IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY
IN CHAMBERS
SUIT NO. ERC.184 OF 1987

IN THE MATTER of 13 Gainsborough Avenue in the Parish of Saint Andrew being the land comprised in Certificate of Title registered at Volume 735, Folio 5 of the Register Book of Titles.

AND

IN THE MATTER of Restrictions relating to the Subdivision thereof.

AND

IN THE MATTER of the Restrictive Covenants (Discharge and Modifications)Act.

Pamela Benka-Coker instructed by Paul Beswick of Ballantyne, Beswick and Company for the Applicant.

D. Goffe and D. Jackson instructed by Myers, Fletcher and Gordon Manton and Hart for Hubert and Pearl White, Lancia Manufacturing Company, Limited,

Kathleen Wehby, Ishmael and Hermenia Robertson, Anthony Vassel, and Gloria Hylton, the objectors.

Heard: May 15, 16, November 5, and 29, 1990.

JUDGMENT

BINGHAM J.

Mr. Denzil Ferguson and his wife are the Managing Director and a Director respectively of Gainsborough Development Company Limited the applicant who is the registered proprietor of land with a single family dwelling house on it and which land is known as 13 Gainsborough Avenue, Saint Andrew registered at Volume 735, Folio 5 in the Register Book of Titles. It is a lot measuring approximately .66 of a acre more or less and is part of a Subdivision of lands formerly known as Barbican and is situated to the North of Barbican Road. This development was laid out in 1951. As far as my own memory will permit the areas to the North of Barbican Road having regard to the type of houses that were constructed in that section were intended for the Upper income group for residential purposes only and single family houses. The section to the South of Barbican Road was acquired mostly by the Middle income group and this

was also restricted to single family houses. The predecessor in title to the present applicant, one Vera Wong had in about July 1982 made an unsuccessful attempt to obtain planning permission to construct a building which would have called for a density of 67 rooms per acre. The maximum permitted density at that time was 29 rooms per acre. Planning permission was granted for her to construct two sets of three bedroom semi-detached units (a set of 3 bedroom duplexes).

The present applicant acquired the lot in 1985 and in August 1985 obtained planning permission to construct four three bedroom houses. The applicant built the present dwelling house which he and Mrs Ferguson and their family now occupies. It was while the process of the construction of the other three houses had commenced that an Injunction was obtained by one of the objectors restraining the further progress of these buildings. The applicant was then obliged to do what they ought to have done from the very outset of formulating these development plans, that is to make an application to this Court under S. 3 of the Restrictive Covenants (Discharge and Modification) Act seeking to have the existing covenants modified or discharged. That this was not done until an objector took action to enforce what is her undoubted legal right is just another example of what is now to be regarded as a common place situation and which is a daily occurrence in the Corporate Area where covenants are honoured more in the breach than in the observance. One would have thought that the local Planning Authority would have as a condition precedent made it obligatory/that no application for planning permission ought to be considered by it before such covenants as are in existence are removed by due process. It is my view that in so far as section 3 (1) of the Act fixes "The Town Planning Authority or any person interested in any free hold land affected by the restriction in making the application to modify or discharge the covenants," this would make such an application to the Court if it was successful, a condition precedent to planning permission being given by the Authority.

The present applicants would now like to build; in fact have completed an attractive dwelling house in which the Ferguson's reside with their family and they were for a time engaged in the construction of three more such dwellings. Be that as it may, the applicant being restricted by the covenants, it has now made application to the Court to have the restrictive covenants on the Title, to which the other lot owners are entitled to the benefit thereof, modified.

