[2023] JMSC Civ 206

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2009HCV05638

IN THE MATTER OF ALL THAT parcel of land part of Barbican now known as Barbican Heights in the parish of Saint Andrew being the lot numbered Five on the plan of Lot 417A Barbican Heights aforesaid deposited in the Office of Titles on the 20th day of September 1977 of the shape and dimensions and butting as appears by the said plan and being the land comprised in Certificate of Title registered at Volume 1284 Folio 371 of the Register Book of Titles

AND

IN THE MATTER of the Restrictive Covenant numbered (1), (2) and (3)

AND

IN THE MATTER of Restrictive Covenants (Discharge and Modification) Act

Re: Lot 417A Barbican Heights

Miss. Annaliesa Lindsay and Miss. Aaliyah Green instructed by Lindsay Law for the applicants

Mr. Nigel Jones and Miss. Kashima Moore instructed by Nigel Jones & Company for the objector Ms Monica Ladd

Mrs. Daniella Gentles - Silvera K.C, Mr. Chad Wynter and Ms. Kim Gallimore instructed by Livingston Alexander Levy for the objectors Mr. Afeef Assad Lazarus and Mrs. Melba Magreta Lazarus

Mrs. Kerese Bruce - Patterson instructed by Bruce Patterson & Company for the objectors Mr. Robert Pickersgill, Mr. Leicester Levy, Mr. Glenford Christian and Mrs Marie Christian, Ms. Tamara Williams, Mr. Peter Glaze, Mr. Haresh Khelmani, Mr. Winston Roman, Mr. Von White and Mrs. Collen White, Mr. Bashi Khelmani and Mrs Inda Khelmani

Mr Alfred McPherson instructed by Alfred McPherson & Co, for himself and Mrs Margaret McPherson, objectors.

Heard February 13 to 15, 2023, March 1, 2023, and October 20, 2023

Application to modify restrictive covenants under section 3(1) of the Restrictive Covenants (Discharge and Modification) Act – what is the neighbourhood – whether the character of the neighbourhood has changed - whether restrictions are obsolete - whether the reasonable user of land impeded – whether the proposed modification will not injure the persons entitled to the benefit of the restrictions

IN CHAMBERS

CORAM: JARRETT, J

Introduction

[1] Millsborough Crescent is part of the upscale residential community of Barbican Heights in the parish of St Andrew. On this road, the owners of lots are subject to reciprocal rights and obligations in respect of restrictive covenants endorsed on their certificates of title. Before the court is an application under section 3 of the **Restrictive Covenants (Discharge and Modification) Act** ("the Act")**,** by David

Seivright and his wife Lisa-Gaye Seivright ("the applicants"), for the modification of three of these restrictive covenants. The applicants are the owners of Lot Numbered 5 on the plan of Lot 417A Barbican Heights, with the civic address 8C Millsborough Crescent, Kingston 6. The application is passionately opposed by seventeen (17) objectors ("the objectors"). Save for Alfred and Margaret McPherson whose dwelling house is on Plymouth Avenue, all the objectors reside on Millsborough Crescent.

The application for modification

[2] The application for modification is by way of an Amended Fixed Date Claim Form filed on May 31, 2012. It states that the following restrictive covenants which are endorsed on the applicants' certificate of title registered at volume 1284 folio 371 of the Register Book of Titles, are those for which modification is being sought: -

1) There shall be no sub-division of the said land.

2) No building of any kind other than a private dwelling house with appropriate outbuildings 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 Two Thousand Eight Hundred Dollars.

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

[3] The modifications would result in the following restrictions being substituted for the aforesaid restrictive covenants:

1) There shall be no subdivision of the said land save and except a duplex as approved by the relevant authorities.

2) No building of any kind other than a duplex with appropriate outbuildings appurtenant thereto and to be occupied therewith shall be erected on the said land and the value of such private duplex dwelling house and outbuildings shall in the aggregate not be less than Five Million Dollars.

3) The main building to be erected on the said land shall face the roadway or one of the roadways bounding the said land and no building or structure shall be erected on the said land nearer than thirty feet to any road boundary which the same may face nor less than ten feet from any other boundary thereof and all gates and doors in or upon any fence or opening upon any road shall open inwards and all outbuildings shall be erected to the rear of the main building save and except that the guardhouse and garbage receptacle (if any) shall not be considered a breach of the restrictive covenant.

[4] The submissions in this matter were very comprehensive and ably presented by all counsel. I thank them for their remarkable industry. I wish to assure the parties that save for the affidavit of Victor Zadie (which I comment on in paragraph 9 below), I have read and had regard to all the evidence and the submissions presented in this application but will only refer in this judgment to those aspects of the evidence and the submissions which are relevant to my findings and conclusions.

The evidence in support of the modification

[5] The evidence in support of the application is contained in four affidavits filed by the applicants. In their affidavit filed on October 30, 2009, the applicants indicate that they rely on the following grounds in support of their application:

a) The proposed modification of the restrictive covenants will not injure the persons (if any) entitled to the benefit of the said restriction.

b) The continued existence of such restriction or the continued existence thereof without modification would impede the reasonable user of the land for private purposes without securing to any person any practical benefits sufficient in nature to justify the continued existence of such restriction thereof without modification.

c) The persons of full age and capacity for the time being entitled to the benefit of the said restrictions have by implication by their acts of (sic) omission agreed to the same being modified.

d) By reason of changes in the character of the neighbourhood the restrictions ought to be deemed obsolete.

They say the restrictions were imposed since September 20, 1977, and they seek the modifications to erect a private duplex dwelling house. They contend that in the last ten (10) years, the Barbican area has seen the "proliferation" of many townhouses and apartments.

[6] In their affidavit filed on May 31, 2012, the applicants say that they obtained approval on May 3, 2012, from the then Kingston and St Andrew Corporation ("KSAC") in relation to their Lot numbered 5 on the plan of Lot 417A, the subject of their application, and they exhibit that approval. The exhibit is a letter from the KSAC granting building and planning approval for a duplex residence consisting of two (2), three (3) storey, four (4) bedroom dwelling house with a total floor area of 764 Square metres on a lot size of 1, 308.25 square metres. In their affidavit

filed on January 27, 2022, the applicants say that the proposed construction which they "called a duplex" in the application for modification which was published in the Jamaica Gleaner Newspaper on November 15, 2021, is the second half of a previously approved duplex that will be constructed on unit 8D. Unit 8D is empty land contiguous to unit 8C where they currently have their dwelling home. In April 2017, they began construction but were able to complete only one half of the approved duplex due to financial constraints. They are now pursuing the completion of the second unit.

[7] The applicants also testify that the proposed construction will not impede the reasonable use of the land as the intended use of the proposed unit will be a single-family dwelling house with its own entrance from the road and it will be consistent with the character of the neighbourhood. It is their belief that the development will not injure the use and enjoyment of the surrounding proprietors or the benefits they derive from the restrictive covenants. They also believe that the development will maintain the spirit and intent of the restrictive covenants and will not increase the density of the neighbourhood. The building approval they obtained is for a two (2) storey building however they "are now proposing" a one (1) storey building thereby reducing the size by one- half. The neighbourhood, they say, consists of: "mixed housing solutions including some multi-family schemes", comprising several units far in excess of that for which they have obtained approval. They cite as one example 10B Millsborough Crescent which is directly next door to them, and which consists of attached villas and apartments.

[8] In their affidavit filed on September 30, 2022, in response to the objectors' evidence, the applicants say that none of the objectors who reside on Millsborough Crescent can see their house from their homes and the closest objector lives 10 houses up the road from them at a distance of several hundred feet. Two of their immediate neighbours have no objections to the modification , and copies of letters written by these persons indicating their no-objection, were exhibited. Just like the objectors, they also value their peace, quiet and privacy in the neighbourhood. Their proposed construction is within the density specifications and is not

prescriptive of the outcome of any: “future speculative applications. There is precedent for them to obtain permission to subdivide their lot once the requisite requirements are met, and they believe that the addition to their property will be consistent with first rate amenities which they and their neighbours currently enjoy.

The objectors’ evidence

[9] In short, the objectors object to the modifications on the basis that none of the requirements for the modification and discharge of restrictive covenants under section 3(1) of the Act, has been met by the applicants. Of the 17 objectors, Monica Ladd, Alfred and Margaret McPherson, Leicester Levy and Afeef Assad Lazarus, filed affidavits in response to the affidavits of the applicants. There was an affidavit of Victor Zadie filed on January 24, 2023, objecting to the application. He did not attend the trial, and neither was he represented by counsel. With no explanation provided to the court for his absence, I have not had any regard to his affidavit .

