JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 11/94

COR: THE HON MR JUSTICE CAREY JA
THE HON MR JUSTICE GORDON JA
THE HON MR JUSTICE PATTERSON JA

BETWEEN	KEITH LAMB	APPELLANT
A N D	MIDAC EQUIPMENT LTD	
A N D	TERRA NOVA (1982) LTD	RESPONDENTS

C.M.M. Daley & Miss Yvonne Ridgard for appellant

Miss Hilary Phillips & Mrs Denise Kitson for Midac Equipment Ltd

11th, 12th, 13th December 1995 & 12th February 1996

CAREY JA

This is an appeal from an order of Langrin J dated 28th January 1994 in which he declared as follows, that:

> "1. The Parcel of land now known as 10 Merrick Avenue, is not affected by the restrictions imposed by Instrument of Transfer numbered 70876.
>
> 2. Upon the true construction of the said Instrument of transfer the nature and extent of the restrictions thereby imposed are personal only and are only enforceable by the original covenantor and convenantee."

Accordingly, the question raised on this appeal is whether the covenants imposed on the respondents' land, are personal and therefore unenforceable except by the original parties or are restrictive and therefore enforceable by assigns.

It is necessary then to rehearse the conveyancing history as respects the parcel of land owned by that respondent which is represented before us. Frank Merrick Watson who was the registered proprietor of some five acres of land being part of Terra Nova and registered at Volume 480 Folio 51, subdivided the same into 12 lots of land, two of which are relevant to these proceedings and were transferred to Mary C. Christie and Hubert A. Lowe et ux respectively. The respective lots were registered at Volume 477 Folio 90, and at Volume 479 Folio 78. Mary Christie is the pre-decessor in title to the respondent Midac Equipment, the present proprietor. There were, I should point out, intervening transfers before the respondent acquired ownership. The appellant, on the other hand, is the registered proprietor of the lot formerly owned by Hubert Lowe et ux and similarly there were intervening transfers. A number of covenants which it is irrelevant to recite, were endorsed on the respective titles. The important question will be whether those covenants whatever their content, were validly annexed to the respective parcels of land. It might not be amiss to remark, however, that similar covenants were endorsed on the respective titles.

In order to validly annex the benefit of a covenant to land, apt words must be used, and is usually done by express words in the instrument creating the covenants. It is true as well to say that annexation is not constituted solely by use of a prescribed formula, but could be so constituted by intention ascertained from the surrounding facts at the time of the sale. See Jamaica **Mutual Life Assurance Society v Hillsborough Ltd &** Ors. [1989] 38 WIR 192 where the Privy Council held that there were neither apt words in the relevant conveyance nor was there evidence of intention at the time of the sale. Their Lordships cited with approval dicta of Hall VC in **Renals v Cowlishaw**

[1878] 9 Ch D 125 at p. 130 and of Farwell J in **Rogers v Hosegood** [1900] 2 Ch 388 at p. 408 where the latter said:

> "... When, as in **Renals v Cowlishaw** there is no indication in the original conveyance, or in the circumstances attending it, that the burden of the restrictive covenant is imposed for the benefit of the land reserved, or any particular part of it, then it becomes necessary to examine the circumstances under which any part of the land reserved is sold, in order to see whether a benefit, not originally annexed to it, has become annexed to it on the sale, so that the purchaser is deemed to have bought it with the land, ..."

In the instant case Mr Daley began by saying that the covenants ran with the land because they were annexed to the land by virtue of words of annexation. He however resiled from that stance and essayed an argument that such words were not necessary by reason of section 61 of the Conveyancing Act. That provision reads:

> "**61.**- (1) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.
>
> (2) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators and assigns, and shall have effect as if executors, administrators and assigns were expressed.
>
> (3) This section applies only to covenants made after the commencement of this Act."

