[2023] **JMSC Civ 263**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020CV00385

IN THE MATTER of **ALL THAT** parcel of land known as **NUMBER 23 NEW HAVEN AVENUE** in the parish of **SAINT ANDREW** being the Lot Numbered **THIRTY-SIX** on the Plan of **WIDCOMBE HEIGHTS** deposited in the Office of Titles on the Thirteenth day of March, 1958 of the shape and dimensions and butting as appears by the Plan thereof hereunto annexed and being part of the land comprised in Certificate of Title registered in Volume 770 Folio 26 and now registered at Volume 871 Folio 79 of the Register Book of Titles.

AND

IN THE MATTER of Restrictive Covenants numbered 1, 3 and 8 affecting the land.

AND

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

BETWEEN	**MARCIA GIVANS**	**CLAIMANT**
AND	**ARCHIBALD CAMPBELL**	**1ST DEFENDANT**
AND	**ODETTE CAMPBELL**	**2ND DEFENDANT**
AND	**ROBERT DAVIS**	**3RD DEFENDANT**

AND	**JOHN BARNETT**	**4TH DEFENDANT**
AND	**YVONNE MCCALLA SOBERS**	**5TH DEFENDANT**
AND	**MEGAN IRVINE**	**6TH DEFENDANT**
AND	**HUGH CROSS**	**7TH DEFENDANT**
AND	**SUESETTE HARRIOTT-ROGERS**	**8TH DEFENDANT**
AND	**GARTH LYTTLE**	**9TH DEFENDANT**

TRIAL IN CHAMBERS

Mr. John Clarke, Ms. Britney-Lee Johnson, Attorneys-at-Law instructed by Knight, Junor and Samuels, Attorneys-at-Law for the Applicant.

Mr. John Graham K.C., Attorney-at-Law instructed by John G. Graham and Co., Attorneys-at-Law for the objectors, Archibald and Odette Campbell.

Mr. John Thompson, Attorney-at-Law for the Objectors, Mr. Robert Davis, Mr. John Barnett, Mrs. Yvonne McCalla Sobers, Ms. Megan Irvine and Mr. Hugh Cross.

Ms. Moneaque McLeod, Attorney-at-Law instructed by Rogers and Associates, Attorneys-at-Law for the Objector, Mrs. Suesette Harriott-Rogers.

Dr. Garth E. Lyttle, Attorney-at-Law instructed by Garth E. Lyttle & Co., Attorneys-at-Law for the Objector, Dr. Garth E. Lyttle.

Restrictive Covenants- Restrictive Covenants (Modification and Discharge) Act- Application to modify Restrictive Covenants- Whether modification changes the character of the neighbourhood- Whether modification injures the persons entitled to the benefit of the restriction- Whether the covenants should be deemed obsolete- Whether the existence of the covenant impedes reasonable use of the land.

Heard: June 27th, 2022, June 30, 2022, September 23rd 2022, September 30th 2022, October 14th 2022, November 3rd 2022, November 11th 2022 and April 26th 2023.

P. MASON J (Ag.)

BACKGROUND TO THE CLAIM

[1] The Applicant, Marcia Elaine Givans ("Mrs. Givans"), is the registered proprietor of property situated at 23 New Haven Avenue in the parish of St. Andrew registered at Volume 871 Folio 79 in the Register Book of Titles. By virtue of a Fixed Date Claim Form filed on February 03, 2020, the Applicant seeks to modify restrictive covenants 1, 3 and 8 affecting the said land. The said covenants are as follows:

> *"1. There shall be no subdivision of the said land.*
>
> *3. No building of any kind other than a private dwelling house with appropriate out-buildings appurtenant thereto and to be occupied therewith shall be erected on the said land and the value of such private dwelling house and outbuildings shall in the aggregate not be less than One Thousand Five Hundred Pounds.*
>
> *8. No fence hedge or other construction of any kind nor any tree or plant of a height of more than 4 feet 6 inches above road level shall be erected, grown or permitted within 15 feet of any road intersection and the Road Authority shall have the right to enter upon the said land and to clean, repair improve and maintain all or any kind of the drains gullies or water courses which may be thereon and to remove out or trim any fence hedge or other construction and any tree or plant which may be erected placed or grown upon the said land in contravention of this restrictive covenant without liability for any loss or damage thence arising and the Registered Proprietor shall pay to the Road Authority the cost incurred by reason of the matters aforesaid."*

[2] The modifications being sought are as follows:

> *"1. There shall be no sub-division of the said land save and except in accordance with the Registration (Strata Titles) Act.*
>
> *3. No building of any kind other than apartment with appropriate out-buildings and structures appurtenant thereto and to be occupied therewith shall be erected on the said land.*

> *8. No fence hedge or other construction of any kind not any tree or plant of a height of more than 12 feet above road level shall be erected grown or permitted within 8 feet of any road intersection."*

[3] The grounds on which the applicant relies are contained in section 3(1) (a), (b) and (d) of the **Restrictive Covenant (Modification and Discharge) Act** (hereafter referred to as "*The Act"*).

[4] By way of a letter dated March 22, 2019, the Kingston & St. Andrew Municipal Corporation (hereafter referred to as ***KSAMC***) granted planning and building permission to erect one (1) one (1) bedroom apartment, one (1) game room and six (6) two (2) bedroom townhouses. This letter was exhibited to the Affidavit of Marcia Elaine Givans in Support of the Fixed Date Claim Form filed on February 3, 2020. The approval granted by the KSAMC was subject to some general conditions including:

> *"**a**) That this approval does not dispense with the obligation to apply for modification or discharge of any restrictive covenants where the approval is not in conformity with any covenants endorsed on the title and is subject to such modification or discharge as the case may be. The applicant shall, where the Restrictive Covenants (Discharge and Modification) Act applies, make the relevant application to the court.*
>
> *g) That failure to comply with the conditions as listed herein and approved will be considered a breach and will render this **NULL** and **VOID**."*

[5] Construction began in June 2019 before the application was made for the modification of the restrictive covenants. There were no notices posted on the exterior of the development as required by the KSAMC. After construction began, Mr. Archibald Campbell, the direct neighbour to the right of the development sent a cease and desist letter to Mrs. Givans however despite this, construction continued.

OBJECTIONS

[6] The application for modification is being opposed by several residents from the area, namely Robert Davis of 27 Hopeview Avenue, John Barnett of 24 Hopeview Avenue, Yvonne McCalla Sobers of 11 Widcombe Drive, Paul Carroll of 25 Hopeview Avenue, Megan Irvine of 9 Widcombe Drive, Odette and Archibald Campbell of 21 New Haven Avenue, Suesette Harriott-Rogers of 35 Hopeview Avenue, Dr. Garth Lyttle of 34 Widcombe Heights, Maxlyn Joy Noble of 17 New Haven Avenue, Charmaine Penelope Franklyn of 6 New Haven Avenue and Valerie Joan Stone of 13 Hopeview Avenue.

