IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2005 HCV 1767
IN CHAMBERS

IN THE MATTER OF all that parcel of land part of NORBROOK HEIGHTS formerly of CONSTANT SPRING ESTATE in the parish of SAINT ANDREW being the lot numbered FIFTEEN on the plan of Norbrook Heights aforesaid of the shape and dimensions and butting as appears by the said plan being ALL the land formerly comprised in Certificate of Title registered at Volume 998 Folio 680 and now registered at Volume 1370 Folio 325 (now called No. 13 Norbrook Crescent) and being together with ALL that parcel of land part of CONSTANT SPRING ESTATE in the parish of SAINT ANDREW containing by survey One Thousand Three Hundred and Fifty-Two Square metres and Ninety-four Thousandths of a square metre and being ALL the land registered at Volume 1385 Folio 124.

AND

IN THE MATTER of the Restriction (relating to subdivision) affecting the user thereof

AND

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

Mrs. Pamela Benka-Coker Q.C., Miss Carol Davis and Mrs. M. Georgia Gibson-Henlin for the Applicant.

Mr. Kwame Gordon and Miss Althea McBean instructed by Frater Ennis and Gordon for the Objectors.

Land Law - Restrictive Covenant – Covenant preventing subdivision - Application to modify – Whether objectors entitled to the benefit of the Covenant – Whether words used in the originating document sufficient to annex the benefit to the land – Whether land affected by the covenant - Whether building scheme created – Unity of seisin

Land Law - Restrictive Covenant – Covenant preventing subdivision - Application to modify – Whether character of neighbourhood has changed – Whether objectors have acceded to the breach - Restrictive Covenants (Modification and Discharge) Act, section 3

Heard: 14th July 2008, 6th, 7th 8th April and 30th July, 2009

Brooks, J.

Millard Development Co. Ltd. is a land developer. It purchased a plot of land known as number 13 Norbrook Crescent in order to erect thereon a multi-unit residential complex. Millard secured the requisite planning and building permission to construct the units. Thereafter it constructed on the land, 17 townhouses and a five-storey, 8-unit apartment building. It then entered into contracts for the sale of several of the units. Subsequently, it sought the court's permission to modify the restrictive covenants endorsed on the certificates of title for the land, which prevented the subdivision of the land and the construction thereon of only a private dwelling house.

Millard's application to modify the restrictive covenant has been opposed by several of the neighbours, all of whom reside at No. 11A

Norbrook Crescent, which ironically, was previously subdivided and has constructed thereon, a number of townhouses and a three-storey apartment building. The objectors say that the development at No. 13 is a nuisance, it blocks their natural light, blocks their view, increases road traffic and noise and causes an invasion of their privacy.

Millard has denied all these accusations and, at a very late stage, denied that the objectors were entitled to the benefit of the covenants and/or were estopped from objecting to Millard's application.

A number of issues arise for resolution:

a. is the land at 11A Norbrook Crescent entitled to the benefit of the covenants?

b. does the fact that 11A was subdivided, with different covenants applied to the splinter titles, prevent the owners of the splinter titles objecting to the modification of the covenants affecting No 13?

c. has the character of the neighbourhood changed from single family units to multi-unit complexes?

d. have the objectors, by their previous action/inactivity impliedly consented to the construction of the complex at No. 13?

I shall address these questions in the context of the Restrictive Covenants (Modification and Discharge) Act (the Act).

It is, however, first necessary to set out the way in which the covenants came to be placed on the certificates of titles for Nos. 11A and 13.

The History of the Relevant Titles

All the relevant lands have been brought under the auspices of the Registration of Titles Act. The first Certificate of Title which the documentation reveals, as comprising the relevant lands, is that registered at Volume 89 Folio 45 of the Register Book of Titles. For convenience, I shall refer to this and all other certificates of title, by the format "C/T x/y". The land in this title comprised an area of almost 943 acres. It eventually came into the hands of Harold Dunn and others (referred to as 'Dunn *et al*' by their Lordships in *Jamaica Mutual Life Assurance v Hillsborough Ltd. and others* (1989) 38 WIR 192, in another case involving lands at Norbrook).

