

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006 HCV 00856

In the matter of all that parcel of land known as # 30 Dillsbury Avenue in the parish of Saint Andrew being the lot numbered 360 on the plan of Barbican Heights deposited in the Office of Titles on the 17th March 1955 and being the land comprised in Certificate of Title registered at Volume 754 Folio 11 of the Register Book of Titles,

AND

In the matter of the restriction against subdivision and the distances of building from boundaries (affecting the user thereof).

AND

In the matter of the Restrictive Covenants (Discharge and Modification) Act.

R. Braham and D. Gentles-Silvera instructed by Livingston Alexander & Levy for Applicant

T. Dunn instructed by Nunes Scholefield DeLeon & Company for Objector

*Modification of Restrictive Covenants –
Change in Character of Neighbourhood –
Obsolete Restrictions*

Heard: December 1, 2010 and April 14, 2011

Lawrence-Beswick J

1. Mrs. Dorothea Veronica Gordon-Smith is the registered proprietor of 30 Dillsbury Avenue, Kingston 6 (“#30”). She is seeking by this hearing to modify the restrictive covenants to which the land is subject, in order to lawfully construct four (4) townhouses and a bungalow. The restrictive covenants currently restrict any building on the land to be a single family dwelling.

2. Mr. Hugh Gordon is the registered proprietor of the neighbouring premises at 28 Dillsbury Avenue, Kingston 6 (“#28”). He objects to the proposed modification because, he alleges, it will:

- a. interfere with his privacy and will negatively affect the quiet enjoyment of his property;
- b. block and impede his view of the hills to the west and his view of the coast line which is an integral part of his enjoyment of his property;
- c. negatively affect and significantly reduce the value of his property which currently benefits from being located in a first class neighbourhood of predominantly single family units and
- d. result in six additional families being his neighbours which mean more noise, which in turn will create a nuisance and affect the quiet enjoyment of his property.

3. Mr. Gordon asks that Mrs. Gordon-Smith not be allowed to modify the covenants or, in the alternative, to compensate him in the sum of US\$700,000.00 for loss and injury that he will suffer if the modification of the covenants is allowed.

4. The three covenants for which modification is sought, in restricting the use of the land to that of a single private dwelling house provide:

“i *There shall be no subdivision of the said land.*”

“ii *No building of any kind other than a private dwelling house with appropriate out-building appurtenant thereto and to be occupied therewith shall be erected on the said land and*

the value of such private dwelling house and out-buildings shall in the aggregate not be less than one thousand four hundred pounds."

- "iii *The main building erected on the said land shall face the roadway or one of the roadways bounding the said land and no building or structure shall be erected on the said land nearer than sixty feet to any road boundary which the same may face nor less than 10 feet from any other boundary thereof and all gates and doors in or upon any fence or opening upon any road shall open inwards and all out-buildings shall be erected to the rear of the main building."*

5. Section 3 of the **Restrictive Covenants (Discharge and Modification) Act** ("the Act") provides that a Judge in Chambers has the power to modify any restrictive covenants (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied:

- a. that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case; ... the restriction ought to be deemed obsolete or
- b. that the continued existence of such restriction ... would impede the reasonable user of the land

The onus is on the applicant to prove that at least one of the grounds set out in the Act exists.

Changes in Character of Property and Neighbourhood

6. The first issue is whether there have been changes in the character of the property or the neighbourhood such that the covenants ought to be deemed obsolete.

7. What is a neighbourhood? In **Re Davis' Application**, the court stated:

"Provided a neighbourhood is sufficiently clearly defined as to attract to itself and maintain a reputation for quality or amenity, the size of the neighbourhood and, within reasonable limits, the progress and nature of the

development outside its boundaries is of little consequence."¹

8. The learned authors of Preston and Newsom's **Restrictive Covenants affecting Freehold Land** (8th Ed.) opined that:

*"The neighbourhood need not be large. It may be a mere enclave nor need it so far as definition goes be coterminous with the area subject to the very restriction that is to be modified or other restrictions forming part of a series with that restriction."*²

9. In this application I consider Dillsbury Avenue to be itself a neighbourhood. It is an avenue on which were located 32 lots of land and which links the two clearly distinct neighbourhoods of Jacks Hill and Barbican Heights/Millsborough. There is but one side road, Dillsbury Mews which leads to a cul-de-sac.

