Privy Council Appeal No. 16 of 1971

Texaco Antilles Limited – – – – – – *Appellants*

v.

Dorothy Kernochan and another – – – – *Respondents*

FROM

THE COURT OF APPEAL FOR THE BAHAMA ISLANDS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH JANUARY 1973

Present at the Hearing:
LORD MORRIS OF BORTH-Y-GEST
LORD CROSS OF CHELSEA
LORD SALMON

[*Delivered by* LORD CROSS OF CHELSEA]

This is an appeal, by leave of the Board, by Texaco Antilles Limited, the defendants in the action, from a judgment of the Court of Appeal for the Bahama Islands dated 3rd July 1969 whereby that Court by a majority (Sinclair P. and Bourke J.A., Archer J.A. dissenting) affirmed a judgment dated 20th May 1968 of Cunningham Smith J. sitting on the Equity Side of the Supreme Court granting the respondents, the plaintiffs in the action, an injunction against the appellants. The injunction was in the following terms:

> "THIS COURT DOTH ORDER that the Defendant be restrained whether by itself or its servants or agents or otherwise from doing the following acts that is to say building or permitting to be built on lots 13, 14, 15, 16, 17 and 18 of Block 3 of the Subdivision known as Westward Villas First and Second Addition Westward Villas situate in the Western District of the Island of New Providence the property of the Defendant a gas station or public garage or from carrying on or permitting to be carried on on the said lots the business of a gas station or public garage or any other trade or business in breach of the Restrictive covenants imposed on the owners or occupiers of the said lots by the W. E. Brown Land Company Limited and referred to in a Deed of Coveyance dated the 12th day of February 1968 and made between Anjask Company Limited of the one part and the Defendant of the other part".

The facts are as follows. In 1925 the W. E. Brown Land Company Limited which owned a tract of land on the north coast of New Providence Island to the west of the city of Nassau prepared and lodged in the office of the Surveyor General where it was open to inspection by members of the public a lotted plan of part of the land owned by them which was described as Westward Villas Subdivision and First and Second Addition Westward Villas. The plan showed some 500 lots

divided into eighteen blocks in three rows of six blocks each separated by roadways. The lots on the northern or seaward side of the two blocks in the centre of the northern row of blocks, numbered blocks 3 and 4, were marked "commercial" and the lots on the southern side of those two blocks and also all the lots in the two adjoining blocks in the same row, numbered blocks 2 and 5, were marked "apartments". The lots in the other blocks were unmarked. The plan bore on it the following somewhat cryptic note "The above map is a proposed general plan of development of the land shown thereon. Until a plan covering any portion is filed for record the plan of development of said portion may be changed subject to the provisions of any contracts in writing expressly made relating thereto". It appears that shortly after the plan had been lodged the Land Company began to sell some of the lots. The appellants' property—Lots 13 to 18 in Block 3—lie on the northern side of that block in the part marked "commercial". The original purchaser of Lots 15 and 16 was one Albury to whom they were conveyed by the Company by a conveyance dated 5th May 1927. That conveyance which was on a printed form contained (*inter alia*) the following recitals:

> "WHEREAS the Company are seized in fee simple of the lot of land intended to be hereby granted and conveyed being part of a tract of land known as Westward Villas Subdivision and First and Second Addition Westward Villas, which has been laid out by the Company to be sold in lots for building purposes according to a plan prepared by W. E. Brown Civil Engineer, dated February 1925, and being No. 21C and now filed in the office of the Surveyor General of the Colony; AND WHEREAS some of the said lots have been already sold and the conveyances thereof contain covenants by the purchasers to observe conditions and restrictions similar to those set forth in the Schedule hereto;".

The operative part of the conveyance so far as material ran as follows:

> ". . . the Company AS BENEFICIAL OWNERS hereby grant and convey unto the Purchaser ALL those lots or parcels of land situate in the Western District of the said Island of New Providence and being designated as Lots 15 and 16 of Block 3 in the said plan, together with the right to enforce for the benefit of the said lots or parcels of land intended to be hereby granted and conveyed all covenants entered into by purchasers of other lots or portions of Westward Villas Subdivision and First and Second Addition Westward Villas aforesaid for the observance of conditions and restrictions similar to those set forth in the Schedule hereto TO HOLD the same unto and to the use of the Purchaser in fee simple.
>
> 2. The Purchaser as to the lots or parcels of land intended to be hereby granted and conveyed (and with intent to bind all persons in whom the said lots or parcels 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.