[7] By virtue of a Formal Objection to the Lifting of the Restrictive Covenant as Described in Claim No. SU2020CV00385 filed on November 4, 2020, eight residents outlined the grounds for their objections. Three of the eight residents, Hugh Cross, Heather Cain and Ryan Machado did not present any affidavit in support. These grounds are summarized as follows, that:

> 1. The erection of a three-storey townhouse complex changes the Nature and Character of the community, neighbourhood and strata.
>
> 2. The Third Storey of the intended Townhouse Complex, and worse, any possible access to the roof above it will have a direct, unobstructed line of sight into the bedrooms, patios, living rooms and lawns of the objectors' properties and is both an invasion of privacy and violates the right to enjoyment, owed to the owners and occupants of nearby properties.
>
> 3. The intended structure of the building, based on the approvals received from KSAMC, varies significantly from what was communicated to immediate neighbours about the intended structure for erection.
>
> 4. The notice requesting filing of objections was not served on all the directly affected property owners.

5. The incorrect address for the property was used in the Legal Notice. The address was stated as 23 New Haven Avenue, Kingston 8 in the parish of Saint Andrew when in fact it is 23 New Haven Avenue, Kingston 6.

[8] While Mr. Archibald Campbell and Mrs. Odette Campbell ("The Campbells") were also signatory to the objections filed above, they filed another set of objections outlining further grounds directly affecting their enjoyment of their property. These grounds are as follows:

1. None of the provisions of Section 3(1) (a) (b) (c) and (d) of the Restrictive Covenants (Discharge and Modification) Act apply in this case.

2. The properties set out in the Widcombe Heights area are laid out as an upscale residential scheme which requires that only a private dwelling house be erected on the lots, that there be no further subdivision and that each dwelling house be created at a certain distance from the boundaries in order to preserve the high quality and character of the neighbourhood.

3. We have created a dwelling house which conforms with the general character of the neighbourhood and the relevant restrictions.

4. The area has generally developed in the manner envisaged when it was laid out with the erection of single-family dwelling houses on spacious lots and thus the character of the neighbourhood has undergone no changes by virtue of which the restrictions ought not to be deemed obsolete.

5. The proposed modifications are therefore likely to interfere substantially with and be detrimental to our enjoyment, comfort and convenience of our said property and in particular it will lead to an increase in traffic and noise and density given the likely increase in the number of persons that will live on the subject land.

6. If the application were to be allowed, the applicant would be allowed to erect building close to the boundaries of land the subject matter of the application and in such a way as to inhibit the enjoyment of the adjoining

owners and adjacent properties by their owners to whom the benefit of the restrictions enure.

7. The modifications applied for are not consistent with the further orderly development of the area.

8. The applicant is seeking to be freed of the restrictions which may make her property more convenient for her own private purposes without regard for the owners of the other lots in the vicinity and the damage which will be caused to us and other owners if the restrictions are modified.

SUBMISSIONS

[9] I am grateful to Counsel for their detailed and fulsome submissions. I will attempt to summarize the relevant submissions presented by outlining only that which is relevant to assist me in arriving at my decision.

APPLICANT'S SUBMISSIONS

[10] The Applicant filed written submissions on June 21, 2022. Mr. John Clarke submits on behalf of the Applicant that she has satisfied the requirements of section 3 (1) (a), (b), (c) and (d) of the Act. Mr. Clarke argues that the covenants should be deemed obsolete due to changes in the use and occupation of the neighbourhood.

[11] He defines the neighbourhood as "*all that area which forms part of Barbican plan or, at a minimum, the 148 lots which were part of the Widcombe Height plan deposited in 1956 at the Registrar of Title (sic)*". Counsel further submits that in keeping with the definition of neighbourhood in **Re Davis [1950] 7 P & CR.1**, the character of the Widcombe Heights neighbourhood has changed rendering the covenants obsolete.

[12] Mr. Clarke further relies on the case of **#30 Dillsbury Avenue Claim Number: 2006 HCV 00856** to submit that a generous approach should be taken to the term "neighbourhood" and that there is no rational or logical basis for limiting the neighbourhood to the tiny area cited by the objectors.

[13] Counsel urged the Court to exercise its discretion to allow for modification of the covenants as the face of the neighbourhood has permanently changed and that the covenants concerning such dwellings and land space ought to be deemed obsolete.

[14] Counsel further argued that the restrictive covenants prevent the land from being reasonably used for a purpose that the relevant agencies have approved which is consistent with the development plan for the area. It is also contended that the continued existence of the restrictive covenants would impede the reasonable user of the land for both private and public purposes.

[15] Mr. Clarke has also submitted that due to the desirability of the area, being in the middle of the city, that city living requires adapting to changes. He went on to aver that the current trend in the area involves building townhouses immediately adjoining a single-family dwelling. According to Mr. Clarke, there is no evidence to suggest that the nominal increase of 6 to 9 units would contribute to the noise level or breach of privacy in any noticeable way and that any structure or family house could cause an invasion of privacy. Counsel then submitted in the alternative that the benefits are not of a sufficient degree to justify the continued existence of the covenant.

[16] Counsel further stated that based on the fact that they have received no objections from residents, Mr. and Mrs. Wong and Ms. Janet Lindo that persons of full age and capacity entitled to the benefit of the restriction have by implication or agreement or by their omissions agreed to the covenants being discharged or modified. He further submitted that the court would have to make some findings of fact as there is some disputed evidence between the parties in relation to whether the objectors initially consented to the covenants being discharged or modified.

[17] Mr. Clarke suggested that the case law indicates that the kind of injury contemplated is an injury to the relevant person in relation to his ownership of the land benefitted including a reduction in the value of land, subjection to noise or traffic or impairment of views, intrusion of privacy, unsightliness or alteration to the character or ambience of the neighbourhood.

[18] The applicant is unaware, according to counsel, of any discretionary considerations which should be utilised as a fair basis for the court to refuse to grant the modification sought. This, he says is on the basis that the Applicant sought the relevant approval of the various planning authorities and then the court concerning the modification of the covenants.

[19] Counsel states in paragraph 71, page 21 of his submissions:

> *"At all material times, the Applicant adhered to the relevant rules and process. The applicant had taken the usual steps to engage its Attorneys-at-Law to affect (sic) the process of applying for the discharge or modification of the covenant. The applicant had taken a proper conscientious step to effect the removal. She did not deliberately flout the law, nor was she indifferent to the law…."*

This statement by Counsel will be addressed further on in the judgment.

OBJECTORS' SUBMISSIONS

[20] Mr. John Graham K.C., Counsel for Mr. Archibald Campbell and Mrs. Odette Campbell submitted that the onus is on the applicant to prove that at least one of the grounds set out in section 3 (1) of the Act exists **(Re Lots 12 and 13 Fortlands (1969) 11 JLR, 387 at page 391)**.

[21] The objectors also contend, while vehemently denying the suggestion by the applicant that the fact that there is more than one JPS metre on a property does not mean that it is a multifamily residence, nor does it change the character of the neighbourhood. Counsel further submitted that the authorities conclude that the extent of the area comprising the neighbourhood can consist of a small enclave in the immediate vicinity of the applicant's land or even be confined to two plots comprising only the benefited land.

[22] Counsel submitted that the neighbourhood can be defined as the area comprising the Widcombe Heights subdivision and since inception, the neighbourhood of Widcombe Heights has remained one comprising single-dwelling units without any developmental change. This was supported by evidence filed in Affidavits of Archibald Campbell and Odette Campbell as well as the expert report of Dr. Patricia Green.