In August 1956, after the transfer off of several parcels thereof, Dunn *et al* sold 85 plus acres of the land to Eastwood Park Development Co. Ltd. The sale was made subject to restrictive covenants. I have not been provided with a copy of that instrument of transfer, but a copy of the resultant title, C/T 794/84 has been exhibited.

Between September 1956 and April 1959, Eastwood Park Development effected partial surrenders of the title, resulting in splinter titles for at least 45 lots. In 1963 Eastwood Park Development effected

another partial surrender, this time for land which it subdivided into 53 lots. Other transactions took place thereafter, in respect of the land remaining in C/T 794/84 but those do not directly affect this claim. It is the subdivision in 1963 which provides the backdrop for the current assessment.

Because it was a surrender instrument, all 53 titles were registered in Eastwood Park Development's name. The instrument of surrender resulted in the application of identical restrictive covenants to all 53 titles. There were 8 covenants. These were substantially different from the restrictive covenants which ostensibly affected the parent title C/T 794/84, but based on the decision in *Jamaica Mutual Life Assurance v Hillsborough* I need not address the covenants on the parent title.

This claim primarily concerns the titles to 3 of the 53 lots, namely, C/T 998/679, C/T 998/680 and C/T 998/683. The first is the parent title for the lands at No. 11A while the latter two are for No. 13.

No. 11A Norbrook Crescent

C/T 998/679 was transferred in September 1966 to Mr. Gilbert Allison and Ms. Candace Dennis. Mr. Allison eventually secured the entire estate in the land. In 1977 he secured an order of this court modifying covenants 1 and 4. The modification allowed further subdivision of the land and for buildings to be constructed nearer to the boundaries thereof.

In April 1978 Mr. Allison surrendered C/T 998/679 and received, at his request, three splinter titles in its place, representing the whole of his land. They were C/T 1147/435 – C/T 1147/437. They were subject to similar, but not identically worded, restrictive covenants as those recorded on C/T 998/679. As with C/T 998/679, the restrictive covenants were said to have been "enforceable by the registered proprietor for the time being of the land or any portion thereof now or formerly comprised in [C/T 794/84]". The importance of the court order is that Mr. Allison recognized and this court accepted, that the land in C/T 998/679 was subject to the covenants endorsed thereon.

The land comprised in C/T 1147/437 was to be further developed. After it came into the hands of a Mr. Paul Marshalleck, he secured a further modification of the covenants numbered 1, 2 and 3 which were endorsed on that title. Those modifications similarly allowed for further subdivision of the land and reduction of the prescribed distances from boundaries. Pursuant to his application, 8 splinter titles were issued in his name. Each had 13 covenants endorsed thereon, which covenants were said to be "enforceable by the registered proprietor for the time being of the land or any portion thereof formerly comprised in [C/T 1147/436 and C/T 1147/437]". The splinter titles were originally registered at C/T 1228/171-

C/T 1228/178. These are the titles held by a number of the objectors to Mallard's application. Although at least five persons filed objections, all but one failed to pursue the objection. The exception, a Mr. Andrew Sinclair occupies a townhouse at No. 11 A. His title is C/T 1228/171.

A similar comment may be made about Mr. Marshalleck's application as was made about Mr. Allison's. It may be noted also that other applications for modification were successfully made in respect of covenants for other titles splintered directly from C/T 794/84. Two of these were C/T 998/677 and C/T 998/682. At least two others of those splintered directly from C/T 794/84 were further splintered. It is not known, however, whether this was by way of a court order for modification of then existing covenants.

No 13 Norbrook Crescent

No. 13 is comprised of two of the original splinter titles, namely C/T 998/680 and a portion of C/T 998/683. The former was sold by Eastwood Park Development to a Mr. Bancroft Johnson, from whose estate Millard acquired it in February 2004. It was replaced by C/T 1370/325 which is one of the two titles the subject of this application.

C/T 998/683, in 1986, came to be vested in a Mr. Rivington Gardner. In 1989 he secured an order from this court modifying the restrictive covenants on the title. As in the cases previously mentioned the relevant

covenants were those concerning subdivision of the land and the distance from the boundaries. In March 2005 he transferred a portion of the land to Millard. The resultant C/T was 1385/124, which is the second of the titles the subject of this application.

