**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL COURT**

**CLAIM NO. 2012HCV5494**

**IN THE MATTER OF** All that parcel of land part of **Shaw Park** in the parish of **St. Ann**, contained by survey Two Roods, thirty seven perches and eight tenths of a perch on the plan annexed thereto and of the shape and dimensions and abutting as appears by the plan thereof and being all the land comprised in Certificate of title Registered at Volume 1184 Folio 805 of the Register Book of Titles.

**AND**

**IN THE MATTER OF THE RESTRICTIONS AFFECTING THE USE OF THE SAID LAND**

**AND**

**IN THE MATTER OF the Restrictive covenant (Discharge and Modification Act).**

| | | |
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| **BETWEEN** | **HEADLEY STEPHENSON** | **1ST CLAIMANT** |
| **AND** | **HELENE STEPHENSON** | **2ND CLAIMANT** |
| **AND** | **TMB RESORTS INTERNATIONAL LIMITED** | **DEFENDANT** |

**Mrs. Tana'ania Small Davis, Mrs. Daniela Gentles Silvera and Ms. Sidia Smith instructed by Livingston Alexander and Levy Attorneys-at-Law for the applicant**

**Mr. Jason Facey instructed by Facey Law for the Objector. Mr. Jason Facey instructed by Facey Law for the Objector.**

**Application to modify restrictive covenant - Whether modification injures the persons entitled to the benefit of the restriction - Whether modification changes the character of the neighbourhood - Whether the existence of the covenant impedes reasonable use of the land.**

**HEARD: 10th December 2015, 2nd, 19th, 29th February 2016 and 31st May 2016**

**IN CHAMBERS**

**BERTRAM LINTON, J (AG.)**

**THE APPLICATION**

**[1]** The applicants Headley and Helene Stephenson are the registered proprietors of the Lot 3 Ridge Road Shaw Park in the parish of St. Ann registered at Volume1184 Folio 805 , and by their Amended Fixed Date Claim Form , seek to modify the existing restrictive covenant #8 which reads;

> *"No trade business or profession shall be carried on or practised (sic) on the said land which shall be used exclusively for the purpose of a private dwelling and there shall not be placed or exhibited or constructed upon the said lands any lights lighting apparatus or structures of any kind nor shall any noisy instruments of music nor reproduction of same be permitted nor used upon the said lands the presence or use of which in either respective event may cause or tend to cause interference annoyance or discomfort to the occupiers of adjacent lands."*

In keeping with the highlighted text below;

*"No trade or profession shall be carried on or* ***practiced*** *on the said land,* ***save and except that the use of the said land for the purpose of a hotel or guest***

***house with necessary outbuildings and facilities appurtenant thereto shall not be considered a breach of this covenant*** *and there shall not be placed or exhibited or constructed upon the lands any lights lighting apparatus or structures of any kind nor shall any noisy instruments of music nor reproduction of same be permitted nor used upon the said lands the presence or use of which in either event may cause or tend to cause interference annoyance or discomfort to the occupiers of adjacent lands.*

**[2]** The property is situated in Shaw Park in the Parish of St. Ann and is known as "Ridge Estate". The applicant's property is called "**PINK ROCK"** and for clarity will hereafter be referred to as such. The area is zoned for resort/residential use pursuant to the *Town and Country (St. Ann Parish) Provisional development order (Confirmation Notification) 1999*

**[3]** The Applicants have said that the modification is being sought to facilitate their operation of a small guesthouse/hotel thereby offering for rent 9 of the current 10 bedrooms to the public .In support of their applications, evidence has been adduced from Mrs. Daniella Gentles-Silvera, Mr. Ivan Powell, Ms. Twalisha Stephenson, and Mr. Headley Stephenson.