[23] Counsel also further contended that despite the changes that may have taken place in the other adjoining neighbourhoods, New Haven is situate within an enclave which is unaffected by any changes which may exist in the adjoining communities. Significant reliance was placed on the case of **Chin Jen Hsia et al v. Martin Lyn & Ors [2020] JMSC Civ. 5**. Counsel also propounded that in 2022 a purchaser of a Lot in New Haven would expect to receive a single-dwelling unit and this, he says, is still achievable.

[24] Counsel further argued that the original purpose of the covenants can still be achieved and as a result, the covenants are not obsolete. Reliance was placed on the following cases: **Re Shaw Park [2016] JMSC Civ. 120**, **Re Norbrook Drive E.R.C. 80/90** and **Re 13 Norbrook Crescent Claim No. 2005 HCV 1767**.

[25] Counsel contends that single family residences are still the prevailing feature of the Widcombe Heights development and in particular New Haven Avenue and that despite the tendency toward multi-unit complexes in surrounding areas/neighbourhoods, the covenant restricting subdivision of land has not been deemed obsolete.

[26] In relying on **Sagicor Pooled Investment Funds v. Robertha Ann Matthies et al [2017] JMCA Civ. 35,** Counsel argued that the restrictions achieve practical benefits to the residents and those benefits are of significant weight to justify the continuance of the restriction without modification.

[27] Counsel argued that the practical benefits include privacy and density. With reference to the Affidavit of Archibald Campbell and Odette Campbell sworn to on January 8, 2021, counsel contends that the residents of the third story townhouse complex would have a direct unobstructed line of sight into the bedrooms, patio, and lawns of his clients' property.

[28] Counsel believes that the increase in the density of the neighbourhood would result in increased traffic and noise in the area which would deprive the objectors of the privacy and tranquillity of the neighbourhood. He further averred that there would be an increase in the strain services such as garbage collection.

[29] Counsel requests that the court draw the conclusion that Dr. Earl Bailey was merely an advocate rather than an unbiased expert. This, he says, is based on the fact that there was no depth and no precision in his choice of owners in the neighbourhood that he interviewed, and he gave evidence about an amended approval when there was no documentary evidence provided by either KSAMC or the Applicant to support the existence or the fact that such an application was made.

[30] Counsel also further submitted that section 3(1) (c) of the Act does not apply as once the Objectors were notified that the Applicant intended to modify the restrictive covenants, they made their objections.

[31] As it relates to injury to the persons entitled to the benefit of the restriction, Counsel set out the principles applicable to this ground as stated in **Re Cherry Gardens [2016] JMCA Civ 31** where Brooks JA (as he then was) stated that:

> *(2) The onus of proof lies on the applicant to satisfy the requirements of section 3(1)(d)*
>
> *(3) The objector is not obliged to adduce evidence of the injury that he complains about*
>
> *(4) The injury to the objector must be related to his own proprietary interest*
>
> *(5) The onus is on the applicant to show that the objection is frivolous*
>
> *(6) The applicant must show that granting the application would not amount to a relaxation of that covenant which would constitute a real risk as a precedent, of disturbing the pattern that the covenant was designed to protect. In other words, the applicant must show that the mere existence of an order modifying the covenant would not undermine an intact system of restrictions*
>
> *(7) Even if no injury to the objector is proved, the court still has the discretion to refuse the application to modify or discharge the covenant.*
>
> *(8) Each case turns on its own facts.*

[32] Mr. John Graham K.C. in concluding, submitted that the proposed modification would cause injury to the objectors by way of loss of privacy, increased noise, increased

population density and material changes that would permanently alter the character of the neighbourhood.

[33] Submissions made by Mr. John Thompson, Counsel for Objectors John Barnett, Paul Carroll, Robert Davis, Megan Irvine and Yvonne McCalla Sobers, were mostly ad idem with those of Mr. John Graham, K.C. As such, I will only outline that which I consider material.

[34] Counsel asserts that the building at 23 New Haven Avenue is an unapproved structure by the designated authority, KSAMC. This is on the basis that the terms of the approval granted by the KSAMC have been breached since the structure does not conform to the approved plans and regulation under KSAMC rendering the approval null and void. This is because the planning permission was for seven (7) units, consisting of six (6) two-bedroom townhouses, however the Applicant under cross-examination admitted that there are nine (9) units being built. Additionally, the Applicant started construction prior to making the application to modify the restrictive covenants.

[35] I will now attempt to outline certain areas of submissions made by Ms. Moneaque McLeod, Counsel for Mrs. Suesette Harriott-Rogers, to the extent that it differs from the previous submissions.

[36] Counsel submits, in reliance on ***Re 30 Dillsbury Avenue (Supra)*** and ***Chin Jen Hsia and others v Martin Lyn and others (Supra)***, that a limited definition ought to be adopted for the neighbourhood, based on the apparent differences between the character of the properties within the neighbourhood and those in the surrounding areas, and those lying on the outskirts. Therefore, the appropriate neighbourhood would be Widcombe Height subdivision based on Dr. Green's definition.

[37] In applying the ***Estate Agent's Test*** as outlined in ***Chin Jen Hsia and others v Martin Lyn and others (Supra)***, Counsel concluded that a purchaser would expect to find single family homes within that neighbourhood as the character remains unchanged.

[38] Counsel also further asserts, relying on **Re Roseberry [2021] JMSC Civ 187**, that the presence of some *amount* of developments within a neighbourhood still does not mean that the covenant was obsolete as there was still a predominance of single family residences. She further argued that a determination of the issue would ultimately rest on if the character of the neighbourhood had changed by the developments.

[39] Counsel also further submits that the fact that Mrs. Harriott-Rogers property is close to Charlemont Drive which forms the outer border of the enclave and proximity to the street does not deprive her the entitlements she has within the enclave.

[40] She further asserts that due to the fact that 23 New Haven is located at an intersection, the construction of a higher fence would impact visibility from two street and would deprive road users of the safety the covenant provides.

[41] Counsel argued that the presence of the covenant cannot be seen as a hinderance to the reasonable use of the premises as the property can be reasonably used as a single-family dwelling house with a wide set back from the roadway and low fencing. She then concluded that the reasonable use of the land has not been sterilized by the covenants and the objects and purpose of the covenants can still be achieved.

[42] As it relates to the consent of the beneficiaries as outlined in ***s 3 (1) (c) of the Act***, Counsel submitted that there is no evidence that all the beneficiaries were notified of the plans for the development. She further referred to the plans as a “well-kept secret”.

[43] In response to the Applicants assertion that the Objector is in breach of the covenants due to the height of her fence, Counsel asserts that the acceptance or committing of any minor breach by an objector would not deny them of their rights to enforce the covenant. Counsel relied on ***Re Lot 12 and 13 Fortlands (Supra)*** where the Court held the mere passive acquiescence of a breach did not prevent future complaints and further, that the fact that an objector is himself in breach of a covenant does not prevent him from taking steps to protect his own right.

[44] Counsel then concluded that there is no acquiescence by either act or omission and that the beneficiaries are entitled to enforce their rights as per the restrictive covenants.

THE EXPERT EVIDENCE

[45] Dr. Earl Bailey, Senior Lecturer in the Faculty of the Built Environment at the University of Technology, in his report on behalf of the Applicant, stated that there are already at least twenty (20) similar residential developments in the area bearing comparable function and design/layout.

