IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2007 HCV 02420

IN THE MATTER of ALL THAT parcel of land part of GREENWICH PARK in the parish of SAINT ANN being Lot numbered TWO HUNDRED AND SEVEN on the plan part of GREENWICH PARK aforesaid deposited in the Office of Titles on the 24th day of March 1977 of the shape and dimensions and butting as appears by the said plan and bring part of land comprised in Certificate of Title registered at Volume 1128 Folio 148 but itself being registered at Volume 1183 Folio 725 of the Register Book of Titles.

IN CHAMBERS

Mr. J. Spence and C. Stewart instructed by DunnCox, Attorneys-at-Law for the Applicant.

Ms. K. Lee and Ms. S. Hanson instructed by Myers, Fletcher & Gordon, Attorneys-at-Law for the Respondents.

Application to Modify Restrictive Covenants – Residential – 2 Lots – Objections to one only – No Objection from Parish Council or NEPA

Heard on 1st May 2009, 17th June 2009 and 24th November 2009

G. Brown, J (Ag.)

This involves two applications for the modification of restrictive covenants as regards to all that parcel of land known as Lots 207 and 46 at the Greenwich Park subdivision in the parish of Saint Ann. In respect of Lot 207, there have been four separate objections filed by proprietors in the

scheme. However, with regard to Lot 46, no objection was filed. It must also be noted that the Saint Ann Parish Council and the National Environment and Planning Agency (NEPA) are not objecting to the proposed amendment.

The Applicant is seeking an order that the following restrictions numbers 1, 2 and 15 on the Certificate of Titles registered at Volume 1183 Folio 725 which reads as follows:

> "1. The lot and all buildings and other erections thereon shall not nor shall any part of the Lot or erections at any time be used otherwise than as one single private dwelling house and the appurtenances thereof and any such dwelling house shall not cost less than ONE HUNDRED THOUSAND DOLLARS."
>
> "2. No building erected on the Lot shall be used for the purpose of a shop, school, chapel or church and no trade or business whatsoever shall be carried on upon the Lot or any part thereof."
>
> "15. There shall not at any time be erected, placed or suffered to be or remain on the Lot any temporary building or structure except such as are used for the purpose of building a private dwelling in accordance with sub-paragraph (1) hereof."

Affecting the erection of buildings on the said land is modified as follows:

> "1. No building of any kind shall be erected on the Lot or any part of the Lot EXCEPT in accordance with the approval of the relevant authority."
>
> "2. No building erected on the Lot shall be used for the purpose of a shop, school, chapel or church and no trade or business whatsoever shall be carried on upon the Lot or any part thereof SAVE AND EXCEPT as approved by the relevant authority."
>
> "15. There shall not at any time be erected, placed or suffered to be or remain on the Lot any temporary building or structure except such as are used for the purpose of the erection of building in accordance with sub-paragraph (1) hereof."

The applications are made pursuant to section 3(1) of the Act which provides as follows:

> *A judge in Chambers shall have the power, by order wholly or partially to discharge or modify any such restriction (subject or not to payment by the*

applicant of compensation to any 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 and private purposes without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of such restriction, as the case may be, the continued existence thereof without modification;

(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;

(d) That the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.

In Re Lots 12 and 13 Fortlands (1969) 11 JLR 387 at page 391, Parnell, J said as follows:

"From the above provision, I deduce the following prepositions:

(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.

Issues considered are as follows:

1) Has there been a change in the character of the property or the neighbourhood rendering it obsolete?

2) Would the continued existence of the covenant without modification impede the reasonable user of the land without securing any benefit sufficient to justify the continued existence of such restriction?

3) Would the proposed modification injure the persons entitled to the benefit of the restriction?

Has there been a change in the character of the property or the neighbourhood rendering the restriction obsolete?

The language of the statute does not suggest that a change in the character of the neighbourhood necessarily means that the restriction is obsolete. Thus, the first issue to be determined is whether there has been any change in the character of the neighbourhood and if so, whether such a change renders the restriction obsolete. Support for this position is found in the case of Stephenson v Liverant.[1]

Change in the character of the neighbourhood

The immediate question posed by this issue is what constitutes the 'neighbourhood' for the purposes of the Act. The court has provided some assistance on this point in the case of

[1] (1972) 18 WIR 323, P 336

Regardless Limited v Anis Haddeed, Shirley Haddeed and Alice May Chang[2] in which it was held that:

> *"neighbourhood' is determined by the 'estate agent's test'; namely, what does the purchaser of a house in the land expect to get."*

In looking at this question the court considered what, under those circumstances a purchaser within the neighbourhood would expect, they found that imminent expectations included:

'privacy, seclusion, a view on either side of his house of beautiful gardens and to enjoy peace and quiet occasioned by low occupancy in a place where private single-family dwelling houses exist.'

