[2023] JMSC Civ. 209

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. SU2022CV01606

BETWEEN	**SHERON HENRY**	**CLAIMANT**
AND	**KHAHAILE BROWN**	**1ST DEFENDANT**
AND	**ROHAN SILVERA**	**2ND DEFENDANT**
AND	**OCCUPANT(S) (OF 9 SCOTLAND DRIVE, COLLEGE GREEN, HOPE PASTURES, KINGSTON)**	**3RD DEFENDANT**

IN CHAMBERS

Mr. John Givans instructed by Givans & Company Attorneys-at-Law for the Claimant.

Mr. Arnaldo Brown and Mr. David Stone instructed by Arnaldo Brown & Company Attorneys-at-Law for the Defendants.

Civil Procedure: Restrictive Covenant - Advertising Dwelling House for Short-Term Rental on Airbnb Website- Whether Dwelling House is being used for Residential Purposes only – Business or Trade – Nuisance -Whether activities on premises by occupants of the absentee owner amount to private nuisance.

Heard on May 2, 2023, and October 6, 2023

M. JACKSON J (Ag.)

INTRODUCTION

[1] In this trial, Miss Sheron Henry ("the Claimant") detailed the basis of her complaint as follows:

> *"I bought my property over twenty years ago, and I thought I would have been able to enjoy my home in peace and quiet, but I have been*

experiencing pure grief and stress because of the actions of the 1st and 2nd Defendant ... the 1st and 2nd Defendants do not live at No. 9. Instead they rent out their property on various terms to different persons who have by and large been making life very uncomfortable and unbearable for me … in the vicinity of No. 9 … the ... letting of the property as an Airbnb... they set up a website for this purpose ... Every day, I wake up fearful for my life because I do not know these strangers in my vicinity… These persons invariably smoke ganja, which affects my sinuses as I suffer from chronic sinusitis. They are usually very noisy, talk loudly with much expletives and blast music from their vehicles. Several Sundays, over 10 persons were at the property smoking ganja, playing loud music with their pants almost falling to the ground around their ankles and coming and going.

They were creating such a disturbance and nuisance that the police had to be called. Three police came to the premises and searched them*. They left the following day. As recently as May 1 and May 6, 2022, I was awakened at around 2 – 3 a.m before day by the sound of loud laughing and talking coming from the Defendants' property. The noise disturbance went on for much of the remainder of the early morning, and I had difficulty going back to sleep.*

On one occasion, I saw a young man urinating on a palm tree near my property. They keep the garbage bin at the front of the property overflowing and several times refuse litter the area near my property. The behaviour of the Defendants now makes the community a very unpleasant place in which to live. Most evenings when I go home, my mind is uneasy and unsettled, and my head aches because I do not know and fear and dread what I would be encountering near my house from the Defendants'. The activities ..have been going on for several months. If the Defendants are not legally enjoined as a matter of urgency, I fear that their conduct will never cease … and the nuisance and disturbance will drive me either mad or from my home or both and also cause my health, both from stress and sinusitis, to deteriorate… the grief, stress, discomfort and fear to which I am being subject daily cannot be quantified monetarily…"

[2] The property, referred to by the Claimant as "No. 9", is located in the residential gated community, College Green Commons, Hope Pastures, Kingston 6 in the parish of Saint Andrew. It was jointly purchased by Miss Khahaile Brown and Mr Rohan Silvera ("the 1st and 2nd Defendants") and was registered in their names on March 23, 2019.

[3] By her Fixed Date Claim Form filed on May 16, 2022, the Claimant is asking the court to grant the following remedies:

1. A Declaration that property at 9 Scotland Drive, College Green, Hope Pastures, Kingston 6, St. Andrew is being used for trade or business contrary to Restrictive Covenant number 11 on the Certificate of Title registered at Volume 1279 Folio 65 of the Register Book of Titles.

2. A Declaration that the said property is not being used for residential purposes only, contrary to Restrictive Covenant number 10 on the said Certificate of Title.

3. A Declaration that the said Restrictive Covenants enure to the benefit of and is enforceable by the Claimant against the 1st and 2nd Defendants.

4. A Declaration that the activities of the 3rd Defendants, who are the short-term occupants/licensees/tenants of the 1st and 2nd defendants, constitute a nuisance actionable by the Claimant and are in breach of Restrictive Covenants number 10 and 11 on the said Certificate of Title.

5. An injunction preventing the 1st and 2nd Defendants, whether by or through themselves, their servants and/or their agents, from granting their said property for short-term occupancy, licence or tenancy.

6. An injunction preventing the 1st and 2nd Defendants, whether by or through themselves, their servants and/or their agents, from permitting their said property to be used in such a manner as to amount to a nuisance.

7. An injunction preventing the 3rd Defendant from carrying out activities on the said property, which can amount to a nuisance.