[46] He opined that there is an increasing trend in redefining the spatial, physical, social and demographic content of traditionally large single family residential middle to upper income communities, where natural development and market forces are favouring smaller and single families in high-rise residential communities.

[47] In his report, he declared that the Widcombe communities fall under the Barbican Local Planning Area which proposes a dominantly residential land use with areas reserved for offices and commercial, government and statutory undertakings and some spaces for recreation and parking.

[48] He further stated that as it relates to Restrictive Covenant 1, the land is not being subdivided since the multiple family dwelling unit being erected on the land will give each unit's owner the opportunity to own their individual unit and simultaneously have common/equal access to communal areas.

[49] As it relates to Restrictive Covenant 3, he stated the design and density of the development does not abruptly depart from the neighbouring structures and requested that the court make considerations for the trend in development in the area and its surroundings. He further stated that the covenant is antiquated and does not reflect contemporary socio-economic and spatial realities.

[50] He further opined that the provision in Restrictive Covenant 8, is irrelevant due to the current concerns for personal security throughout the KMA and Jamaica in general.

He further maintained that this provision is ignored throughout the entire KMA and other areas in the country. The development has retained approximately 15 feet from its two neighbours and this, added to the setback of the houses there is approximately 30 feet between buildings. This, he says, provides more than sufficient room for recreational activities, privacy and comfort on both sides.

[51] Dr. Bailey averred that the space occupied by the development could easily be occupied by a single-family dwelling of equal size and design. He further conceded that the increasing economic value brought about by the development, will have windfall effects on property values in the neighbourhood and assist in retaining its exclusive value.

[52] He also spoke to the social value which would be brought about by the development which he says cannot be easily priced as the socio demographic profile of would-be buyers such as Professors, Legal Professionals etc would add social value to the community.

[53] Dr. Patricia Green, Architect, in her expert report on the Objector's behalf, opined that the restrictive covenants 1, 3, and 8 still serve a purpose and should remain unmodified for the property at 23 New Haven Avenue.

[54] She defined the neighbourhood as Widcombe Heights, which, she states consists of detached single-dwelling units as both single and double storey structures. Dr. Green further stated that only one property was subdivided into seven (7) smaller lots each containing two storey dwellings.

[55] On further analysis, Dr. Green concluded that since the inception of its subdivision, Widcombe Heights has remained intact with only one change out of what she says is 148 lots. She stated that up until the time of the application for the modification of the covenants at 23 New Haven Avenue, the character of the neighbourhood remained as single-dwelling units without any developmental change.

[56] She further opined that the restrictive covenants at 23 New Haven Avenue inside Widcombe Heights remain valid and that the continued existence of the restrictive covenants without modification retain practical benefits.

[57] She sought to set out a detailed historical analysis of the Widcombe Heights neighbourhood further outlining the benefits of the restrictive covenants and why they were put in place including for the purposes of earthquake and hurricane disaster mitigation responses.

[58] In contrast to Dr. Bailey's declaration that Widcombe Heights fall under the Barbican Local Planning Area, Dr Green proposes the Widcombe Heights neighbourhood is a part of the Papine University District Local Planning Area of the 2017 National Environment and Planning Agency (NEPA) Kingston and Saint Andrew and the Pedro Keys Provisional Development Order (hereafter referred to as "The Development Order"). She further highlighted **POLICY PUD H 2** of the Development Order which outlines the density ranges which should apply as:

> *(2) Density shall not exceed 75 habitable rooms per hectare (**30 habitable rooms per acre**) with building heights **not exceeding two (2) storeys** in areas so identified on the Density Zoning Map in Figure 7;*

ISSUES

[59] The issues to dealt with are as follows:

I. Whether the Objectors are entitled to the benefit of the restrictive covenants?

II. Whether Widcombe Heights is the geographical extent of the neighbourhood?

III. Whether there has been changes in the character of the neighbourhood, or are there other circumstances which render the covenant obsolete?

IV. Whether the covenants impede the reasonable user of land without securing any practical benefits to justify the continued existence thereof without modification?

V. Whether the beneficiaries of the covenants have consented whether expressly or by implication?

VI. Whether the proposed modification would cause injury to the objectors?

THE LAW AND ANALYSIS

[60] Section 3 (1) of the ***Restrictive Covenants (Discharge & Modification) Act*** provides that:

> *3.-(1) A Judge in Chambers shall have power, from time to time on the application of the Town and Country or Planning Authority or of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction (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 which the Judge may think material, the restriction ought to be deemed obsolete; or*
>
> *(b) that the continued existence of such restriction or the continued existence thereof without modification would impede the reasonable user of the land for public or private purposes without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of such restriction, or, as the case may be, the continued existence thereof without modification; or*
>
> *(c) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or*
>
> *(d) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction:*

[61] In the case of **Re Lots 12 and 13 Fortlands (Supra)**, Parnell J of the Supreme Court of Jamaica made the following deductions from s 3(1) of the Act above:

> *(1) that the burden is on the applicant to prove that the restriction arising under a covenant which affects his freehold land should be discharged or modified;*
>
> *(2) that the extent of the burden of proof is to satisfy the judge on a balance of probabilities that at least one of the matters stipulated under (a)-(d) has been established;*
>
> *(3) that every person entitled to the benefit of the restriction which is to be discharged or modified ought to be notified of the application which has been made so that he may intervene as an interested party if he so wishes;*
>
> *(4) that even if the applicant shows the judge that one of the matters required to be established by him for the removal or modification of the covenant has been made out, the application may still be refused if, in the court's discretion, there is proper or sufficient ground for so doing;*
>
> *(5) that any compensation payable as a result of loss suffered or to be suffered by an interested party as a consequence of the discharge or modification of the covenant in favour of the applicant is limited to an amount proved by the person claiming the said loss as traceable to the benefit which the applicant will obtain as a result of the order.*

ISSUE I: *Whether the Objectors are entitled to the benefit of the restrictive covenants?*

[62] There is no dispute as to whether the Objectors are entitled to the benefit of the covenants. Both the objectors' and the applicant's property are a part of the same subdivision. All parties conceded that the properties are a part of the Widcombe Heights Subdivision. The applicant's property at Number 23 New Haven Avenue is registered as Lot 36 on the Plan, along a few of the Objectors', namely, the Campbell's property at Number 21 New Haven Avenue is registered as Lot 21 on the Plan; Objector Robert Davis property at Number 27 Hopeview Avenue is registered as Lot 66 on the Plan and Objector Suesette Harriot-Rogers property at Number 35 Hopeview Avenue is registered as Lot 62 on the Plan. All objectors' properties are registered on the Plan of Widcombe Heights. The court is satisfied that all parties are a part of the Widcombe Heights subdivision.

[63] As outlined on each of the respective titles - "*The land above described (hereinafter call "the said land") is subject to the undermentioned restrictive covenants which shall run*

with the land and shall bind as well the Registered Proprietor, its heirs, personal representatives and Transferees as the Registered Proprietor for the time being of the said land, its heirs, personal representatives and transferees and shall enure to the benefit of and be enforceable by the registered proprietor for the time being of the land or any portion thereof…". I am therefore satisfied that the Objectors are entitled to the benefit of the restrictive covenants.