3. The Purchaser for himself his heirs and assigns, hereby covenants with the Company, their successors and assigns (and so that this covenant shall, so far as practicable, be enforceable by the owners occupiers and tenants for the time being of the said tract of land known as Westward Villas Subdivision and First and Second Addition Westward Villas which has been laid out as aforesaid), that all and singular the conditions and restrictions set forth in the Schedule hereto shall run with the land and shall bind the said lot or parcel of land intended to be hereby granted and conveyed and all subsequent owners, occupiers and tenants thereof; AND ALSO that he, the Purchaser and the persons deriving title under him, will henceforth and at all times hereafter observe and perform the said conditions and restrictions.

. . . . . .

5. The Company, for themselves, their successors and assigns do hereby declare that the Purchaser, his heirs, executors, administrators and assigns shall be entitled to the benefit of the similar covenants, conditions and restrictions entered into by any other purchaser or purchasers of any portion or portions of the said tract of land known as Westward Villas Subdivision and First and Second Addition Westward Villas which has been laid out as aforesaid.

6. The Company, for themselves, their successors and assigns, do hereby declare that "—which is clearly a mistake for "covenant with "—" the Purchaser, his heirs, executors, administrators and assigns as follows: That the conditions and restrictions set forth in the Schedule hereto shall be included in all conveyances of all lots in the Westward Villas Subdivision and First and Second Addition Westward Villas aforesaid except those lots in Blocks Two (2) Three (3) Four (4) and Five (5); ".

The Schedule contained a number of restrictions.

Numbers 1 to 3 related to the cost and character of the houses to be built on the lots. Number 4 read as follows:

"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 Block 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 respondents are the owners of Lot 39 and part of Lot 40 on the southern side of Block 3 just behind the appellants' lots. The original purchaser of Lots 39 and 40 was one Hilton who bought them from the Land Company on 17th May 1933 by a conveyance—on a similar printed form—which was *mutatis mutandis* in the same terms as the

Conveyance of Lots 15 and 16. By 3rd April 1935 the Land Company had apparently sold some 150 of the lots, and on that day they conveyed the unsold lots—some 350 in number—which included Lots 13, 14, 17 and 18 of Block 3—together with other property—to the Ocean and Lake View Company Ltd. That conveyance contained no reference either in the recitals or the operative part to the restrictions contained in the common form conveyances of the lots already sold. The unsold lots were conveyed by the following description:

> "AND ALSO ALL those pieces or parcels of land situate as aforesaid which said pieces or parcels of land form portions of the Subdivision known as Westward Villas the said Subdivision being a portion of the said tract of land originally known as "Chapmans" or "Cunninghams" the said pieces or parcels of land having the positions boundaries shapes and dimensions as are shown on the diagram or plan hereto attached numbered 1 and being delineated on those parts which are coloured Pink of the said diagram or plan numbered 1."

The attached plan was a copy of the plan lodged by the Land Company with the Surveyor General with the lots being sold coloured pink and with the following note on it in addition to the note previously mentioned:—"Note. The property shown upon this plot is restricted to residence except where otherwise indicated. W. E. Brown Land Company Ltd. by F. W. Hazzard, President Andrew T. Healy, Secretary". On 27th January 1939 the Ocean Company sold a number of the lots which they had bought from the Land Company (including lots 14, 17 and 18 of Block 3) together with other property to Bahamas Ltd. That conveyance recited that the lots being sold were "subject to certain restrictions and conditions imposed on the said hereditaments by the W. E. Brown Land Company Limited which said restrictions and conditions still continue," and conveyed them expressly subject to such restrictions and conditions. On 12th January 1942 the Ocean Company conveyed (*inter alia*) Lot 13 of Block 3 to Chapmans Ltd. subject to the restrictions and conditions imposed by the Land Company which were stated still to continue. Meanwhile Chapmans Ltd. had acquired all the other lots now owned by the appellants and also the lots now owned by the respondents. They acquired Lots 14, 17 and 18 from Bahamas Ltd., by a conveyance dated 3rd May 1939, Lots 15 and 16 from Albury by a conveyance dated 24th October 1939 and Lots 39 and 40 from Hilton by a conveyance dated 13th October 1939. All the said conveyances were expressed to be subject to the restrictions imposed by the Land Company. Chapmans remained the owners of all the said lots until 12th November 1951 when they conveyed Lots 13 to 18 of Block 3 (the lots now owned by the appellants) to Bahamian Industries Ltd. Their Lordships have only seen an abstract of this document. It would appear that it may have contained a recital referring to the restrictions; after describing the property sold by reference to the plan lodged with the Surveyor General the conveyance according to the abstract continued as follows:

> "TO HOLD the same unto and to the use of the Purchasers and their assigns in fee simple subject to the said restrictions and conditions imposed on the said hereditaments by the W. E. Brown Land Company Limited which said restrictions and conditions still continue and the Purchasers with the object and intention of indemnifying the Vendors in respect of the said restrictions and conditions but not further or otherwise thereby covenanted with the Vendors that the Purchasers and their assigns would thenceforth duly observe and perform the same and at all times indemnify the

> Vendors their successors and assigns against all actions claims and demands whatsoever in respect thereof so far as the same affected the hereditaments thereby assured and the Purchasers thereby specifically indemnified the Vendors their successors and assigns against any and all of the covenants restrictions and conditions so imposed upon the said hereditaments and premises as aforesaid and thereby agreed that the Vendors were not obliged to perform the covenants in respect of the said hereditaments and premises entered into by The W. E. Brown Land Company Limited with the purchasers of various lots of the Westward Villas Subdivision."

On 19th March 1954 Chapmans conveyed a number of the lots including Block 3 Lots 39 and 40 to Western Estates Ltd. This conveyance also referred to and was made subject to the restrictions. The respondents purchased Lot 39 and part of Lot 40 on 9th April 1962 from one Livingston who was a successor in title to Western Estates Limited and built a house on the property in which they have lived since then. The appellants bought Lots 13 to 18 on 17th January 1968 from Anjask Ltd. who were successors in title to Bahamian Industries Limited with the intention of building on it what they describe as a "service station" or "gas station" which would be operated by a tenant to whom they would lease it. At the front of the premises—the side furthest away from the respondents' property—there would be a row of petrol pumps; in the centre there would be a building part of which would be used for the repair of tyres; at the back—the side nearest to the respondents' property—there would be an open space covered by a canopy supported by columns with a hydraulic lift to raise cars for oiling and greasing. There would be room for four cars in this area three of which would be being washed while the other was being oiled and greased. There would be no room to store cars. Car engines would not be overhauled and no repair work of a serious character would be undertaken but only minor repairs—such as the fitting of a new windscreen wiper or the replacement of broken lamps. When the respondents learnt of the appellants' plan they issued their writ in this action on 22nd March 1968.

These being the facts their Lordships turn to consider the questions argued on the appeal. Condition 4 in the schedule to the printed form of conveyance is not well drafted but counsel for the appellants conceded, in their Lordships' view rightly, that its meaning is clear enough. In general the estate has to be purely residential. The common vendor was however given the right to allow lots on the northern side of Blocks 3 and 4 to be used for commercial purposes and to allow lots on the southern side of those blocks and the lots in Blocks 2 and 5 to be used as hotels or flats. But no lot was to be used even with the permission of the common vendor as a machine shop, public garage or manufacturing establishment. The answer which the appellants make to the respondents' claim to enforce this restriction is twofold. First they say that the building which they wish to erect if used for the purpose which they have in mind will not be a "public garage". Secondly they say that in any case the restrictions are not binding on them.