With all respect to Mr. Daley, this section of the Act is no more than a deeming provision which obviates the need to use certain designations in the circumstances stated. The provision is not, in my judgment, concerned with words of annexation. But more to the point, nothing in the Conveyancing Act applies to land brought under the

operation of the Registration of Titles Act. See section 2 Conveyancing Act. We are in this appeal concerned with land brought under its operation. The learned editor of Preston & Newsom (5th edition) in dealing with the appropriate words, says this at pp. 13-14 of that work and I accept this as representing the law:

> "... There are two familiar methods of indicating in a covenant of this kind the land in respect of which the benefit is to enure. One is to describe the character in which the covenantee receives the covenant ... a covenant with so-and-so, owners or owner for the time being of whatever the land may be. Another method is to state by means of an appropriate declaration that the covenant is taken 'for the benefit of' whatever the lands may be.' "

A reference to the transfer in this matter between the original covenantee and original covenantor, viz, Frank Merrick Watson and Mary Connelly Christie, shows the following endorsement regarding the covenants imposed:

> " And the said Mary Connelly Christie covenants with the said Frank Merrick Watson his heirs executors administrators transferees and assigns to observe the restrictive covenants set out in the schedule hereto."

The clause does not, as Miss Phillips pointed out, speak to the covenantee as being owner of any remaining land nor does it speak to the covenants enuring for the benefit of any remaining lands. Far from bringing about annexation to benefit the property of the covenantee, it has created covenants which, in my opinion, would be of use to the covenantee for the protection of his property in his own lands and enabling him to dispose of the property advantageously in the future. Such a covenant is not annexed as was pointed out by Sargant J in **Chambers v Randall** [1923] 1 Ch 149 at p. 155. Where the covenants are not annexed, then they are personal, and thus enforceable

only between the original covenantor and covenantee, not subsequent purchasers or transferees.

The conclusion is in my view inescapable, that on the sale and transfer of the land by Frank Merrick Watson to Mary Connelley Christie, the covenants imposed, were not validly annexed to the land.

I turn next to consider the appellant's position. He is the present successor in title of the parcel of land originally transferred to Hubert Lowe by Frank Merrick Watson. That lot was registered at Volume 479 Folio 78. The endorsement of the incumbrances to which the lot was subject reads:

> "The abovenamed Hubert Adolphus Lowe and Ivy his wife covenant with Frank Merrick Watson the registered proprietor of the remaining land comprised in Certificate of Title registered in Volume 480 Folio 51 above mentioned his heirs executors administrators transferees and assigns to observe the following restrictive covenants."

The language used is in all material respects similar to that endorsed on the registered title of Mary Christie at Volume 477 Folio 90. Again there are no apt words of annexation. Appropriate words for this purpose must show that the burden of the restrictive covenant is imposed for the benefit of the land reserved. The appropriate words are firstly "to the intent that the burden of this covenant may run with and bind the land hereby conveyed and every part thereof." The words are necessary to demonstrate the intention that the covenants shall relate to the land of the covenantor and shall not be merely personal. And secondly they are - "and to the intent that the benefit thereof may be annexed to and run with - the land of the vendor remaining unsold": **Rogers v Hosegood** (supra). Annexation is also possible as the result of some subsequent instrument executed by the vendor. As **Reid v Bickerstaff** [1909] 2

Ch 305 shows it is sufficient if the benefit of the covenant has been annexed to the land at the date of the later conveyance, but it was never suggested by Mr. Daley that annexation occurred as a result of any later conveyance.

Miss Phillips in developing her argument as to the absence of words of annexation, relied on a statement from **Preston & Newsom** (5th edition) p. 13, where the learned editor stated as follows:

> "There are three, and only three, ways in which a plaintiff not being the original covenantee, can become entitled to the benefit of a restrictive covenant.
>
> A. He may be an assign of land to which the benefit of the covenant is annexed.
>
> B. He may be an express assign of the benefit of the covenant, and of some or all of the land for the protection of which it was taken.
>
> C. Both he and the defendant may own land subject to a scheme of reciprocal rights and obligations.
>
> There is no fourth class."

