the office of the Surveyor General, now the Crown Lands Office.

Exhibit C (to be produced at the hearing)

5. The Appellant derives title to part of its property, namely Lots 15 and 16, through a Conveyance dated the 5th May 1927 and made between (1) the Brown Company and (2) J. Baird Albury (hereinafter called "the Albury Conveyance"). The Albury Conveyance does not form part of the record, but it was common ground in the Court of Appeal that it was in a standard printed form identical with a Conveyance dated the 22nd March 1928 made between (1) the Brown Company and (2) Herman Ferguson Butler

p.99

p.48 l.21
p.64 l. 1
p.71 l.18

(hereinafter called "the Butler Conveyance") relating to Lot 31 of Block 4 of the Subdivision which was in evidence and forms part of the record. The Butler and Albury Conveyances recite that the Subdivision had been laid out by the Brown Company to be sold in lots for building purposes according to the Lotted Plan, and that some of the lots had already been sold and the conveyances thereof contained covenants by the purchasers to observe conditions and restrictions similar to those set forth in the Schedule thereto, and contain the following covenant in clause 2 thereof :- Exhibit L p.126

"2. The Purchaser as to the lot or parcel of land intended to be hereby granted and conveyed (and with intent to bind all persons in whom the said lot or parcel of land shall for the time being be vested but so as not to be personally liable under this covenant after he has parted with the same) doth hereby covenant with the Company, their successors and assigns AND the Company as to those lots or portions of Westward Villas Subdivision and First and Second Addition Westward Villas aforesaid which now remain unsold (and with intent to bind all persons in whom the same shall for the time being be vested, but so as not to be liable under this covenant as to any lot or lots of land after they have parted with the same) do hereby covenant with the Purchaser his heirs and assigns that they, the Company and the Purchaser respectively and all persons deriving title under them respectively, will at all times hereafter observe in respect of the lots of land vested in them respectively all the conditions and restrictions set forth in the Schedule hereto it being the intention of the parties hereto that the said conditions and restrictions shall be mutually enforceable by and against all owners for the time being of the said lots of land respectively." Exhibit L p.127

The Schedule to the printed form of the Butler and Albury Conveyances contains a number of conditions and restrictions, including in paragraph 4 the following :- Exhibit L p.130

"4. No more than one private residence and one garage or one combined garage and servants' quarters shall be built on any lot except on the lots in Blocks Two (2) to Five (5), inclusive. The Company reserves the right, however, to remove the restrictions from any or all of the lots of the said Blocks Two (2) to Five (5), inclusive, to allow the building upon them of hotels or apartment houses or stores for the sale of provisions or other merchandise, but said stores shall be permitted to be built only on the northern half of Blocks Three (3) and Four (4). No machine shop, public garage or manufacturing establishment will be permitted on any of the lots of Westward Villas Subdivision and First and Second Addition Westward Villas aforesaid."

The conditions and restrictions set out in the Schedule to the printed form were referred to in the Conveyance dated the 17th January 1968 and made between (1) Anjask Company Limited and (2) the Appellant. It appears that this Conveyance is the same as that erroneously referred to in the Order appealed from as bearing date 12th February 1968

p.160

p.41

6. The Appellant derives title to the remainder of its property, namely Lots 13, 14, 17 and 18, through a Conveyance dated the 3rd April 1935 made between (1) the Brown Company and (2) Ocean and Lake View Company Limited (hereinafter called "the Ocean Company Conveyance"). By the Ocean Company Conveyance, the Brown Company sold off to Ocean and Lake View Company Limited (hereinafter called "the Ocean Company") all the Lots comprised in the Subdivision then remaining unsold. The Ocean Company Conveyance was not in the printed form, and did not contain or refer to the restrictive covenants set out in the printed form. But it did have annexed to it a plan, which is a reproduction of the Lotted Plan with the Lots being sold coloured brown thereon and with the additional note endorsed thereon which reads :

Exhibit K
l.122

p.96

"The property shown upon this plan is restricted to residence except where otherwise indicated."