8. Damages for breach of the said Restrictive Covenants.

9. Damages for nuisance, income, discomfort, distress and annoyance.

[4] The relevant Covenants which anchor the Claimant's claim and are endorsed on her Certificate of Title, registered at Volume 1279 and Folio 79, and the Defendants' Certificate of Title, registered at Volume 1279 and Folio 65, and the Parent Title registered at Volume 1268, and Folio 557 provide:

> *"The restrictive covenants are set out hereunder shall run with the land above-described (hereinafter called 'the said land' and shall bind as well the registered owner proprietor, his heirs personal representative and transfers and the registered for the time being of the lands or any portion thereof now or formerly comprised in Certificate of Title registered at Volume 1268 and Folio 557.*
>
> *10. No building other than one private dwelling house with the appropriate out-buildings shall be erected or permitted on the said land, and the dwelling house shall be used for residential purposes only.*
>
> *11. No building on the said land shall at ant (sic) time be used for the purpose of a Shop, Club, School, Chapel or church, or Nursing Home or for Racing Stables and no trade or business whatsoever shall be carried on upon the said land or any part thereof."*

[5] The 1st and 2nd Defendants stand in strong opposition to the claim and have described it as a crusade against them aimed at interfering with their constitutional rights to own property, freedom of association, community, and the right to the enjoyment of their property.

[6] It is necessary to state that the Claim referred to a 3rd Defendant as Occupants of premises Number 9 Scotland Drive. These persons did not participate in the proceedings, and neither were served with any originating documents. I will not make any order against them or include them in the discussion.

The Issues

[7] This trial raises important legal issues in relation to the rights of the parties, as well as that of other property owners and residents in these residential gated communities. The determination of these legal issues will, of necessity, require

an assessment of the law surrounding Private Nuisance and the operation of Restrictive Covenants.

[8] I, therefore, consider the following two issues to be determinative of this claim:

(i) Whether the 1st and 2nd Defendants' use of their property is in breach of Restrictive Covenants 10 and 11; and

(ii) Whether the acts of occupiers, guests, and/or visitors of the 1st and 2nd Defendants amount to acts of nuisance?

[9] To succeed in this claim, the Claimant must establish on a balance of probabilities that the 1st and 2nd Defendants' and or their occupants' use of their property conflicts with Restrictive Covenants 10 and 11 and that the breach was an unreasonable use of the land for which a claim in private nuisance has arisen.

The Evidence in Summary

[10] The parties' affidavit evidence and accompanying documentary evidence stand as their evidence in chief. The Claimant was cross-examined. The 1st and 2nd Defendants were not. Most notably, neither party called any independent witnesses to support their account.

The Claimant's Evidence

[11] The Claimant purchased her property in the residential gated community in March 1995, over twenty-eight years ago. The 1st and 2nd Defendants purchased their property in 2019 but have never lived or stayed there.

[12] The College Green Commons is managed by the College Green Citizens Association ("the Association"). The Claimant is a member of the executive of this Association. The property owners have signed an agreement which allows the executive of the Association to carry out its mandate and uphold the Covenants that run with the land. The owners signed an agreement through the

Association that none of the private dwelling houses on the land should be rented for short-term rentals as Airbnb. The Association passed the formal resolution giving effect to that agreement on March 10, 2020. The 1st and 2nd Defendants were involved in the process.

[13] The owners and occupants share certain common areas. These include the entrance, gateway, outer boundaries, and walkways. All visitors and or guests, as well as their vehicles, are recorded by the security guard in a logbook before entry onto the property is permitted.

[14] The 1st and 2nd Defendants initially rented their property to a popular local entertainer for about a year. After the entertainer moved, they began listing the dwelling house for short-term rentals via an internet booking agency: https://www.airbnb.c.uk/rooms/4835166. The property was advertised as having two sets of accommodations which can accommodate up to ten guests. The original is the private dwelling, which is a Townhouse which was built with the original structure and is located at the front of the property. The second is a two bed-room structure at the back of the premises.

[15] Between July 1, 2021, and May 6, 2022, the 1st and 2nd Defendants had over 50 different visitors staying at their premises on short-term rentals. The average stay of each occupant was between three to five days. These visitors, on occasions, had more than two vehicles parked at the premises.

[16] The presence and stay of their visitors have been a source of nuisance to the Claimant and other residents. They were very noisy, often talked loudly with the use of expletives, and often blasted music from their vehicles; their cars blocked the claimant's and other owners' driveway, congregated at the driveway of the Claimant, and contributed to the unsightly pile-up of garbage near the property of the Claimant. Their actions have made life very uncomfortable and unbearable for the Claimant in the property that she bought to live in, that she lives in and calls her home.

[17] Several actions were taken on behalf of the Association to lessen and or prevent the interference with the Claimant's quiet enjoyment of her property and other property owners. The Association engaged the law firm, Nunes Scholefield Deleon & Co., and by a letter dated July 27, 2021, wrote to the 1st and 2nd Defendants and threatened to pursue legal action if the interference persisted. Notwithstanding, such a strong missive, the short-term letting by the 1st and 2nd Defendants continued, and so did the interference with the Claimant's quiet enjoyment of her property.

[18] The Kingston and Saint Andrew Municipal Corporation was also summoned, and a representative attended upon the premises and issued a cease-and-desist order against the 1st and 2nd Defendants. The letting and the interferences abated temporarily but continued shortly thereafter with the arrival of a new set of short-term visitors.

[19] In January 2022, the executive of the Association, along with other property owners, including the Claimant, convened a meeting with the 1st and 2nd Defendants. At the meeting, the 1st and 2nd Defendants were reminded that the use of their property by their visitors was in breach of Restrictive Covenants 10 and 11 and interfered with the right to quiet enjoyment by the other property owners of their properties. The evidence of the Claimant is that a husband and wife who were nearby neighbours of hers moved out of their property because of the nuisance.

