IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

CLAIM NO. ERC 10/2002

IN THE MATTER of ALL THAT Parcel of land known as No. 10 Durie Drive, Kingston 8, in the parish of Saint Andrew being:

ALL THAT parcel of land part of CHERRY GARDENS and ACADIA in the parish of Saint Andrew containing by survey Fourteen Thousand One Hundred and Sixty Seven Square feet and Ninety Hundredths of a square foot and being the land comprised in Certificate of Title registered at Volume 1246 Folio 932 of the Register Book of Titles.

AND

THAT parcel of land part of AYLSHAM HEIGHTS IN THE PARISH OF Saint Andrew being the Lot numbered TWO on the plan of AYLSHAM HEIGHTS aforesaid deposited in the Office of Titles on the 12th day of April, 1966 of the shape and dimension as appears by the said plan and being the land comprised in Certificate of Title registered at Volume 1026 Folio 164 of the Register Book of Titles.

D. Satterswaite instructed by K. Phipps for the Applicants

M. Wong and L. Russell instructed by Myers Fletcher & Gordon for the Respondent

Heard: March 4, 5, 6, and July 11, 2008

Beswick J

Injunction – Consent Order – Variation/Discharge

1. Mr. Harold Morrison obtained an injunction preventing Mr. and Mrs Frank Phipps (the Phippses) from subdividing their land at Durie Drive, St. Andrew. The injunction was based on a Consent Order which amended certain restrictive covenants concerning the Phippses land.

2. There is a plan now to construct a multi-unit development project on that land and therefore, by these proceedings, the Phippses seek to have the injunction discharged and the Consent Order discharged or varied. I refuse their application. My reasons follow.

Background

3. On April 3, 1990 the Phippses transferred one of the lots of their land at Durie Drive, St. Andrew to Mr. Harold Morrison (the Morrison's land). Adjoining this land were two other lots of land which belonged to the Phippses, and which were separated from each other by a gully. One lot had no access to the road (the gully land). The second lot (the Phipps' land) was held as one holding with the gully land, and had access to the road.

4. The gully land and the Phipps' land each had its own title. The title of the gully land contained restrictions on subdivision of the land. The title of the Phipps' land did not restrict subdivision but was concerned with discharge of water and the location of buildings, inter alia.

5. In 2002, the Phippses applied for a modification of restrictive covenants attached to the titles of the gully land and the Phipps' land, to allow for subdivision approved by the relevant authorities. Mr. Morrison, as owner of the neighbouring land, objected.

Discussions ensued and on January 7, 2003, a Consent Order was made. It stated that, "By and with the consent of [Mr. and Mrs. Phipps] and [Mr. Morrison] it is hereby agreed as follows." The Order then amended five restrictive covenants on the titles of the Phippses. Some ten months later, Counsel for the Phippses, Ms. Satterswaite, alleged in a letter to Counsel for Mr. Morrison that the Order was irregular.

6. On November 30, 2004, the Registrar of Titles issued a new Certificate of Title (new Phipps' title) replacing the titles for the gully land and the Phipps' land with one title. Restrictive covenants were originally endorsed on it but these were deleted on January 7, 2005 by a Deputy Registrar of Titles. The new Phipps' title therefore imposes no restriction on subdivision.

7. On December 5, 2007, Mr. Richard Todd, of a development company, advised Mr. Morrison that he intended to commence construction on December 10, 2007 of a multi-unit development project at 12 Durie Drive. Mr. Morrison's land is at 10 Durie Drive. The injunction that Mr. Morrison obtained was to restrict that development. His Counsel, Ms. Wong, maintains that the terms of the Consent Order of January 7, 2003 do not permit subdivision of the land. Counsel for the Phippses, Ms. Satterswaite, argues that the Consent Order is void and inapplicable because the Phippses did not consent to it and it is contrary to the Rules of Court. It should therefore be discharged or varied and the injunction based on it should be discharged thereby allowing subdivision.

8. **The Issues**

(1) The first issue to be determined is whether or not the Consent Order is valid.

Knowledge of the terms of the Consent Order

The Phippses' evidence is that they did not consent to the Order nor did they authorize their Counsel to so consent. According to them, they did not become aware of the existence of the Order until September 2003, some eight months after it had been made. They learnt of it by a letter to Mr. Phipps from Mr. Clough, attorney-at-law.

9. Mr. Clough had represented the Phippses in the suit applying for modification of the covenants on the Phipps and gully land. However, when objections arose to that application, the Phippses chose Mr. R.N.A. Henriques Q.C. to appear as Counsel for them to argue their case in what had then become a contentious matter. Mr. Clough's law firm, Clough Long & Company remained on the record as their attorneys-at-law. There is much correspondence exhibited showing Mr. Clough's efforts to have Mr. Henriques' available dates accommodated by the Court for the actual hearing. Mr. and Mrs. Phipps knew that Mr. Henriques had not attended any hearing on their behalf, as he had not been available. He would therefore not have been present when the Consent Order was made. It is the Phippses' position that in any event, the Consent Order is not consistent with their instructions to Mr. Clough.