Of the six objectors, five live on Edgecombe Avenue which touches Gainsborough Avenue at its western end. The other objector, Gloria Hylton resides almost directly in front of the applicant's lot. Having regard to the location of 13 Gainsborough Avenue, being situated within a distance of about five to six chains from where Gainsborough Avenue and Edgecombe Avenue, meet, it is not at all surprising that most of the objectors are residents from Edgecombe Avenue. A visit to the locus revealed that, facing Gainsborough Avenue at No. 13, to the left there is one single family dwelling house before one reaches to a large corner lot which is numbered on Edgecombe Avenue and is the residence of one of the objectors. The residence of all the other objectors are in close proximity to Gainsborough Avenue. The neighbour of Mrs Hylton, Mrs Kathleen Wehby . whose residence is to the right is another large corner lot also numbered on Edgecombe Avenue. The visit to the locus also revealed that Gainsborough Avenue from the direction that I approached it from Widcome Avenue, runs in a direction from east to west in what appeared to me to be a straight and undeviating path until it ends at the western boundary where it intersects with Edgecombe Avenue which runs from South to North. All the lots and the developments on them as far as I was able to observe certainly within the immediate neighbourhood revealed what was in complete conformity with the permitted user as laid down in the covenant which were annexed to the Titles to these lots when the subdivision was laid out. There is at present on Edgecombe Avenue to the north and not far from where Gainsborough Avenue and Edgecombe Avenue meet, one empty lot to the left as one proceeds up Edgecombe Avenue. Gainsborough Avenue and the surrounding areas to the Eastern and Westernly boundaries with Widcombe and Edgecombe Avenue presented one with an atmosphere of a tranquil nature. The residences all seemed to be well maintained and had the sort of exclusiveness that results from the acquisition of a choice holding and what that carries with it.

This application has as its objective, the modification of the existing restrictive covenants numbered 1, 3 and 4 on the Certificate of Title registered at Volume 735, Folio 5 of the Register Book of Titles and in so far as is material now reads as follows:-

"1. There shall be no subdivision of the land
3. No building of any kind other than a private dwelling house with appropriate out buildings
.....
.....shall be erected on the said land"

4. The main building to be erected shall face the road way and no building or structure shall be erected on the said land near than sixty feet to any road boundary .....no less than ten feet from any other boundary....."

The present application seeks the modification and/or discharge of the existing covenants referred to above in so far as relevant to read.-

"1. There shall be no subdivision of the said land save and except into five lots comprising four dwelling lots of not less than three thousand two hundred square feet and not more than four thousand two hundred and fifty square feet each, and one common area lot including roadway for the aforesaid dwelling lots of not less than nine thousand, two hundred and fifty square feet, which may be Strata Lots in accordance with the provision of the Registration (Strata Titles Act)."

3. No building of any kind other than 4 private dwelling houses with appropriate out-buildings thereto and to be occupied therewith shall be erected on the said land and the value of such private dwelling houses and out-buildings shall in the aggregate not to be erected in the said land nearer than twenty feet to any road.

4. No building to be erected on the said land shall be erected on the said land nearer than twenty feet to any road boundary which the same may face nor less than ten feet from any other boundary thereof and all gates and doors in or upon any fence or opening shall open inwards and all out buildings shall be erected to the rear of the premises."

The grounds upon which the application is based is set out at paragraph 13 of the affidavit of Denzil Ferguson, the Managing Director of the applicant Company, sworn to on 20th October 1988. The deponent stated:-

"(a) That the proposed modification will not injure the persons entitled to the benefit of the said restrictions."

(b) That the continued existence of the said restrictions would unless modified impede the reasonable user of the said lands for private purposes without securing to any persons practical benefits sufficient in nature or extent to justify the continued existence of such restrictions without modification.

(c) That by reason of the character and changes in the neighbourhood, the aforesaid ought to be deemed obselete. That the premises is situated in an area which has become increasingly characterised by multiple town-house dwellings on one property and that the proposed construction does not in any way reduce the value of the other dwelling houses in the area or negatively change the character of the neighbourhood.

(d) That the persons of full age and capacity for the time being entitled to the benefit of the restrictions have agreed either expressly or by implication by their acts or omissions to the same being modified."

These grounds when examined encompass almost verbatim those as set out in section 3 (1) A-D of the Restrictive Covenants (Discharge and Modification) Act, although not framed in the same order. The present Act in so far as it is modelled on section 84 of the law of Property Act (U.K.) prior to its amendment in 1969, also means that the English cases in so far as relevant are applicable and of assistance in applications of this nature. This observation was made as far back as 1961 by Waddington J. (as he then was) in Re Constant Spring and Nordrock Estate [1960] 3 W.I.R. 270 at 273 A-B. A similar observation was made as recently as 1986 by the Privy Council per dictum of Lord Oliver of Aylmerton in Stannard and others vs Issa [1986] 34 W.I.R. 198 at 191 (J) and 192 at (A) - (G).