[20] The 1st and 2nd Defendants assured the meeting that the disturbances would cease, and it did for a while. The 1st and 2nd Defendants also promised to provide a larger garbage skip, which would assist in reducing the unsightly pile-up of garbage near the Claimant's property. That promise was never fulfilled.

[21] The cross-examination of the Claimant was rather laconic. It focused primarily on whether the residential gated community was a registered strata corporation and governed by the Strata Laws. The Claimant admitted that it was not. The

Claimant also accepted and agreed that the word “visitor” was what appeared in the logbook. She, however, went on to state that the 1st and 2nd Defendants have never lived on the property, nor were they ever present to accommodate or entertain any of the visitors on their property. The Claimant was also asked whether the Association was a legal entity. She agreed it was not.

The 1st and 2nd Defendants’ Evidence

[22] Their evidence mirrors each other in every material way, and for the most part, their response to the claim was that they neither admitted nor denied the allegations and put the Claimant to strict proof. In essence, they swore that:

(i) their property was never used for non-residential purposes. In their affidavits dated March 27, 2023, they maintained that their premises was used only for residential purposes and lodging;

(ii) they were never told or made aware of the Restrictive Covenants;

(iii) they never signed the Owner’s Agreement;

(iv) the Association’s resolution is not binding on them;

(v) the Association has no legal authority;

(vi) the occupants who stayed at their property have not caused a nuisance;

(vii) at no time, ten persons ever occupied their premises at any one time;

(viii) the pile-up of garbage was not the fault of their visitors, but of the local authority who has the designated responsibility to carry out such service);

(ix) they were never issued with a cease and desist order;

(x) the claimant has not provided expert evidence that she was entitled to an award for special damages for medical expenses;

(xi) the occupants at their property were never a threat to the Claimant;

(xii) they were not present at any meeting with the association or made any promises to the Association, and

(xiii) no illegal activity, smoking, or disorderly behaviour had ever taken place at their premises.

[23] The Defendants further stated that they have created rules for their visitors and that the property has a security camera so that any illegal activity can be proven. They admitted that there was one single disturbance by one of their visitors and that they asked the visitor to leave the premises. They, however, maintained that the visitor did not occupy the premises on a short-term rental. This visitor was never called or identified by the 1st and 2nd Defendants.

Issue (i): Whether the 1st and 2nd Defendants' use of their property was in breach of Restrictive Covenants 10 and 11?

The Submissions in Brief

[24] Mr Brown submitted that the final determination of the matter will depend on how the Restrictive Covenants are to be interpreted and construed. He argued that the word "visitor", as recorded in the logbook, meant nothing more than that the persons who stayed at the premises were the visitors of the 1st and 2nd Defendants. In this regard, he went on to submit that the Claimant has not demonstrated on the evidence that the persons were renting their property on a short-term basis or that such rental was in breach of the Covenants. He went on to submit that the Claimant has not proved that a business was being conducted on the property.

[25] Without more cogent evidence, Mr Brown submitted, there is nothing to support the assertion that the 1st and 2nd Defendants' use of the property was in breach of Restrictive Covenants 10 or 11. He relied on the case of **O'Connor (Senior) and others v The Proprietors, Strata Plan No. 51** [2017] UKPC 45 ("**O'Connor**"), and submitted that the use of the property for rental as an Airbnb could also be considered residential purpose. Mr Brown also argued that the 1st and 2nd Defendants are entitled to the freedom to use their property as they wish.

[26] Mr Givans, on the other hand, submitted that the 1st and 2nd Defendants have not distinctly disputed or provided evidence to the contrary that they do not live at the premises. He further submitted that this court is within its right to consider who those several persons logged as visitors were visiting, if it were the case that the 1st and 2nd Defendants, at those material times, were absent from their premises.

[27] Mr Givans further submitted that the Claimant had amassed and detailed several different acts of nuisance as a result of the unreasonable use of the 1st and 2nd Defendants' property by their occupants, yet their responses, he asserted, were nothing more than mere bald assertions.

[28] He went on to submit that it was not surprising that their responses were such because the unchallenged fact is that they were absentee owners and were, therefore, handicapped in effectively responding to the various acts of nuisance that had occurred on their property.

[29] He further submitted that when considered as a whole, the evidence contained in the logbook and the advertising of the 1st and 2nd Defendants' property on the Airbnb website are indicative of the fact that the property was being let for short-term rental in breach of Restrictive Covenant 10.

[30] Mr Givans argued that the meaning of "residential purposes" is essential to determine whether the occupation by the visitors of the Defendants was in keeping with the meaning of "residential purposes" as intended by the Covenant.

He relied on a judgment from the Commission of Strata Corporations Tribunal, **Proprietors Strata Plan No. 2652 v Stephen Spence**, delivered on May 13, 2019, in support of his arguments. Counsel relied on paragraphs 16 – 19, where the Tribunal discussed the cases of **O'Connor** and **Bryne v The Owners of Ceresa River Apartments Strata Plan 55597** [2017] WASCA 104 ("**Bryne**").