She argued that the respondent did not fall into any of these categories. Mr. Daley for his part faintly argued annexation but suggested that the parties to the appeal owned land which was subject to a building scheme that is, "C" above. He did not attempt to argue that the appellant was an assignee of any land to which the benefit of the covenants is annexed. The instruments of transfer neither to Mary Christie nor to Hubert and Ivy Lowe contained any express assignment to them or any of them of the benefit of the covenants.

Was there a building scheme?

Mr. Daley contended that what he termed the original scheme is when Merrick Watson subdivided his five acres, and that constituted a building scheme. He said:

(i) that the land was properly identified

(ii) the land was sold by a common vendor

who imposed covenants which were consistent only with land for purposes of building, and

(iii) there was reciprocity of obligations every pushaser had an obligation which he could enforce and could be enforced against him.

He said that when each purchaser bought, he knew that the covenants bound others in the sub-division, and that there was a plan deposited which contained conditions of approval granted under the Local Improvements Act. Actual notice to the respondent was irrelevant because it is fixed with notice by operation of the Registration of Titles Act, section 126. Once the original purchaser knew there was a building scheme, then subsequent proprietors were fixed with knowledge.

Miss Phillips said that the conditions required to establish a building scheme were not complied with. She relied on dicta of Buckley LJ in **Reid v Bickerstaff** [1908-10] All ER 298 at p. 302 where the learned Lord Justice pointed out that:

> "... There can be no building scheme unless two conditions are satisfied - namely, first, that defined lands constituting the estate to which the scheme relates shall be identified; and, secondly, that the nature and particulars of the scheme shall be sufficiently disclosed for the purchaser to have been informed that his restrictive covenants are imposed upon him for the benefit of other purchasers of plots within that defined estate with the reciprocal advantage that he shall, as against such other purchasers, be entitled to the benefit of such restrictive covenants as are in turn to be imposed upon them. Compliance with the first condition identifies the class of persons as between whom reciprocity of obligation is to exist. Compliance with the second discloses the nature of the obligations which are to be mutually enforceable. There must be as between the several purchasers community of interest and reciprocity of obligation."

There is a belief that the coincidence of a common vendor and the existence of common covenants implies a building scheme but as Goff J (as he then was) made clear in **Re Wembley Park Estate Co Ltd's Transfer London Shephardi Trust v Baker & Ors.** [1968] 2 WLR 500, "no case goes that far." In **Reid v Bickerstaff** (supra) Cozens-Hardy MR provided some assistance in regard to the nature of a building scheme. At p. 300, he said this:

> "... what are some of the essentials of a building scheme? In my opinion, there must be a defined area within which the scheme is operative. Reciprocity is the foundation of the idea of a scheme. A purchaser of one parcel cannot be subject to an implied obligation to purchasers of an undefined and unknown area. He must know both the extent of his burden and the extent of his benefit. Not only must the area be defined, but the obligations to be imposed within that area must be defined. Those obligations need not to be identical. For example, there may be houses of a certain value in one part, and houses of a different value in another part. A building scheme is not created by the mere fact that the owner of an estate sells it in lots and takes varying covenants from various purchasers. There must be notice to the various purchasers of what I may venture to call the local law imposed by the vendors upon a definite area."

Both these cases were cited with approval in **Jamaica Mutual Life Assurance Society v Hillsborough Ltd & Ors** (supra) where the Privy Council held that none of the conditions for establishing a building scheme existed on the facts of that case. It cannot therefore be enough for the purposes of this appeal to pin any faith in the fact that Merrick Watson is the common vendor and imposed common covenants on the two lots he sold to Mary Christie and Hubert Lowe as Mr. Daley appears to be arguing. What is essential to be shown as well, is that the purchasers had notice that they

defined portion thereof for sale in lots subject to restrictions intended to be imposed on all the lots and consistent with some general scheme of development, and that the restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold. Where the purchaser acquires the lot in ignorance of any of the factors enumerated above, then, it may not be possible to establish a fourth factor, viz, that both purchasers or their predecessors in title, purchased their lots from the common vendor on the basis that the restrictions subject to which the purchases were made, were to enure for the benefit of the other lots retained by the vendors.