The "Public Garage" point

It is common ground that the question to be answered is not whether such an establishment would be called a "public garage" today but whether it would have been so described in 1925. Further it is not suggested that the words bore a different meaning in the Bahamas at that date from the meaning which they bore in this country. Reference is made in some of the judgments below to the definition of "garage" in the local Garages Licensing Act 1925 where the word is defined as "any premises used for the repair of vehicles for profit" but their

Lordships agree with Bourke J.A. that a definition for a particular statutory purpose does not really help one to determine the ordinary meaning of the word. In 1901 the Oxford English Dictionary did not contain the word "garage". In the supplement issued in 1933 it is said to mean "a building either private or public where motor vehicles are housed for storage or repairs and cleaning". No doubt in 1933—and also in 1925—petrol and oil would normally have been sold at garages but an establishment where the bulk of the receipts would come from the sales of petrol, where cars would not be housed for storage, and where only minor repairs would be carried out was probably unknown. Such establishments which are now very common can their Lordships think well be described as garages today. The appellants however submit that this is irrelevant. It is for the respondents to show beyond any reasonable doubt that what the appellants propose to do will be a breach of this covenant construed in the light of conditions prevailing in 1925 and that though if the framers of the restrictions had foreseen the emergence of "filling stations" they might well have prohibited them expressly it would be wrong to hold that a new type of business unknown in those days is caught by it. Many chemists—so the argument ran—sell cosmetics but a covenant not to carry on the business of a chemist would not be broken by the carrying on of the business of the sale of cosmetics. Similarly one cannot say that because in 1925 garages sold petrol as a small part of their business a business which substantially consists in the sale of petrol is a garage within the meaning of that word as then used. The respondents on the other hand say that the appellants exaggerate the differences between a garage business as understood in 1925 and a modern "filling station". The very fact that the word "garage" can properly be used to describe such establishments today shows that they are not a new type of business but simply a development of the old garage business. True it is that the sale of petrol looms larger than it did in the old days and that cars are not housed on the premises for storage but they are brought on to the premises for substantial periods for washing and greasing and the effecting of minor repairs. If someone had been asked in 1925 whether the premises which the appellants wish to build used for the purposes which they have in mind could fairly be called a "public garage" he would so the respondents say have said "Yes." The point is not altogether easy and their Lordships feel the force of the argument that it is for the respondents to satisfy the Court that the appellants will be committing a breach of the covenant but the judge of first instance and two of the three judges in the Court of Appeal had no doubt that they would be committing a breach of it. The question is not of course a pure question of fact but it is akin to a question of fact and on such a point their Lordships would not think it right to overrule the decision of both lower Courts unless they were satisfied that it was wrong. They are not so satisfied in this case.

Are the restrictions binding on the appellants?

The appellants conceded that were it not for the "unity of seisin" point to be referred to later the restrictions contained in the "Albury" conveyance in relation to lots 15 and 16 would be binding on them. They submitted, however, that Lots 13, 14, 17 and 18 were not in any case bound by the restrictions since the Ocean Company when it purchased the legal estate in these lots from the Land Company in 1935 had no notice of the existence of the restrictions and the fact that the Ocean Company itself may subsequently have acquired notice of them or that any of their successors in title had notice of them when they bought would be irrelevant once the chain had been broken. The onus