ISSUE II*: <u>Whether Widcombe Heights is the geographical extent of the neighbourhood?</u>*

[64] Before considering whether to grant the application for modification, it must be determined whether Widcombe Heights is the geographical extent of the neighbourhood.

[65] In ascertaining whether Upper Montrose Road constitutes a neighbourhood, J Pusey J at paragraph 63 in the case of **<u>Chin-Jen Hsia et al v Martin Lyn et al [2020] JMSC Civ 5</u>** referred to **Preston and Newsom** definition as quoted in **Re Davis Application (Supra)** as follows:

> *"Provided a neighbourhood is sufficiently clearly defined as to attract to itself and maintain a reputation for quality and amenity, the size of the neighbourhood and within reasonable limits, the process and nature of the development outside its boundaries is of little consequence."*
>
> *The test is thus essentially an estate agent's test: what does the purchaser of a house in that road, or that part of the road, expect to get?.....*
>
> *The neighbourhood need not be large: it may be a mere enclave. Nor need it, so far as this definition goes, be coterminous with the area subject to the very restrictions that is to be modified or other restrictions forming part of a series with that restriction.....*
>
> *The test is a pragmatic one: if the events in the vicinity have stultified the covenant, those events may be considered even if they are on land never affected by the restriction in question or any related restriction.....*

....this part of the subsection seems to be directed not to matters of title and the right to enforce the restriction, but to the question whether the restrictions affecting a given property, situated where it is situated, have been stultified by events on the surrounding premises."

[66] I pause here to acknowledge the ruling made by the Court of Appeal overturning the decision made by the Supreme Court in **Chin-Jen Hsia et al v Martin Lyn et al (Supra).** The Supreme Court case however was overturned based on the issue of the Objectors' entitlement to the benefit of the restrictive covenants. I find that the case is however useful in dealing with the issue of the definition of the neighbourhood and change in its character.

[67] Hart-Hines J at paragraph 30 in **Re Roseberry (Supra)** referred to the case of **23-25 Seymour Avenue and 14 Upper Montrose Road Claim Nos. 2003 HCV 03060, 2008 HCV 03061 and 2008 HCV 03062**, Supreme Court Jamaica, judgment delivered on 7 September 2011, where Brooks J (as he then was) at paragraph 25 highlighted key principles to be adopted when giving consideration to applications made pursuant to section 3 of the Act. The learned judge stated as follows:

"In Hopefield Corner, Anderson, J., cited several well established authorities, which, in my view, outline, among others, the following principles:

a. the term "neighbourhood" was not necessarily restricted to the lands affected by the covenant in question;

b. the neighbourhood need not be large; it may be a mere enclave;

c. the test to determine what was the neighbourhood in any given case is the "estate agent's test". That test asks the question "what does the purchaser of a house in that road, or that part of the road, expect to get?"

d. the character of a neighbourhood, for these purposes, is derived from the style, arrangement and appearances of its buildings and from the social customs of its inhabitants, and,

e. in determining whether the covenants have been rendered obsolete, pragmatism is the watchword. I respectfully accept these principles as accurately stating the relevant law."

[68] At this juncture, I must say that I prefer the evidence of the expert, Dr. Green. I found her to be credible, providing sufficient explanation for her opinion. Therefore, going forward, I will only refer to the evidence of Dr. Bailey to the extent that it draws a distinction from the opinion of Dr. Green.

[69] Dr. Bailey in his Expert Report opined that the neighbourhood for the purposes of this application is Widcombe Heights which he says is located in the Barbican Local Planning Area. At this juncture, I must indicate that I accept the evidence of Dr. Green as due to the fact that on a careful observation of the map, I found that Widcombe Heights fell under the Papine Local Planning Area and not the Barbican Local Planning Area.

[70] On the other hand, Dr. Green, in her report also found that the neighbourhood is Widcombe Heights. However, she opined that this community falls within the Papine Local Planning Area. She also claims that the Widcombe Heights neighbourhood "*comprises 6 roads with lots on both sides namely, Monterey Drive, Fairland Avenue, Hopeview Avenue, Widcombe Drive and Charlemont Drive with its hard edge at Widcombe Drive…… containing southerly lots only*."

[71] Though both experts identify the neighbourhood as Widcombe Heights, Dr. Bailey did not provide an account of the extent of the neighbourhood. Based on the law cited above, I therefore accept the opinion of Dr. Green. On a visit to the locus in quo, I found that Monterey Drive, Hopeview Avenue, Fairland Avenue, Widcombe Drive and Charlemont Drive contained mostly single-family residences with buildings of a maximum of two (2) storeys which were set back about 30ft from the road. I found that although the streets surrounding that area contained multiple apartments, those roads stood out to be different and are not in the New Haven enclave but are located on the outskirts of the neighbourhood in question.

[72] I therefore found that the neighbourhood comprises an enclave in Widcombe Heights which includes lots on both sides namely, Monterey Drive, Fairland Avenue, Hopeview Avenue, Widcombe Drive and a part of Charlemont Drive with its hard edge at Widcombe Drive containing southerly lots only.

ISSUE III: ***Whether there have been changes in the character of the neighbourhood, or are there other circumstances which render the covenant obsolete?***

[73] Having identified the extent of the neighbourhood, I now examine whether there are any changes in the character of the neighbourhood which would render the covenants obsolete.

[74] Sampson Owusu at page 513 of **Commonwealth Caribbean Land Law** when dealing with the issue of changes which may render a restrictive covenant obsolete stated that:

> *The Act is not designed to facilitate expropriation of private rights of another, except where the circumstances make it necessary for the courts to remove or to modify a restriction which can no longer serve the purpose for which it was imposed. The fact that the discharge or modification will make the applicant's property more enjoyable or more convenient for his own private purposes is not a valid ground for the exercise of the jurisdiction to modify or discharge a covenant.*

[75] In the case of ***Re 30 Dillsbury Avenue (Supra)***, Lawrence-Beswick J in dealing with the issue of whether there were changes in the character of the neighbourhood, stated at paragraph 10:

> *"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 (sic) to get?"*
>
> *"Character", as considered in Re Davis' Application "derives from style, arrangement and appearance of the house on the estate and from the social customs of the inhabitants."*

[76] In the case of **Re Norbrook Crescent (Supra)**, the court found that the character of the neighbourhood did not change even though several of the properties were converted to multi-unit residential complexes. Brooks J (as he then was) stated that he observed on his visit to the locus in quo that there were still a large number of properties which seemed to retain the quality of a private residence. In finding that the character of the neighbourhood had not changed, Brooks J stated at page 21:

> *It is my view that with the large number of single family homes which still exists, the covenant still has value and currency. In that context, the construction of a new single-family residence would not be out of place on Norbrook Crescent. The benefit of the covenant may still be enjoyed.*

[77] Dr. Green opined that Widcombe Heights consists of detached single-dwelling units as both single and double storey structures. Dr, Green further stated that only one property was subdivided into seven (7) smaller lots each containing two storey dwellings.

[78] On further analysis, Dr. Green concluded that since the inception of its subdivision, Widcombe Heights has remained intact with only one change (mentioned at paragraph 74 above) out of what she says is 148 lots. She stated that up until the time of the application for the modification of the covenants at 23 New Haven Avenue, the character of the neighbourhood remained as single-dwelling units without any developmental change.