Such material as there is, does not persuade me that the purchasers had such notice as I have intimated that they should have. The court is entitled to look at the contract and not only at the conveyances. These documents should provide a purchaser with notice of what Cozens-Hardy MR ventured to describe as the local law imposed by the vendor upon a definite area. In the conveyance by the common vendor to the purchaser of a plot, there should be recitals of intention and the fact that the lots are being laid out for development as a building scheme. Whether a building scheme has been created in the absence of express statement or direct evidence of such intention, can only be inferred from such evidence of intention as come within rules laid down in **Elliston v Reacher** [1908] 2 Ch 374.

When one looks at the language which has previously been set out, creating the covenants in the transfer between Frank Merrick Watson and Mary Christie, it is inconsistent with any intention that the restrictive covenants should enure for the benefit of any or which other plots or on any and what other lands of the vendor. At all events all we have is the registered title showing the land was subdivided and the transfers to the original purchasers are conspicuously silent as to reciprocity of rights

and obligations. I derive comfort from the words of Green MR in **White v Bijou Mansions Ltd.** [1938] 1 Ch 351 at p. 362 where he said:

> "... there are certain matters which must be present before it is possible to say that covenants entered into by a number of persons, not with one another, but with somebody else, are mutually enforceable. The first thing that must be present in my view is this, there must be some common regulations intended to apply to the whole of the estate in development. When I say common regulations, I do not exclude, of course, the possibility that the regulations may differ in different parts of the estate, or that they may be subject to relaxation. The material thing I think is that every purchaser, in order that this principle can apply, must know when he buys what are the regulations to which he is subjecting himself, and what are the regulations to which other purchasers on the estate will be called upon to subject themselves. Unless you have that, it is quite impossible in my judgment to draw the necessary inference, whether you refer to it as an agreement or as an community of interest importing reciprocity of obligation."

There was absolutely no evidence that every purchaser in the sub-divided land, knew what were the regulations to which he was subjecting himself and what were the regulations to which other purchasers would be subjecting themselves. Contrary to the opinion of Mr. Daley, in the absence of this knowledge, it is impossible to draw the necessary inference of a community of interest importing reciprocity of obligations.

Moreover, the statutory provision (section 126 Registration of Titles Act) to which Mr. Daley referred us, does not in my view, have any bearing on determining whether a building scheme exists. That provision places a duty on a proprietor subdividing land, to deposit a map properly delineating roads, streets and the like and the several allotments with symbols. I have said enough, I venture to think, to

demonstrate that no building scheme ever existed and for this reason as well, the covenants are personal and could only be enforced by the original covenantor and convenantee.

It follows from what has been adumbrated above, that I fully and entirely agree with the reasoning and conclusion of Langrin J and would affirm his judgment. I would accordingly dismiss the appeal with costs to the respondent to be taxed if not agreed.

GORDON JA

I have read the draft judgments of Carey and Patterson JJ A. I agree the appeal must be dismissed.

PATTERSON, J. A.

Midac Equipment Limited ("Midac"), a company duly incorporated in Jamaica, with registered offices at 10 Merrick Avenue, Kingston 10, in the parish of St. Andrew, by an action commenced by notice of motion supported by affidavit, moved the court below under the provisions of section 5 of the Restrictive Covenants (Discharge and Modification) Act to declare:-

> 1. "Whether all that parcel of land now known as 10 Merrick Avenue part of Terra Nova Number Seventeen Waterloo Road, and being the land comprised in Certificate of Title registered at Volume 477 Folio 90 of the Register Book of Titles is affected by the restrictions imposed by Instrument of Transfer numbered 70867.
>
> 2. What, upon the true construction of the said Instrument of Transfer, is the nature and extent of the restrictions thereby imposed and whether the same are enforceable, and if so, by whom"

Midac is the registered proprietor in fee simple of land comprised in certificate of title registered at Volume 477 Folio 90 of the Register Book of Titles, having acquired title thereto by transfer on the 20th July, 1981. This land is the lot numbered 9 on the plan known as numbers 13, 15 and 17 Waterloo Road in the parish of St. Andrew, being a part of the land comprised in certificate of title registered at Volume 480 Folio 51 of the Register Book of Titles.