[31] Counsel further argued that while the Defendants have a right to the enjoyment of their property, such a right must depend on the law of tort in nuisance, which, he submitted, imposes restrictions on the enjoyment of persons' rights with respect to their property and in relation to the effect of any such activity on a neighbouring property.

The Undisputed facts

[32] At this juncture, I find it useful to set out those matters that are not in dispute between the parties. By this exercise, I can narrow the issues which are germane to the resolution of this case.

[33] I find the following evidence to be without controversy:

(1) the 1st and 2nd Defendants never lived or stayed at their property;

(2) the law relating to strata corporations and or their by-law are not relevant to the determination of the matter;

(3) the Association's agreement signed by the Owners has no legal force and is also not relevant to the determination of the matter;

(4) the Claimant has legal standing to bring this action;

(5) the Parent Certificate of Title registered at Volume 1268 Folio 557 of the Register Book of Titles burdens the land and binds the Claimant and 1st and 2nd Defendants;

(6) Restrictive Covenants 10 and 11 are binding on the Claimant and the 1st and 2nd Defendants and run with the land.

[34] The 1st and 2nd Defendants have sought to defend the claim by arguing that they were not aware of the Restrictive Covenants. On this point, I will simply state that the principle of *caveat emptor* – "let the buyer be aware" – is applicable in these proceedings. Accordingly, the 1st and 2nd Defendants are deemed to have known about the Covenants.

[35] I wish to mention the comprehensive letter dated July 27, 2021, written by Counsel, Miss Jaavonne Z. Taylor from the firm, Nunes Scholefield, Deleon & Co., Attorneys-at-Law. This letter was written a year before the claim was instituted and two years before the trial commenced.

[36] Miss Taylor, among other things, wrote:

> *"…We are instructed that you are the registered proprietors of the property, which is currently being let for short-term rental. The residents have expressed legitimate concerns regarding their safety, as many strangers frequent your property on a short-term basis. We understand that they cause a nuisance to residents as they are boisterous, play loud music, smoke marijuana, and block the parking spaces of other residents... this results in the residents becoming uncomfortable in their homes as they know nothing about these frequent guests and their visitors and fearful that the community is becoming commercialised…*
>
> *We are sure you will appreciate that the College Green Community is a tranquil gated residential community, and it is the intention of the residents to maintain it in that manner. By using your property for short-term rental, you have compromised the integrity of the College Green Community as a purely residential community, have caused the residents great concern for their safety and security and by extension, have raised concerns about their property values now that your property is being used as a 'mini-hotel'.*
>
> *This act of letting the premises for short-term rental …is a contravention of the Restrictive Covenant on your Certificate of Title, which provides as follows:*
>
> > *'**...no trade or business whatsoever shall be carried on upon the said land or any part thereof**'".*

[37] Considering the foregoing, and when taken as a whole, I do not accept that the 1st and 2nd Defendants were not made aware of Restrictive Covenants 10 and 11. I, therefore, find that they had notice of all 17 Restrictive Covenants endorsed on their Duplicate Certificate of Title.

[38] As with all cases, the application of facts to the law is essential. Context is, therefore, important. In this regard, it goes without saying the mere rental of the 1st and 2nd Defendants' property or earnings through rental, does not mean that the Restrictive Covenants are breached, or that there is an unreasonable use of the land. The factual matrix of this case is the opposite. The substratum of the claim is that the 1st and 2nd Defendants were renting their private dwelling house exclusively for short-term rental to vacationers in contravention of the Restrictive Covenants. An examination of the facts is, therefore, imperative.

The Airbnb Website

[39] The 1st and 2nd Defendants listed their property twice on the Airbnb website. The first states:

> *"****Comfy- Cozy Getaway***** Madison Vacation**** Kingston, Saint Andrew, Parish, Jamaica. *Entire Home hosted by Khahaile. -* ***4 Guests. 2 bedrooms. 2 beds.*** *1 bathroom. Response time within a few hours. "****Park for free. This is one of few places in the area with free parking"*** (My emphasis)

[40] The second states:

> *"Homely 3-bedroom townhouse in a gated community****. 6 guests. 3 bedrooms, 3 beds. 2.5 bathrooms. Add dates for prices****. - Entire townhouse hosted by Khahaile. Park for Free.* ***Add your trip dates to get the cancellation details for this stay.*** *Explore other options in Kingston…" "Park for free. This is one of few places in the area with free parking." (My emphasis)*

[41] Additionally, the website displayed a picture of the 1st Defendant, who was introduced as the host for the property. There were also several pictures of the different rooms inside the dwelling house. There was a picture of the entrance to College Green Commons. The website has in place an instant booking calendar,

which requires the guest to input check-in and check-out dates and indicate the number of guests arriving.

[42] It also provides a checking-in time at the property of 15:00 p.m. Further, the website detailed that smoking, pets, parties, or other events are not allowed. It also provided a Google map location with a promise that the exact location would be provided after the booking was completed. The website lists the services offered, including cleanliness, accuracy, communication and a response rate of 100%.

[43] The site had several reviews from visitors/guests. Two of those reviews were done in April and August 2022, respectively.