[79] In addition, the applicant submitted that the character of the Widcombe Heights neighbourhood has changed rendering the covenant obsolete. The applicant relied on the expert report of Dr. Bailey, where on page 18 he stated that the development features private multiple dwelling houses under one roof and shares common entrances and other common areas and services. The report further went on to state that the design and density of the unit does not abruptly depart from neighbouring structures and that in this regard, the court is being asked to make considerations for the rapidly expanding trends in developments in the area and its surroundings.

[80] It is noteworthy that in cross examination, when asked if he saw any evidence of multifamily structures in that area, Dr. Bailey said yes based on the fact that there were multiple JPS meters on several properties. However, Counsel John Graham K.C. submitted that the mere fact that there is more than one JPS metre on a property does not mean that it is a multifamily residence, nor does it change the character of the neighbourhood. I tend to agree with this submission. I find support for this in the case of **Chin Jen Hsia, Sarah and Hall, Marvin et al v Lyn, Martin et al (Supra)**, where the Applicant submitted that:

> *Also number 18 Upper Montrose Road was tenanted and operated a six family dwelling with the main house and outhouses with six Jamaica Public Service Company light meters evident. Therefore the character of the neighbourhood is changing from single residence to multiple residence complexes.*

In response to the said submission, J Pusey J stated:

> *The fact that one is used as a Hotel/bed and breakfast or another has six electricity meters does not affect the fact that the structure on the lot is a single residence with the requisite layback of boundaries and is not prohibited by the covenants that the Applicants want to modify*

[81] On my visit to the locus in quo, I found that the homes in the Widcombe Heights area were predominantly single-family homes with a maximum of 2 storeys. I tend to agree with Dr. Green that there was only one lot which deviated from the covenants in that it was subdivided. Following from ***Re Norbrook Crescent (Supra)***, the fact that one lot was subdivided does not operate to change the character of the neighbourhood. In that case, Brooks J (as he then was) found that the covenants were still of value due to the fact that even though some of the properties were changed to multifamily complexes, a large number of single-family homes still existed.

[82] The fact that there are multifamily complexes on the outskirts on Charlemont Drive and in the surrounding neighbourhoods of Charlemont Avenue and Widcombe Road does not operate to change the character of Widcombe being predominantly single-family homes. This further reiterates that the prevailing feature of the area is that of single-family homes.

[83] In applying the principle set out in ***Re 30 Dillsbury (Supra),*** today's purchaser would therefore expect to find in Widcombe Heights, single family homes with double or single storey structures on lots which provide sufficient distance from the roadway and boundaries to ensure privacy. On the question of whether this can still be achieved, I would answer in the affirmative. I therefore find that the applicant is fully able to use the lot in line with the covenants and that the character of the neighbourhood of Widcombe Heights has remained intact.

ISSUE IV: *Whether the covenants impede the reasonable user of land without securing any practical benefits to justify the continued existence thereof without modification?*

[84] The test to be applied under this ground is outlined by Lord Evershed in the case of **Re Ghey and Galton's Application [1957] 2 QB 650** at p. 663, which has been adopted in numerous cases. The test is as follows:

> *"It must be shown in order to satisfy this requirement, that the continuance of the unmodified covenants hinders, to a real sensible degree, the land being reasonably used, having due regard to the situation it occupies, to the surrounding property, and to the purpose of the covenants."*

[85] The court in the case of **Re No. 39 Wellington Drive Suit No. ERC 139 of 1990 (unreported)** at paragraph 40 adopted the question asked by Carey J.A. in **Stannard v Issa [1987] A.C. 175**. Orr J adopted the test as follows:

> *And so I ask the question which Carey J.A. asked in the Issa case: "Can the present restrictions prevent the land being reasonably used for the purposes the covenants are guaranteed to preserve?" My answer is no. I find the present restrictions do not prevent the reasonable user of the applicant's lot as a singly (sic) family residence of high quality the cumulative purpose of the restrictions. Indeed the plan of the area tendered in evidence in support of the application clearly shows that the vast majority of the houses are still single storey, single family and this was confirmed by a view of the neighbourhood.*

[86] In **Stannard v Issa (Supra)**, the Privy Council accepted the powerful dissenting judgment of Carey J. A. The Privy Council quoted a portion of the said judgment at paragraphs 12 and 13 as follows:

> *12. Carey, J.A., in a powerful dissenting judgment observed that:*
> *"An applicant for modification or discharge of a restrictive covenant where his ground is that provided for in section 3(1)(b) has a burden imposed on him to show that the permitted user is no longer reasonable and that another user which would be reasonable is impeded…. Lord Evershed, M.R. in Re Ghey and Galton's Application [1957] 3 All E.R. 164 at page 171 expressed the view that in relation to this ground:–*
>
> *'…it must be shown, in order to satisfy this requirement, that the continuance of the unmodified covenants hinders, to a real, sensible degree, the land being*

> *reasonably used, having due regard to the situation it occupies to the surrounding property, and to the purpose of the covenants.'*
>
> ***Put another way, the restrictions must be shown to have sterilised the reasonable use of the land**. Can the present restrictions prevent the land being reasonably used for purposes the covenants are guaranteed to preserve? Accordingly, I would suggest that it would not be adequate to show that the proposed development might enhance the value of the land for that would demonstrate the [respondent's] proposals are reasonable and the restriction impedes that development…"*
>
> *13. Carey, J.A., concluded:*
>
> *"I would make one final comment. If the evidence indicates that the purpose of the covenants is still capable of fulfilment, then in my judgment the onus on the [respondent] would not have been discharged."*

[87] Dr. Bailey, in his Expert Report opined that "*a large percentage of the existing large single family dwelling units within the New Haven, Widcombe and other similar area are proving costly and cumbersome to maintain which has resulted in disrepair and others being out up for sale, as current owners are becoming frustrated with rental management and upkeep and are opting to scale down their living conditions"*. He further stated that "*the conversion of these large single family dwellings to high rise single family multi-storey dwellings will bring significant aesthetic value to the community and better opportunities for building maintenance* …." I must say that on a visit to the area, I was not of that impression. Further, it seems to me that aesthetic value must be treated the same as an increase in the value of the land as outlined in Carey J.A.'s dissenting judgment outlined above at paragraph 86. To show that the development would create aesthetic value is not enough to satisfy this ground.

[88] Counsel on behalf of the Applicant submitted that the restrictive covenants prevent the land from being reasonably used for a purpose that the relevant agencies have approved which he says is consistent with the development plan for the area. At paragraph 52 of his submissions, he further stated that "*all the parties live in the middle of the city in a desirable area. It is submitted that city living requires adapting to changes, and the current trend in the area involves building townhouses immediately adjoining a single family dwelling."*

[89] In answering the question asked by Carey JA *of whether the present restrictions prevent the land being reasonably used for the purposes the covenants are guaranteed to preserve*, I find that the present restrictions do not prevent the reasonable user of the applicant's lot from using the premises in line with the covenants. On a visit to the locus in quo, I found that majority of the houses were single family residences with a maximum of two storeys with well-manicured lawns and sufficient setback from the boundaries. Overall, the high living conditions with great aesthetic value has been maintained.