7. The Respondents derive title to their property, Lot 39 and one-half of Lot 40, through a Conveyance made in 1933 between (1) the Brown Company and (2) Thomas Sampson Hilton (hereinafter called "the Hilton Conveyance"). The Hilton Conveyance was not produced at the trial, but there was evidence before Cunningham Smith J. and it was common ground in the Court of Appeal that it was in the same printed form as the Albury and Butler Conveyances. p.20 l.7

8. By 1942, all the Appellant's Lots 13 to 18 and both the Respondents' Lots 39 and 40 had been conveyed to a company called Chapmans Limited by the following Conveyances :-

Lot Nos.	Date	Vendor	
13	12th January 1942	The Ocean Company	p.139 l.22
15 and 16	24th October 1939	Joseph Baird Albury	p.147 l.26
14, 17 and 18	3rd May 1939	Bahamas Limited	p.144 l.30
39 and 40	13th October 1939	Thomas Sampson Hilton	Exhibit F(i) p.106

Lots 13 to 18 were sold by Chapmans Limited to Bahamian Industries Limited by a Conveyance dated the 12th November 1951. p.139 l.39 Lots 39 and 40 were sold by Chapmans Limited to Western Estates Limited by a Conveyance dated the 19th March 1954. p.108 There was accordingly for several years unity of seisin between the Appellant's Lots and the Respondents' Lots. In the Court of Appeal, the Appellant contended that the unity of seisin had the effect, as between the parties, of extinguishing the restrictive covenants, and that they were not revived when the Appellant's Lots and the Respondents' Lots again became held in different ownership.

9. It was conceded on behalf of the Appellant in the Court of Appeal that the burden of the restrictive covenants entered into by the Purchaser in the Albury Conveyance relating to Lots 15 and 16 had devolved on them. p.48 l.28 It was also conceded that, subject to the question of p.48 l.30

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unity of seisin, the Respondents were entitled to the benefit of those covenants, as regards those Lots only, by reason of the express
p.49 l.17 annexation of the benefit in clause 3 of the Albury Conveyance. It was further conceded that the benefit of the restrictive covenants entered into by the Brown Company, relating to (inter alia) Lots 13, 14, 17 and 18, in the Hilton Conveyance would have devolved on the Respondents, by reason of the express annexation in clause 3 thereof, and would be enforceable by the Respondents had it not been for two factors, firstly the question of unity of seisin and secondly the question of whether the Ocean Company and its successors were bound by the covenants.

p.9 l.8 10. In its Defence dated the 28th March 1968, paragraph 13, the Appellant averred that the restrictive covenants were created as part of a building scheme comprising the Subdivision. However, both at the trial and before the Court of Appeal, the Appellant contended that no such building scheme had been created. Both Cunningham J. and the Court of Appeal considered in some detail whether there was a building scheme, so that the Respondents would have the benefit of the restrictive covenants thereunder as well as by the express annexation. In the
p.70 l.44 Court of Appeal, it became clear that this question was of importance only by reason of the unity of seisin. The Respondents contended that, where restrictive covenants are mutually enforceable under a building scheme, they are not extinguished by unity of seisin.

11. Cunningham Smith J. at first instance, and Sinclair P. and Bourke J.A. all held that the requirements of a building scheme set out by Parker J. in Elliston v. Reacher 1908 2 Ch. 374 at p. 384 had been satisfied. Sinclair P., after considering the facts in detail and referring to Tucker v. Vowles 1893 1 Ch. 195 and White v. Bijou Mansions Ltd. 1938 Ch. 351, concluded:

p.54 l.44 - p.55 l.11 "In my view the Albury, Hilton and Butler conveyances when coupled with the lotted plan, Exhibit C, constituted sufficient evidence to establish the existence of a building scheme for the Subdivision in

accordance with the requirements laid down in Elliston v. Reacher, the common vendor being W. E. Brown Land Company Limited. Taken together the recitals and covenants in the conveyances cover all the lots in the scheme area as to which there was to be reciprocity of obligations. I think it is a fair inference from the facts that the whole Subdivision was governed by a building scheme in which each purchaser was to enter into a liability, not only to his vendor, but also to the purchasers of other lots, which they could enforce against him."