Monica Ladd

[10] Ms Monica Ladd resides at 29 Millsborough Crescent. In her affidavit filed on May 27, 2022, she says that she and her husband, the late Oliver Clarke, acquired their property because of the character of the neighbourhood which prevails due to the existence of the restrictive covenants in issue. Millsborough Crescent remains almost exclusively single family, it has retained its character, and the restrictive covenants are necessary to preserve that character. The restrictions are not obsolete. The proposed modifications would cause her injury, the existence of the restrictions does not impede the reasonable user and, she has not consented to the modification.

[11] Her further evidence is that she and her husband acquired their property because of the low density and sizable lots in the area which were being used for single family dwellings. She said this offers privacy. According to her, these qualities have been maintained, offering her and other residents, peace and quiet. She contends that Millsborough Crescent has maintained this quietude which demonstrates that the applicants' property can be used without breaching the restrictive covenants. She objects to any subdivision of the property and to any construction which would give rise to multi-family structures. If the application is granted to develop Lot numbered 5 to erect a duplex, it will likely lead to other similar applications from developers. It is her fear that developers will point to the applicants' property as a precedent for the modification and argue that there has been a change in the character of the neighbourhood.

Alfred and Margaret McPherson

[12] Alfred and Margaret McPherson ("the McPhersons") are husband and wife. They filed a joint affidavit on July 19, 2022. They reside at 2 Plymouth Avenue, which is Lot numbered 1 on the Plan of Barbican Heights deposited in the Office of Titles on the March 14, 1989 being lands comprised in Certificate of Title registered at Volume 1219 Folio 503 of the Register Book of Titles.

[13] According to the McPhersons, the applicants purchased their lot with actual or constructive notice of the restrictive covenants which they now seek to modify to construct a duplex. On Millsborough Crescent and in particular the Millsborough Crescent /Plymouth Avenue neighbourhood, in which their lot and that of the applicants are located, the majority of the lot sizes vary from a little over half an acre and upwards. The proposed development by the applicants will "obliterate the import of the restrictive covenants in issue which have been adhered to "by and large" by the owners of land in the Millsborough Crescent/Plymouth neighbourhood and will be out of character with the neighbourhood.

[14] The McPhersons say that they believe that the modification of the restrictive covenants by the court will give the effect of setting a precedent and open the flood gates to similar applications for subdivision into very small lots. This, they say, would “erode the fabric” of the neighbourhood in which their lot and the applicants’ lot are located and depreciate the value of their lot and all the other lots entitled to the benefit of the restrictive covenants. They identify nine (9) lots on Millsborough Crescent and Plymouth Avenue combined, in which restrictive covenant number 1 against subdivision, has been modified to permit subdivision into smaller lots.

[15] According to them, the Millsborough Crescent /Plymouth Avenue neighbourhood is a top-class residential scheme developed over 40 years ago. The restrictive covenants, and especially number 1, prohibiting subdivision into smaller lots, were intended to preserve to the owners of lands in the building scheme, certain first-rate residential amenities. Most of the lots in their neighbourhood have been used in compliance with the restrictive covenants as they were originally intended. The majority of the lots have single family dwelling houses of a certain size on them, which are surrounded by trees, gardens and manicured lawns with sufficient land space between them along with outdoor domestic amenities. All of this goes towards setting and maintaining a high tone for the area and enhances property values. According to the McPhersons, they bought their lot in 1989 and built their house on the basis of Millsborough Crescent/Plymouth Avenue being a quiet, exclusive residential area with single family dwelling houses on most if not all of the lots in the area.

[16] The applicants intend to subdivide their lot for financial advantage and private use, to their disadvantage and expense. The development of the applicants’ lot into a duplex will be inconsistent with the appearance and character of their neighbourhood, detract from the reputation and quality of the neighbourhood and lower the value of the homes in it. The language of the proposed modification is nonspecific and nebulous, and it is likely that if granted, the proposed restrictive covenant number 1, will be replicated on both splinter titles issued and this would result in multifamily units or townhouse developments. The applicants’ lot is less

than one half acre, is one of the smaller lots on Millsborough Crescent/Plymouth Avenue and is unsuitable for further subdivision into smaller lots. The modifications, say the McPhersons, would undermine the integrity of the original building scheme.

[17] The building approval granted to the applicants to construct a duplex was subject to there being no breach of the restrictive covenants. But, according to the McPhersons, the applicants have built one unit without first obtaining an order from the court modifying the restrictive covenants. Additionally, the approval which was given in May 2012, and which required that construction be completed in two years, is now null and void due to the effluxion of time. 10B Millsborough Crescent which the applicants refer to, was more of a development of land at 16 Edgecombe Avenue, and it was due to "legal manoeuvres" which led to 16 Edgecombe Avenue appearing as 10B Millsborough Crescent.

[18] The character of the neighbourhood of Millsborough Crescent/Plymouth Avenue has not changed and there are no circumstances that would justify the restrictive covenants being deemed obsolete. The continued existence of the restrictive covenants will not impede the reasonable user of the land for public or private purposes and will secure to surrounding neighbours, practical benefits sufficient to justify their continuation. It is impossible for the applicants' proposed development to conform with the standard of the area and its character which is "relatively large lots with homes of grace and elegance and extensive lawns and gardens affording seclusion from adjoining premises".

Leicester Levy

[19] Leicester Levy says he is the managing director of Gammon Investments Limited, the registered proprietor of 15 Millsborough Crescent. He has lived in the "Millsborough Community" since 1983 in a single-family dwelling house. According to him, Millsborough Crescent consists solely of single-family dwelling households

which is the character of the neighbourhood. He objects to the application on the basis that the proposed construction is inconsistent with the character of the neighbourhood and will impede the reasonable use of the land. According to him, the proposed construction is not a duplex in its truest definition, as it will not take the shape, form, and design of the neighbouring unit 8C. He says that a duplex is defined in the Collins Dictionary as a house divided into two separate units for two separate families or groups of people. He therefore believes that the proposed construction will be a multi-family dwelling which is inconsistent with the character of the neighbourhood.

[20] As to 10B Millsborough Crescent, Mr Levy says that it is not a Millsborough Crescent property in its truest form but is a derivative of an Edgecombe Avenue sub-development. 10BMillsborough Cresent is derived from land registered at Volume 1296 Folio 150 and Volume 735 Folio 36 of the Register Book of Titles and is deemed to be an access to the sub-parcels of 16 Edgecombe Avenue subdevelopment. He further contends that the proposed development will pose a risk to all the objectors and impede, among other things, their privacy, and the quietude of the neighbourhood. It will change the neighbourhood's character, allow for future modifications that will impact privacy, quietude and ease of access to premises. According to him, it will be a "complete overhaul" of the current character of the neighbourhood which they wish to maintain.

Afeef Assad Lazarus

[21] Afeef Lazarus resides at 11 Millsborough Crescent. In his affidavit filed on July 29, 2022, he says that he is one of the registered proprietors of all that parcel of land part of Barbian now known as Barbican Heights being lot numbered 428 on the plan of Barbican Heights comprised in Certificate of Title registered at Volume 940 Folio 477 of the Register Book of Titles. His lot and that of the objectors were splintered from Certificate of Title registered at Volume 453 Folio 56 and were two of the lots in Deposited Plan 1934. The applicant's proposed construction of a

duplex will be a breach of restrictive covenants 1, 2 and 3 and consequently he will suffer loss and damage due to the noise and disturbance associated with the construction, as his and his wife's use and enjoyment of their premises will be seriously disturbed.

[22] According to Mr Lazarus, when he and his wife purchased their property, they expected that the character of the neighbourhood would continue to be that of single-family dwelling houses on relatively large lot sizes with little or no traffic thereby offering a quiet neighbourhood. The character of Millsborough Crescent has remained "overwhelmingly single-family dwelling houses" and therefore the restrictive covenants the applicants are seeking to modify ought not to be deemed obsolete. Although the applicants say in their affidavit filed on January 27, 2022, that the proposed construction will not be a two (2) storey building but instead a one (1) storey building, which will be a single family dwelling; if the modification is granted, the resultant subdivision will be of lot sizes less than ¼ acre each , which is not the usual acreage of lots on Millsborough Crescent. There are at least forty (40) houses on Millsborough Crescent, says Mr Lazarus, and of that number, only two (2) lots have multifamily dwellings on them. He says that the first one is at the corner of Millsborough Crescent and Millsborough Avenue and its civic address is in fact No. 4 Millsborough Avenue, which has a different character from Millsborough Crescent. While the second one is closer to the intersection of Millsborough Avenue and Millsborough Crescent.