**THE OBJECTION**

**[4]** The modification has been objected to by TMB Resorts International Ltd. TMB are registered proprietors of Lots 28 and 29 on the plan of Ridge Estate. It is TMB's contention that the proposed modification is not in keeping with the character of the neighbourhood which is one of "privacy and quietude of the neighbourhood that one would expect from a residential area as opposed to one within which a commercial activity which is offered to the public takes place" (extract from Further submissions for and on behalf of the Objector filed on December 9, 2015 at page 7 paragraph 5.2.5)

Further it is said by the objector that the intended use of 'Pink Rock' will cause an inordinate strain on the communal resources especially the water supply and the

roadway for which the Ridge Estate Company Ltd is responsible and to which all the owners contribute.

**THE LAW**

**[5]** The Application is made pursuant to Section 3(1) of the Restrictive Covenant (Discharge and modification) Act which provides as follows;

> *" A Judge in chambers shall have the power, from time to time on application of the Town and country Planning Authority or of any person interested in the freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction(subject or not to payment by the applicant of compensation to any person suffering loss in consequence of the order0r on being satisfied-*
>
> *(a) That by reason of the 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) The continued existence of the restriction would unless modified ,impede the reasonable user of the said land for private purpose without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of such restriction without modification;*
>
> *(c) The persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction have agreed either expressly or by implication by their acts or omission to the same being modified;*
>
> *(d) The proposed modification will not injure the persons entitled to the benefit of the restrictions;*
>
> *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 suffers loss in consequence of the discharge or modification, nor shall any compensation be payable in excess of such loss."*

**[6]** I adopt the learning of Parnell, J, In Re Lots 12 and 13 Fortlands (1969) 11 JLR,387at page 391, as to the application of the section to the case at bar. He deduced;

1. That the burden is on the applicant to prove that the restriction arising under the covenant which affects his freehold land should be discharged or modified.

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

**THE ISSUES**

**[7]** The major issue is whether the modification should be granted by the court in keeping with the request made pursuant to the Restrictive Covenant (Discharge and Modification) Act Section 3 (1) bearing in mind what already takes place; or whether what is proposed at 'Pink Rock' is so outside of the current areas of activity taking place in that neighbourhood that it would not fit in with the tenure of the community or what is intended and expected to be the tenure and nature of that neighbourhood. In other words does the restriction still make sense, or is it obsolete?

**[8]** A valid consideration as well is how the modification if granted would affect all the current proprietors. Would not granting it be an unreasonable hindrance to 'Pink Rock' while not giving the others any real benefit from its continued existence? Is there enough to justify its continued existence?

**[9]** It is also important to see what the views are from the other proprietors, the persons in Ridge Estate who would be entitled to the benefits or advantages of the current restriction. Have they expressed agreement or disapproval whether overtly or by their course of conduct to what has been proposed? Have their acts

or omission especially in relation to their own property agreed with or repudiated the modification.

**[10]** If the Plan for the guest house /small hotel, as proposed for 'Pink Rock' is to go ahead will it occasion any specific injury to anyone for whom the restriction had been imposed? This must be looked at with reference to the objector "TMB".

If it does mean that 'TMB' will be "injured" what is the extent of that hurt/loss, is compensation payable and in what amount.

**THE EVIDENCE**

**[11]** For the Applicants the written evidence relied on were

(a) Affidavit in support of Fixed Date Claim Form filed on 5th October, 2012

(b) Affidavit of Headley Stephenson filed 22nd January, 2015

(c) Third affidavit of Headley Stephenson filed 29th October, 2015

(d) Affidavit of Twalisha Stephenson filed 30th July 2015

(e) Affidavit of Ivan Powell filed on 30th July, 2015

(f) Second Affidavit of Ivan Powell filed 29th January, 2016

**[12]** The Objector has relied on the following;

(a) Objection to Application filed 28th April, 2013

(b) Affidavit of Ian Levy filed 8th June, 2015

(c) Affidavit of Ian Levy filed 30th October, 2015

In addition the court had the benefit of oral evidence from the affiants who were also tested in cross examination.