Bourke J.A. dealt at length with the facts, the authorities and the argument on behalf of the Appellant on this question, and concluded:

"Reading the printed form I am of the view that the vendor did invite the purchasers to buy on the term that the land should be bound by one general or local law; and that the restrictions were not imposed solely for the benefit of the vendor's retained land - either to protect his retained land or to help him in disposing of the land comprised in an alleged scheme. I consider the restrictions were intended by the vendor and would be understood by the purchasers to be for their common advantage, as well as for the land retained to be sold off as purchasers appeared. The evidence may be of a somewhat meagre nature but it is not in my judgment so fragile as to be incapable of supporting the inference as to an intention to create a scheme. I would hold that there is sufficient evidence to sustain the finding of the lower Court that a building scheme for the Westward Villas Subdivision and its Additions was created." p.84 ll.7-25

12. Archer J.A., however, held that there was no building scheme, mainly on the ground that the contents of the printed form were inconsistent with an intention to create a building scheme. He said that "the scheme does not provide that each lot that is sold shall be subject to the burden and have the benefit of the restrictive p.65 l.27 p.65 l.46

covenants" and considered that the absence of reciprocity of benefit and burden over the area was fatal to the existence of a building scheme. The Respondents contend that Archer J.A. either overlooked or else misinterpreted the effect of clause 2 of the standard printed form, and that his judgment cannot be supported in this respect. Archer J.A. also appears to have placed some reliance on the absence of express mention of the restrictive covenants in the Ocean Company Conveyance. The Respondents contend that the contents of the Ocean Company Conveyance are irrelevant in this connection, for two reasons. First, clause 2 of the standard printed form contains an express covenant by the Brown Company binding itself to observe the restrictive covenants on the unsold Lots, a point which Archer J.A. again appears to have overlooked. Secondly, even if there had been no such express covenant on the part of the Brown Company, the establishment of a building scheme would have had the effect of imposing the restrictive covenants on the unsold lots (see McKenzie v. Childers (1889) 43 Ch. D. 265).

p.66 l.2

Exhibit L p.127

p.66 ll.6-8

13. The question whether the unity of seisin extinguished the restrictive covenants as between the owners for the time being of the Appellant's Lots and the Respondents' Lots did not arise before Cunningham Smith J., and was not considered by Archer J.A., Bourke J.A. was of the opinion that, if the covenants had been enforceable only by virtue of the annexation of the benefit, by analogy with easements, the restrictive covenants would not have survived the merger of the dominant and servient tenements. Sinclair P. expressed no concluded view on the question.

p.88 ll.32-37

p.61 l.6

14. Both Sinclair P. and Bourke J.A. however considered that different principles apply in the case of a building scheme. Sinclair P. referred to Lawrence v. South County Freeholds Limited 1939 Ch. 656 at p. 679, where Simonds J. (as he then was), in dealing with certain observations made by Cozens-Hardy M.R. in Elliston v Reacher 1908 2 Ch. 665 at p.672, expressed the view obiter that covenants entered into by an original purchaser from the common vendor of more than one lot under a building

p.61 ll.8 et seq.

p.89 ll.3 et seq.

scheme would be enforceable inter se between sub-purchasers of the lots, and concluded:

"But where there is unity of seisin of some of the lots affected by a building scheme, I do not think that the covenant is destroyed. I think that observations of Lord Simonds in Lawrence v. South County Freeholds Limited, though obiter, afford strong support for the view I have taken. It is true that the issue he was discussing in Elliston v Reacher was as to an original purchaser from the common vendor, but I cannot see any reason in principle why his observations should be so limited. I think they have a wider connotation and should apply equally to a subsequent purchaser. A building scheme is based on community of interest of all the owners of the lots, requiring reciprocity of obligations. The scheme would be destroyed piecemeal if each time there were unity of seisin of certain lots the mutual obligations were extinguished. A building scheme must stand or fall as a whole, whereas the other kinds of covenant stand or fall by themselves. I am therefore of the opinion that, since I have held there was a building scheme, unity of seisin of the appellants' and the respondents' land did not extinguish the benefit of the covenants." p.61 11.8-31

15. The dicta of Simonds J. referred to above have recently been followed and applied by Megarry J. in Brunner v Greenslade 1971 Ch. 993. The Respondents contend that the creation of a building scheme involves the concept of a local law for the area of the scheme, and that equity renders the local law mutually enforceable by all the owners of lots, notwithstanding that some of the lots may at some time have been in common ownership.

16. It was next contended on behalf of the Appellant that, as regards Lots 13, 14, 17 and 18 comprised in the Ocean Company Conveyance, the Ocean Company was a bona fide purchaser for value without notice of the covenants imposed by clause 3 of the Albury, Butler and Hilton Conveyance. p.48 1.43

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Under section 57 of The Conveyancing and Law of Property Act (Cap. 115), a purchaser is affected by notice of matters of which he would have obtained knowledge "if such inquiries and inspections had been made as ought reasonably to have been made."