[44] The review for April 2022, stated:

> "*Worst Airbnb I've ever stayed! The bathroom is very dirty, with no towel, no rag, and no iron. Communication was very poor we had to keep calling the host for everything we needed. I would not recommend it if you have money to waste book here.*"
>
> "Shanique, *April 2022,*"

[45] The review for August 2022, stated:

> "*Because of an issue at the apartment linked to here, we actually stayed in a different Airbnb, also hosted by Khahaile near Constant Spring Golf Club, so this review is about that property. The flat was big, beautiful, and clean, though the pillows were very old. In these cases, the details matter to…*"
>
> "Aleksandra, *August 2022,*"

<u>The Security Logbook</u>

[46] The specific dates on which the different visitors arrived and logged by the security guards were:

(a) July 1, 9, 13, 16, 21, 25, 29, and 30, 2021;

(b) August 4, 2021;

(c) September 3, 2021;

(d) October 2 and 27, 2021;

(e) December 8 – 12, 13, 21, 26, 27, and 30, 2021;

(f) March 25, 2022;

(g) April 6, 9, 15, 19 and 30, 2022; and

(h) May 2, 5, and 6, 2022.

[47] Having highlighted these facts, I will now move on to consider whether the use of the property by the 1st and 2nd Defendants and/or their occupants was consistent with the term for residential purposes in keeping with Restrictive Covenant 10.

Restrictive Covenant 10 – The meaning of the words "private dwelling house" and "residential purposes only"

[48] There is an obvious absence of a definition for "private dwelling house" and "residential purposes only" in the Covenants. Both words have no specialised legal meaning. I am compelled, in the circumstances, to have regard to judicial pronouncements on the matter of definition.

[49] I find the case of **O'Connor,** as relied on by Mr Brown, to be very helpful. It also referred to the Australian case of **Byrne,** which was relied on by Mr Givans. In **O'Connor,** Lord Carnwath, in delivering the judgment of the Board, stated that:

> *"11.* ***It is apparent also that the problem of distinguishing between short- and long-term residential uses is a familiar one.*** *A useful example is a judgment of the Court of Appeal of Western Australia:* ***Byrne v The Owners of Ceresa River Apartments Strata Plan 55597*** *[2017] WASCA 104. It concerned lot 14 in a development which lay within an area where the permitted use in 2011 was 'human habitation on a permanent basis' and where 'short stay accommodation' (as defined) was not permitted without planning approval. On 23 May 2013, planning approval was granted for change of use to 'serviced apartment', which was defined as 'an independent living residential unit providing for short*

> *stay accommodation.' By-law 16.1, applicable to lot 14, was in the following terms:*
>
> > *'16. Use of Premises*
> >
> > *16.1 …a proprietor of a residential lot may only use his lot as a residence.*
> >
> > *16.2 Notwithstanding bylaw 16.1, a proprietor of a residential lot may:*
> >
> > *16.2.1 grant occupancy rights in respect of his lot to residential tenants …'*
>
> *12.* ***The Court held that, on their proper construction, by-laws 16.1 and 16.2 provided that lot 14 could only be occupied by persons who used it 'as their settled or usual abode' (paras 150 to 155). This was derived from the words 'residence' in by-law 16.1 and 'residential' in 16.2.1.*** *Mr Byrne, who had been letting lot 14 for short periods, relied on a provision in the Western Australian Strata Titles Act 1985 (in similar terms to section 20(4) in the present case). His argument was not that section 42(3) of the 1985 Act made by-law 16 invalid but that the by-law should be construed as permitting short-term letting in order to make it consistent with the Strata Titles Act.* ***The court held that the by-law operated as a restriction on use rather than on alienation and was, therefore, unobjectionable****."* (My emphasis).

[50] His Lordship went on to state in paragraph 15 of the judgment that the Board regards this appeal as turning on a short question of construction of the relevant by-laws, which are to be construed benevolently, having regard to their purpose in assisting the good management of the development for the benefit of its residents. He further noted at paragraph 16 that one of the features of the by-law that attracted immediate attention was that it applies to a "residential strata lot", that is a lot "intended for use as a residence", and that is common ground that a by-law designed to secure restriction to residential use is in principle unobjectionable.

[51] Their Lordships were of the view that the resolution of the matter turned on the construction of the relevant by-laws of the subject strata property and whether their proper interpretation was in contravention of the governing statute. The relevant by-law provides as follows:

> *"7.1 Each Proprietor shall:*
>
> *9. Not use or permit his Residential Strata Lot to be used other than as a private residence of the Proprietor or for accommodation of the Proprietor's guests and visitors. Notwithstanding the foregoing, the Proprietor may rent out his Residential Strata Lot from time to time provided that in no event shall any individual rental be for a period of less than one (1) month ..."*

[52] Section 20(4) of the Ordinance provides:

> *"No by-law shall operate to prohibit or restrict the devolution of strata lots or any transfer, lease, mortgage or other dealing therewith or to destroy or modify any easement implied or created by this Ordinance."*

[53] In respect of by-law 7.1.9., the Board considered it in two prongs: first, the literal interpretation of the first sentence and second, the qualification provided by the second sentence. While their Lordships found as a general principle, it is not objectionable for by-laws to restrict the use of strata property to residential use, or to determine what is considered residential use. The proper construction of 7.1.9 provides that reasonable residential use is permitted to persons other than the proprietor. This would allow for reasonable exploitation of the property through renting or leasing as guaranteed under the statute.