**DISCUSSION AND ANALYSIS**

**Persons entitled to the benefit of the restriction**

**[13]** It is necessary from the outset to say that the applicant has outlined in detail all the parties who were served so as to establish that all the relevant beneficiaries of the covenant were notified and so had an opportunity to be heard . No issue was raised on this point and as such the court is satisfied based on the

application, affidavit and the directions previously given by the court in furtherance of the application that all the relevant parties were notified of the terms of the requested modification contained in the application.

**[14]** Both the Objector and the applicant's property are part of the same subdivision and are entitled to the benefit of the restrictive covenant in question.

It is necessary then to look at the issues in terms of the various considerations that are to be addressed in order to decide whether or not the restriction is to be modified as requested.

**CONSIDERATION A**

**Changes in character of neighbourhood/ Obsolete**

**[15]** The language of the statute does not suggest that a change in the character of the neighbourhood necessarily means that the restriction is obsolete.

This consideration requires a look at whether the type of activity in the area is the same as what has occurred from the beginning of the subdivision or has new activity taken place which makes the area seem different to an observer that would have come back after being away for some time. Further does the new activity now render a restriction as to use for private dwelling obsolete?

**[16]** The applicant has sought to show that the character of the neighbourhood has changed such that the restriction has become obsolete. The 'neighbourhood' as defined in **Regardless Limited** v **Anis Haddeed et al** [**1996] 33 JLR 417** is said to be "determined by the 'estate agent's test'; namely, what does the purchaser of a house in the land expect to get."

**[17]** It is uncontroverted that at least 8 of the 15 properties in the Ridge Estate offer short term rental to the public and are not occupied only as private dwelling houses .It is also true that the objector advertises and rents his premises to the public from time to time on short term rental contracts. It is a fact that the area is zoned by the local municipal authority for resort/ residential use (Town *and Country (St. Ann Parish) Provisional Development Order Confirmation Notification 1999.*

**[18]** The person who acquires property in this subdivision, in this present climate would then reasonably expect that the hybrid circumstances exists as allowed by the municipality not only from the documentation and description, but the fact that members of the public have the right to occupation in many of the premises, based on the payment of money for various short periods of time.

**[19]** On the other hand I am also sympathetic to the view proffered by Mr. Facey for the objectors that houses which are rented to visitors and tourists as a single unit can still be regarded as private residential accommodation within the context of the zoning laws. One passage is particularly useful in making the point. At page 331 in **Stephenson et ux v Liverant et al [1982] 18 WIR, 323,** Luckhoo, J A, says:

> *"The contention that by renting to tourists, business is being carried on upon the land, requires a closer examination. It is clear that the owners of nearly all the houses derive a steady annual income from such rent. Looked at in this light, it is true to say that the houses are being used for the purpose of business. But it should be noticed that within the houses themselves no business is being carried on. The houses are not being used as a shop, a school, a chapel or a nursing home or a stable. They are being used as private dwellings. Such user does not really jeopardize to any significant extent, those incidents which the first part of covenant 5 was intended to secure. Neither would the transactions which may be necessary to conclude a contract of tenancy, impeach the spirit of the latter part of the covenant.*

**[20]** This view is very seductive on the point, but is to be seen in the context in which it was decided. In that case the area was zoned solely for private residential purposes but like the case at bar had the features of the use in a hybrid situation to include resort activities. The applicants in **Stephenson v Liverant** sought the modification of the relevant covenants to enable them to erect certain apartment blocks for the purpose of letting to tourists. The relevant covenants prohibited, *inter alia* (1) the erection on any lot of any building other than a private dwelling

house with appropriate out buildings and (2) the use of any building erected as a shop… and the carrying on of any business.

**[21]** The major similarity in the case at bar, is that 'PINK ROCK' and all the properties in the neighbourhood were destined for private family use originally, but some have evolved into public accommodation. In fact it would seem from the current trend of properties like that of the objector, some are advertised and used as such already.