Preliminary Point

In the present application, Millard had initially approached the court pursuant to section 3 of the Act. At that time it had acknowledged that its titles were endorsed with and affected by, certain restrictive covenants. Importantly, its director Mr. Michael Millwood, in his first affidavit in support of the application, also acknowledged that the occupants of the properties at No. 11A Norbrook Crescent, including Mr. Andrew Sinclair, were among the beneficiaries of the covenants.

Approximately 3½ years after the application was originally filed, Millard, faced with the objections mentioned above, changed its tack. It now seeks by way of a preliminary point, a declaration that the objectors are not, in fact, entitled to object to its application.

I heard arguments on the preliminary point and reserved my decision. In the interest of time, I then heard the evidence and submissions in respect of the substantive point. I shall deal with the preliminary point first.

The grounds on which the preliminary point was based are as follows:

a. The restrictions imposed on C/T 794/84 were not properly annexed because there was unity of seisin of all the land in the covenantor/covenantee;

b. The transfer to the objectors made their holding subject to the benefit of a different kind of restriction;

c. That, by his application to surrender, Paul Marshalleck, being entitled to the benefit of the restrictions formerly endorsed on his titles, released himself from them and made new covenants in relation to the lands contained in his title...

The preliminary point was presented by Mrs. Gibson-Henlin for Millard. In a detailed submission learned counsel sought to show that the benefit of the restrictive covenants was not annexed to the objector's land and that they could only be relied upon if they were imposed as part of a scheme of development (otherwise called a building scheme). As far as the building scheme was concerned, the submission continued, the fact that Eastwood Park Development took all 53 titles in its name meant that there was unity of seisin. Essentially that meant that the benefit of the covenants was held by the same entity which simultaneously bore the burden thereof. Since that entity could not sue itself, the covenants were thereby destroyed.

In order to determine whether the burden of the covenants was annexed to the land at No. 13 and whether the benefit was annexed to the land at No. 11A, one has to examine the surrender document by which Eastwood Park Development imposed the covenants. It reads, in part:

> "Eastwood Park Development Company Limited…being registered as proprietor of the land comprised in [C/T 794/84] HEREBY SURRENDER (sic) the said Certificate of Title and REQUEST (sic) that **separate Certificates of Title be issued** for each of the lots…**subject to the restrictive covenants set out in the Second Schedule**…
>
> SECOND SCHEDULE
>
> The land above described (hereinafter called "the said land") is subject to **the undermentioned restrictive covenants which shall run with the land** and **shall bind as well as the Transferee his heirs, personal representatives and Transferees as the Registered Proprietor for the time being** of the said land his heirs personal representatives and Transferees and **shall enure to the benefit of and be enforceable by the Registered Proprietors for the time being of the land** or any portion thereof **now or formerly comprised in [C/T 794/84**]…." (Emphasis supplied)

The resultant splinter titles would then (as in the cases of those I have seen) have all stated that Eastwood Park Development was then "the registered proprietor of an estate in fee simple subject to the incumbrances noted" on the title for the relevant lot. The lot was, in each case, described by its peculiar number "on the Plan of Norbrook Heights" which had been "deposited in the Office of Titles on the 13th day of June, 1963".

A person seeking to enforce a restrictive covenant on another must show *either* that the benefit of the covenant was attached to his land (the dominant land) when that other person entered into the covenant, *or* that the covenant was entered into as part of a scheme of development. Where that other person is not the original covenantor, the would-be enforcer must *also* show that the burden of the covenant was not personal to the original covenantor, but was attached to the land said to be the servient land, so that

the burden passed to successive owners. This is the essence of the decision of their Lordships in *Lamb v Midac Equipment Ltd.* PCA 57 of 1997 (delivered 4/2/1999) which was a decision of the Privy Council on an appeal from this jurisdiction.

Was the benefit of the covenant annexed to the land in each lot?

Although the words used as the preamble to the covenants, do not specifically state, as it did in the case of the burden, that the benefit of the covenants should have run with the land, I find that the intention was that the benefit would so run. The fact that that benefit would be for and be enforceable by the Registered Proprietor "for the time being" indicates that it was not personal to any individual proprietor. Nor does it seem to require any specific act of assignment by such a proprietor, for his successor to enjoy that benefit.