[23] The restrictive covenants have been in place since around 1977 and have served to preserve the nature, character and integrity of the community for the benefit of all the proprietors in it. Because of these covenants, says Mr Lazarus, the proprietors have enjoyed the peace and security of a well-kept residential neighbourhood. According to him, the proposed modification will interfere with their privacy, negatively affect their quiet enjoyment of their properties and result in the depreciation of the value and aesthetics of the neighbouring adjoining properties including that of the applicants, because it will create a "sense of overcrowding".

The experts' reports

[24] Export reports were prepared by Mrs Norma Breakenridge of Breakenridge & Associates, Chartered Valuation Surveyors and Licenced Real Estate Dealers and by Mr Kenneth A. Allison of Allison Pitter & Co. Chartered Valuation Surveyors. Mrs Breakenridge was engaged by the applicants, and Mr Allison by Monica Ladd. On November 22, 2022, both these Chartered Valuation Surveyors were appointed experts for the purposes of this application by M Jackson J (Ag), and permission given for reliance to be placed on their reports without them being called to give evidence at the hearing of the application.

Norma Breakenridge

[25] Mrs Breakenridge reports that Millsborough Crescent falls within Barbican Heights which is in the "Barbican area". Barbican Heights was developed in the 1950's and 1960's. She says that the development pattern of Barbican had created an environment of upper-class households with large dwelling houses on large lots. Properties in the area were single-family houses which had been well maintained aesthetically. The past three decades however have seen redevelopment of several sites into multifamily development of townhouses in sections of "Millsborough Avenue, Dillsbury Avenue and Farrington Drive/Crescent etc". She says however that despite this growth, there are still enclaves that have retained their single-family exclusive characteristics with the composition of upper-class households having large dwelling houses on large lots in sections such as "Millsborough Crescent/Edgecombe Avenue/Gainsborough Avenue /Plymouth Avenue among others".

[26] For the purposes of her report, Mrs Breakenridge, says Millsborough Crescent and Plymouth Avenue are considered sub-neighbourhoods and Barbican has several sub-neighbourhoods. Millsborough Crescent is zoned for single family residences with a density of thirty (30) habitable rooms per acre. She identifies sixteen (16)

instances where restrictive covenants have been modified on the certificates of title for lots on Millsborough Crescent. Seven (7) concerned the restriction in relation to subdivision, two (2) were in relation to the restriction concerning a private dwelling house, thirteen (13) related to setbacks, and one (1) concerned the height of a fence or hedge within the stipulated setback.

[27] The proposed development, says Mrs Breakenridge, is to maintain the existing four-bedroom structure and to construct the section of the duplex comprising a two-bedroom unit with living/dining room and basement. She says that over the years, Millsborough Crescent has maintained its single-family zoning except for a few properties that have other than single family houses. There are about fifty (50) properties on Millsborough Crescent, and therefore the proposed development would represent 2% of the properties on the road. Such a small percentage, opines Mrs Breakenridge, would not have a great impact on Millsborough Crescent, as it would only add an extra household and perhaps two additional motor vehicles, in the short term. In her view, there would be little impact on noise nuisance, quietude, overuse of the resources of municipal services, pressure on the infrastructure or erosion of the landscape.

[28] Mrs Breakenridge further says that since the development will now be one (1) storey with a basement, no privacy issues will arise as the building will not be overlooking the neighbours. The structure will be fresh and new and could uplift the area. Already there are two multi-family developments on Millsborough Crescent. The complex at the corner of Millsborough Avenue and Millsborough Crescent does not form part of Deposit Plan 1934 and has a civic address on Millsborough Avenue. 10B Millsborough Crescent, which is next door to the applicant's property, is a mixed development of townhouses and apartments and "attached to land on Edgecombe Avenue". There is a townhouse complex at the northern end of Millsborough Crescent and anecdotal evidence is that an application for a townhouse complex has been approved for 8B Millsborough Crescent.

[29] Mrs Breakenridge opines that density would be a concern, as the applicants' property would have a greater carrying capacity and this would impact the neighbours on the other side of the road. In her view the long-term effect of the modification would provide a precedent that could be relied on for future applications seeking to modify the covenants in order to construct similar developments. She believes that in the case of the applicant's lot, the continued existence of the restrictive covenants without modification would "partially impede the reasonable use of the land as it would limit the development of the site in practical terms". She points to the thirteen (13) properties which have had the setback restriction modified from fifteen (15) feet to fifty-eight (58) feet from any road boundary. While the proposed development will be in keeping with the density requirements for the area, she believes that modifying the subdivision covenant to construct a duplex and thereby create two lots, with a single-family residential unit on each lot, would set a precedent of subdividing small lots.

[30] Modifying the covenant to create a second duplex for single family dwelling purposes would, says Mrs Breakenridge, be consistent with the "immediate surrounding properties and the neighbourhood as a whole in terms of its use". Its use and enjoyment would be in keeping with the character of the area as a residential area. She describes the majority of the houses on Millsborough Crescent as being of traditional design on spacious lots, with landscaped grounds, generous curtilage and as presenting "an atmosphere of exclusivity and quietude". The proposed construction features contemporary architecture and is modern and futuristic. In her view, the appearance of the proposed duplex would be consistent with 10B Millsborough Crescent but would be "contrary to the existing aesthetics of properties in the neighbourhood as a whole but would still present a fresh new image that has an 'up market flair". Mrs Breakenridge concludes by opining that the modification and the proposed development will keep the property in residential use, with a density and setback which conform to other developments on the road.

Kenneth Allison

[31] Kenneth Allison describes Millsborough Crescent as a prime residential neighbourhood in Barbican Heights, regarded as one of the most prestigious areas located at the foothills of Jacks Hill in upper St. Andrew. He says it is "a true crescent shaped roadway, starting from its junction with Millsborough Avenue just above the junction of Millsborough Avenue and Dillsbury Avenue running in an easterly, then northerly, then westerly direction back to its junction with Millsborough Avenue and Tavistock Terrace to its northern end". Under the Provisional Development Order 2017, Barbican Heights is zoned for low density residential development with allowable densities of up to thirty (30) habitable rooms per acre. According to him, there is an increasing trend for the construction of multifamily developments in Barbican due to the larger lot sizes and the desirability of the area as a residential location. He describes development on Millsborough Crescent as predominantly singly family, detached type, on relatively large lots ranging generally from half an acre to two acres and says that the owners of properties in the neighbourhood have guarded this position zealously.

[32] The applicants' lot forms part of Deposited Plan 1934 which comprises Millsborough Crescent, Plymouth Avenue, Tavistock Terrace, Roedeen Close, Harriman Close and part of Millsborough Avenue. According to Mr Allison, the development of this area saw Millsborough Avenue, Millsborough Crescent and Plymouth Avenue being initially similarly developed with middle to upper income, single family residences. Millsborough Crescent currently comprises seventy-six (76) lots including one with a street address on Millsborough Close, one with a street address on Millsborough Avenue and one with a street address on Plymouth Avenue. Over the last two decades, a significant amount of further subdivision on Millsborough Avenue through to Dillsbury Avenue has led to villas, townhouse schemes and apartment complexes making these the dominant residential use types in those areas. An example of this is Millsborough Avenue in which only

approximately fourteen (14) lots have not to date been converted into multifamily use. Millsborough Crescent however has been more guarded against the shift in density. He identifies 30 additional lots between the original subdivision and the current subdivision.

[33] According to Mr Allsion, while subdivisions have taken place on Millsborough Crescent, they have not been of the type to create multifamily residential complexes as a dominant feature. This, in his opinion, is what distinguishes Millsborough Crescent from Millsborough Avenue making them two different neighbourhoods. Applying the "estate agent's test", he believes that the expectation of purchasers of properties on Millsborough Crescent would be that of single-family residences on relatively large lot sizes, while on Millsborough Avenue it would be a single-family unit in a multi-family residential complex comprising predominantly townhouses and villas as opposed to a limited number of apartments.

[34] In his opinion, the proposed development is unlikely to adversely affect traffic flow, the provision or stability of public utilities, and the aesthetics or drainage of the neighbourhood. Once the development is in keeping with the existing tone of the neighbourhood, in his view it is also unlikely that it will affect the quiet enjoyment of the immediate neighbours. He further opined that as the applicants' existing single-family dwelling house, was developed within the context of the existing restrictive covenants, it has already achieved its "highest and best use", therefore there could be no sterilisation of the applicant's lot, should further sub-division not be approved.