I am more in agreement with the finding of Smith JA in the same case that;

> *"…those dwelling houses which were being rented solely to tourists were being used as holiday resort houses and not as private dwelling houses, and this involved carrying on business albeit in limited form. The proved or admitted breaches of the restrictions imposed did not alter the character of the subdivision since neither the presence of additional buildings, nor the fact that all buildings were erected in contravention of the covenants, nor the limited form of business done in respect of some of the lots, resulted in any change in its private residential nature."*

**[22]** Ridge Estate seems to have an evolving character as a resort neighbourhood, this means that the area has changed and seems to have evolving into its outlook that of a mixed private residential /resort type environment. This is evidenced by the very nature of the Objector's use of its own property, and the use to which another property Bird Cage Villas has been put; which is that they are rented to different persons, for short periods as resort accommodation, and this must be seen as commercial activity albeit in a limited form.

**[23]** It is my finding then that the character of the neighbourhood has changed from simply being private dwellings to one that is resort in its outlook. Its hybrid nature represents a departure from the traditional family residence to resort residence in a private setting.

**Is the restriction obsolete?**

**[24]** A vital question to my mind at this juncture is whether the use of a significant number of the "private dwellings" as rented accommodation for tourists now means that the restriction is obsolete. The court in **Truman, Hanbury, Buxton & Co. Ltd.'s Application [1956] 1Q.B.261,** examined the issue of obsolescence and Romer L.J phrased it in these terms;

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

**[25]** It would seem from the evidence of the use of properties in the estate that this is now the feature of the area known as Ridge Estate. Indeed, undisputed evidence has been presented to the court that "Tallenrood Villa" which is owned by Mr. Lee the director of the Ridge Estate Company Limited, the body that manages the subdivision, has been identified in the resort market as a property suitable for use as a bed and breakfast.

**[26]** I am constrained to agree with Mrs. Small Davis's submission that, "the Ridge Estate has come full circle: initially permitting hotel/guest house usage, restricting use to private dwelling in the mid 1960 and acquiescing/permitting resort /guest usage for at least the last twenty years."It is not hard to see why the local planning authority has the area as zoned for residential / resort since 1999.

**[27]** It is my finding that based on the evidence of a tacit repudiation, of the concept of the area being one where there are private dwellings only, by a large proportion of the owners and the local planning authority; it makes little sense to insist that a

the purpose for which the restriction had been imposed remains realistic. The restriction is therefore obsolete as the applicant has argued should be modified to reflect their intended activities.

I pause here to state that an applicant need only satisfy one of the criteria in the section in order to succeed and this has been done in the opinion of this court.

For completeness I will however go on to consider the other limbs in the interest of a full discussion on all the issues relevant to the application.

**CONSIDERATION B**

**The continued existence…without modification**

**[28]** This provision was considered in the Privy Council in the case of **Stanard v Issa [1987] 1 A.C 175,** this was a matter originating right here in Jamaica. The case involved a restriction which prohibited subdivision of the residential lots in a development as well as trade, business and any commercial activity. The applicant wished to redevelop her land by erecting six blocks of three storey buildings comprising 40 apartments, with amenities like swimming pools and the like. She applied to a Judge in Chambers for modification of the covenants pursuant to Section 3(1) of the Act. In dismissing appeal the following principle was distilled by the Committee;

> *"In order to that the continued existence of the restrictions without modification would impede the reasonable user of the applicant's land within the section 3(1) b, the applicant had to establish that the covenants without modification to a real or sensible extent hindered the reasonable use of the land and not merely that some reasonable use of the land was impeded to a sensible degree;"*

The Committee was endorsing the opinion of Carey JA, that the existing covenant must "have sterilized the reasonable use of the land" and that the applicant must prove that the new purpose for the land prayed must be the only reasonable one.