The land comprised in certificate of title registered at Volume 480 Folio 51 contained by survey five acres one rood five perches and four tenths of a perch

and on the 12th February, 1947, Frank Merrick Watson was the registered proprietor in fee simple thereof. The certificate of title disclosed he sub-divided that plot of land into thirteen lots, and between the 24th March, 1947 and the 6th November, 1947, he transferred each and every lot to various proprietors. Watson's land was a part of the land comprised in certificate of title registered at Volume 133 Folio 98 and was subject to the incumbrances notified on the certificate of title which are in these terms:-

> "The above named Frank Merrick Watson for himself his heirs personal representatives and transferees covenants with Joseph Blackwell the registered proprietor of the remaining land comprised in Certificate of Title registered in Volume 133 Folio 98 abovementioned, his heirs personal representatives and transferees as follows:".

Three stipulations follow

Watson transferred lot 9 to Mary Connelley Christie and on 15th April, 1947 she was registered as the proprietor thereof at Volume 477 Folio 90,and by the instrument of transfer, the said "Mary Connelly Christie" covenanted "with the said Frank Merrick Watson his heirs executors administrators transferees and assigns to observe the restrictive covenants" set out in the schedule to the said instrument of transfer No. 70867 dated the 3rd April, 1947. The certificate of title recites that Mary Connelley Christie is now the proprietor of an estate in fee simple and "subject to the incumbrances notified hereunder" in the parcel of land, and the incumbrances notified are those contained in the instrument of transfer which are in these terms:-

> "The abovenamed Mary Connelley Christie covenants with Frank Merrick Watson the registered proprietor of the remaining land comprised in Certificate of Title registered in Volume 480 Folio 51 abovementioned his heirs executors administrators transferees and assigns to observe the following restrictive covenants:"

Ten covenants follow

Watson transferred lot 1 to Hubert Adolphus Lowe and Ivy, his wife by instrument of transfer on the 15th April, 1947 and they were registered as the proprietors thereof at Volume 479 Folio 78. Their certificate of title shows that they also covenanted -

> "with Frank Merrick Watson the registered proprietor of the remaining land comprised in Certificate of Title registered in Volume 480 Folio 51 abovementioned his heirs executors administrators transferees and assigns to observe the following restrictive covenants:"

Ten covenants follow, which are identical in terms to those noted in the certificate of title registered at Volume 477 Folio 90. This parcel of land was eventually transferred to Keith Rutherford Lamb on the 4th February, 1972. The certificate of title registered at Volume 477 Folio 78 was cancelled on the 29th March, 1978 and a new certificate of title (in duplicate)in lieu thereof was registered at Volume 1146 Folio 968. That Certificate of Title notes that Keith Rutherford Lamb "is now the proprietor of an estate in fee simple subject to the incumbrances notified hereunder" in the parcel of land, and the incumbrances notified thereon are as follows:

> "Hubert Adolphus Lowe and Ivy his wife the former registered proprietors Covenant with Frank Merrick Watson the registered proprietor of the remaining land comprised in Certificate of Title registered in Volume 480 Folio 51 abovementioned his heirs executors administrators transferees and assign to observe the following restrictive covenants."

Ten covenants follow.