An analogy may be drawn between the words used in the instant case and those used in the indenture imposing covenants, which were the subject of the judgment in *Miles v Easter* [1933] 1 Ch. 611. In that case the covenants imposing the burden on the vendors were "expressed to be made with the "purchasers their heirs and assigns or other the owner or owners for the time being of the land coloured pink or any part or parts thereof"". The English Court of Appeal at page 634 of the judgment continued by saying:

> "These are apt words to ensure that the benefit of the covenant should run with the pink land and every part of it, and one cannot doubt that in framing them the author had *Renals v Cowlishaw* [(1879) 11 Ch. D. 866] and *Rogers v Hosegood* [[1900] 2 Ch. 388] in mind."

The instant case is similar to *Miles v Easter* in that the draftsman in each was more specific in dealing with the burden, than he was with describing the effect of the benefit. That similarity, in my view, should not result in a finding that the benefit does not run with the land. The minimum standard has been satisfied for the benefit despite the greater specificity in respect of the burden.

Was the burden annexed to the land in each lot?

It is my view that the terms on which the covenants were imposed, resulted in the burden being attached to the land affected. I have highlighted in the quotation above, the portions which bring me to that conclusion. The original registered proprietor's title was specifically made subject to the covenants noted on the title. The land comprised in the title was similarly specifically stated to be made subject to the covenants. That the covenants would run with the land and bind the Registered Proprietor and all those taking title through him were very carefully stated. Registration under the Torrens system also means, at least, that successors in title would be fixed with notice of the covenants.

Did the imposition of different covenants on the lands at 11A deprive the proprietors therein of the benefit of the original covenants?

Mrs. Gibson-Henlin argued that the fact that Mr. Allison and Mr. Marshalleck both imposed covenants which were not identical to the covenants imposed by Eastwood Park Gardens, it meant that the holders of titles with the later covenants were deprived of the benefit of the earlier ones. Learned Counsel went as far as submitting that Mr. Marshalleck had unilaterally released the objectors' lands from the benefit of the original covenants, "by making these new covenants which enure not to the benefit of Volume 794 Folio 84 but Volume 1147 Folio 437". I find that the submissions are not well founded. Apart from the fact that there is nothing which shows a rejection by Mr. Marshalleck of the benefit of the covenants, it is possible for there to be one set of covenants applicable between one group of owners, whose lands are also subject to another set of covenants between them and another set of owners. The following quote from paragraph 2-76 of the 9th Edition of *Preston and Newsom's Restrictive Covenants* supports my finding:

> "Within the area of a scheme there may be a sub-scheme. That is to say, the owners of two or more plots may agree that they and their plots are to be mutually released from the principal of stipulations or mutually bound by stipulations replacing those of the scheme. Where this is so, an owner within the area of the sub-scheme can enforce only the conditions of the sub-scheme against another owner in the area of the sub-scheme. **But an owner outside the area of the sub-scheme can enforce the terms of the scheme itself against an owner within the area of the sub-scheme, and vice versa.**" (Emphasis supplied)

The point, in my view, cannot logically be restricted to schemes of development.

Was there a scheme of development?

In a scheme of development "the restrictions are enforceable by and against all owners of plots within the area of the scheme irrespective of the order in which they or their predecessors acquired their plots from a common vendor". (Paragraph 2-53 of *Preston and Newsom*) Proof of the existence of a scheme of development is an alternative to proving annexation of the benefit and the burden respectively of the covenant. (See *Lamb v Midac* mentioned above).

There are a number of differences between the facts of this case and those in *Jamaica Mutual Life Assurance v Hillsborough Ltd.* mentioned above. This subdivision contained 56 lots while that in *Jamaica Mutual* had only 3. The covenants in this case were identical while those in *Jamaica Mutual* had important differences. There is, however, a similarity which, in my view, despite all the trappings of a building scheme, militates against a finding that Eastwood Park Development did, in fact, create a building scheme. It is that Eastwood Park Development transferred other lands from C/T 794/84 before it surrendered the lands to create the subject subdivision.

Eastwood Park Development's successor in title to the remainder of C/T 794/84, York Castles Ltd. created further subdivisions of its own.