[90] There was no evidence presented to this court on behalf of the applicant, that indicates that she would have any difficulty disposing the property as a single-family residence and with the existing restrictions. As stated by Harris J (Ag) in ***Re 48 Norbrook Drive (Supra)*** and adopted by Hart-Hines J in the case of ***Re 30 Roseberry (Supra)***:

> *"It is evident that there is a desire and intention on the part of the Applicant to erect six town houses to satisfy their own financial exploits. This could not be regarded as reasonable user of the land. A party is not free to expropriate the private rights of another merely for his own advantage".*

This statement, I find, succinctly describes the applicant's situation as the lot was being properly used before as a single-family dwelling and was demolished to provide for six (6) three (3) bedroom townhouses and three (3) one (1) bedroom apartments. The financial benefit is quite obvious. I therefore find that the restrictions must be shown to have sterilised the reasonable use of the land.

[91] The applicant has another hurdle to surmount in showing that the restrictions do not secure any practical benefits sufficient to justify their continuance. The applicant submitted that it is unclear what are the practical benefits enjoyed by the objectors from the restrictive covenants. She further submitted that there is no evidence to suggest that the nominal increase of 6 to 9 units would contribute to the noise level or breach of privacy in any noticeable way. The applicants further submitted that any structure or family house could cause an "invasion of privacy" and all the concerns raised by the objectors.

[92] Counsel on behalf of the Objectors have submitted that some of the practical benefits of the restrictions include privacy and density. He further stated that based on the Affidavit of Archibald Campbell and Odette Campbell sworn to on January 8, 2021, the inhabitants of the third story townhouse complex would have a direct and unobstructed line of sight into the bedrooms, patio, living rooms and lawns of their property. On visiting the locus, I found this to be true. He also stated that the development would increase population density in the neighbourhood which would cause an increase in traffic and noise.

[93] In resolving this issue, the question to be asked as per ***Stannard v Issa (Supra)*** is:

> "*does the restriction achieve some practical benefit and if so is it a benefit of sufficient weight to justify the continuance of the restrictions without modification?"*

[94] At paragraph 17 of ***Stannard v Issa (Supra)***, Lord Oliver in resolving this issue found:

> ***"It hardly needs stating that, for anyone desirous of preserving the peaceful character of a neighbourhood, the ability to restrict the number of dwellings permitted to be built is a clear benefit, just as, for instance, was the ability in Gilbert v. Spoor [1983] Ch. 27 to preserve a view by restricting building****. It scarcely requires evidence to demonstrate that the privacy and quietude of an enclave of single dwellings in large gardens is going to be adversely affected by the introduction on adjoining lands of no less than forty additional families. If, therefore, it were (sic) necessary to decide the point, it is in their Lordships' view quite clear that the trial judge was correct in finding that the continued existence of the covenants secured substantial practical benefits to the appellants"*
>
> *Emphasis mine*

[95] As it relates to the practical benefits brought about by the restrictive covenants, I find it clear on the facts that the restrictions were put in place to preserve the low population density in the neighbourhood while providing for low traffic, quietude and privacy. The introduction of a multifamily complex with an additional nine families will

affect the population density which I find will result in increased traffic and noise. As it pertains to privacy, I found based on my visit to the locus in quo, that residents on the top floor of the complex, especially from the large window in the six penthouse bathrooms will have an unobstructed view into the backyard and top floor of the Campbell's residence. While standing on the top floor at the front balcony, I was also able to see in the yards of the residents on the left of Widcombe Drive.

[96] I also found that the structure was in breach of Covenant 8 in that parts of the building was located 10ft away from the boundary as opposed to the 15ft required by the said covenant. The building was also the highest building in that area though it was pointed out that it would have been the same height as the Campbell's home. On a visit to the locus in quo I found that the building was distinctly taller than the Campbells home. I find that this breach greatly impedes on the privacy of other residents especially the Campbells. Restrictive Covenant 8 was intended to provide the residents with some level of privacy and tranquillity, and this remains an important feature to date. I therefore do not find that this Covenant is obsolete.

[97] Counsel for the applicant, in his submissions pointed out that the Campbells were not in a position to object based on privacy due to the fact that their property on the top floor, impeded on the privacy of other residents. However, I found that there were several two storey buildings in the area, even located directly across from the development. I find that even if this is the case, the development is in breach of **POLICY PUD H 2** of the Development Order, in that it contains three storeys as opposed to two which is the maximum allowed under the Development Order.

[98] In answering the question posed by Lord Oliver in ***Stannard v Issa (Supra)*** of *whether the restriction achieve some practical benefit and if so, is it a benefit of sufficient weight to justify the continuance of the restrictions without modification?",* I find that the restrictions achieve some practical benefits which are sufficient to justify the continuance of the restrictions without modification.

[99] I therefore find that the Applicant has failed to satisfy section 3 (1) (b) of the Restrictive Covenants (Modification & Discharge) Act.

ISSUE V*: <u>Whether the beneficiaries of the covenants have consented whether expressly or by implication?</u>*

[100] Bingham J, when analysing the meaning of section 3(1)(c) of the Restrictive Covenants (Modification & Discharge) Act in **<u>Re Gainsborough Avenue No ERC 184 of 1987</u>**, stated thus:

> *These words when examined in my opinion clearly and unequivocally imply and when properly construed refer to all the covenantees who qualify as benefiting 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.*

[101] In ***Re Roseberry (Supra)***, Hart-Hines J found that if an Objector was not served with the Notice of the Application for modification, then he could not know of the application and could not object to it. She relied on the case of **<u>Hopefield Corner Limited v Fabrics De Younis Limited</u>** Supreme Court Civil Appeals No. 7/06, Court of Appeal Jamaica, Judgment delivered on 24 October 2008. In that case it was held that where a notice ordered by the court was sent to an incorrect address, or if the advertisements of the notice of modification did not assist a layman to easily identify the lot in question, then a person entitled to the benefit of the covenant would have been deprived of his opportunity to object to the proposed modification, and any order modifying said covenant would be invalid or irregular.

[102] Counsel for the Applicant submitted that the application should be granted as:

> *"..persons of full age and capacity entitled to the benefit of such restriction have agreed expressly (Kingston and St. Andrew Metropolitan Area) or implications by their acts or omission (NEPA, Janet Lindo, neighbours served notice who didn't come (per affidavits of service and posting) and the overwhelming amount of neighbours who are not objecting to the restrictive covenants being modified."*

[103] It was submitted on behalf of the Campbells' that once they were notified that the Applicant intended to modify the restrictive covenants, they have at every stage, stated their objections. The Objectors further contended that this ground was not satisfied on the basis that the Applicant had stated that only three neighbours were issued with notices to object which were dated July 23, 2020, and sent more than two months later under cover of letter dated October 1, 2020. The said notices were also sent more than a year after construction had already started.

[104] It was submitted on behalf of Suesette Harriot-Rodgers that there is no evidence that all the beneficiaries were ever notified of the plans for the development. It was also submitted that the construction of the development was far from complete before objections were raised. It was further submitted that the actions of the objectors in mobilizing themselves and putting their concerns before the Court, even before obtaining proper legal representation, is proof that they have not consented to the development.