It is trite law that in seeking to establish a basis for the modification of the existing covenants the burden of proof is on the applicant to satisfy the court on the grounds he propounds that the restrictions he seeks to be modified should be so modified. There is no corresponding burden of proof on the objectors in as much as they are seeking to protect an existing right that they have in preserving the benefit of the covenants to which they are entitled. If the applicant in being able to establish one of the gounds, he may be entitled to an order. However, even if he succeeds in so doing it does not follow that he will obtain the order sought as there is still a discretion in the court as to whether to grant or refuse the application if there is proper and sufficient grounds for a refusal.

These covenants affects a lot of land approximately .66 of an acre situated at 13 Gainsborough Avenue, in Saint Andrew. This lot was originally part of a larger tract of land comprised in certificate of Title registered at Volume 453 Folio 56 which was subdivided in 1951 and is part of a larger plot of land known as Barbican.

The development in so far as it relates to Gainsborough Avenue indicates both from the plammetric map of the area and from a visit to the locus that to the extreme eastern end of this Avenue is Widcombe Avenue which runs in South to North direction and at the Westernly end is Edgecombe Avenue which also runs from South to North. Gainsborough Avenue is situated from east to west in an almost straight and undeviating path meeting the two Avenues at either end. As one traverses Gainsborough Avenue from the direction of Widcombe Avenue, you are immediately struck by the presence of a row of neatly preserved single family dwellings situated on either side of the roadway which changes with a stark reality upon approaching the development which is the subject matter of this application. I say this because, but for the presence of a beautifully constructed dwelling house on this lot which is in keeping with the permitted user and the covenants now in force, there also now exists what appears to be the shell of some partly constructed buildings which from appearance have gone beyond foundation level and the construction of the outer walls and which seem to be approaching the stage of the belt-course. Although the Town and Country Planning Authority have given their approval to the proposed development of "two semi-detached flats comprising, four dwelling units," no attempt was made by either the Authority or the applicant under Section 3 (1) of the Restrictive Covenant (Discharge and Modification) Act, in seeking to modify or discharge the existing covenants which restricts the development to that of a user in keeping with "a single dwelling house with out-buildings." It was this attempt by the applicant to commence these other structures in what amounted to a clear breach of the existing covenant which resulted in an Interlocutory Injunction being granted to one of the objectors in C.L.1987/R016 which brought a halt to this construction. It was this action on the part of this objector that has lead to the present application.

The Affidavit of the objectors filed in response to that deponed to by Denzil Ferguson is in Standard form and are in substance and effect similar in content. To summarise them they state in so far as is relevant that.-

1. That the Act (referred to supra) does not apply to this matter.

2. The objectors bought the said lands and erected their houses in keeping with the existing covenants which precludes-

1. Any sub-division of the respective lots.

2. No building other than a private dwelling house and other out-buildings appurtenant thereto.

3. The said dwelling house to be so constructed as to face the roadway and to be situated at a distance of sixty feet from the roadway and not near than ten feet from the nearest boundary.

At the outset of the hearing the court was informed by learned counsel for the applicant that no reliance was being placed upon grounds (b) and (c) as set out at paragraph 13 of Mr. Ferguson's Affidavit in Support of Summons. These two grounds are in effect similar to section 3 (1) (a) and (b) of the Act. These grounds were, however, certainly in so far as section 3 (1) (a) is concerned not entirely abandoned in argument. Learned Counsel for the applicant sought to rely in the main upon (a) and (d) of the grounds at paragraph 13 (referred to supra) which grounds are identical to section 3 (1) (c) and (d) of the Act.

In so far as (d) (Supra) sought to allege that

> "persons of full age and capacity for the time time being entitled to the benefit of the restrictions have agreed either expressly or by implication by their acts or omissions to the same (the covenants) being modified,"

and having regard to the six affidavits sworn to by the objectors one of whom resides on Gainsborough Avenue and all of whom are persons who have the benefit of the covenant and hence a proprietory right in having the same enforced, this ground is untenable. Section 3 (1) (c) of the Act in so far as it is material states:-

> "that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction.
> .....
> .....<u>have agreed either expressly or by implication by their acts or omissions to the same being discharged or modified.</u>" (Emphasis mine)

These words when examined in my opinion clearly and unequivocally imply and when properly construed refer to all the covenantees . who qualify as benefitting therefrom and not to some of them. Once the rights of these six proprietors to object to the application is recognised then this ground is unmeritorious and must fail. It was not surprising, therefore, that although the only ground which was abandoned in argument was what was in effect section 3 (1) (b) of the Act, not much time was spent by learned counsel for the applicant in argument on grounds (c) and (d) - (Section 3 (1) (a) and (c) of the Act).