10. Have there been changes in the character of the neighbourhood?

*"In these matters the test is said to be essentially an estate agent's test, that is: 'What does the purchaser of a house in that road or that part of the road expect to get?'"*³

"Character", as considered in **Re Davis' Application**⁴ "derives from style, arrangement and appearance of the house on the estate and from the social customs of the inhabitants."

11. The evidence of Mr. Karl Allison is that there were initially 32 lots on the avenue with lot sizes between 0.33 acres and 1.76 acres. There are now two vacant lots (including # 30) and 13 single family dwellings. The other lots have multiple dwellings. This means that the majority of the lots house multiple dwellings.

¹ (1950) 7P and CR 1

² Pg 255-256

³ Restrictive Covenants Affecting Freehold land (supra)

⁴ Supra

12. The unchallenged evidence of Mr. Allison and Mrs. Gordon-Smith is that there are more than 100 additional houses on Dillsbury Avenue with the advent of the multifamily dwellings.

13. Today's purchasers would therefore expect to find on Dillsbury Avenue multiple dwellings on lots of less than 0.33 acres and as small as 2000 square feet.

14. I therefore readily find that the character of the neighbourhood of Dillsbury Avenue has changed from one where all of the lots were single family dwellings to one where multifamily dwellings are in the majority. The character of the property itself at 30 Dillsbury Avenue changed from a split level single family location to being a vacant lot.

15. **Should the restrictions be deemed obsolete?**

The next issue is whether the restrictions should be deemed obsolete.

Romer LJ sought to define the meaning of "obsolete" as he interpreted Section 84 (1) (a) of the U.K. Law of Property Act which is equivalent to Section 3(a) of the Act.

16. He opined that:

*"if ... the character of an estate ... gradually changes, a time may come when the purpose [for which the covenants were imposed] ... can no longer be achieved. When that time does come, it may be said that the covenants have become obsolete, because their original purpose can no longer be served ... it is in that sense that the word "obsolete" is used"*⁵

⁵ Truman, Hanbury, Buxton & Co Ltd's Application [1956] 1 QB 261 at 272

17. In my view the purpose of these covenants was to ensure that a limited number of single family dwellings formed the avenue, each of which was surrounded by an average of an acre of land.

18. The face of the neighbourhood has permanently changed and in my opinion, the covenants concerning such dwellings and land space ought to be deemed obsolete and their modification would be permissible under section 3(1) of the Act.

19. Because of this finding, I will not consider the effect on Mrs. Gordon-Smith's application, of Section 3(1) (b) and (d) of the Act on which she also relies.

20. **Loss of view to be suffered by Objector**

Mr. Gordon complains that his privacy would be invaded if the modifications were allowed and multiple dwellings were constructed at # 30. No longer would he be able to enjoy his house or his swimming pool in privacy. It is his evidence that when a house had existed at # 30, it was so located that persons did not look directly into his yard.

21. Mrs. Gordon-Smith adamantly denies that. She and her family had occupied the now demolished house. She remembers being able to look directly into the Gordon's yard.

In any event she is willing to increase the height of their dividing wall.

22. In a city, where a house has neighbouring properties, privacy is going to be compromised. I accept on a balance of probabilities that there was a view of Mr. Gordon's swimming pool and yard from Mrs. Gordon-Smith's home at # 30. There is no evidence that the modification would result in less privacy than if a single family dwelling were constructed.

In any event, Mrs. Gordon-Smith's offer to increase the height of the wall would remedy any such problem, despite Mr. Gordon's protestations that the wall would then be too high.

23. Mr. Gordon further contends that his view of the hills and coastline would be impeded by construction permitted by the modification sought.

24. Currently, there is no building on # 30. However, the unchallenged evidence is that the building which had been on it had been a split-level building, i.e., one storey at certain sections and two storeys at other sections.