[54] However, in considering the proviso in the by-law 7.1.9. that "in no event shall any individual rental be for a period of less than one (1) month", the Board expressed that the length of occupation is primary to determining the character of the property, that is, whether it is being used as a residence. At paragraph 18, Lord Carnwath concluded:

> *"18. In the Board's view, the limitation to one month can be seen as designed to provide some definition of what is meant by 'use as a residence' for this purpose. The character of the use is clearly affected by the length of occupation.* ***Short-term use by holiday-makers is different in kind from longer-term residential use, even if it may be difficult to draw a clear dividing line****."* (My emphasis)

[55] Their Lordships adopted the reasoning of Latham LJ in the UK Court of Appeal decision **Caradon District Council v Paton** (2001) 33 HLR 34 that for a property

to be considered a residence, it requires some degree of permanence on the part of the occupant and his or her intention for that property must be for his or her home even if for a short period. At paragraph 19, the Board has this to say:

> *"19. As already noted, this is a familiar problem in the law. For example, in an English case,* ***Caradon District Council v Paton*** *(2001) 33 HLR 34, the Court of Appeal had to decide whether a covenant requiring a house not to be used other than as a private dwelling-house was breached by use for occupation by holidaymakers under tenancies for short periods. Latham LJ said:*
>
> > *'****Both in the ordinary use of the word and in its context it seems to me that a person who is in a holiday property for a week or two would not describe that as his or her home. It seems to me that what is required in order to amount to use of a property as a home is a degree of permanence, together with the intention that that should be a home, albeit for a relatively short period, but not for the purposes of a holiday****.' (para 36)*
> >
> > ***The Board respectfully agrees with this analysis, and would apply the same thinking to the concept of use as a residence****."* (My emphasis)

[56] I will acknowledge that the case of **O'Connor** dealt with properties governed by Strata legislation and their by-laws, which do not arise in this case. However, as with **Caradon District Council v Paton,** both cases concerned similar short-term rental and an examination of the meaning of the term "residential purposes". I, therefore, find them highly persuasive.

[57] Against that background, I was able to extract useful guidance regarding the interpretation to be applied to the words "for residential purposes" and "private dwelling house". I deduced that the use of a property for "residential purposes" denotes a sense of permanence together with the intention that the property should be a home and not only described as such but also used as such. In other words, there is a degree of settled occupation which formed the centre of the occupier's existence on the premises.

[58] Conversely, the term “short-term rental” denotes use that is transient, leisure activity and would include occupancy for a short stay, whether for vacation, business purposes, or otherwise. It does not have a sense of permanence, nor is there any intention of the occupant that the property should be his or her home. In other words, the use of the property is more than ancillary or subordinate to residential use.

[59] Now, with respect to the instant case, I find Restrictive Covenant 10 to be unambiguous. It is restrictive in nature and limits the use of the premises by the 1st and 2nd Defendants to the erection of a private dwelling house for residential purposes only. This covenant places restrictions on the use of the land to preserve the nature and character of the neighbourhood as well as to ensure privacy and quietude of the residents. The dwelling house must be used for residential purposes only. The entire tone and language of the covenants evince such.

[60] I accept that the covenant laid down no requirement for the 1st and 2nd Defendants to reside at the property. Neither is there any restriction on having visitors or guests at their property. However, in keeping with the interpretation by the courts as to what constitutes the use of a property for residential purposes and the clear and unambiguous nature of Covenant 10, there must be a sense of permanency with respect to the “main occupant” of the property. In other words, there must be the intention of that person to use the property as his or her home. It is the main occupant who will then have the visitors or guests. Accordingly, the main occupant’s stay must not be ancillary or subordinate to residential purposes.

[61] The reviews of the occupants Shanique and Aleksandra for the months of April and August of 2022, both of whom stayed at the Defendants’ premises, speak volumes, and provide strong evidence that their use of the property was contrary to a stay that was intended for “residential purposes only” or an intention to make

the property their home". Their stay was for a holiday getaway and not for use as their home.

[62] Equally, an assessment of the security logbook with the names of over 50 persons and several motor vehicles over the period July 1, 2021, to May 6, 2022, is also cogent evidence that the property was being used to facilitate short-term rental for vacationers. This number shows the intensity of the traffic of strangers punctuated by short stays in, out and through the residential gated community and the Defendant's premises, which the Claimant and others call home. This is a clear breach of the Restrictive Covenants.

[63] Importantly, in December 2021, the evidence revealed that there were ten different people and several different cars at the Defendants premises. The logbook showed that their entire stay was only a matter of days. In the face of this tangible, the court was not provided with any explanation or evidence in rebuttal from the Defendants.

[64] I must also highlight that the Defendants, in their evidence, had stated that the property was used for residential and "lodging purposes". I note that the word "lodging" was not mentioned or defined in any of the 17 Covenants. The Defendants introduced this concept. This is, however, not a word with any specialised legal meaning. However, though they had introduced the word, they did not elaborate on what it meant in the context of the use of their property by their occupants.

[65] This court sought guidance on the natural meaning of the word from the **Cambridge Oxford Dictionary.** The dictionary defines "lodging" as "a place someone pays to stay in, while they are away from their home"**.** It goes on to state that it is a temporary place of residence or a temporary residence, sleeping accommodation**.** On their account, they clearly were facilitating temporary housing accommodation for their occupants, who were away from their homes.