It is not known whether any of the splinter titles in those subdivisions created either before or after the subject one, was impressed with the same restrictive covenants as those presently under consideration. There would therefore be no proof of the reciprocity which, as emphasized in *Emile Elias and Co. Ltd. v Pine Groves Ltd.* (1993) 42 WIR 439 at p. 446, is "crucial" to a building scheme. It must be remembered that there was no restriction on the scope of the area to benefit from the covenants in the subject splinter titles. The obligation was to "the registered proprietor for the time being of the land or any portion thereof now or formerly comprised in [C/T 794/84]". Thus, obligations would have ostensibly been owed to persons who possibly (and probably) owed no similar obligations to the proprietors of titles in the subject subdivision.

I find, for that reason, there was no building scheme in place. Had I found otherwise, I would, nonetheless, have rejected Mrs. Gibson-Henlin's submission, concerning the issue of the unity of seisin. I would have done so on three bases. Firstly, it is not the surrender document but rather the first sale, in the case of each lot, which creates the covenant, secondly, the fact that sections 70, 71 and 75 of the Registration of Titles Act suggest that the

registered proprietor, takes with notice of and holds his title subject to, “such incumbrances as may be notified on” his title and thirdly, the number of lots in the development would suggest resuscitation of the covenant in the event of the termination of the unity of seisin. Their Lordships in the Privy Council decision of *Texaco Antilles Ltd. v Kernochan and others* [1973] A.C. 609 at page 626 seem to be of the view that the covenants, in large developments, could be revived in certain circumstances when a common owner brings the unity to an end. That reasoning, though *obiter dicta* would have been a powerful influence in these circumstances.

Conclusion

In light of the fact that I have found that both the benefit and the burden were expressed to run with each of the lots comprising the subdivision created by the 1963 surrender, the preliminary point must fail. The objectors are entitled to the benefit of the covenants and may properly seek to enforce them. I shall now consider the substantive application.

The Application

The Covenants sought to be amended

Millard outlined the covenants which it seeks to have modified and/or discharged as follows:

“With respect to Volume 1385 Folio 124

1. There shall be no sub-division of the said land save and except into 2 lots in accordance with plans approved by the Kingston and Saint Andrew Corporation and in which case the lots shall not be less than 20,000 square feet

And with respect to Volume 1370 Folio 325

1) There shall be no subdivision of the said land.

and thereafter with respect to both Volume 1385 Folio 124 and Volume 1370 Folio 325

2) No building of any kind other than a private dwelling house with appropriate offices, out buildings appurtenant thereto and to be occupied therewith shall be erected on the said land and the value of such private dwelling house and out buildings shall in the aggregate not be less than Two Thousand Pounds.

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 fifteen 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 out buildings shall be erected to the rear of the main building….

4) No building erected on the said land shall be used for the purpose of a Shop, School, Chapel, Church or Nursing Home or for racing tables and no trade or business whatsoever shall be carried on upon the said land or any part thereof.

7) No fence or hedge or other construction of any kind tree or plant of a height or more than four feet six inches above road level shall be erected grown or permitted within fifteen feet of any road intersection and the Road Authority shall have the right to enter upon the said land and to clean repair improve and maintain all or any of the drains, gullies or water courses which may be thereon and to remove cut or trim any fence hedge or other construction and any tree or plant which may be erected placed or grown upon the said land in contravention of this restrictive covenant without liability for any loss or damage

thence arising and the registered proprietor shall pay to the Road Authority the cost incurred by reason of the matters aforesaid."

The modification sought

It wished those covenants to be modified or discharged as follows:

"1. There shall be no subdivision of the said land except as may be approved by the relevant authorities

2. No buildings of any kind other than private dwelling houses, Townhouses and or Apartments with appropriate offices appurtenant thereto and to be occupied therewith shall be erected on the said land.

3. The building(s) to be erected on the said land shall face the driveway or one of the driveway bounding the said land and no structure shall be erected on the said land nearer than 14 metres or 46 feet to the centre line of Norbrook Crescent nor less than 1.14m or 3'-9" 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. For the purpose of this covenant the eaves and steps shall not be considered as part of the building. The guard house, swimming pool, garbage receptacles and pump house shall be exempted from this covenant.

3 (a) In the alternative that the covenant numbered 3 be discharged.

4. No building erected on the said land shall be used for the purpose of a Shop, School, Chapel, Church or Nursing Home or for racing stables and no trade or business whatsoever shall be carried on upon the said land or any part thereof, save and except the use of the said land or any building thereon for the purpose necessary and incidental to the management and operation of any Townhouse or Apartment building.