In the instant case, one could argue that similar expectations would be held by any person seeking to purchase a lot in 'Greenwich Park' as the area was created by the Greenwich Park Development Limited for residential purposes[3]. In fact, at paragraph 2 of the affidavits of each objector, they state that:

> *"We bought our said property, on which is erected a valuable home which conforms with the general character of the neighbourhood, on the understanding that the land, the subject of this application and other lots in the sub-division would only be used for the erection thereon of single private dwelling houses."*

Therefore, it is submitted that 'Greenwich Park' is deemed a 'neighbourhood' within the meaning of the Act. If this is accepted then the areas in which the hotels are located, namely, the Arawak Inn Hotel and Sandals Dunns River, do not form part of the 'neighbourhood' in which Lots 207 and 46 are located. Thus, the question of whether the character of the neighbourhood has changed is limited to an assessment of the Greenwich Park area.

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[2] (1996) 33 JLR 417

[3] See paragraph 23 of the Objectors' submissions

The Applicants, in their submissions, contend that the area in which the lots are located have become commercialized and on that basis the character of the neighbourhood has changed. They state at paragraph 12 of their submissions:

> *"the development [of the hotels] has reached such a level that it has passed the threshold for a residence in respect of lot 207; that is, the minimum level of peace and quiet and privacy that one would expect from a residence is simply no longer attainable."*

It is my opinion that this argument must fail on the basis that the areas in which there has been commercial development does not form part of the 'neighbourhood' of Greenwich Park.

The objectors whose affidavits have been filed are owners of adjoining property and they all contend and I do verily believe that the properties within the community have been used for residential purposes. This being so, there has been no change in the character of the neighbourhood.

I find it worthy of noting that even if the court was so minded as to adopt the approach of the Applicant by extending the 'neighbourhood' to the areas on which the hotels are located, the Applicant's claim would nonetheless fail. This is because they would still have to satisfy the court that the character of the neighbourhood has changed and it is known that the Arawak Inn Hotel and Sandals Dunns River pre-existed the Greenwich Park housing scheme. Further, the designation of the main road as a 'highway' does not change the fact that the road continues to be used in the same way as it was before its development and hence subject to the same flow of traffic. This all goes to show that despite the later developments, there has in fact been no change in the character of the neighbourhood.

It is my view that a useful factor in determining the neighbourhood is to look at what area is governed by the restrictive covenants and the covenants in question apply strictly to the Greenwich Park area. While this might be the case, there is also the view that:

> *"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 . . ."*[4]

This suggests that if there are events in the vicinity surrounding the 'neighbourhood' operating to reduce the effect of the covenant then those events may be considered. The question then is whether the hotels operating in the vicinity have the effect of stultifying the relevant covenants. It is submitted that this is not the case. The presence and operation of the hotels on the other side of the main road have never interfered with the use of the homes in Greenwich Park as dwelling houses. Thus, these events would not be factors worthy of consideration within the meaning of the above extract.

Is the restriction obsolete?

In the event that I am wrong and there was in fact a change in the character of the neighbourhood, it does not follow that the restriction should be deemed obsolete.[5] It is not sufficient for there to be a mere change in character; the change must be to such extent that the restriction becomes obsolete. In determining whether the changes are such as to deem the covenants obsolete, the court in Re Truman, Hanbury, Buxton & Co. Ltd's Application[6] laid down the following test: whether the original purposes for which the covenants were imposed can or cannot still be achieved. This principle is derived from the judgment of Romer L.J. where he said:

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[4] Preston and Newsom's Restrictive Covenants Affecting Freehold Land (4th Ed.)
[5] Stevenson v Liverant (1972) 18 WIR 323 at p 336
[6] [1956] 1 Q.B. 261

> *"The character of an estate as a whole or of a particular part of it gradually changes, a time may come when the purpose to which I have referred can no longer be achieved, for what was intended at first to be a residential area has become, either through express or tacit waiver of the covenants, substantially a commercial area. When that time does come, it may be said that the covenants have become obsolete, because their original purpose can no longer be served and, in my opinion, it is in that sense that the word 'obsolete' is used in section 84(1)(a)."*

In applying this principle to the instant case, it is my view that nothing arises on the evidence to suggest that the physical characteristics necessary for a private dwelling house have been interfered with, in fact, the affidavits of the objectors all show that the properties within Greenwich Park area continue to be used as dwelling houses. Thus, the original purpose for which the covenants were imposed, that is, for use as single-family dwelling houses, is still capable of being achieved. Therefore, the changes, if any, are not sufficient to deem the covenants obsolete.

Would the continued existence of the covenant without modification impede the reasonable user of the land without securing any benefit sufficient to justify the continued existence of such restriction?