Submissions

The applicants

[35] In her written submissions, Miss Lindsay, counsel for the applicants cited the decision of Parnel J in **Lots 12 and 13 Fortlands (1969) 11 JLR,** for the guidance it gives on how to interpret section 3 the Act. Counsel submitted that in determining whether the restrictive covenants are obsolete the court must consider the real estate agent's test. For this submission, she relied on the Court of Appeal decision of **Central Mining and Excavating Ltd v Peter Croswell 1993(30) JLR.** She argued that in that case, the court held that the real question is whether the original object of the restrictive covenant can or cannot still be achieved without the modification sought. If it cannot, the restrictive covenant is obsolete. Miss Lindsay submitted that in the instant case, the restrictive covenants in issue are obsolete due to the changes in the character of the neighbourhood. The covenants, argued counsel, restrict the construction of duplex dwelling houses and by extension multifamily dwellings, when in reality, multifamily dwellings now exist within the Millsborough community.

[36] The Millsborough community has changed over the years, submitted Miss Lindsay, and has seen the development of several townhouses or multifamily dwellings. According to her, modification of the restrictive covenants in issue is consistent with the current state of the community. Support for this submission was said to be found in Mr Allison's analysis of the subdivisions that have taken place on Millsborough Avenue through to Dillsbury Avenue, where townhouse schemes, villas and apartment complexes are the dominant residential use types. Counsel also drew attention to Mrs Breakenridge's identification of 16 units in the Millsborough community that have applied and been approved modification of the restriction in relation to subdivision to construct bungalows and two-story units.

[37] It was argued that the objectors are a small fraction of the residents in the community and that it is noteworthy that the applicants' immediate neighbours have not objected. There are several townhouses or multifamily developments on Millsborough Crescent, submitted counsel, therefore the duplex will be consistent with the character and aesthetics of the neighbouring premises. Applying the definition of 'injury' within the meaning of section 3(1)(d), referred to by Anderson

J in **Hopefield Corner Ltd v Fabrics De Younis Limited, unreported Supreme Court decision delivered June 15, 2011**, Miss Lindsay submitted that the modification will not cause any injury to the objectors, and as such, ground 3(1)(d) has been satisfied. Counsel said that in **Hopefield Corner Ltd v Fabrics De Younis Limited** (supra), Anderson J referred to the Australian decision in **Lolakis and another v Konitas [2002] NSWC 889,** in which "injury" in a comparable New South Wales legislation was said to relate to the relevant person in respect of ownership or interest in land. It was said to include either economic injury or physical injury and that a person may be substantially injured without the value of his land being affected. Counsel said that there is no evidence that the privacy of the objectors will be affected, and she relied on Lawrence-Beswick J's dicta in **30 Dillsbury Ave**, **unreported Supreme Court decision delivered April 14, 2011,** where the learned judge said that a house in a city with neighbouring properties will have privacy compromised.

[38] In respect to section 3(1)(b) of the Act, it was submitted that the question is whether the restrictive covenants achieve some practical benefit of sufficient weight to justify their continuance without modification. **Stannard and Others v Issa [1987] AC 175** and **Sagicor Pooled Investments v Robertha Mathias et al [2017] JMCA Civ 35**, were cited in support of this submission. Counsel said the court must examine all the circumstances of the case to include the fact that the restrictions are obsolete, the duplex will pose no credible threat to the character of the neighbourhood, and without modification, the restrictions impede the reasonable user by the applicants of their land. Sixteen (16) other modifications have taken place, argued counsel, and if the restrictions were useful, no modifications would have been made.

[39] In oral submissions, Miss Lindsay said that there are two separate neighbourhoods on Millsborough Crescents. Lower Millsborough Crescent which comprises lots with civic addresses numbered two (2) to twelve (12), and lower Millsborough Crescent, which are the lots above number twelve (12) . Based on Mr Allison's report, counsel said the modifications would cause no injury to the objectors. There

has been sterilisation of the lands in lower Millsborough Crescent by the continued existence of the restrictive covenants, but that is not the case in upper Millsborough Crescent. Miss Lindsay drew reference to the existence of enclaves reported by Mrs Breakenridge, to support her two neighbourhoods theory. She cited the decision in **Sarah Chin- Jen Hsia, Martin Hall et al v Martin Lyn and Others [2020] JMSC Civ 5,** in which an argument was advanced of two distinct neighbourhoods on Montrose Avenue. Neither of the experts spoke to any injury that the modifications will cause to the objectors. Both of them, argued Miss Lindsay, indicated that the proposed development will have very little impact on noise levels, the density and the quietude of the neighbourhood. In relation to lower Millsborough Crescent counsel said that there are several lots in which subdivisions have been approved.

[40] According to Miss Lindsay, the usefulness of the restrictions for lower Millsborough Crescent has been made redundant, and to that extent, the objections are frivolous. She raised concerns about the "thin end of the wedge" argument in relation to the question whether the modifications will cause injury. In her view, the court must look at each case on its own merit and not speculate on what may come before it at a later date. What the applicants intend to construct is a duplex which in effect will be a single-family dwelling and not a multi-family dwelling. Counsel submitted that the practical result of the proposed development is two single family dwellings on two separate lots, which, she argued, should not be objectionable. The proposed setbacks will be compliant with the National Environment and Protection Agency's (NEPA) guidelines and in keeping with previous modifications. She also sought to distinguish **Vayden McMorris v Claude Brown and Others [1999] AC 142,** on the basis that that was a case of a first modification of a subdivision restriction, which is not the situation in the case at Bar.

[41] In further written submissions after the court's visit to the area, Miss Lindsay argued that applying the estate agent's test in lower Millsborough Crescent, there can be no expectation that in this neighbourhood, a prospective purchaser can expect only single-family dwellings. She said that the neighbourhood now consists

of multiple family complexes and subdivided lots. The decision of Harrison J **in Re Kensington Crescent, ERC 10 of 1995** was relied on for the submission that the court must look at the "fulsome area" and conclude that the "neighbourhood is still undergoing significant development projects".

The objectors

Afeef Lazarus

[42] King's Counsel Mrs Gentles-Silvera on behalf of Afeef Lazarus submitted that the burden is on the applicants to prove on a balance of probabilities at least one of the grounds in section 3(1) of the Act. Even if that is done, she argued, the court still has a discretion whether to grant the application. My attention was brought to the decision of **Hopefield Corner v Fabrics De Younis Limited,** (supra**)** and **Re Lots 12 and 13 Fortlands** (supra)**.**

[43] In relation to section 3(1)(d) of the Act, it was submitted that the burden on the applicants is to prove that the proposed modification will not cause injury to those entitled to the benefit of the covenants and not that the proposed development will not injure them. It appears, argued King's Counsel, that the latter is what the applicant's seemed to be contending. The Privy Council decision in **Vayden McMorris v Claude Brown and Others** (supra) was relied on for the Board's acceptance of the thin end of the wedge argument and as recognising that once a restrictive covenant in its present form provides some practical benefit to the persons entitled, to deprive them of that benefit must cause some injury. Citing Mrs Breckenridge's report, King's Counsel made the point that the thin end of the wedge argument was also recognised by her in that report when she opined that the development of a duplex on two lots would set a precedent for subdividing smaller lots, and the applicants' property is already one of the smaller lots in the neighbourhood.

[44] Granting the application for modification especially to subdivide the lot into a duplex, is the thin end of the wedge, as it would open the original covenants for modification. This, argued Mrs Gentles-Silvera, would be injurious to those entitled to the benefit of the covenants. Besides, the applicants have not established that the modifications would not constitute a real risk as a precedent. In fact, in **Vayden McMorris v Claude Brown and Others** (supra), the Privy Council said that it is in those cases where some modification has taken place that it is more important to be vigilant to future changes. The consent of the applicants' immediate neighbours, does not, argued counsel, affect the objectors' entitlement to object. Additionally, even if an objector is some distance away from the applicants' lot, that objector is still entitled to preserve the integrity of the entire neighbourhood.

[45] In relation to section 3(1)(b) of the Act, it was submitted on the authority of the Privy Council in **Stannard and Others v Issa** (supra) that to succeed, the applicants must show that the present user permitted by the restrictions is no longer reasonable; the proposed user is reasonable; and that in their present state the restrictions hinder to a real degree the land being reasonably used having regard to the situation it occupies to the surrounding property and to the purpose of the covenants. It was argued that the applicants have failed to meet these requirements and have in fact applied the wrong test, that is, that the proposed construction of a duplex on unit 8D is reasonable. The applicants cannot say that the restrictions sterilise the reasonable use of the land or that they prohibit the reasonable use of the land as the present user is that of a single-family dwelling house on a large lot which is perfectly reasonable.