7. No fence hedge or other construction of any kind nor any tree or plant of a height of more than 4 feet six inches above road level shall be erected grown with 15 feet of or permitted any road intersection or any other distance which may be approved by the relevant authorities hereof."

Analysis in the context of Section 3 (1) of the Act

The bases on which the modification/discharge was sought incorporated all four of the grounds, set out in Section 3 (1) of the Act, by which this court may exercise its discretion in respect of the application. The section allows the court, on the application of an interested person, such as a registered proprietor, to discharge or modify restrictive covenants which affect freehold land. The onus is on the applicant to show that any one or more of the grounds set out in Section 3 are satisfied. (See *Stannard and others v Issa* (1986) 23 J.L.R. 489 at p. 494 D *et. seq.*). I shall examine each ground individually.

Change in the character of the neighbourhood

The Act sets out the first ground as follows:

> "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"

Mr. Millwood, in his affidavit, identified a number of properties in the Norbrook area, where the single family residence has given way to multi-unit residential complexes. On a visit to the location with the parties, a number of such properties were pointed out to me. Three were on Norbrook Crescent, two on nearby Norbrook Close and several on Norbrook Drive, which seems to be the major road from which Norbrook Crescent runs.

I observed on that visit, however, that there was still a large number of properties which seemed to have retained the quality of a private residence. It is important to note that, for this ground, Millard must not only prove that there have been changes in the character of the neighbourhood but also that those changes have rendered the restriction obsolete.

Although 15 years have passed since the unreported decision of Harris, J. (as she then was) in the case of *Re 48 Norbrook Drive* (E.R.C. 80/90 delivered 27/7/1994), the findings, the reasoning and the decision in that case are still applicable today. That decision considered restrictive covenants imposed on a title which had been splintered by Eastwood Park Development from C/T 794/84. It was an earlier subdivision to the one which is the subject of this claim. Harris, J then found that because the single family residence was still the prevailing feature of development in the area, despite the general tendency toward multi-unit complexes, the covenant restricting subdivision of the land, had not been rendered obsolete. Her Ladyship relied on the cases of *Re Truman, Hanbury, Buxton & Co. Application* [1956] 1 Q.B. 261 and *Driscoll v Church Commissioners for England* [1957] 1 Q.B. 330 in arriving at her decision on that point. The decision of Harris, J. was upheld by our Court of Appeal in the case of *Regardless Ltd. v Haddeed and others* (1996) 33 J.L.R. 417. There,

Patterson, J.A. accepted the position that, “covenants have become obsolete, because their original purpose can no longer be served and…it is in that sense that the word ‘obsolete’ is used in [the legislation]”. (See page 428 A)

It is perhaps ironic that 48 Norbrook Drive was one of those properties relied on by Millard as an example of the change to multi-unit complexes. But that is an aside. It is my view that with the large number of single family homes which still exists, the covenant still has value and currency. In that context, the construction of a new single-family residence would not be out of place on Norbrook Crescent. The benefit of the covenant may still be enjoyed.

I would distinguish the case of *Re 15½ Kensington Crescent; Applicant C.O. Jacks and Associates Ltd.* (1996) 33 J.L.R. 57 cited by Mrs. Benka-Coker, Q.C. on behalf of Millard. In that case it was clearly demonstrated that the original purpose of the covenant restricting use to single dwelling houses could no longer be achieved. Of the 32 lots in the Kensington Crescent subdivision only 6 residences remained. 5 of the 6 were in poor condition and the conversion of at least 3 of those 5 was imminent. No such imbalance occurs in the instant case.

For the reasons stated above, this ground fails.

Do the covenants impede reasonable user?

The second ground set out by the Act is:

> "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"

The applicant must show, in attempting to establish this ground, that

a. the restriction impedes reasonable user, **and**

b. secures no practical benefits to any person sufficient to justify its continuance.