Most of counsel's time was spent on ground (a) - (Section 3 (1) (d) of the Act) which for emphasis reads:-

> "That the present modification will not injure the persons entitled to the benefit of the said restriction."

It may suffice to state that although section 3 (1) (a) of the Act was touched upon in argument, although counsel had mentioned at the outset that she did not intend to rely upon it, the visit made by the court and the parties to the locus revealed that by no stretch of one's imagination it be seriously contended that the area within Gainsborough Avenue and its immediate environs could be regarded as having been altered in tone and character in a manner rendering the existing covenants obselete. In this regard, counsel's stand at the outset in relation to this ground was not at all surprising but in so far as she did press some material in argument, it was sufficient to cause me to give serious thought to it.

To summarise her submissions it was contended on behalf of the applicant that:-

1. The six objectors will not be injured by the Modification sought.

2. The proposed development which were commenced are entirely in keeping with the use of the premises as dwellings.

3. The parent Title relating to the lands the subject of the subdivision (and this is common ground) indicates that the subdivision was originally laid out in 1951.

4. The evidence contained in the affidavit of Lloyd Davis, a Chartered Surveyor from Allison, Pitter and Associates in relation to the report of an appraisal done by him of the proposed development and stating that the proposed development will not result in any injury to any of the said objectors.

5. The present residential needs in the corporate area are now quite different from that existing in 1951 when the sub-division was laid out.

In so far as the report of Mr. Lloyd Davis, a Chartered Surveyor and Planner would appear to be suggesting that there exists a case, having regard to societal needs for houses of a particular quality and towards supporting the case for a higher rather than a lower density in areas including that the subject of the present application, and laudable as the motives of the developers may at first appear by the proposed construction in seeking to attempt to alleviate the present housing shortage, it has to be appreciated from the very outset that however, much Mr. Davis' report would tend to suggest that there have been changes in certain sections of the wider community of Barbican as distinct from what may

properly be regarded as the immediate neighbourhood that is part of Gainsborough Avenue and its environs, the visit to the locus revealed that this neighbourhood has remained unaffected by any change from a lower to a higher density. Such changes as have in fact taken place would not in any event affect the rights of the covenantees, in whose favour the covenants now run, from insisting on their strict legal rights by enforcing them and thereby preserving without modification the tone and character of the neighbourhood as it now exists.

The argument against there being any modification of the existing covenants in this matter is even stronger due to the fact that the applicant cannot complain that they are being sterilised in their use of the said lot or that any such refusal would impede the reasonable user of the land for private purposes without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of the covenant without modification (Vide section 3 (1) (b) of the said Act). This is so as the applicant has carried out the construction of a dwelling house in conformity with the covenants as they now exists.

In Re Constant Spring Estate (referred to supra) Waddington J. at page 273 D - G relied in support on the dictum of Lord Evershed M.R. in Re Ghey and Galton's Application [1957] 3 A.E.R. at pg 168 where the learned Judge said:-

> "It is true to say that in Re Henderson paragraph (a) of S. 84 (1) of the Law of Property Act 1925 (U.K.) was not invoked so that the language of the Judge was really related and related only to the two alternative grounds, which were comprehended in paragraph (a) but the citation adopted, as it was by Romer L.J. in this court seems to me a useful prelude to a consideration of the present case, because it indicates that what has to be done if the applicant is to succeed is something far more than to show that to an impartial planner the applicants proposal might be called as such a good and reasonable thing.
>
> An applicant must affirmatively prove that one or other of the grounds for the jurisdiction has been established and unless that is proved, the person who has the proprietory right, as covenantees of controlling the development of the property as he desires and protecting his own proprietory interest, is entitled to continue to enjoy that proprietory right." (Emphasis mine).

I would venture to adopt this statement as being apposite to the facts and circumstances of this present case.

On the basis of the submission the determination of this matter does not pose much difficulty, as from the principles to be extracted from all the local and the English authorities in so far as they are relevant, it is abundantly clear that once it is conceeded that there have been no changes in the character of the neighbourhood or some other such circumstance as to lead a Court to come to a conclusion that the restrictions ought to be deemed obselete, then it would seem logically to follow that for the Court to allow or permit any modification or discharge of the existing covenants by permitting an alteration in the user of the lot in question, would thereby result in injury, (using that term in its wider content) being caused to the existing covenantees.

