



MORE ON RESTRICTIVE COVENANTS - THE PRIVY COUNCIL DECISION

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This is a follow up on an article written by Donna Samuels of DunnCox which looked at the implications for enforceability of restrictive covenants arising from the Privy Council decision in the case of Half Moon Bay Limited and Crown Eagle Hotels Limited.

This case has implications not only for restrictive covenants but for any other incumbrances which may affect the root of registered title.

Defect in the chain of events on a root of title could result in a person having a title which looks perfect on the face of it but is defective because of some irregularity in a previous transaction such as fraud or improper payment of stamp and transfer tax.

In the United States the risk of a defect in title faced by banks, financial institution and individuals has been met by the creation of title insurance to cover the possibility of entities or persons paying out sums of money only to find out that the security is defective and of no use or the transfer invalid.

The Registration of Titles Act in Jamaica was taken from the Torrens System of land law in Australia which was designed to eliminate problems from previous transaction affecting current purchasers for value in land transactions. There is no title insurance readily available in our jurisdiction such as it is in the United States of America. The Assurance Fund created under the Registration of Titles Act does however provide limited compensation in certain circumstances.

The general features of the Torrens System is that incumbrances must be entered on the title and anyone who acquires title in good faith from a registered proprietor obtains an indefeasible title subject to the incumbrances entered on the title but free from incumbrances not so entered whether he had notice of them or not.

In the case mentioned above , the Lawlords emphasized this position in their judgment by reciting sections 70 and 71 of the Registration of Titles Act which states:

“70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, *but absolutely free from all other incumbrances whatsoever ...*”

“71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.”

This means that for incumbrances to be enforceable they must be registered on the title. It is not sufficient to write them in a transfer and expect to enforce them in later transactions.

The law recognises the importance of making land transactions straightforward and the fact that it is not practical to be searching reams of past transactions to ascertain what are the incumbrances on a title.

This decision also has implications for easements or water rights which are not obvious or entered on the title.

This case may also have implications on how banks and other institutions treat dealing with a title before receiving confirmation that the entries have been made to the title.

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