Two quotations from *Stannard v Issa* cited above, in my view, succinctly summarize the status of Millard's application in respect of this ground. The first addresses the aspect of reasonable user:

> "In the instant case there was no evidence whatever of any difficulty in developing the…land or in disposing of it for development within the framework of the existing restrictions and certainly there was no suggestion that they had the effect of sterilising the land." (page 494 G)

The second treats with the aspect of the practical benefits secured:

> "It hardly needs stating that, for anyone desirous of preserving the peaceful character of a neighbourhood, the ability to restrict the number of dwellings permitted to be built is a clear benefit…It scarcely requires evidence to demonstrate that the privacy and quietude of an enclave of single dwellings in large gardens is going to be adversely affected by the introduction on adjoining lands of no less than forty additional families." (page 495 D-E)

I gratefully adopt these observations as being relevant to the instant case. The covenant no longer protects properties with acres of gardens and

there is no threat here of a forty-family complex, but the principle to be extracted from those quotations is still very relevant in the context of this community. The covenants are still of substantial benefit to its residents. There is nothing akin to a sterilization of the land. This ground also fails.

The beneficiaries of the covenant have consented.

The third ground set out in section 3(1) states:

> "that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified"

An examination of this ground requires an outline of some of the evidence of Mr. Millwood and a Mr. Dwight Anderson. In his affidavit filed on May 19, 2008, Mr. Millwood deposed that "throughout the construction of the townhouses and apartments on the said land, none of the Objectors herein objected to the construction". He continued, at paragraph 11 of the affidavit, to describe his interaction with a Ms. Marcia Nicely, "who represented that she was the Manager of the Strata Corporation with respect to Lot 11A Norbrook Crescent".

According to Mr. Millwood, Ms. Nicely, at one point, asked him to show her the approval for the construction. He says that he did so and she said, "OK". He says that he had several discussions with Ms. Nicely. In some of these, she expressed concern about some aspects of the construction

and he addressed each of her concerns to her satisfaction. The last concern was about the physical boundary between Nos. 11A and 13. He said:

> "I duly constructed the picket fence as requested, and Ms. Nicely raised no further objections. From Ms. Nicely's conduct I concluded that the members of the Strata Corporation did not object to the construction of the townhouses and apartments, once the concerns expressed were addressed as aforesaid."

Mr. Millwood would have been given the impression that Ms. Nicely had been consulting with her fellow owners at No. 11A. He reported, in cross-examination, that he spoke to Ms. Nicely about purchasing a portion of the land forming part of No. 11A and she said that she would have discussed it "with the other owners". He testified that:

> "She came back to me after about two weeks and said that some say yes and some said no and accused her of taking money from me."

He denied that he had ever paid any money to Ms. Nicely, although he stated that he did change her wash tub and paint the rear of her house as mortar had splashed on the latter from the construction at No. 13.

Mr. Anderson supervised the construction of the complex at No. 13. He deposed about very similar experiences with Ms. Nicely as did Mr. Millwood. Mr. Anderson said at paragraph 5 of his affidavit:

> "…Mrs. Nicely in fact approached me on several occasions and discussed aspects of the development as we proceeded. The discussions between us were always cordial, and on all occasions we sought to satisfy concerns raised on the part of the Proprietors…"

He also said at paragraph 6:

> "At no time did Ms. Nicely or any of the neighbors (sic) at No 11 A or at all indicate any objection to the project during the process of construction, which lasted for approximately 15 months."

As mentioned above, Mr. Sinclair is the only objector whose evidence could have been considered. He stated in his affidavit that he did not agree with the covenants being modified. He deposed about the inconvenience and injury which he suffered during the course of the construction at No. 13, but apparently took no step to have the covenant enforced or to bring a halt to the construction. He does not mention taking any step to alert Millard or any of its representatives that he objected to their actions.

Mr. Sinclair filed his objection two months after he was served. The delay by itself is not fatal to his position. Their Lordships in *McMorris v Brown and another* (1998) 53 WIR 261, in a decision on an appeal to the Privy Council from this jurisdiction, ruled that a four- month delay in filing an objection did not imply consent to the subdivision sought by that applicant. In my view, it is Mr. Sinclair's silence and inactivity during the 15 months of construction which is fatal to his opposition to the application.

In the *McMorris* case, the objector was not aware that there had been a modification to the covenant restricting subdivision. It was when he observed construction underway at his neighbour's premises that he enquired and then learned that subdivision approval had been granted. He thereafter took steps to have the modification order set aside. That is a

different situation from Mr. Sinclair's and I find that his objection cannot stand in light of the facts in his case.

In the circumstances where there is in fact only one objector to Millard's application and that that objection cannot stand, I find that Millard has made out its claim on ground (c) of section 3 (1).