The accommodation was akin to that provided in the tourist-type hospitality industry.

[66] "For residential purposes only" certainly would not allow owners, as the Defendants did, to place advertisements on a popular global website to attract persons from all over the world who are seeking short-term rental accommodations and to allow those persons to use the property for that purpose exclusively. The use of their property is equated to running a hotel, which was not contemplated as a feature of a private dwelling house or the use of the premises for residential purposes.

[67] Before departing from this issue, it appears that the Defendants may have done some construction to the property, which allowed them to have five (5) bedrooms and three and a half (3 1/2) bathrooms, and that may not be in keeping with Covenant 10, which states among other things that, "*no building other than one dwelling house should be erected or permitted on the said land*". Even though no challenge was made in this regard, I must make it clear that this case is not so much about that breach, which will necessitate expert evidence. I have chosen to confine the discussions on whether the private dwelling house is being used for residential purposes, which is the substance of the complaint by the Claimant.

[68] I find that the 1st and 2nd Defendants have been using the property specifically for non-residential purposes and have caused it to be occupied by a slew of short-term vacationers for the purposes of short-term rental in breach of Restrictive Covenant 10.

Restrictive Covenant 11 – Trade or Business- Whatsoever

[69] The language of Restrictive Covenant 11 is also clear. It restricts the land from being used for carrying on any trade or business whatsoever. This includes a shop, church or chapel, school, club, nursing home or racing stables. Renting the property to tenants does not, without more, equate to using the property for trade

or business. In this case, there is, however, much more than just renting the property. The language of Restrictive Covenant 11 limits the purpose for which the private dwelling house can be used. It means that the premises is not to be used for any trade or business. Advertising the property on a global website for the sole purpose of attracting vacationers for a "cozy getaway" extends beyond the limits of the intended use of the property as set out in Restrictive Covenant 11 and is tantamount to the use of the property as a trade or business.

[70] Importantly, displaying pictures of the various rooms on the premises and reinforcing that a significant feature of the stay at the property is the access to "free parking" is a business venture. The 1st Defendant also introduced herself as the off-site host, who has amassed a 100 per cent response rate. The reviews of the persons who stayed at the property in the year 2022 are indicative of the business of a mini- hotel. One guest did not receive the service paid for, while the other was satisfied with the service obtained at another premises upon being relocated.

[71] This is an abundance of evidence that the 1st and 2nd Defendants are in the business of using their property for short-term rentals, which conflicts with the unambiguous language of Restrictive Covenant 11.

[72] I find that the use of the 1st and 2nd Defendants' property was for trade or business.

Issue (ii): Whether the acts of agents, occupiers, guests, and/or visitors of the 1st and 2nd Defendants amount to acts of nuisance?

[73] The American scholar William Prosser, in his book, **Handbook of the Law of Torts**, 571 (4th ed 1971), aptly stated that "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'".

[74] The learned author of **Salmond on the Law of Torts** 17th Edition, posits that: "*Private nuisances, at least in the vast majority of cases, are interferences for a substantial length of time by owners or occupiers of property with the use or enjoyment of the neighbouring property*."

[75] In discussing the basis of liability in private nuisance, Professor Gilbert Kodilinye, in his work **Commonwealth Caribbean Tort Law** 3rd Edition, explained at page 160 that:

> *"The main problem in the law of private nuisance is striking a balance between the right of the defendant to use his land as he wishes and the right of the plaintiff to be protected from interference with his quiet enjoyment of his land. In order to strike this balance, two main requirements have been developed:*
>
> *(a) the injury or interference complained of will not be actionable unless it is (i) sensible (in the case of material damage to the land); or (ii) substantial (in the case of interference with the enjoyment of the land);*
>
> *(b) the defendant will not be held liable unless his conduct was unreasonable in the circumstances."*

[76] He further states at page 161 that:

> *"Where an action in nuisance is founded on interference with the enjoyment of land, such as where the plaintiff complains of inconvenience, annoyance or discomfort caused by the defendant's conduct, the interference must be shown to be substantial. The classic formulation of the rule is that of Luxmoore J in* ***Vanderpant v Mayfair Hotel Co Ltd*** *[1929] All ER 296, p 308:*
>
> > *'Every person is entitled as against his neighbour to the comfortable and healthy enjoyment of the premises occupied by him; and, in deciding whether, in any particular case, his right has been interfered with and a nuisance thereby caused,* ***it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions obtaining among the English people."*** (My Emphasis).

[77] As to whether the owner of a property can be liable in private nuisance for the acts committed on his property by a third party, Finnemore J in **Hall v Beckenham Corporation** [1949] 1 KB 716, at pages 723 – 724, opined that:

> *"It is argued for the plaintiff that the corporation are the occupiers of the recreation ground; that, although the nuisance is being caused there by other people, they, the corporation, must so manage and control their property that no nuisance is committed on it; and that if a nuisance is created by other people, even trespassers, the corporation are at common law responsible in damages.* ***That argument addressed to a private individual would be right… The reason is plain: an owner of private property can prevent people from coming on to his land and committing a nuisance there****."* (My emphasis)

[78] While I agree with Mr Brown's submission that the 1st and 2nd Defendants are entitled to enjoy their property, it is clear from the cases and the academic discourse that that enjoyment must not unreasonably interfere with or disturb the rights of others or create a nuisance. The Claimant has maintained that the 1st and 2nd Defendants' use of their property is an unreasonable use of the land, which interferes with the quiet and peaceful enjoyment of her property.