**[29]** Taking this into account it is the finding of the court that the applicant would fail on this limb. Nothing in the evidence suggests that the only reasonable use for the property is the one intended by the applicant. The intention of the covenant appears to be that of guaranteeing the residential and private nature of the neighbourhood .This goal is still viable for various individual properties despite the use of the other properties and the evolution taking place in the area. Indeed the evidence is that the real reason it was not being used in keeping with the covenant is that it was not conducive to their needs and they could not find a suitable purchaser. A mix of residential and resort properties in the area seems to be what is happening now. It is the court's positions that while it is the intention of the Applicant to veer toward the resort side of the equation as it were, this application would not satisfy the threshold that the case law requires.

**CONSIDERATION C**

**The persons of full age…have agreed either expressly or by implication…**

**[30]** The most powerful evidence in this regard is the documentary evidence from the Home owners association showing that there has been consent to the applicant's proposed use of 'Pink Rock'. Mr. Levy's repudiation of the letter signed by the directors, very notably did not include any allegation of fraud or forgery and his assertion that it lacked unanimity was quickly dispatched. His assertion that there was a host of disapproval from many other owners was not supported by the evidence and as the applicant's counsel pointed out, this would have been expected to have come predominantly from the persons who still maintain private dwellings in the subdivision, and would best speak to any issues of privacy.

**[31]** It seems safe to conclude based on the evidence before this court that there has been agreement to the modification by the relevant persons who stand to be affected. Indeed the lone objector on record TMB resorts is a company which has advertised it own property for rental to the public in breach of the covenant in its purest form and so to my mind has given tacit approval to the concept which the applicant wishes to adopt for their property.

**CONSIDERATION D**

**The proposed modification will not injure the persons entitled to the benefit of the said restrictions**

**[32]** The issues as outlined would suggest that the nature and scale of what is proposed for “PINK ROCK” is as yet unprecedented among the other proprietors and would command an inordinate amount of the communal resources. The evidence as to the plan for provision of an independent water supply is noted. It has been argued quite convincingly by the objector that the trucking of water and the increased traffic occasioned by the applicant’s business clients and customers and workers traversing of the privately maintained roadways is bound to affect those who contribute to its upkeep negatively. All repairs are funded jointly and the essence of the objectors’ argument is that if more of the resources are dedicated to Pink Rock it would ultimately mean that TMB and others would be subsidizing “PINK ROCK”.

**[33]** One is never able in any situation of this nature to guarantee equal use of resources in circumstances where maintenance and contribution to common areas is a feature of communal living. Mr. Facey is quite right in asserting as well that agreements to put in extra water tanks or if necessary to repairs roadways, make extra provision for disposal of garbage or to control the noise of the additional persons coming into what seems to be set up as a private community with shared obligations is not within the ambit of the court to enforce. As Mr. Facey has pointed out, in order to attend the subject property one must traverse the major common thoroughfare, pass the objector’s property and would somewhat be in the ‘heart’ of the subdivision.

**[34]** I must also note “the thin edge of the wedge” argument as raised by Mr. Facey for the objector. This undoubtedly, without going into too much speculation as to the creation of a precedent, be the subject of consideration to the management company, and would need to be handled in terms of the balance to be maintained among the proprietors of contributions and the use of the resources.

**[35]** I do not foresee that TMB will be affected more particularly or specifically than any other member of the Ridge Estate community. The use of the word 'affected' is used very specifically and preferred to 'injured', as I feel that it is more appropriate to the circumstances of this case. In my opinion it is not a case which calls for compensation to the objector as there has been no specific allegation of injury over and above the use of resources which are common to all the other persons in the neighbourhood.

**[36]** Further, I am not of the opinion that the concerns raised by the objector are frivolous or vexatious but was prompted by a genuine need to protect the resources of the subdivision to which he is a contributor.

However it is the finding of this court that it is just in all the circumstances to allow the modification as requested.

No order as to costs.