Reasonable User

An application under Section 3(1) (b) imposes on the Applicant a burden to show that:

> *"The continuance of the unmodified covenants hinders,* ***to a real, sensible degree*** *[my emphasis] the land being reasonably used, having due regard to the situation it occupies, to the surrounding property, and to the purpose of the covenants."*[7]

[7] Re Ghey and Galton's Application [1957] 2 Q.B. 650

This section of the Act was considered in the case of Stannard v Issa[8] in which the Privy Council applied the above quotation. It was the reasoning of the Committee that:

> *"If the evidence indicates that the purpose of the covenants is still capable of fulfillment, then in my judgment the onus on the applicant would not have been discharged"*

The question then is whether the covenants applicable to the Greenwich Park area have become so unreasonable with regards to their purpose and surrounding properties that they hinder the reasonable use of the property.

The intention of the covenants in the instant case was to guarantee that the properties would be used for residential purposes. It is submitted that based on the use of the properties belonging to the objectors and the general use of other premises in the community, the purpose of residential dwelling is still capable of fulfillment. This stands despite the presence of the hotels in surrounding vicinities which cause the flow of traffic to increase somewhat, it is in any event my view that this does not hinder to a "real sensible degree" the reasonable use of the land as a residential premise.

Practical Benefits

In Stannard v Issa, the Committee found 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"*

In the instant case, it is submitted that the clear benefit of a covenant restricting the use of land to private dwelling houses is the preservation of the peaceful character of the neighbourhood as a

[88] [1987] AC 175

residential area. Based on the approach adopted by the court, this is a benefit sufficient to justify the continued existence of the covenant.

Thus, to adopt the view of the Committee, because the purpose of the covenants is still capable of being fulfilled and the benefit that is afforded by the covenants is sufficient to justify its continuance, the onus on the Applicants has not been discharged.

Will the proposed modification injure persons entitled to the benefit of the covenants?

As mentioned above, the benefit afforded by the covenants is to guarantee the continued status of the neighbourhood as a residential area. At paragraph 9 of the Applicant's affidavit in support of Fixed Date Claim Form, he states that he is desirous of developing the land into a:

> "*Sophisticated commercial complex comprising professional offices, restaurants and shops and retail stores provided the relevant planning approval is granted.*"

When one compares the original intention of the covenants and the intention of the Applicant, can it reasonable be said that the proposed modification would not injure the persons entitled to the benefit of the covenants?

The dictum of Luckhoo, J.A. in Stevenson v Liverant[9] answers this question perfectly where he states:

> *"While the project itself might not be aesthetically uninjurious it can hardly be doubted that the privacy now enjoyed by the objectors would be diminished. A fortiori the modification proposed would interfere with the privacy now enjoyed by the objectors and which is sought to be ensured by the restrictions..... There remains the "thin end of the wedge" argument. There can be little doubt that the proposed modification would render the covenants vulnerable to the action of the court and this in itself would be a good reason why the objection cannot fairly be deemed to be frivolous or vexations"*

[9] Ibid

To apply that reasoning to the instant case, while the presence of a sophisticated commercial complex might enhance the aesthetic appeal of the community, it would undoubtedly diminish the privacy enjoyed by the objectors. It is also an important fact that a number of residences within the community are retired returning residents who are expecting to enjoy the quietude of their neighbourhood.

Further, in relation to the 'thin end of the wedge argument', a benefit afforded by the continuation of the covenants as they stand now protects them [the covenants] from the strong arm of the court. If they are modified, this protection will no longer exist.

Notwithstanding the above, the Applicant has submitted that the modification already exist on other titles. This is evidenced by the affidavits of Hopeton Henry, owner of Lots 42B and 43A, Sailja Rampa, owner of Lot 43B and Yvonne Ruth Hall owner of Lot 45. In each affidavit, the deponents states that they no longer enjoy the peace, quiet and privacy that one expects from a residential area. The relevant titles no longer contain restrictions as to commercial use.

This creates an insurmountable hurdle for the objectors, in that, because other titles in the neighbourhood have been modified to the same effect, there is nothing to preclude the court in this application from granting the Applicant permission to modify the covenants in the same way.

Further, I have been minded to consider that the lots, which titles have already been modified, are located closer to the lots owned by the objectors than Lots 46 and 207. Also, there has been no objection to the modification of the covenants in relation to Lot 46 which falls before Lot 207. In addition, the Applicant is seeking to modify the lots and any erection on it to be used in any manner and for any purpose approved by the relevant authority. NEPA and the Parish Council

would have the final responsibility to determine how the property may be used and they have not objected to the proposed modification. This therefore strengthens the Applicant's case. However one must remember that burden was on the Applicant to establish that his title should be modified and not the objectors.

The objectors' failure in the past to object to these very modifications being sought in this application should not defeat their case. The neighbourhood has not change from a residential one and there was no evidence before the court that commercial buildings have been erected.

I am satisfied that the modification sought by the Applicant will change the character of the neighbourhood and interfere with the owners' peace and privacy.

The application is refused.

Costs to the Respondents to be agreed or taxed.