[79] The evidence in relation to the numerous instances of interference with the Claimant's quiet enjoyment of her property by persons occupying the property belonging to the 1st and 2nd Defendants remains unchallenged. The Claimant, in her affidavit, has complained of experiencing grief and stress because of the actions of the 1st and 2nd Defendants occupants and/ or visitors and that those persons have been making life very uncomfortable and unbearable for her.

[80] She emphasised the constant fear of waking up every day to a different set of strangers in the vicinity of her property. She says some of the visitors to the property smoke, which affects her health, and that the visitors are usually loud both in their vocal exchanges and in the music, they play from their vehicles. She also said the visitors keep the garbage bin at the front of the property overflowing and several times refuse litter the area close to her property.

[81] When considered as a whole, I find the circumstances described by the Claimant of the use of 1st and 2nd Defendants' property by their occupants or visitors and themselves to be unreasonable. I also find that based on the language of the Covenants, the residential gated community was built for residential purposes only. Therefore, the 1st and 2nd Defendants, by advertising in a global space which has the potential to attract thousands of persons, as it did, went beyond the intended residential purpose on which the Covenants were established.

[82] Of note, and most unfortunate, was the fact that the 1st and 2nd Defendants, on several occasions, were made aware of the nuisance caused by their guests/visitors, and they have failed to take the necessary steps to reduce or prevent its continuation.

[83] I, therefore, find that there is sufficient evidence that the guests/visitors who were permitted to occupy the 1st and 2nd Defendants' premises have created a nuisance, and the 1st and 2nd Defendants are, therefore, liable for the nuisance created by their occupants.

Damages

[84] The Claimant claims damages for the nuisance. It is settled law that the Claimant must prove her loss, and as such, a claim for damages must not only be pleaded but must also be proven. No medical report or expert evidence was presented to this court to substantiate the harm she complained of to her physical and psychological health. As such, I will make no award on the issue of damages as the extent of the physical harm suffered by the Claimant is unknown to the court.

[85] Though the issue of nominal damage could have been considered and was strongly contemplated by this court, I will not make such an order in the light that the Claimant would have succeeded on the substantive relief sought.

Concluding Remarks and Final Disposition

[86] It would appear as if the days when neighbourly engagements to resolve matters of this nature, without the involvement of the court, are way behind us. Gone are the days when the courts were spared the burden of these almost "domestic-type matters". The 1st and 2nd Defendants' conduct in the handling of this matter is unfortunate and unwarranted having regard to the unambiguous nature of the relevant Covenants and their obvious prior knowledge.

[87] I will, however, add that with the explosion of the Airbnb concept in this jurisdiction, this might be the time for the authorities to contemplate the feasibility of implementing measures to regulate this emergent income-generating practice.

[88] In the final disposition of this matter, I find on a balance of probabilities that the 1st and 2nd Defendants have acted in breach of Restrictive Covenants 10 and 11, and the activities of their occupants have interfered with the Claimant's quiet enjoyment of her property. Thus, she is entitled to the relief sought.

[89] Accordingly, I make the following orders:

1. It is hereby **DECLARED** that the property at 9 Scotland Drive, College Green, Hope Pastures, Kingston 6, St. Andrew, registered at Volume 1279 Folio 65 of the Registered Book of Titles, is being used for trade or business contrary to the Restrictive Covenant number 11 endorsed on the Certificates of Title of the Claimant and the 1st and 2nd Defendants.

2. It is hereby **DECLARED** that the property mentioned in paragraph 1 of this Order is not being used for residential purposes only, contrary to Restrictive Covenant number 10 endorsed on the Certificates of Title of the Claimant and the 1st and 2nd Defendants.

3. It is hereby **DECLARED** that Restrictive Covenants 10 and 11 endorsed on the Certificates of Title of the Claimant and the 1st and 2nd Defendants enure to the benefit of and is enforceable by the Claimant against the 1st and 2nd Defendants.

4. It is hereby **DECLARED** that the activities of the occupiers at the instance of the 1st and 2nd Defendants constituted a nuisance and are in breach of the Restrictive Covenants 10 and 11 endorsed on the Certificates of Title of the Claimant and the 1st and 2nd Defendants and is actionable by the Claimant.

5. The 1st and 2nd Defendants, whether by or through themselves, their servants and/ or their agents, are barred from allowing their property to be used for short-term occupancy, licence or tenancy for the purpose of a trade or business.

6. The 1st and 2nd Defendants, whether by or through themselves, their servants and/ or their agents, are barred from permitting their property located at 9 Scotland Drive, College Green, Hope Pastures, Kingston 6, St. Andrew, registered at Volume 1279 Folio 65 of the Register Book of Titles to be used in such a manner as to amount to a nuisance.

7. Leave to appeal is refused.

8. Costs to the Claimant to be taxed if not agreed.

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Maxine. C. Jackson
Puisne Judge (Ag)