[46] King's Counsel further argued that the practical benefits of the restrictions are the preservation of a neighbourhood with a peaceful character by reducing the number of homes and maintaining the setbacks of 60 feet and 30 feet from the roadway boundary and between buildings respectively.

[47] The estate agents test was said to be the test for determining the neighbourhood. This test asks the question what a purchaser of a particular property would expect

to get. The authorities of **48 Norbrook Drive ERC 10 of 1982, unreported Supreme Court decision delivered on November 16, 1982, Sarah Chin-Jen Hsia, Martin Hall et al v Martin Lyn** (supra) and **Hopefield Corner Limited v Fabrics De Younis Ltd** (supra) were cited. Relying on Mr Allison's report, Mrs Gentles -Silvera argued that on Millsborough Crescent, one would expect to get a single-family residence on a relatively large lot as opposed to Millsborough Avenue with multifamily complexes. It was therefore submitted that Millsborough Crescent is a different neighbourhood from Millsborough Avenue. King's Counsel disagreed with the applicants' contention that there are two neighbourhoods on Millsborough Crescent. She said that the character of the neighbourhood, which is Millsborough Crescent, has not changed. In relation to restrictive covenant number 1, if the modification is granted, this would change the character of the neighbourhood as it would reduce the acreage of the lots on the road, which currently are all about half an acre in size.

[48] It was submitted that apart from 10B Millsborough Crescent which is a townhouse development, there are no other lots with apartments and townhouses on them in the neighbourhood. If the application sought is granted, the character of the neighbourhood will change from single-family homes on large lots. Two dwelling homes on two small lots will be out of character with the neighbourhood.

[49] In any event, the restrictions are not obsolete. **Re Truman, Hansbury, Buxton & Co. Ltd [1956] 1QB 216**, was relied on for the meaning of 'obsolete' in section (3)(1)(a) of the Act, which is that the original purpose of the covenants can no longer be served. The original purpose of the covenants was to establish single family dwellings on large lots which give the owners privacy, tranquillity and space, and most of the houses in the neighbourhood are still faithful to the restrictions.

The McPhersons

[50] Mr McPherson adopted the submissions of King's Counsel and made submissions which were in tandem with hers with respect to the test to be applied in determining whether a restrictive covenant is obsolete. He cited **Re 48 Norbrook Drive** (supra) for the principle that a tendency towards subdivisions in and of itself does not make a restriction obsolete. He also relied on the estate agent's test and cited the decision in **Re 39 Wellington Drive (1991) No. ERC 139/1990,** for its application.

[51] According to Mr McPherson, Millsborough Crescent and Plymouth Avenue constitute a complete standalone neighbourhood and not a sub-neighbourhood as described by Mrs Breakenridge. Barbican Heights and especially Millsborough Crescent and Plymouth Avenue, is a top-class neighbourhood and the restrictions in issue were imposed with the objective of preserving to the owners of land in the neighbourhood, first rate residential amenities. The majority of the lots, argued Mr McPherson, have been used in compliance with the restrictions and both experts indicate in their reports that the neighbourhood has retained its single-family exclusive characteristics with upper class houses on large lots, save for numbers 2 and 10B Millsborough Crescent. In relation to 10B Millsborough Crescent, Mr McPherson argued that this lot is not derived from Deposited Plan 1934 and it not truly part of Millsborough Crescent.

Monica Ladd

[52] Mr Jones, counsel for Ms Ladd, also adopted the submissions of King's Counsel and further argued that the claimants' proposition that there are two Millsborough Crescents, is not supported by the experts' evidence. Besides, this argument which is being made for the first time at trial, is inconsistent with the applicants' own written submissions where they seem to posit that Millsborough Cresent and Millsborough Avenue constitute one neighbourhood.

[53] In relation to the May 3, 2012, building and planning approval, Mr Jones said that a duplex is an adjoined building and that the KSAC must be taken to know that.

Yet, he argued, the sketch submitted into evidence by the applicants, shows a clear boundary delineation between the current unit 8C and the proposed unit 8D. He therefore submitted that it is unlikely that the development the applicants propose to construct, will resemble what was approved. He emphasized that although the applicants say that they have modified their original plans, what is before the court as being approved by the KSAC is a duplex consisting of two (2), three (3) storey, four (4) bedroom houses, which is not what is depicted on the sketch submitted into evidence by the applicants. The plans for the proposed development ought to have been exhibited in these proceedings by the applicants but they were not exhibited. The court therefore remains uncertain as to what is being constructed and that is a basis on which to deny the application. Counsel argued that based on Mrs Breakenridge's report, it appears that she did not have sight of the plans either. Therefore, if indeed the construction will result in four additional rooms as contemplated by the approved plans, the room density would amount to more than the allowable density requirements and so Mrs Breakenridge's conclusions regarding the effect of the proposed development on the density of the area, may well have been different.

[54] According to Mr Jones, the applicants' reliance on information of previous modifications does not assist them. There is no evidence for example, that the seven (7) modifications to the subdivision restriction, were all in what the claimants now call "lower" Millsborough Cresent. Counsel argued further that since the applicants' case now seems to turn on there being two Millsborough Crescents, and with a concession that the restrictive covenants remain intact in relation to "upper" Millsborough Crescent, if the court finds that there is only one Millsborough Crescent, then the application must be refused.

[55] In written submissions, it was posited that the neighbourhood in issue is Millsborough Crescent. The decisions of **30 Dillsbury Ave.** (supra), and **48 Norbrook Drive,** (supra), were relied on for the definition of "neighbourhood". It was argued that in coming to its decision as to whether the covenants are obsolete,

the court must consider whether changes to the neighbourhood are such that it is completely different from what it was prior to the covenants being endorsed on title.

[56] Counsel submitted that the covenants are not obsolete as it is clear from the two experts, that the neighbourhood remains predominantly single-family dwellings. Therefore, the restrictive covenants preventing subdivision and requiring that the properties be used only for single-family dwellings, are still relevant. On the question whether the covenants restrict the reasonable user of the land without securing any practical benefit sufficient to justify their existence, it was argued that the test is whether the restrictive covenants have sterilised the land. For this submission, reliance was placed on the Privy Council decision of **Stannard and Others v Issa** (supra). As the applicants' use of their lot currently conforms with the restrictive covenants, Mr Jones said that this demonstrates that the covenants do not restrict the reasonable user. Should the application be granted, the precedent the modification would set is a real and tangible injury that Ms Ladd would face and this is a sufficient basis for the court to refuse it.

Robert Pickersgill, Leicester Levy, Glenford and Marie Christian , Tamara Williams, Peter Glaze, Haresh Khelmani, Winston Roman, Von and Collen White, Bashi and Inda Khelmani

[57] The submissions of Mrs Kerese Bruce - Patterson counsel for Robert Pickersgill, Leicester Levy, Glenford and Marie Christian , Tamara Williams, Peter Glaze, Haresh Khelmani, Winston Roman, Von and Collen White, Bashi and Inda Khelmani, were consistent with those of Mrs Gentles-Silvera, and Mr Jones in relation to the burden on the applicants under section 3(1)(a); the test for determining the neighbourhood ; the test for determining whether the restrictions impede the reasonable user; as well as the legitimacy of the thin end of the wedge argument. Mrs Bruce-Patterson also adopted the arguments of King's Counsel and submitted that there was only one neighbourhood on Millsborough Crescent and

not two. In her oral submissions she said that 10B Millsborough Crescent did not derive from Deposited Plan 1934 and is part of Edgecombe Avenue.

[58] Counsel further argued that a failure to object to previous modifications does not constitute consent to the current application and cited the decision in **Sarah Chin-Jen Hsia, Martin Hall et al v Martin Lyn and Others** (supra) **,** in support of that submission. The applicants have failed, she said, to satisfy the grounds in section 3(1) of the Act. She reiterated earlier submissions made by Mr Jones that the approved development differs from what the applicants now say that they propose to construct.

Analysis and discussion

[59] Section 3(1) of the Act provides that: -

> "3(1) A judge in chambers shall have power , from time to time on the application of the Town and Country Planning Authority or of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to user thereof of the building thereon, by order wholly or partially 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 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:

Provided that no compensation shall be payable in respect of the discharge or modification of a restriction by reason of any advantage thereby accruing to the owner of the land affected by the restriction, unless the person entitled to the benefit of the restriction also suffers loss in consequence of the discharge or modification, nor shall any compensation be payable in excess of such loss."