There is nothing to suggest that such covenants as were imposed in 1951 when the subdivision was laid out were not created for the benefit of all the persons who purchased property therein. In so far as the immediate area in question had remained in effect one which the user has been in conformity with the existing covenants by the erection of a single dwelling house on each lot, it would be idle to contend that such use to which the applicants propose to develop the lot, which is the subject of the present application, has any other objective but to benefit the personal interest of the developers to the exclusion of the overall interest of the existing covenantees. To allow the construction of three (3) other dwellings as the plans annexed to the record indicate, will not only result in a density totally out of character with the use to which the other lots have been put, but this would also in so far as the tone and character of the immediate neighbourhood is concerned destroy the very privacy which the size of the lots and the houses in the manner of their construction now virtually guarantees to these persons.

In so far as ground (a) as set out at paragraph 13 of Mr. Ferguson's affidavit was concerned (S. 3 (1) (a) of the Act), this was in effect the only substantive ground on which any serious argument was advanced. What the court was asked to address its mind to was that as the proposed development in so far as it was of a high class nature estimated to cost between $900,000 - $925,000 for each house, in July 1989 when the appraisal was prepared by Mr. Lloyd Davis (vide his report). This it was being contended would ensure that the general tone and character of the neighbourhood would remain unaffected. There was also the question of the overall public demand for dwellings of such a nature. The argument being further that there would be no pecuniary injury caused to the objectors (covenantees) as such a development would result in their properties appreciating in value in money terms. The short answer to this submission is that given the fact that it has been conceeded that the character of the neighbourhood has not altered materially so as to render the covenants obsolete, to now modify them to allow the proposed development would in effect do substantial injury to the neighbourhood by removing the protection against the greater density as would result from having four families consisting of between four to five persons occupying a lot intended for one such family with the extra traffic and the resulting hazards, not to mention the increased noise levels which would be the natural consequence of the proposed modification. What the existing covenantees are seeking to protect is the privacy which the lower density and other such amenities which enures to their benefit and which they acquired when they bought into this subdivision by purchasing their lots and building their houses, and not merely any financial benefit which will accrue to them as a result of the construction of any high class development.

On the other hand the applicant also cannot complain that they are being sterilised in their use by being unable to properly develop their lot as not only did they purchase it in 1985 with full knowledge of the existing covenants but they have constructed a dwelling house of a stature in keeping with the covenants as they now exist. Moreover, in determining whether the proposed application will or will not cause injury to the existing covenantees the strict criterion as the learned editor of Preston and Newsom on Restrictive Covenants 7th Edition puts it at page 256:-

> "is not whether the proposed development will be uninjurious but whether the proposed discharge or modification will be uninjurious..... Here we have a system of covenants which is apparently either wholly or substantially intact and in which the applicants now seek to make a breach. The substance of the (original covenantees) objection(s) is that the very making of the order of modification could in itself cause him (them) injury in the ownership of unsold land, as showing that the estates system of restrictions has become vulnerable." Re Teagle and Sparkes Application [1962] 14 P & C R. 68 also followed in Re Murray's Application 14 P.& C.R. 63.

It is my considered opinion after examining the material before me that to allow the application would not only affect the present benefits which the objectors now enjoy and which the covenant assures them protection by its existence, but the removal would further allow the applicant the opportunity to exploit the situation by way of a user for their own selfish pecuniary gain without any consideration for what the existing proprietors in the neighbourhood acquired and now enjoy by the use to which their present holdings are put.

This present application has a marked similiarity to that of E.R.C. 160/1962 Re 48 Norbrook Drive an unreported judgment of this court by Morgan J. (as she then was) delivered on 16th November 1964. To summarise the facts an application was made for modification in what is commonly regarded as an exclusive high class sub-division where there were covenants imposed restricting the user to erecting a single dwelling house on one acre and half acre lots. The applicants desired to have the existing covenants on their one acre lot modified to permit the construction of eight town houses. The objectors were quite willing to agree to a modification of the covenants to allow for the construction of two dwelling houses. Both on the basis of the increased density as well as on the main ground of an invasion of their privacy as well as the peace and tranquility that the existing covenantees acquired their holdings for, the application was refused. The deponent Denzil Ferguson, the Managing Director of the applicant company has not in his affidavit said as to what is the underlying reason for this application. In Re 48 Norbrook Drive (referred to supra) the applicants gave a reason for wanting to carry out the development. This reason lead the learned judge to make the following observation:

> "the applicant stated that he proposes to erect eight (8) Town Houses, one of which he will own. He cannot erect any less number, he cannot afford to do that in other words the profit he would make from erecting two houses would not be sufficient to afford him the ownership of one house. To make enough money, it must be eight houses."