10. I accept as true the evidence that Counsel, Mr. R.N.A. Henriques Q.C. was absent when the Order was made. However, Counsel from the firm of Mr. Clough represented Mr. and Mrs. Phipps and there is no evidence that any complaint was made to the presiding Judge concerning absent Counsel Henriques. Mr. Clough's firm had continued to be on the record for the Phippses. The evidence is unchallenged that the Consent Order was drafted by Clough Long & Company and was filed in Court by them. If the Phippses have any

remedy for their matter proceeding in the absence of Mr. Henriques, or for the Consent Order not reflecting their instructions, it is not to be obtained in this claim.

11. It is my view that the Phippses must be presumed to have knowledge of the content of the Consent Order. The matter had been scheduled for a Court hearing, the attorneys-at-law on the record for them attended the hearing, were party to the making of the Order on their behalf before the Judge, had perfected the Order and had served it.

12. *Regularity of the Consent Order*

Rule 42.7(1) of the Civil Procedure Rules (CPR) (2002) as amended concerns "Consent Judgments and Orders." It provides that it applies where:

> "(b) all relevant parties agree the terms in which judgment should be given or an order made,"
>
> and Rule 42.7 (5) CPR specifies certain criteria to be met.

Ms. Satterswaite, Counsel for Mr. and Mrs. Phipps contends that the Consent Order did not meet those criteria and is therefore void.

13. It is clear to me that the criteria of Rule 42.7 (5) have not been met. Rule 42.7 (5) CPR indicates the criteria to be met in making a Consent Order. It says that the Order must be:

> "(a) drawn in the terms agreed;
>
> (b) expressed as being "By Consent";
>
> (c) signed by the attorney-at-law acting for each party to whom the order relates; and
>
> (d) ....."

There is no signature of an attorney-at-law for each party and there is no statement that the Consent Order was drawn in the terms agreed.

14. However, Rule 42.7(2) CPR specifies the "kinds of judgment or order to which Rule 42.7 applies," and this Consent Order does not qualify.

Rule 42.7(2) provides:

> "..... [T]his rule applies to the following kinds of judgment or order –
>
> (a) a judgment for -
>
> (i) the payment of a debt or damages ....
>
> (i) the delivery up of goods ....
>
> (ii) Costs
>
> (b) an Order for –
>
> (i) the dismissal of any claim ....
>
> (ii) the stay of proceedings ....
>
> (iii) the stay of enforcement of a judgment ....
>
> (iv) setting aside or varying a default judgment....
>
> (v) the payment out of money ....
>
> (vi) the discharge from liability of any party;
>
> (vii) the payment .... of costs ....
>
> (viii) any procedural order other than ....

15. The Consent Order of January 7, 2003 concerns modification of a Restrictive Covenant. It is not a procedural Order. It does not classify as any of the Orders to which Rule 42.7 applies. It was a final Order which fully determined the originating summons originally filed by the Phippses for modification of covenants. It therefore need not meet the criteria specified in Rule 42.7

16. *Validity of the Order*

It is my view that this Order is valid. It states that it is with the consent of the parties and the parties were represented by their attorneys-at-law on the record. It is signed by a Judge of the Supreme Court. It is filed and served by attorneys-at-law on behalf of the Phippses. It bears the stamp of the Supreme Court. It falls outside the strict requirements of Rule 42.7.

Consent Order

17. (2) The next issue therefore is to determine the meaning of the Consent Order.

The Consent Order of January 7, 2003 made five changes to the Restrictive Covenants:-

1. It is endorsed on the certificate of title of the Phipps' land that it should be held as one holding with the gully land. The Consent Order extended that to say that owners of the Phipps' land and the gully land shall be entitled to erect on each lot a single family private dwelling house with appropriate outbuildings, value of each house and outbuilding to be not less than $6 million.
2. Covenant # 1 on the gully land stated there should be no sub-division of the gully land. The Consent Order extended that to say that that was subject to the owners' entitlement to erect a single-family private dwelling house on each of the said lots of land.
3. Covenant # 2 on the gully land stated that no building other than a private dwelling house with appropriate outbuildings shall be erected on the land and its value should not be less than five thousand pounds.

The Consent Order replaced "private dwelling house" with "single family private dwelling house" and "five thousand pounds" with "$6 million." The words "shall be erected" are absent from the Order, apparently in error.

4. Covenant # 11 on the gully land stated that it and the Phipps' land shall be held as one holding. The Consent Order added that the owners of the gully land and the Phipps' land shall be entitled to erect on each of the said lots a single family private dwelling house with appropriate outbuildings with a value being not less than $6 million.

5. The Consent Order then amended "the one holding covenant endorsement" on the gully land. The original endorsement was that the gully land shall be attached to the Phipps' land and be held as one holding. The amendment added to that endorsement a repetition of Order 4 above concerning the right of the owners of the gully and Phipps' lands to erect a house on each lot.