[60] A good starting point in the analysis of this section of the Act, is the dictum of Bingham J in **Re Gainsborough 27 JLR 491 at 494**, where the learned judge restated the following well known principles which had earlier been expressed by Parnel J in **Re Lots 12 and 13 Fortlands** (supra):-

"It is trite law that in seeking to establish a basis for the modification of the existing covenants the burden of proof is on the applicant to satisfy the court

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

[61] The burden is therefore undoubtedly on the applicants to prove, that at least one of the alternative circumstances in section 3(1) of the Act exists, thereby enabling the court to modify restrictive covenants 1, 2 and 3 endorsed on their certificate of title. Miss Lindsay indicated in her submissions, that the applicants are no longer claiming, that the objectors had agreed to the modification by implication. In the result, I will only consider whether the applicants have proven facts bringing their application within either section 3(1)(a), (b) or (d) of the Act.

Section 3(1)(a) - Ought the restrictions to be deemed obsolete?

[62] Section 3(1)(a) of the Act requires the applicants to prove that the restrictive covenants should be deemed obsolete because of changes in the character of the neighbourhood. For the meaning of the "neighbourhood", I find the commentary of the Lands Tribunal in England in **Re Davis' Application (1950) 7 P.& C.R.1 ,** to be very helpful . I should first observe however that guidance from English authorities in this area of the law has long been accepted in our jurisdiction as appropriate, since the language of section 84 of the 1925 Law of Property Act in England, prior to the 1959 amendment, is in almost identical terms to section 3(1) of the Act. In **Re Gainsborough** (supra), Bingham J, after outlining the provisions

of section 3(1) of the Act, underscored the correctness of relying on these authorities: -

> "The present Act in so far as it is modelled on section 84 of the law of Property Act (U.K.) prior to its amendment in 1959, also means that the English cases in so far as is relevant are applicable and of assistance in applications of this nature. This observation was made as far back as 1961 by Waddington, J., (as he then was) in *Re Constant Spring and Norbrook Estate* [1960] 3 W.I.R. 270 at 273 A-B. A similar observation was made as recently as 1986 by the Privy Council per dictum of Lord Oliver of Aylmerton in *Standard* and *Others v. Issa* [1986] 34 W.I.R. 198 at 191 (J) and 192 at (A) - (G)."

[63] The observations made by the Lands Tribunal in England on the question of the "neighbourhood" in **Re Davis' Application** (supra), were these: -

> "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 progress and nature of the development outside its boundaries is of little consequence".

[64] Harris J in **Re 48 Norbrook Drive** (supra), quoted with approval, the following statement made in relation to the definition of the "neighbourhood", in **Preston and Newton's Restrictive Covenants, 7th edition at page 230,** and said that the generally accepted test in determining the neighbourhood is the estate agent's test, which asks the question what does the purchaser of a house on 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 definition goes, be conterminous (sic) with the area subject to the very restriction that is to be modified, or other restrictions forming part of a series with that restriction".

There is no dispute among the parties that the estate agents test is the relevant test. Where the dispute lies is in the answer to the question posed by the test.

[65] At trial, the applicants' position on this issue was markedly different from that taken in their written submissions. As I understand their argument at trial it is that there are two separate neighbourhoods on Millsborough Crescent: upper Millsborough Crescent and lower Millsborough Crescent. In lower Millsborough Crescent where the applicants' lot is located, the expectation from the application of the estate agent's test, would be different from the application of that test in upper Millsborough Crescent. In lower Millsborough Crescent, the continued usefulness of the restrictive covenants is now redundant, as the character of that neighbourhood has changed and is now largely characterised by further subdivisions resulting in multi-family developments. In stark contrast to those oral submissions, are the applicant's written submissions in which they seem to characterise the neighbourhood as including the entire Millsborough Crescent as well as Millsborough Avenue. They contend in those submissions that the restrictive covenants prevent multifamily dwellings when currently these types of developments exist "within the community". At paragraph 18, this is their argument:

> "The community of Millsborough has changed over the years and has seen the existence of several townhouses or multifamily dwellings and therefore, it is submitted that the restrictive covenants should be modified to reflect the change within the community, while at the same time, the(sic) recognizing that modifications are also consistent with the current state of the community".

The applicants then go on to quote from page 8 of the expert report of Mr Allison and conclude that his observation supports their submission that the restrictive covenants should be modified because the community has changed.

[66] The difficulty with this submission, however, is that in the extract from Mr Allison's report on which the applicants rely, he spoke to the significant amount of further

subdivision on “Millsborough Avenue through to Dillsbury Avenue” where there are villas, townhouse schemes and apartment complexes, but he did not expressly include Millsborough Crescent or Plymouth Avenue in that observation. In fact, the paragraph following the one relied on by the applicants clearly refutes any suggestion that Millsborough Crescent has seen a similar “significant amount of further subdivision”. In that paragraph, Mr Allison contrasts the developments on Millsborough Avenue through to Dillsbury Avenue with Millsborough Crescent and comments that Millsborough Crescent has been “far more guarded against this shift in residential density”. He then goes on to identify the additional 30 lots between the original and the current subdivision. In the end, he concludes with what I consider to be a significant analysis: -

> “So, whereas subdivisions have taken place on Millsborough Crescent over time, it has not been of the type to create multi-family residential complexes as a dominant feature, and it is this that distinguishes the Crescent from the Avenue as two separate neighbourhoods in our opinion. Furthermore, applying the ‘Estate Agent Test’ of ‘what would a purchaser on that road or part of that road expect to get?’ On Millsborough Crescent the expectation would be that of single-family residences on relatively large lot sizes, whereas on Millsborough Avenue, it would be a single-family unit in a multi-family residential complex – predominantly comprising town homes and villas versus a limited number of apartments.”

[67] It seems to me that Mrs Breakenridge’s own analysis of the neighbourhood is largely consistent with that of Mr Allison, save that she includes Plymouth Avenue. She says that for the past three decades there has been redevelopment in Barbican Heights resulting in multi-family dwellings. But there remain enclaves that have retained their single-family exclusive characteristics, and in her view, Millsborough Crescent/ Plymouth Avenue, which she says is comprised of upper-class households with large dwelling houses on large lots, is one such enclave. Furthermore, like Mr Allison, she has not opined that Millsborough Crescent is

comprised of two separate neighbourhoods. Instead, as has been seen, she characterises Millsborough Crescent and Plymouth Avenue as examples of an enclave which has retained the characteristics of single-family dwellings on large lots. Miss Lindsay's suggestion, therefore, that Mrs Breakenridge by her report supports the two Millsborough Crescent premise, is unfounded.

[68] On March 1, 2023, the court visited and inspected Millsborough Crescent, Millsborough Avenue and Plymouth Avenue. In my view, Millsborough Crescent is sufficiently clearly defined by predominantly single-family residential homes on large lots with generous setbacks. There is a consistency in the tone and quality of the entire road, depicted not only by the predominance of single-family homes with traditional designs on large lots with generous setbacks, but also by a sense of peace, quiet and tranquillity which obviously derive from those amenities. I am satisfied and accordingly find, that the entire Millsborough Cresent is a neighbourhood. I therefore reject Miss Lindsay's categorisation of a lower Millsborough Crescent and an upper Millsborough Cresent, each being a separate neighbourhood.

[69] The contrast in the style, arrangement and appearance of the dwellings on Millsborough Crescent as against those on Millsborough Avenue is palpable. On Millsborough Avenue, on almost every other lot are modern multi-family dwellings where the buildings are close to each other and to the road boundary. The character of Millsborough Avenue is certainly not the same as that of Millsborough Crescent or Plymouth Avenue. The evidence is clear, and I accordingly find that while there have been further subdivisions on Millsborough Crescent, as well as some modifications to the setbacks, Millsborough Cresent remains predominantly a road with single family dwelling houses on large lots with generous setbacks. As Mr Allison describes it, Millsborough Cresent is a perfect crescent. I agree with him. There is in my view a distinctiveness about it which separates it from Plymouth Avenue, even though both roads have similar characters. I consequently accept and find that the neighbourhood for purposes of this application is Millsborough Crescent.

[70] The argument in the applicants' written submissions (which were not expressly abandoned) , is that the neighbourhood encompasses the wider Barbican area to include, both Millsborough Cresent and Millsborough Avenue, and that the character of that neighbourhood has changed as it now includes multifamily dwellings of townhouses and apartment complexes. The applicants place great emphasis on the further subdivisions which they say have taken place on both Millsborough Crescent and Millsborough Avenue. The evidence however is plain, that despite the subdivisions that have taken place on Millsborough Crescent, that road remains comprised of predominantly single-family dwellings on large lots with generous setbacks. The same cannot however be said of Millsborough Avenue.