17. In the Bahamas, there is a system of recording documents of title to land under The Registration of Records Act (cap. 193). The Act is permissive, and provides that certain documents may be recorded in a registry. The documents are indexed under the names of the parties. The Butler Conveyance was duly recorded under the Act on the 19th June 1934, and would have been disclosed if a search against the Brown Company had been made prior to the Ocean Company Conveyance. Cunningham Smith J. and the majority of the Court of Appeal held that, in the circumstances, this was sufficient to give the Ocean Company constructive notice of the covenants. Sinclair P. said :-

p.57 l.32

p.58 ll. 19-32

"I accept that registration of a document under the Registration of Records Act is not of itself notice to all the world of its contents, but here I think that the plan of the Subdivision annexed to the Ocean conveyance did give warning of at least a possible building scheme and of restrictions affecting the Subdivision and that, in those circumstances, a proper investigation of title should have included a search in the Registry for any instruments relating to the scheme and the restrictions. In my view, in such a search the Butler conveyance should have been looked at and that conveyance gave sufficient notice of the building scheme and the restrictions".

Bourke J.A. said :-

p.91 l.37-p.92 l.10

"The Ocean Conveyance referred to the lots as "pieces or parcels of land" and took full cognisance of the building scheme plan; and the plan disclosed what lots had been sold off by Brown and the lots unsold, the subject matter of the Ocean and Lake View Company's purchase. The Company was operating in the Bahamas and not in the moon. One would think that it must have been

realised by the purchaser that the acquisition intended concerned land subject to a scheme of development. Be that as it may, there was the appearance of such development, of a community of interest, which would, in the ordinary nature of such things, be bound about by restrictive covenants for the benefit of the whole scheme and the individual purchasers of lots. The smell of restrictive covenants was in the air and all around. Surely in all reasonableness the Company can be said to be put upon inquiry as to the existence of collateral obligations and as to burdens attaching to the lots retained in Brown's hands which was it was purchasing. Search in the registry would have brought the covenants to the knowledge of the purchaser."

18. Archer J.A. on the other hand held, following Morecock v. Dickins (1768) Amb. 678, held that there was no obligation on the Ocean Company to inquire into all the Brown Company's dispositions of Lots. In Morecock v. Dickins Lord Camden L.C. held that registration of an equitable mortgage in the Middlesex Deeds Register was not by itself sufficient to give constructive notice thereof to a subsequent legal mortgagee. The Respondents contend that that decision is clearly distinguishable, because there was nothing to put the subsequent legal mortgagee upon inquiry. In the present case, the Respondents contend that the Ocean Company was put upon inquiry, for the reasons given by Sinclair P. and Bourke J.A. p.67 11.19-23

19. It was contended by the Appellant in the Court of Appeal that, if Lots 13, 14, 17 and 18 are free of the burden of the restrictive covenants, so that the Respondents can only enforce the covenants in regard to Lots 15 and 16, the Court ought not to grant an injunction and that the Respondents' remedy should be by way of damages only. Neither Cunningham Smith J. nor any of the members of the Court of Appeal found it necessary to deal with this point. The Respondents contend that even if Lots 13, 14, 17 and 18 are free of the burden, neither that nor any other circumstance would justify the Court in departing, as regards Lots 15 and 16, p.90 l.20

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from the normal rule established by Doherty v. Allman (1878) 3 App. Cas. 709 that the remedy for breach of a negative covenant is an injunction.

20. The final question considered by Cunningham Smith J. and the Court of Appeal was whether the proposed erection and operation by the Appellant of a "gas filling station" or a "service station" would be a breach of the covenant not to erect a "public garage." The main evidence on this question consisted of plans of the proposed filling station which were produced in evidence (but do not form part of the record) and the oral evidence of Francis Von Schilling, the Bahamas Manager of the Appellant. Bourke J.A. correctly summarised the Appellant's proposals as follows :-

p.25 l.8

pp.25-28

p.75 ll. 22-34

> "Minor repairs are to be carried out; there will be petrol storage tanks and pumps for fuelling; a store for the sale of lubricants and other motor necessaries; a room for a compressor; a workshop for the carrying out of the repairs mainly of tyres, and a hydraulic lift to raise cars for greasing and oiling; and washing facilities; these latter facilities being available in an area open at the sides where the shelter of a roof is afforded; there is also a roof that would shelter cars on the front portion. Four cars could be taken at one time at the rear - three for washing and one for greasing."