In the court below, Midac contended that the instrument of transfer no. 70867 - Watson to Christie, did not annex the benefit of the restrictive covenants noted therein to any particular parcel of land, and that the covenants imposed by Frank Merrick Watson in the said instrument of transfer to Mary Connolley Christie, the predecessor in title to Midac, were personal covenants, enforceable against the original covenantor only, i.e. Mary Connolley Christie, by the original covenantee, Frank Merrick Watson, his heirs executors administrators transferees and assigns. Keith Rutherford Lamb claimed entitlement to the benefit of the restrictive covenants on the basis of being "a transferee of parts of the remaining extent of the land comprised in Certificate of Title registered at Volume 480 Folio 51", and also on the basis that the covenants were "imposed as a condition for the subdivision of the land comprised in the plan of Nos. 13, 15 and 17 Waterloo Road which covenants are entered on the Certificate of Title in respect of the Applicant's land as well as on the Certificate of Titles in respect of my own lands", In other words, he is contending that both parcels of land are part of a building scheme to which

restrictive covenants were annexed and he is therefore entitled to the benefit of such restrictive covenants.

Langrin J. who heard the motion, made the following declarations:

> "(1) The Parcel of land now known as 10 Merrick Avenue, is not affected by the restrictions imposed by Instrument of Transfer numbered 70867.
>
> (2) Upon the true construction of the said Instrument of transfer the nature and extent of the restrictions thereby imposed are personal only and are only enforceable by the original covenantor and covenantee,
>
> Because
>
> (a) the benefit was not expressly annexed to any other land
>
> (b) the covenants imposed did not enure for the benefit of any other lands.
>
> (c) the original covenantee did not assign the benefit of the covenant.
>
> (d) there was no building scheme in evidence at the time when the convenants were imposed."

The main thrust of Mr. Daley's argument before us was centered on what he said was the failure of the learned trial judge to recognise that Frank Merrick Watson had created a building scheme by the subdivision of the land comprised in the plan of nos. 13, 15 and 17 Waterloo Road. He contended that implicit in the subdivision there is a building scheme because (l) the land is identified, (2) there is a common vendor who imposed covenants that are consistent only with a building scheme,(3) there is reciprocity of obligations between the purchasers

of the various lots, which are enforceable. He buttressed his argument by referring to the fact that the covenants imposed by Watson on the lots purchased by Christie and Lowe were identical. Counsel submitted that "the covenants imposed by Watson on the respondent's predecessors in title are enforceable by all the other owners of land in the building scheme, irrespective of whoever hands those lands passed, until discharged or modified partially or wholly". He submitted further that the covenants are annexed to the land by virtue of the express words of annexation which appear in the instrument of transfer.

The questions raised in the motion were not without difficulty, but it appears to me that the first issue to be decided is whether the restrictive covenants entered into between Frank Merrick Watson and the original transferee Mary Connolley Christie run with and bind the land or whether a mere personal contract was created. If they bind the land, then in equity they would pass with the land to subsequent assignees and would be enforceable against an assignee of the covenantor lot, unless he is a bona fide purchaser for value without notice, but if a mere personal contract was created between the vendor and the purchaser, mere assignment of the land would not operate to pass the burden of the covenants .

Where it is intended that the covenant shall bind the freehold land of the covenantor, and shall not be merely personal, then the instrument of conveyance will usually include the binding words expressing the intention. The usual form of words are these:

> "The purchaser for himself his heirs executors administrators and assigns

> hereby covenants with the vendor, his heirs, executors and administrators and assigns, to the intent that the burden of this covenant may run with and bind the land hereby conveyed and every part thereof.'

But even where the usual form of binding words are omitted from the instrument of conveyance, the intention may be implied. There are three cardinal factors that must co-exist for a covenant to run with and bind freehold land, (1) the covenant must control the use of the land by the covenantor (2) the observance of it must be of benefit to the land retained by the covenantee, and most importantly, (3) the original contracting parties must have intended that they shall run with and bind the land of the covenantor.

In the instant case, the instrument of transfer which created the covenants stipulated therein, does not contain the usual binding words to show that the covenants were intended to run with and bind the land of the covenantor, nor can any such intention be gathered from the document. I agree with the submission of Miss Phillips that in the event a mere personal covenant was created. The covenants will not be enforceable against Midac, an assign of the covenantor except for the benefit or protection of land capable of being benefitted by them. Where neither the plaintiff nor the defendant in an action to enforce the covenant is the original covenantee or covenantor, as in the instant case, and the burden has not passed to the assignee of the covenantor nor the benefit to the assignee of the covenantee, the plaintiff will not succeed in his action.