The learned judge then opined in the following manner

> "It seems to me that he desires a density which fits in with his own convenience and projections."

This would seem to be apposite to the attitude of the developers in the present case who desire to erect four three bedroom dwelling houses on a lot of land of two-thirds of an acre in a neighbourhood which is entirely restricted by way of user to a single family dwelling to each lot.

In determining the matter in favour of the objectors in the case referred to supra, the learned judge was minded to ask herself this question which she answered in the negative.

"Is that a reasonable user?"

I too would unhesitatingly say an emphatic no to the same question posed in relation to the present application.

The argument was also advanced on the applicant's behalf that there have been breaches/and or several modifications in the subdivision by the erection of several town houses and apartments. The short answer to this is that on my visit to the locus I did not observe any such developments within the immediate neighbourhood of Gainsborough Avenue and its environs, being that part of Widcombe and Edgecombe Avenue closest to Gainsborough Avenue, which area I would regard as the immediate neighbourhood and the area most likely to be affected by such changes taking place. Even if this were so, the mere fact of such breaches per se would not prevent the covenantees including these six objectors from maintaining their present stand in so far as this application is concerned. Each of them having an individual as well as a collective right to take such steps to enforce the covenant by virtue of their acquisition of their respective lots as the covenants were annexed to their registered titles and there being no issue that the benefit of which runs with the land and the reversion.

In this regard I do not consider such changes that have taken place on Barbican Road and Welwyn Avenue as in any way related to the nature and character of the neighbourhood of Gainsborough Avenue as I conceive it to be. In this regard the dicta of Luckoo J.A. and Smith J.A. (as he then was) in Stephenson vs Liverant [1972] 18 W.I.R. 323 is of relevance and very instructive (vide in particular dictum of Luckoo J.A. at pg. 329 E-H and Smith J.A. at pags. 334F-I and 335 A-B).

In conclusion it is my opinion that once the two grounds (b) and (c) as set out in paragraph 13 of Mr. Ferguson's affidavit, which when examined are in conformity with Section 3 (1) (a) and (b) of the relevant Act were abandoned, and having regard to the construction that I have placed upon the third ground (similar to section 3 (1) (c) of the said Act), the remaining ground which was the linchpin of Mrs. Benka-Coker's arguments was doomed to failure. The reason for this is that the word 'injury' as used in Section 3 (1) (d) is not limited in scope to pecuniary loss, a situation which would be of relevance if Section 3 (1) (a) and (d) were both being relied upon by the applicant and because of such proof being established in relation to S. 3 (1) (a), the question of compensation would then arise for determination. Once as in this case it is not being contended that there have been such changes in the character of the immediate neighbourhood of Gainsborough Avenue rendering the existing covenants obsolete, then to seek such modifications to them as the present application now attempted to do so as to alter the nature and character of the present user to which these covenants now afford protection would in my opinion result in injury to the existing covenantees in so far as it would result in not only the tone and character of the neighbourhood being altered in such a manner as to affect the privacy and the low density now in place, but it would open the door to other similar applications for a change of user by the proprietors of other lots in that neighbourhood.

There is no gainsaying the fact that there is a serious housing shortage in the corporate area containing as it does about half of this country's population, and

which calls for some increase in the density in certain areas which were previously regarded as the domain of the privileged few. Barbican Estate as it was

originally laid out in 1951 was at one stage certainly up to the early part of 1970's regarded as an exclusive sub-division which then consisted of the main single dwelling houses. With the passage of time and the need that arose for other types of development to cope with the increasing middle and upper class population modifications in the existing covenants have been permitted in the areas along Barbican Road to fill a part of this need. May be in time similar allowances will be made in other areas which now are still regarded as exclusive, but until that takes place or the legislature steps into to allow such changes in the law as it deems necessary, the procedures as laid down by the law for such modification must be observed and where breached the court must act with extreme despatch to ensure that the rights of the citizens are protected.

On the basis of the arguments presented on behalf of the applicant and for the reasons which I have attempted to set out, this application fails and the summons is accordingly dismissed with costs to the objectors to be agreed or taxed.

Certificate for counsel.