18. It is in my view very clear that the purpose of these amendments was to allow for a single house to be built on ***each*** lot – the Phipps' land and the gully land – although they were being held as one holding, that is, the land, although being held as one holding, could have two houses constructed on it.

19. *Conclusion*

It follows from my findings that the terms of the Consent Order mean that the maximum number of houses that can properly be accommodated on the Phipps' land and the gully land is two, and that the parties have so agreed.

Variation/Discharge of Order

20. The next question is whether the Consent Order can be varied or discharged.

Ms. Satterswaite maintained that since the Order did not reflect the Phipps' instructions, at least it should be altered to state the correct position. There is evidence as to what the Phippses did not want but no evidence as to what the instructions to Mr Clough had been.

Ms. Wong, Counsel for Mr. Morrison, submitted that the Consent Order could not be altered by these proceedings. She acknowledged that it is possible for a Consent Order to be declared void for uncertainty but submitted that it should be so declared only where there is no agreement as to essential terms.

21. The evidence of the discussions and correspondence between the parties and their attorneys-at-law before the Consent Order was made showed that the Consent Order reflected the terms agreed by the parties themselves. Indeed the letter dated November 15, 2002 from Clough Long & Co. (representing the Phippses) to Myers Fletcher & Gordon (representing Mr. Morrison) stated that the Phippses intended "to erect a dwelling house on **each** lot and not to sell each lot without a dwelling house erected thereon." "Each" was in bold print in the letter, thus emphasising it. I see no evidence to support Ms. Satterswaite's interpretation that that letter referred to erection of a dwelling house on each of several lots into which it was proposed to subdivide the Phipps and gully land.

22. The Phippses waited until March 2008 before filing Court proceedings to vary the Consent Order which had been entered in January 2003.

Lord Diplock, in delivering judgment in an appeal from Hong Kong said:

> "Where a party to an action seeks to challenge, on the ground that it was obtained by fraud or mistake, a judgment or order that finally disposes of the issues raised between the parties, the only ways of doing it that are open to him are by appeal from the judgment or order to a higher court or by bringing a fresh action to set it aside....
> **DeLasada v DeLasada** [1980] LR 546 at 561.

There was no appeal from the Order made and no fresh action to set aside the Order.

23. In **Ropac Ltd. v Inntrepreneur Pub Company** [2000 Times 21 June] Neuberger J said:

> "....[W]here the parties had agreed, in clear terms, on a certain course, then, ... the court should place very great weight on what the parties had agreed ... and should be slow, save in unusual circumstances, to depart from what the parties had agreed." [pg 2]

These circumstances here were not unusual – the Phippses' attorney-at-law on the record, Mr. Clough, prepared the Order which was submitted to be signed. Further, the letter with the Order was directed to Mr. Phipps and was dated September 15, 2003.

24. Rix L.J. in **Scammell and Ors. V Dicker** [2005] 3 All ER 838 said at p. 846:

> "... a consent order may be set aside for misrepresentation or fraud or for mistake. However, given that the court is always on hand to lend its assistance in the working out of its orders or in their clarification, it cannot be a mere difficulty in interpretation or execution that can undo what with due formality has been entered as an order of the court in settlement of litigation before it."

The evidence is that Counsel Satterswaite, for the Phippses, regarded as unnecessary and misguided, the application by the Phippses' previous attorneys-at-law to modify the covenants which had resulted in the Consent Order. She surrendered to the Titles Office, the Certificates of Title for the Phipps' land and the gully land and obtained instead one title encompassing both titles. That new title bore covenants and after her representation to the Registrar of the Titles Office and other officers, those covenants were deleted by the Deputy Registrar of Titles.

25. It is my view that it is not open to Counsel to determine what applications filed in Court are unnecessary or misguided. The application was before the Court and the Court made a Consent Order. A Registrar of Titles would not be empowered to vary a Consent Order.

26. I find on a balance of probabilities that the parties had freely and fully agreed on the terms of the modification of the covenants, as reflected in the Consent Order. Further, the Phippses had had an opportunity to clarify their position between November 15, 2002, when their attorneys-at-law had written to Mr. Morrison's attorneys-at-law re-affirming the purpose of the subdivision, and January 7, 2003 when the Order was entered.

27. The intention of the parties at the time of the Consent Order was clear. It is not now open to the Court to depart from that. The power does reside in the Court to vary a valid Consent Order in certain unusual circumstances and by particular procedure. In my view there are no such circumstances here nor has the appropriate procedure been invoked.

28. The Order I make therefore is:

> The applications filed February 25, 2008 for:
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> (1) the discharge of the injunction granted on December 7, 2007 and extended on December 21, 2007 to be discharged and
>
> (2) the Consent Order dated January 7, 2003 to be discharged or varied,
>
> are both refused.