of showing that the Ocean Company were purchasers for value without notice lies, of course, on the appellants. The terms of the conveyance of 27th January 1939 previously referred to show that by that date the Ocean Company knew all about the restrictions and as in 1935 they were taking over from the Land Company all the unsold lots and buying them by reference to a plan which bore a note referring to restrictions it is their Lordships think extremely unlikely that they only came to know of the restrictions after they had purchased. It is, however, common ground between the parties—and is indeed recorded in the judgment of Archer J.A.—that in the course of the hearing in the Court of Appeal the respondents admitted that the Ocean Company had no actual notice of the restrictions when they bought the unsold lots in 1935. Their Lordships, therefore, must deal with this question of notice on what is to their minds a somewhat unrealistic hypothesis. But even if one assumes that the vendors did not disclose the existence of the restrictions and that the purchasers asked no questions about them and only got to know of them after they had purchased the very facts which make it so unlikely that they did not have actual notice are sufficient to give them constructive notice. Any prudent purchaser of a number of unsold lots on a building estate who is shown a plan which marks some of the lots "commercial" and others "apartments" and bears a note saying that the property is restricted to residence except where otherwise indicated would ask the vendor whether the lots which had been already sold had been sold subject to or with the benefit of any restrictions. If the Ocean Company had asked this question of the Land Company and had been given—as one must assume for this purpose that they would have been given—a true answer they would have learnt of the restrictions subject to and with the benefit of which the lots already sold had been conveyed to the various purchasers. The judges who were in the majority in the Court of Appeal held—rightly as their Lordships think—that the Ocean Company had constructive notice of the restrictions but they reached this conclusion not simply because of the nature of the plan by reference to which the unsold lots were sold but partly because they thought that if the Ocean Company had made proper searches under the Registration of Records Act 1928 they would have become aware of the existence of the restrictions. There is no system of Registration of Title in the Bahamas nor is there any law similar to our Land Charges Act 1925 under which restrictive covenants affecting unregistered land are registrable and if registered affect a purchaser with notice even if he fails to search. The local Registration of Records Act simply provides that certain classes of documents including conveyances of land may be recorded in the Register and (by s. 10) that if anyone conveys the same property twice over to different persons the conveyance first lodged for record shall have priority even if later in date. It appears that neither the Albury nor the Hilton conveyance was in fact recorded under the Act but at least one of the conveyances of lots sold before the purchase by the Ocean Company—namely a conveyance of Lot 31 in Block 4 made on 22nd March 1928 to one Butler—has been recorded. The argument for the respondents on this aspect of the case was that it was the duty of the legal advisers of the Ocean Company to search the register before the purchase of the unsold lots went through to see whether any previous conveyance by the Land Company of any of those lots was recorded, that for this purpose it was necessary for them to look at all recorded conveyances by the Land Company, and that had they done this they would have become aware of the terms of the Butler conveyance. To this the appellants replied that even if, which they did not admit, a purchaser was under any duty to conduct such a wide ranging enquiry as was suggested, the only interest of the Ocean Company in the Butler

conveyance would have been to see that it did not comprise any of the lots contracted to be sold to them and that they would not have been concerned with any restrictions contained in it. This point was not taken by the respondents in the Court of first instance and no evidence as to the conveyancing practice in the Bahamas with regard to searches under the Act was given. In the Court of Appeal two of the judges accepted the respondents' contentions but Archer J.A. rejected them commenting that it would be " alarming " if the advisers of the Ocean Company were under an obligation to search the register for all previous dispositions by the Land Company. As their Lordships see it it is not necessary for them to express any view one way or the other on this question.

Their Lordships now turn to the " unity of seisin " point which was the main ground upon which the appellants founded their contention that the restrictions were not binding on them. As stated above from 12th January 1942 until 12th November 1951 Chapmans Limited owned both the lots now owned by the respondents and also the lots now owned by the appellants. As soon as the two sets of lots came into the same hands it became impossible for any action to enforce the covenants to be brought by the owner of one set against the owner of the other since he was the same person and that fact, so the argument runs, put an end to the restrictions so far as concerned the relations of the two sets of lots *inter se*. As a preliminary to the exploration of this point there was apparently much argument in the Courts below and there was some argument before their Lordships as to whether there was here what is called in the books " a building scheme " or a " scheme of development ". In their Lordships' view there was clearly a scheme of development in this case. The Land Company prepared a plan (which incidentally is described as a plan of development) dividing their property into a number of lots, and filed that plan in a public office where it was open to inspection. They prepared a printed form of conveyance which recited that the estate had been laid out in lots for building purposes according to that plan and that the lots were being sold under the conveyances containing similar restrictions and in the body of the conveyance great pains were taken to do all that could legally be done to annex the benefit of the restrictions to every lot—sold or unsold—and to subject each lot—sold or unsold—to the burden of the restrictions so that the " local law " created by the restrictions should be mutually enforceable by and against all the owners for the time being of the lots. What was argued by the appellants on this aspect of the case was—as their Lordships understood—that the very fact that the Land Company had been at pains expressly to annex the benefit of the covenant to every lot precluded the scheme from being a " building scheme " in the legal sense. Their Lordships have no hesitation in rejecting that argument. Extraneous circumstances may indeed show the existence of a building scheme even though there is nothing on the face of the conveyances containing the covenants to indicate that they were to be mutually enforceable by the owners for the time being of a number of different lots but it certainly does not follow from that that there can be no " building scheme " if the conveyances do so indicate. In this connection it is interesting to observe that the precedent for a scheme of development contained in the standard text book (Preston and Newsom: Restrictive Covenants—5th ed. p. 86 and following) is drafted on the same lines as the common form conveyance used by the Land Company in this case. At this point it is convenient to clarify a point upon which there seems to have been some misunderstanding in the Court of Appeal. A passage in the judgment of Bourke J.A. suggests that he understood the contention of the