The benefit of a restrictive covenant may be enforced by a person who is not the original covenantee if he falls within any one of the following classification of persons:

> (1) He is an assign of the land to which the benefit of the covenant had been annexed, either expressly or by necessary implication
>
> (2) He is an express asssign of the benefit of the covenant and of some or all of the land for the protection of which it was taken
>
> (3) He is interested in land in an area subject to a scheme involving reciprocity of benefits and obligations.

(See Jamaica Mutual Life Assurance Society v Hillsborough Ltd & ors [1989] 1 W.L.R. 1104).

Counsel for Lamb, although submitting that the restrictive covenants imposed by the instrument of transfer under review were annexed to the land of Midac and runs with the land, failed to show the way in which the benefit of the covenants were annexed to the parcel of land of which Lamb was an assign. Annexation is a matter of intention which can be gleaned from either the express words of intention in the conveyance or by necessary implication, and there were no words in the instrument of transfer or any other evidence to support a finding that Lamb was entitled to the benefit of the covenants by assign of the land.

Counsel for Lamb did not contend that Lamb was the express assign of the benefit of the covenants. However, he submitted at length that Watson had created a building scheme within an area where Lamb's predecessor in title was the purchaser of a lot of the land, and as such, Lamb was entitled to the benefit of the covenants.

The well established pre-requisites of a building scheme were emphasized by their Lordships' Board in **Jamaica Mutual Life Assurance Society v Hillsborough Ltd & Ors.** (supra) (following a long line of cases from **Renals v Cowlishaw** (1878) 9 Ch. D. 125) as being:

> "(1) the identification of the land to which the scheme relates, and
>
> (2) an acceptance by each purchaser of part of the land from the common vendor that the benefit of the covenants into which he has entered will enure to the vendor and to others deriving title from him and that he correspondingly will enjoy the benefit of covenants entered into by other purchasers of part of the land.
>
> Reciprocity of obligations between purchasers of different plots is essential."

In the instant case, both Christie and Lowe et ux purchased land from a common vendor, Watson, and the covenants entered into by Christie and Lowe et ux are identical, having regard to the incumbrances indorsed on their respective instrument of transfer. But that is not enough to establish a building scheme. This was laid down by Cozens-Hardy M.R. when he said in **Reid v. Bickerstaff** [1909] 2 Ch. 305 at 319:

> "What are some of the essentials of a building scheme? In my opinion there must be a defined area within which the scheme is operative. Reciprocity is the foundation of the idea of a scheme. A purchaser of one parcel cannot be subject to an implied obligation to purchasers of an undefined and unknown area. He must know both the extent of his burden and the extent of his benefit. Not only must the area be defined,

> but the obligations to be imposed within that area must be defined. Those obligations need not be identical. For example, there may be houses of a certain value in one part and houses of a different value in another part. A building scheme is not created by the mere fact that the owner of an estate sells it in lots and takes varying covenants from various purchasers. There must be notice to the various purchasers of what I may venture to call the local law imposed by the vendors upon a definite area." (emphasis supplied).

What then was the evidence before the learned judge? The instrument of transfer which Watson and Christie executed on the 3rd April, 1947, recited that the estate and interest being transferred was :

> "ALL THAT parcel of land part of "Terra Nova" number seventeen Waterloo Road in the parish of Saint Andrew and being the lot numbered nine on the Plan known as numbers 13, 15 and 17 Waterloo Road in the parish of St. Andrew prepared by H.G.Walker, Commissioned Land Surveyor from a survey commenced on the 6th day of October, 1945, deposited in the Office of the Registrar of Titles on the 17th day of January, 1946, of the shape and dimensions and butting as appears by the said Plan and being a portion of the lands comprised and described in the said Certificate of Title registered at Volume 480 Folio 51 of the Register Book of Titles subject to the incumbrances more particularly set out in the schedule hereto."