Cunningham Smith J. said

p.40 ll. 17-28

> "By the use of the word "garage" in 1925, I cannot think that the Common Vendor intended simply a public shelter for motor vehicles That in itself might have been quite innocuous. If he could have foreseen 40 years on, no doubt he would have been more expansive but I am absolutely certain that when he used the work "garage" what he had in mind was a place where cars were kept and repaired and petrol and oil were sold.
>
> What is proposed to be set up is a public garage, call it what you will - and I have no hesitation in finding in favour of the plaintiffs on this point."

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Sinclair P. agreed with the learned Judge. Bourke J.A. said p.62 1.22

> "The degree or nature of the repairs to be carried out is surely not the whole test when it comes to a question as a matter of ordinary language: What is a garage? No doubt these premises could, as a matter of modern usage, be heard to be described as a filling station, a petrol station, a gas station or, as the appellant seems to prefer, from Francis Von Schilling's testimony and an entry on the fact of the plan of the building, a service station. It would also be called a garage, and I do not think loosely or inappropriately having regard to the nature of the premises and the activities to be carried on there entailing the keeping of cars at least temporarily on the premises. I would have thought that this was precisely the sort of thing that would be sought to be guarded against in the building up of a primarily residential area of villas." p.75 1.44 - p.76 1.13

Bourke J.A. then adopted the passage from the judgment of Cunningham Smith J. set out above. The Respondents contend that Bourke J.A. adopted the correct test to be applied and reached the correct conclusion.

21. Archer J.A., however, held that there was no threatened breach of the covenant. In doing so, he said: "In giving the word 'garage' the statutory meaning which it bears in the Garages Licensing Act, Chapter 287, the trial Judge purported to be interpreting the mind of the vendor." p. 68 11. 7-10 The Respondents contend that, although Cunningham Smith J. did refer to the statutory meaning of "garage", he did not rely on that meaning, and that his findings were misinterpreted by Archer J.A. p.39 1.36 In reaching his decision, Archer J.A. relied exclusively on the evidence of Mr. A. B. Malcolm. p.68 11.12-22 pp. 21-22 The Respondents contend that the evidence of Mr. Malcolm did not, and could not, amount to a definition or comprehensive explanation of the meaning of "public garage" in 1927. This evidence consisted merely of Mr. Malcolm's description of his own businesses, together with

an assertion that no complaints had ever been made to him in connection therewith.

22. The Respondents accordingly submit that the concurrent findings of Cunningham Smith J. and the Court of Appeal on the meaning of the words "public garage" in the Bahama Islands in 1927 should not be disturbed.

23. The Respondents humbly submit that this appeal should be dismissed and that the Appellant should be ordered to pay the costs thereof for the following among other

REASONS

(1) BECAUSE on the evidence Cunningham Smith J. and the majority of the Court of Appeal correctly held that a building scheme in respect of the Subdivision had been proved

(2) BECAUSE the restrictions affecting all the Lots in the Subdivision constitute a local law, and remain enforceable between the owners of each Lot notwithstanding any temporary unity of seisin.

(3) BECAUSE the Ocean Company had constructive notice of the restrictions affecting Lots 13, 14, 17 and 18 for the reasons given by Sinclair P. and Bourke J.A.

(4) BECAUSE the Respondents are in any event entitled to an injunction in the terms of the Order appealed from as regards Lots 15 and 16 of the Subdivision.

(5) BECAUSE there were concurrent findings as to the meaning of the words "public garage" in paragraph 4 of the said restrictions.

(6) BECAUSE the proposed use of the Appellant's Lots will involve a breach of the said restrictions.

(7) BECAUSE the judgments of Cunningham Smith J. and the majority of the Court of Appeal on all questions relating to this appeal are correct for the reasons given therein.

JEREMIAH HARMAN Q.C.

NIGEL HAGUE

No. 16 of 1971

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF THE BAHAMA ISLANDS

B E T W E E N

TEXACO ANTILLES LIMITED Appellant

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CASE FOR THE RESPONDENTS

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