25. Mr. Gordon's evidence is that when that building existed he was able to have a view of the hills of St. Andrew and also of the port and of Portmore.

Mrs. Gordon-Smith denies that and asserts that the house which had been there had blocked his view of the port and westerly hills.

26. A visit to the site revealed that the areas from which the westerly hills and the port and Portmore can now be seen from # 28 were very limited-primarily from one section of the carport and one spot in the kitchen.

The views were narrow and distant. The exhibited photographs support this finding.

27. Further, it is evident that any building on the property of # 30, single or multi storey would impede the view from # 28 of the hills of St. Andrew and the port and Portmore.

Indeed, even a tree planted at a particular spot would have that effect because of the limited areas on # 28 from which there is any view of the westerly hills or the port or Portmore.

28. The only way of securing the view of the port and Portmore and of the St. Andrews hills, from Mr. Gordon's premises at # 28 would be to refrain from building or planting trees at particular areas of Mrs. Gordon-Smith's land at # 30.

29. This could not be regarded as being a reasonable approach. As its proprietor, Mrs. Gordon-Smith is at liberty to use her land as she chooses, restricted only by the laws, particularly the covenants, zoning rules and nuisance laws.

Even if the covenants were not modified, she could quite properly erect a building or plant a tree on the property in such a way that the view from # 28 would, as a consequence be restricted.

In this instance, the number of units is not directly related to the view being lost. Any structure or plant would cause a loss if situated in particular areas.

30. The reality of life in a city is that there always looms the possibility of an erstwhile panoramic view being restricted.

31 It is evident that whilst a house existed at # 30, the views from # 28 must have been restricted to some extent, but no doubt Mr. Gordon has grown accustomed to an entirely unimpeded view of whatever is within his sights because # 30 now bears no structure and no trees to block his view.

However, it is not usual for land in the city to remain vacant indefinitely and city living may require adapting to changes.

32. **Loss in Value of Property**

Mr. Gordon also contends that if the modification were granted, the value of his property would fall. He does not provide a basis for his opinion, nor any supporting

evidence for his assertion that the proposed modification would “negatively affect and significantly reduce the value of [# 28]”

33. However, Surveyor Allison’s unchallenged evidence is that:

“[t]here is no empirical evidence in this area to support a decrease or slowing in the rate of appreciation in values resulting from the building of townhouses immediately adjoining a single family dwelling.”

34. I accept Mr. Allison’s evidence as reflecting the truth as it has been unchallenged that he is Chartered Valuation Surveyor with a Masters Degree in Property Investment Analysis and Finance, with years of experience.

35. **Additional Noise**

The final limb of Mr. Gordon’s objection is that the additional proposed families would, as his neighbours, create a nuisance because of additional noise.

36. The noise level in the neighbourhood must have already increased if only in traffic noises, when the number of units exceeded a hundred more than the original number. Five more units would not, I expect, contribute to the noise level in a noticeable way.

The face of the neighbourhood has changed and continues to change.

37. I therefore find no merit in the objections forwarded by Mr. Gordon to the modification of the covenants.

Compensation

38. Mr. Gordon claims US\$700,000.00 compensation in the alternative to his objection being successful, but has not provided credible evidence in support of any loss he may experience from the grant of the modification of the covenants.

I therefore make no award for compensation.

39. **Order**

The Order is that the application for modification of restrictive covenants (1) (3) and (4) is allowed.

Restrictions 1, 3 and 4 endorsed on the Certificate of Title registered at Volume 754 Folio 11 are modified to read:

- “1. There shall be no subdivision of the said land except with the approval of the relevant planning authority.
3. No buildings of any kind other than private dwelling houses, townhouses and/or apartments with appropriate out-building appurtenant thereto and to be occupied therewith shall be erected on the said land.
4. No building or structure shall be erected on the said land nearer than thirty feet to the roadway known as Dillsbury Avenue nor less than ten feet from any other boundary PROVIDED HOWEVER that this covenant shall not apply to the common boundary dividing any of lots comprised in the subdivision of the said land nor to the eaves of any buildings erected on the said land nor to any building which may be used as a guard house or for garbage disposal.”

Each party to bear his own costs.