[71] The applicants have not refuted the evidence of the McPhersons and Mr Levy that 10B Millsborough Crescent is in fact not a true Millsborough Crescent property, but rather a part of an Edgecombe Avenue subdevelopment and a means of access to 16 Edgecombe Avenue. In fact, both Mrs Bruce - Patterson and Mr McPherson submitted that 10B Millsborough Crescent is not on the original Deposit Plan 1934. Mr Allison describes 10B Millsborough Crescent as having developed with land part of Edgecombe Avenue, while Mrs Breakenridge says its "attached to land on Edgecomb Avenue". There is a multifamily development at 2 Millsborough Crescent which is at the corner with Millsborough Avenue. There is also a development at 52 Millsborough Crescent which Mr Allison describes as a subdivision of 15 lots each housing single family villa units ranging in size from 0.16 acres and 0.3 acres. Despite these developments however, as both Mr Allison and Mrs Breakenridge report, the predominant dwellings on Millsborough Crescent are large single-family houses on large lots with generous setbacks. I agree with them. I give no weight to the anecdotal evidence referred to by both Miss Lindsay and Mrs Breakenridge in respect of lot 8B Millsborough Crescent. There is no evidence before me that the court has approved any application for modification of the restrictive covenants in relation to those premises.

[72] In my view the decision in **Re Kensington Crescent** (supra) does not assist the applicants. In that case the court determined that the character of the

neighbourhood of Kensington Crescent had changed from single family dwellings to apartment buildings, business premises and vacant lots. The court clearly was of the view that there was significant change brought about by further development other than single family dwellings. That is not the case with Millsborough Cresent, which remains predominantly single-family dwellings on large lots, with generous setbacks.

[73] Applying the estate agents test therefore I find that a purchaser of a house on Millsborough Crescent expects to get predominantly large single-family dwelling houses on large lots with generous setbacks. I also find that the character of the neighbourhood has not changed. Having made these findings, I need not take the analysis any further, but in the event that I am wrong, I will consider whether the covenants ought to be deemed obsolete.

[74] There is agreement among the parties that the test of whether a restrictive covenant ought to be deemed obsolete under section 3(1)(a) of the Act, is whether the original purpose for which the covenant was imposed can or cannot still be achieved. If it can, the covenant is not obsolete. It if cannot, it is obsolete. The test was laid down by Romer J in Re **Truman, Hanbury, Buxton and Co Ltd's Application** (supra) and this decision has been consistently applied by our courts as the leading authority on the meaning of the words: " the restriction ought to be deemed obsolete" in section 3(1)(a) . It seems clear to me, that the intention of the original covenantors was to preserve the character of Millsborough Crescent as an upscale, single family residential community, with large houses on large lots with generous setbacks, thereby creating privacy and quietude for the lot owners. The evidence and the court's visit unquestionably lead me to conclude that that original purpose can still be achieved and is being achieved. I therefore find that the restrictive covenants ought not to be deemed obsolete.

Section 3(1)(b) – Do the covenants impede the reasonable user of the land without securing a practical benefit?

[75] Section 3(1)(b) of the Act requires the applicants to prove that the restrictive covenants impede the reasonable user without securing a practical benefit. Prior to the amendment to this ground in section 84 of the Law of Property Act 1925 in England by section 28 of the Law of Property Act 1969, the Lord Evershed M.R. in **Ghey & Galton's Application [1957] 2 Q.B 650 at 653,** said in respect of the ground that:

> "I think 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."

Earlier, in **Henderson's Conveyance [1940] Ch 835 at 846,** Farrel J had said that:

> "There must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the person who is enjoying the benefit of it".

[76] The Privy Council in **Stannard and Others v Issa** (supra), also had to consider the meaning of section 3(1)(b) of the Act, and in doing so approved of the dissenting judgment of Carey JA in the Court of Appeal, in which his Lordship had 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…

After referring to the abovementioned quote from Lord Evershed M.R. in **Re Ghey and Galton's Application** (supra), Carey JA continued:-

> "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 that the applicant's proposals are reasonable, and the restriction impedes that development…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 applicant would not have been discharged."

[77] Applying these principles to the evidence in the case before me, I am not satisfied that the applicants have discharged the burden placed on them under section 3(1)(b) of the Act. The applicants' evidence is that the proposed duplex will not impede the reasonable use of the land since the intended use is the construction of a single- family dwelling house, with its own entrance from the road. They say this will be consistent with the character of the neighbourhood. In her own analysis, Mrs Breakenridge appears to support this position, when she says that the restrictive covenants without modification would "partially impede the reasonable use of the land as it would limit the development of the site in practical terms". The Board's decision in **Stannard and Others v Issa** (supra) however makes it plain, that this is not the test to be applied under section 3(1)(b) of the Act. Indeed, an approach similar to that taken by the applicants was applied by some members of the Court of Appeal in that case, but this was criticised by the Board as being a misconstruction of the section. Interestingly, the Board said that that approach would be "impossible to quarrel with" had section 3(1)(b) of Act been amended in similar fashion as the amendment to section 84 of the Law of Property Act 1925 in England, in which the word "some" was substituted for the word "the" in the expression:" impedes the reasonable user". With no such amendment, the Board said that an applicant under section 3(1)(b) "…has to go a great deal further than merely to show to an impartial planner, his proposal appears a good and

reasonable proposal. He must affirmatively prove that one or both of the grounds of jurisdiction has been established."

[78] The applicants have not established by their evidence that the restrictive covenants prevent the land from being used for the purposes they were guaranteed to preserve. As I earlier indicated, it seems to me that the clear purpose of the restrictions was to preserve the character of Millsborough Crescent as an upscale, single family residential community, with large houses on large lots with generous setbacks, thereby creating privacy and quietude for the owners. In fact, what the evidence and the court's visit reveal is that this purpose is still capable of fulfilment, as the character of the neighbourhood remains predominantly single-family dwellings on large lots with generous setbacks. There is no evidence that the effect of the restrictions sterilises the applicant's lot at 8C Millsborough Crescent. Mr Allison's own expert view is that the applicants' existing single -family dwelling house which was developed within the framework of the existing restrictive covenants, has already achieved its 'highest and best use', and so there could be no sterilisation of the applicant's lot, if further sub-division is not approved. I agree with him. In the result, I find that the jurisdictional requirement of the first limb of section 3(1)(b) of the Act has not been met by the applicants. Given this finding, I need not decide whether the evidence supports the second limb of section 3(1)(b), but should I be wrong in relation to this first limb, I will now consider the second limb .

[79] The Board in **Stannard and Others v Issa** (supra), said that in exercising its jurisdiction on the second limb of section 3(1)(b), the court is to consider and evaluate the practical benefits secured by the restrictions. If there are practical benefits, the question is whether they are of sufficient weight to justify their continuance without modification.

[80] I have carefully considered the evidence of the objectors. Ms Ladd's evidence could not be clearer. She said she and her late husband purchased their lot because of the character of the neighbourhood which still prevails because of the

restrictive covenants. That character is single- family dwelling houses on large lots with generous setbacks. These qualities offer her privacy, peace and quiet. These sentiments were consistently echoed throughout the affidavits of the objectors. These are practical benefits which are not, in my view, trivial or unsubstantial. I respectfully adopt the Board's view in **Stannard and Others v Issa,** that it hardly needs stating that "anyone desirous of preserving the peaceful character of a neighbourhood, the ability to restrict the number of dwellings permitted is a clear benefit…". I believe therefore and find that there are practical benefits secured by the continuance of the restrictions, which are of sufficient weight to justify their continued existence without modification. I accordingly find that the applicants have failed to prove that the restrictions impede the reasonable user of the land without securing a practical benefit.

Section 3(1) (d) – Will the proposed modification not injure those entitled to the benefit of the restrictions ?

[81] An applicant relying on section 3(1) (d) of the Act, is required to show that the proposed modifications will not injure those entitled to the benefit of the restrictions. What is to be proved uninjurious, is the proposed modifications, and not the proposed development. This distinction however seems not to have been fully appreciated by the applicants as their evidence is that their proposed construction will not cause injury, as it will maintain the spirt and intent of the restrictive covenants and will not increase the density. Moreover, they say that the 2nd applicant is an architect, and she will make sure that the spirit and intent of the restrictions are maintained. They also contend that the neighbourhood consists of mixed housing solutions including multifamily dwellings and therefore the construction of a duplex ought to create no risk.