[105] In this case, I accept the evidence of the Objectors and find that there was no acquiescence or agreement. In cross-examination, Mrs. Givans indicated that she spoke to the immediate persons in the subdivision. She further admitted that by way of letter, Mr. and Mrs. Campbell had asked her to stop construction. Mrs. Givans further failed to post a notice on the exterior of the development. When asked about it in cross examination, she stated that at the time she spoke to the immediate neighbours which she thought was enough.

[106] Mrs. Givans in her Affidavit also alluded to the fact that there was a meeting held where the neighbours were informed of her intention to build and there were no objections. I do not find Ms. Givans to be credible and I do not prefer her account. Therefore, I am unable to accept that evidence. Additionally, she admitted under cross examination that she was not present at the meeting.

[107] I am of the view that the Applicants failed to properly notify the persons in the subdivision. I further accept the evidence of the objectors that as soon as they became aware of the application for modification, they made their objections known. I must also

further point out to the applicant that the fact that there are persons who are not objecting to the application for modification does not equate to consent in any form.

ISSUE VI: *Whether the proposed modification would cause injury to the objectors?*

[108] In order to satisfy section 3(1)(d) of the Act, the applicant must prove that no injury was occasioned by the persons entitled to the benefit of the covenant. Injury as interpreted by the case law is not limited to economic pecuniary injury or loss, injury may also arise by virtue of the loss of the benefits derived from the covenants, for example, privacy, quietude, or absence of traffic. In order for the applicant to prove that no injury will result from the development, she must provide evidence to the court to show that the covenants are obsolete and are no longer effective and therefore do not provide any benefits to the objectors.

[109] In Sampson Owusu's Book, **Commonwealth Caribbean Land Law**, at page 521, he stated that the test is can it be said that there is a vexatious objection to the proposed user as proposed by Luckoo J.A in ***Stephenson v. Liverant***, which was an appeal from the case of ***Re Lots 12 and 13 Fortlands (Supra)***.

[110] The objectors submit that the proposed modification would cause them injury in that there would be loss of privacy, increased noise, increased population density and a material change that would permanently alter the character of the neighbourhood.

[111] Mr. Clarke however submitted that there is no cogent evidence led to infer that the objector is likely to suffer injury from any of the physical or intangible features. He further relied on the Expert Report of Dr. Bailey to highlight the likely benefit to the neighbourhood being ecological, security and social values.

[112] In cross examination, Mrs. Givans agreed that because of the height of her development, the residents would be able to see directly into the yards of her neighbours. However, she disagreed that it would affect the privacy of those neighbours. On the locus in quo visit, I was able to see directly into the home of Mr. Campbell through the very large third floor bathroom windows and into the yards of other neighbours. She also

further agreed, when asked by Ms. Mcleod, that the neighbourhood was quiet and peaceful.

[113] Having regard to all the circumstances, I find that there were no attempts made by the applicant to address the concerns of the objectors. I find there will be an increase in noise, due to increased traffic through the neighbourhood and the additional 9 families. I also agree with the Objectors that the loss of privacy, increased noise, increased population density and material changed that would permanently alter the character of the neighbourhood. The issue of density and traffic are also not issues which the applicant can address after the fact. I therefore find that the Applicant has failed to satisfy s 3(1)(d) of the Restrictive Covenants (Discharge & Modification) Act.

OTHER CONSIDERATIONS

[114] In order for the court to determine whether or not its discretion must be exercised, regard must be had to the Applicant's conduct. I will first address the statement made by counsel as outlined in paragraph 91 of this judgment. In further submissions, counsel sought to rely on **15 ½ Kensington Crescent** ERC 10 of 1995 delivered on March 11, 1996 where Harrison J stated:

> *"….though the onus is on the Applicant to see to the removal of the covenant , it has taken the usual steps to engage its attorneys to effect the removal. Although prudence demanded to be assured of its removal, the court is of the view that it had taken an acceptable conscientious step through its agent to effect the removal of the said covenant. The Applicant cannot be described as deliberately flouting the law, nor indifferent, but exhibiting a mistrust in a less than diligent attorney. This court will exercise its discretion in the applicant's favor."*

[115] I do not agree with Counsel that the Applicant sought to adhere to the relevant rules at all material times. I additionally cannot accept the statement made by Harrison J above as a reasonable explanation for the failure of the applicant to take the necessary steps to have the covenants modified.

[116] Mrs. Givans started construction before applying for modification in breach of the KSAMC approval. In cross examination, Mrs. Givans admitted that her Attorney advised

her of the need to apply for modification of the covenants before she started construction. She also admitted that a condition of the approval granted by KSAMC was that the application be made for modification of the covenants. However, she further stated that she started construction before commencing proceedings for modification. When asked why she started construction before modification she stated that her Contractor told her to start, and the approval would be granted. I find this to be quite puzzling and I cannot accept Mrs. Givans' explanation. Her Attorney informed her of the procedure to be taken and she chose to take the advice of her contractor. Based on her evidence and admissions in cross-examination. I find Mrs. Givans to be negligent as she chose to ignore the advice of her attorney at law.

[117] The applicant further breached the KSAMC approval which approved planning and building permission to erect one (1) one (1) bedroom apartment, one (1) game room and six (6) two (2) bedroom townhouses. As it stands, the development comprises three (3) one (1) bedroom apartments and six (6) three (3) bedroom townhouses, which is in breach of the said approval. In cross examination Mrs. Givans conceded that the building was in breach of the KSAMC approval. However, Mrs. Givans made it seem as though she was not aware of the changes from the approval. I find that hard to believe since she must have visited the property and observed the changes. It seems to me that the Building Inspectorate at the KSAMC failed to inspect the building during the construction. This was the case in ***Re 10 Roseberry (Supra)*** where Hart-Hines J at paragraph 95 found that the Applicant violated the terms of the building approval which stipulated that if there was non-compliance with the approval, the approval would be null and void. The same applied to this case and I therefore must make a similar finding.

[118] The applicant has also asserted that several of the residents are in breach of covenant 8, notably Mrs. Suesette Harriott-Rodgers. On her behalf, Ms. Mcleod submitted, with reliance on ***Re Lots 12 and 13 Fortlands (Supra)***, that the acceptance or committing of any minor breach by an objector does not deny them of their right to enforce the covenants. In ***Re Lots 12 and 13 Fortlands (Supra)***, Parnell J held that the mere fact that the objector is guilty of a breach did not prevent future complaints and

further, that the fact that an objector is himself in breach of a covenant does not prevent him from taking steps to protect his own right. I therefore agree with this submission.

[119] Having regard to the foregoing, I must refuse the said application in that the applicant failed to prove any of the grounds listed in section 3(1) of the Act. The court will not exercise its discretion based on the conduct of the applicant in this matter. Given the fact that the Objectors did not specify whether the building should be demolished or whether an injunction should be ordered, I cannot make such an order in this case.

ORDERS OF THE COURT

[120] I therefore make the following orders:

I. The application for modification of restrictive covenants numbers 1, 3, and 8 endorsed on certificate of title for property situate at 23 New Haven Avenue in the parish of St. Andrew registered at Volume 871 Folio 79 in the Register Book of Titles is refused.

II. Cost to the Objectors to be agreed or taxes.

III. The Applicant's Attorney-at-Law shall prepare, file and serve this Order within 7 days from the date hereof.