appellants to be that the fact that two or more lots came into the same hands would cause the whole scheme to collapse so that the owners of other lots would no longer be able to enforce the covenants. The appellants' argument as presented to the Board did not involve any such far reaching conclusion. According to it the covenant would continue to be enforceable by the owners of other lots against the owner of the lots in unity of seisin but if and when those lots came once more into different hands their respective owners—while remaining subject to and entitled to the benefit of the covenants as regards other owners—would not be entitled to enforce the covenants *inter se*. Another point which should be mentioned at this stage is that it was common ground between counsel that even if the covenants would *prima facie* become once more enforceable *inter se* by the owners of lots which had previously been in unity of seisin it was competent to the parties to the transaction which put an end to the unity of seisin to provide that the restrictions should no longer apply as between themselves. That this is so is shown by the case of *Knight v. Simmonds* [1896] 1 Ch. 653 at pages 660/661 and also by the part of the judgment of Parker J. in *Elliston v. Reacher* which deals with the claim of the plaintiffs other than *Elliston*—see [1908] 2 Ch. 374 at 393–395. Their Lordships would add that the same consequence may well flow from the surrounding circumstances even if there is nothing said in the conveyance which puts an end to the unity of seisin to indicate that the restrictions are no longer to apply as between the parties to it. Suppose, for example, that the owner of two adjoining houses subject to a scheme of development which forbad user for professional purposes started to use one of the houses for professional purposes and shortly afterwards sold it to someone who to his knowledge proposed to continue such user. In such circumstances the purchaser would run the risk of actions by other owners but any claim by the vendor as owner of the adjoining house to enforce the covenant would be a derogation from his grant even though the conveyance contained no express release of the purchaser from the restrictions in the scheme so far as concerned the vendor as owner of the adjoining house. The point of law which arises for consideration is therefore whether in a case where there is nothing in the conveyance putting an end to the unity of seisin or in the surrounding circumstances to indicate that the restrictions in the scheme are no longer to apply as between the owners of the lots previously in common ownership the fact that they have been in common ownership puts an end to the restrictions so far as concerns the relations of subsequent owners for the time being of that part of the estate *inter se* so that if the common owner of those lots wished them to apply after the severance he would have to reimpose them as fresh restrictions under a subscheme relating to them. It would their Lordships think be somewhat unfortunate if this was the law. In the last century at all events it cannot have been unusual when an estate was laid out for development in lots subject to restrictions intended to apply to all the owners of lots for the time being *inter se* for several adjoining lots to be bought by one builder who built houses on them which he sold to separate purchasers subject to the provisions of the scheme. It is most unlikely in such a case that the builder and the purchasers of his houses would have wished that the restrictions while enforceable by and against the owners of more distant properties should not be enforceable by the adjoining purchasers from the builder *inter se* yet if the appellants' contention is right they would not be so enforceable unless the builder as well as selling subject to the restrictions in the Head Scheme created a subscheme on similar terms in relation to his houses. Nor can their Lordships see any compelling considerations of principle leading to the conclusion for which the appellants contend. It is no doubt true that