[82] The objectors for their part say that they fear that the modifications will set a precedent for future applications seeking to modify the restrictions and therefore

place the restrictions at the risk of further modification or discharge. This is the 'thin end of the wedge' argument. Miss Lindsay criticised this argument and submitted that the court must treat each case that comes before it on its own merits. She is of course right, but in **Vayden McMorris v Claude Brown and Others** (supra), the Privy Council endorsed the 'thin end of the wedge' argument as "correct in principle under the English and Jamaican statutes alike". In that case, the parties owned homes on adjoining properties in the residential area of Forest Hills comprising about 600 acres. The properties were two of six lots in which the registered titles were subject to restrictive covenants one of which was a restriction against subdivision, and another was against building anything on the lots but a private dwelling house. The applicant for modification desired to subdivide his lot into two lots and to build a three-storey, five-bedroom four-bathroom house on the second lot. The adjoining landowner objected to the subdivision. One of the grounds relied on by the applicant to support the modification was section 3(1)(d) of the Act. The trial judge refused the application, but that decision was reversed on appeal.

[83] On an appeal to the Privy Council, the decision of the trial judge was restored. Lord Cooke of Thorndon writing for the Board said the following in relation to section 3(1)(d) at paragraphs 25 to 28:-

> " 25. As to ground (d), the question is whether it has been shown that the proposed modification will not injure the persons entitled to the benefit of the restriction. The consents of other owners do not affect the objector's right to contest this ground. A familiar and at times legitimate argument in this branch of the law is known as the thin end of the wedge argument. Other expressions are sometimes coupled with it, such as "the first is the worst". It is an argument which has prevailed in Jamaica in earlier cases, notably **Stephenson v. Liverant (1972) 18 W.I.R. 323, 337,** per Smith J.A. and **Earl v. Spence (unreported, 22nd June 1992; Court of Appeal of Jamaica (Supreme Court Civil Appeal No. 69/1989),** pages 6

to 8, per Rowe P. These decisions have accepted that cases may arise in which it is very difficult to say that the particular thing which the applicant wishes to do will of itself cause anyone any harm; but that harm may still come to the persons entitled to the benefit of the restriction if it were to become generally allowable to do similar things. Or such harm may flow from the very existence of the order making the modification through the implication that the restriction is vulnerable to the action of the Lands Tribunal in England or the Supreme Court in Jamaica. The Jamaican judges have cited to that effect a passage in Preston and Newsom on Restrictive Covenants Affecting Freehold Land, fourth edition (1967) page 185. That passage has not been carried through to the latest edition of that work - the eighth edition (1991) - but there is a passage to the like effect at page 282 of this edition, based on **Re Teagle's and Sparkes' Application (1962) 14 P. & C.R. 68, 73.**

26. Their Lordships find more recent decisions of the Lands Tribunal in England in the same line of cases collected in **Maudsley and Burn's Land Law: Cases and Materials, seventh edition (1998) page 926**. It appears that, while occasionally the Tribunal has been content to leave future issues until they actually arise, the prevailing approach is as indicated in **Re Snaith and Dolding's Application (1995) 71 P. & C.R. 104, 118.** That case has some similarity to the present on the facts, although there the applicants were seeking modification of a covenant against the erection of more than one house on a lot. It was described in the decision at page 117 as being in "a well-laid out and opulently spacious residential estate". The applicants wished to build a second house on their two-acre plot. Houses nearby had already been built to a similar density, but Judge Bernard Marder Q.C., President, observed at page 118 that this rendered it more rather than less important to preserve the character of the stretch of land in which the properties of the applicants and the objectors were situated. He continued:-

> "The position of the Tribunal is clear. Any application under section 84(1) must be determined upon the facts and merits of the particular case, and the Tribunal is unable to bind itself to a particular course of action in the future in a case which is not before it: see **Re Ghey & Galton [1957] 2 Q.B. 650; 9 P. & C.R. 1** and **Re Farmiloe (1983) 48 P. & C.R. 317.** It is however legitimate in considering a particular application to have regard to the scheme of covenants as a whole and to assess the importance to the beneficiaries of maintaining the integrity of the scheme. The Tribunal has frequently adopted this approach. See for example **Re Henman (1972) 23 P. & C.R. 102; Re Saviker (No. 2) (1973) 26 P. & C.R. 441; and Re Sheehy (1992) 63 P. & C.R. 95.**
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> 27. Insofar as this application would have the effect if granted of opening a breach in a carefully maintained and outstandingly successful scheme of development, to grant the application would in my view deprive the objectors of a substantial practical benefit, namely the assurance of the integrity of the building scheme. Furthermore I see the force of the argument that erection of this house could materially alter the context in which possible future applications would be considered."
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> 28. Their Lordships adopt that approach as correct in principle under the English and the Jamaican statutes alike."

[84] In considering the scheme of the covenants as a whole and the importance to the objectors in maintaining the integrity of the neighbourhood I bear in mind that the neighbourhood remains predominantly single-family dwellings on large lots with generous setbacks. In this context, it is my view that it is legitimate for the objectors to be concerned that any future modifications to the covenants could destroy the character of the neighbourhood they wish to preserve. They have by their evidence clearly demonstrated the importance of maintaining the integrity of the neighbourhood. They gave evidence of the importance to them of maintaining the

privacy and quietude of single-family dwellings on large lots with generous setbacks which continue to reflect the character of the neighbourhood. To my mind, it is a practical benefit to them to have this integrity and character preserved. I should add that I agree with King's Counsel Mrs Gentles -Silvera, that the distance, for example of Ms Monica Ladd's lot from that of the applicants' own lot, does not deprive her or any other objector of the right to seek to preserve the character of the entire neighbourhood. Likewise, the consent or non-objection of neighbouring lot owners, does not disentitle other lot owners from raising their objections to the modifications.

[85] Mrs Breakenridge herself, recognised the thin end of the wedge argument when she said in her report that the long-term effect of the modification would provide a precedent that could be relied on for future applications seeking to modify the covenants in order to construct similar developments.

[86] In the application the modification is said to relate to an approval by the KSAC to construct a duplex which is said to be two, three storey houses. But the applicants' evidence is that they have completed the first phase of what has been approved and now intend to build phase two, which is only a one storey single family dwelling with a basement and its own entrance to the roadway. This means that what would result are two single family dwellings on what is already one of the smaller lots in the neighbourhood. The drawing and sketch which they exhibit before the court, however, make it unclear whether the additional building will result in a duplex having regard to what appears to be a dividing boundary between the current building and the proposed single storey structure, on the exhibit. The objectors point to the definition of a duplex which is essentially a house divided into two similar units, and query whether what has been approved will be a duplex. I agree with counsel Mr Jones that there is uncertainty as to what the applicants will build if their application for modification is granted. Moreover, there is no evidence that what the applicants now propose to construct, has received building and planning approval.

[87] Miss Lindsay sought to distinguish **McMorris v Claude Brown and Others** (supra) on the basis that that was a case of a first application for modification, which accounts for the Board's acceptance of the thin end of the wedge argument. But while that case was indeed one of a first applications for modification of the subdivision restriction, in **Re Snaith and Dolding's Application** (which the Board relied on to pronounce that the thin end of the wedge argument is in principle legitimate under both English and Jamaican law); there had been previous subdivisions on nearby lots. Furthermore, as both Judge Bernard Marder Q.C. in **Re Snaith and Dolding's Application,** and the Board in **McMorris v Claude Brown and Others** (supra) opined, where there have been prior modifications in a neighbourhood, this underlines the risk, and renders it more and not less important to preserve the character of the neighbourhood.

[88] In my view, it is legitimate on the facts of this case to argue that the modification of the restrictions could improve the prospects of other similar applications seeking to be released from the covenants and thus "materially alter the context" in which those applications would be considered. In the final analysis, I find that the applicants have failed to show that the modifications would not constitute a real risk as a precedent to disturb the character and integrity of Millsborough Crescent. They have therefore failed to satisfy the requirements of section 3(1)(d) of the Act.

Conclusion

[89] With none of the grounds under section 3(1) of the Act satisfied by the applicants, the restrictive covenants 1, 2 and 3 will stand as unmodified. In the result, I make the following orders: -

a) The application for modification of restrictive covenants 1,2 and 3 on all that parcel of land part of Barbican now known as Barbican Heights in the parish of St. Andrew, being the lot numbered 5 on the plan of Lot 417A Barbican Heights comprised in Certificate of Title

registered at Volume 1284 Folio 371 of the Register Book of Titles is refused.

b) Costs to the objectors to be agreed or taxed.

A Jarrett
Puisne Judge