In my view, Christie must have been aware that she was purchasing a lot within a defined area. The instrument of transfer made it quite clear. But what is absent from the instrument of transfer are words which would convey to Christie that the restrictive covenants exacted from her were imposed by

Watson not for his own benefit and protection, but were meant by him for the benefit of all purchasers in a scheme. There is nothing to say that the original purchasers of the lots knew that it was the intention of Watson that each would be bound by covenants, the benefit of which would enure not only to all the others, but to their heirs, personal representatives, and assigns. Nor was there any extrinsic evidence from which a scheme could be inferred. The only conveyances in evidence were that under review, and that of Watson to Lowe et ux, both dated 3rd April, 1947, and in my view, their production was not enough to establish from their form that a scheme was intended by Watson. It is clear that other instruments of transfer were executed in respect of the several other lots, but there is no evidence as to whether or not they too contained restrictive covenants, and if so in what terms. What Buckley L.J. said in **Reid v Bickerstaff** (supra) was approved by their Lordships' Board in **Jamaica Mutual Life Assurance Society v Hillsborough Ltd.& ors** (supra), and is true today as it was then. This is what was said:

> "There can be no building scheme unless two conditions are satisfied, namely first, that defined lands constituting the estate to which the scheme relates shall be identified, and secondly, that the nature and particulars of the scheme shall be sufficiently disclosed for the purchaser to have been informed that his restrictive covenants are imposed upon him for the benefit of other purchasers of plots within the defined estate with the reciprocal advantage that he shall as against such other purchasers be entitled to the benefit of such restrictive covenants as are in turn to be imposed upon them. Compliance with the first condition identifies the class of persons as

> between whom reciprocity of obligations is to exist. Compliance with the second discloses the nature of the obligations which are to be mutually enforceable. There must be as between the several purchasers community of interest and reciprocity of obligation."

Greene M.R. expressed a similar view when in **White v Bijou Mansions Ltd.** [1938] 1 Ch.351 at 362 he said:-

> "...There are certain matters which must be present before it is possible to say that covenants entered into by a number of persons, not with one another, but with somebody else, are mutually enforceable. The first thing that must be present in my view is this, there must be some common regulations intended to apply to the whole of the estate in development. When I say common regulations, I do not exclude, of course, the possibility that the regulations may differ in different parts of the estate, or that they may be subject to relaxation. The material thing I think is that every purchaser, in order that this principle can apply, must know when he buys what are the regulations to which he is subjecting himself, and what are the regulations to which other purchasers on the estate will be called upon to subject themselves. Unless you have that, it is quite impossible in my judgment to draw the necessary inference, whether you refer to it as an agreement or as a community of interest importing reciprocity of obligation".

This principle was undoubtedly accepted by their Lordships in **Jamaica Mutual Life Assurance Society v Hillsborough Ltd. & ors.** (supra) to be essential in establishing the existence of a scheme of reciprocal rights and

Applying this principle to the facts of the present case, I find no

evidence to suggest that Christie knew that similar restrictions had been placed on the other purchasers of lots in the estate and that she assumed an obligation to those other purchasers and not to Watson alone, nor is there evidence that Christie acquired the benefit from similar obligations exacted from other purchasers. In short, the evidence points to a case where Watson took from Christie restrictive covenants for his own purposes, and there is nothing to show annexation to the land of the covenants given by Christie and there is no enforceable right in Lamb against Midac for any breach of the restrictive covenants. The restrictive covenants, being personal can be enforced only against the original covenantor, Mary Connelley Christie by the original covenantee Frank Merrick Watson or his heirs, executors, administrators, transferees and assigns, but since Christie has transferred her interest in the land, equity would not, in this case, enforce the covenants against Midac, an assign of Christie, even at the suit of Watson or his assign.

In my judgment, this appeal must fail for the reasons I have given. The declarations of the learned judge below are in my view correct. I too would dismiss the appeal with costs to the respondent Midac to be taxed if not agreed.