if the restrictions in question exist simply for the mutual benefit of two adjoining properties and both those properties are bought by one man the restrictions will automatically come to an end and will not revive on a subsequent severance unless the common owner then recreates them. But their Lordships cannot see that it follows from this that if a number of people agree that the area covered by all their properties shall be subject to a "local law" the provisions of which shall be enforceable by any owner for the time being of any part against any other owner and the whole area has never at any time come into common ownership an action by one owner of a part against another owner of a part must fail if it can be shown that both parts were either at the inception of the scheme or at any time subsequently in common ownership. The view which their Lordships favour is supported by dicta of Lord Cozens-Hardy M.R. in *Elliston v. Reacher* [1908] 2 Ch. 665 at 673 and of Simonds J. in *Lawrence v. South County Freeholds Ltd.* [1939] 1 Ch. 656 at pages 677–683 but at the time when this case was heard by the Court of Appeal there was no decision on the point. Subsequently, however, in the case of *Brunner v. Greenslade* [1971] 1 Ch. 993 which raised the point Megarry J. followed those dicta. The appellants submitted that his decision was wrong but in their Lordships' view it was right.

Finally their Lordships must consider a point which was taken by counsel for the appellants before the Board though not taken below or mentioned in their "case"—namely that by the conveyance dated 12th November 1951 of Lots 13 to 18 of Block 3 by Chapmans Ltd. to Bahamian Industries Ltd. the parties agreed that the lots conveyed and the lots retained by Chapmans—which, of course, included the respondents' lots—should be released from the restrictions. Had this point been taken below their Lordships would no doubt have been supplied with a full copy of this document. As it is, as has been said, they have only an abstract. But construing the abstract as best they can they are of opinion that the conveyance did not refer to or relate in any way to the lots then retained by Chapmans Ltd. The provisions on which the appellants rely appear to be directed entirely to protecting Chapmans Limited from the consequences of any breach of the restrictions by Bahamian Industries Ltd. or their successors in title as owners of the lots sold. Such provisions were, of course, unnecessary since Chapmans Ltd. were not in direct contractual relations with any owners of other parts of the estate and could not be made responsible for anything done on the lots sold unless they participated in the breaches. But it is not at all unusual for conveyances to contain provisions which are unnecessary and it would be wrong to construe these provisions in an unnatural sense because read in their natural sense they are both unnecessary and repetitious. As part of his argument on this aspect of the case counsel for the appellants relied on the fact that the covenant by Bahamian Industries Ltd. to observe the restrictions was "by way of indemnity only". This, he submitted, was inconsistent with the idea that Chapmans Limited as owners of their unsold lots could enforce the restrictions against the covenantors even though no one else was making any claims against them by reason of the breach committed by the covenantors. Their Lordships agree that there is some force in this contention. It is, however, to be remembered that if Bahamian Industries Ltd. had entered into a direct covenant with their vendors to observe the restrictions even though Chapmans were in no need of an indemnity this covenant would have endured after Chapmans had parted with all their unsold lots and could have been enforced by Chapmans for reasons personal to themselves. Their Lordships cannot believe that if the parties had really intended to provide that the Land

Company's restrictions though still binding between the owners of Chapmans' lots and the owners of other lots were not to be binding between the owners of Chapmans' lots *inter se* they would have sought to achieve this result in such a roundabout and obscure fashion. In all probability their minds were not directed to the point at all. In the result therefore their Lordships conclude that the restrictions were binding on the appellants and that the respondents were entitled to an injunction. It was, however, common ground between counsel before the Board that the injunction was granted in too wide terms. In the first place it refers not only to a public garage but also to a gas station. Their Lordships have, of course, held that the building which the appellants wish to put up and the business which would be carried on there—which the appellants themselves describe as a "gas station"—would be within the covenant and it may well be that nothing which according to current usage could reasonably be described as a "gas station" would be permissible. But words change their meanings in course of time and the reference to a "gas station" which is not in the covenant should be deleted. Further the appellants are not threatening to carry on any prohibited trade or business other than that which their Lordships have held to be a "public garage". So the injunction should read after the words "the property of the defendant" as follows: "a public garage or from carrying on or permitting to be carried on on the said lots the business of a public garage in breach of the restrictive covenants etc.".

Their Lordships will humbly advise Her Majesty that subject to this amendment of the order the appeal should be dismissed and that the appellants pay to the respondents their costs of it.

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In the Privy Council

TEXACO ANTILLES LIMITED

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DOROTHY KERNOCHAN AND ANOTHER

DELIVERED BY

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