The proposed modification or discharge will not cause injury

Section 3 (1) makes it clear that success in any of the prescribed grounds is sufficient to allow a judge to exercise the court's discretion in favour of the applicant. Satisfaction that a ground has been made out does not, by itself, oblige the court to grant the application. This is an exercise of the court's equitable jurisdiction and therefore other considerations may apply. For completeness, I would state that Millard would have failed to satisfy the requirement of Section 3 (1) (d) which states:

> "that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction"

The injury to the privacy of persons at No. 11A, is clear. They now have to endure the occupants of at least 8 of the units at No. 13 overlooking their bedrooms. There will be increased noise from the additional families which will occupy the units and increased road traffic from the fact that persons from 25 new households will be utilizing the roadways in Norbrook.

For all the reasons stated by Harris, J. in *Re 48 Norbrook Drive* in relation to that community, I find that ground (d) has not been satisfied.

Other Considerations

The tardy application

Miss McBean, on behalf of the objectors, highlighted the fact that Millard filed this claim only after it had completed construction and entered into contracts to sell some of the units. Learned counsel submitted that the court should "not sanction this blatant disregard for the legal process".

Mr. Millwood's evidence was that, although he was aware of a need to modify the restrictive covenants, that was a matter which he left to his attorneys-at-law. Such an explanation was accepted by Paul Harrison, J. (as he then was) in *Re 15½ Kensington Crescent*, cited above. The learned judge therefore exercised the court's discretion in the applicant's favour. Here, it may well be a pretext but I have no evidence to prove it insincere.

The covenant affecting the distances to the boundaries

In cross-examination Mr. Millwood said that Millard had "no particular reason" why it had applied for the distances between the boundaries and the buildings to be a minimum of 1.14m or 3'-9". It proved, however, that the surveyor's identification report prepared by Angulu and Associates, Commissioned Land Surveyors, (exhibit MM 4 to affidavit filed

June 22, 2005) showed that some “buildings on the site are at distances of 1.14m (3’- 9”) to 2.92m (9’- 7”) to the rear, side and front boundaries in breach of covenant # 3 which stipulates 15 ft. to any other boundary”.

I am concerned that the report and the plan attached to it, do not carefully set out the distances in respect of each building to the relevant boundary and the distance to the roadway. This is so, particularly because the surveyors seem to be addressing distances to the external boundaries of No. 13 as well as distances to boundaries of individual lots. This seems to be in anticipation of the subdivision being put into effect. Neighbours to lot 13 should, however, not be exposed to the possibility of buildings being erected within 1.14 m. of their boundary when what was intended was that that would be a distance for internal boundaries.

The alternative, which has been proposed, is to discharge the covenant entirely. That however, deprives the neighbours of all the protection which they currently enjoy.

In order to minimize cost and the use of the court’s resources perhaps the best method of approach is to allow Millard to submit a more detailed subdivision plan showing the distances of each lot from the boundaries to No. 13, as well as a re-drafted covenant. The court would be then able to better stipulate the modification of restrictive covenant No. 3, which I find

should be granted. The position here is different from that of *Re Chandler's Application* (1958) P. & C.R. 512, in which, according to the learned authors of *Preston and Newsom's Restrictive Covenants* (mentioned above) at paragraph 15-04, an applicant unsuccessfully sought authority to divide a large house into three houses. "If he had succeeded" reported the learned authors, "there would have been great difficulty in drawing up the order, it being in no way clear what building operations would have been involved".

Laundry

The visit to the *locus* revealed that some of the occupants of the 5 storey apartment building had hung laundry to dry on the balconies of their respective units. This laundry was in full view of the occupants of No. 11 A as well as persons traversing the roadway on Norbrook Crescent. Considering the nature of the development in Norbrook, said by all the parties, to be a high-class development, the beneficiaries of the covenants should not be subjected to such a practice. Its restraint should be a part of any order allowing modification of the covenants.

Covenant No. 7

It has not been explained why Millard wishes to have covenant No. 7 modified to remove the right of the Road Authority to enter the land and correct any breaches which may exist therein. The land surveyors have not

identified the covenant to have been breached or being in danger of being breached. Neither is it apparent from any of the other evidence presented, why such exclusion would be desirable or necessary. I find that Millard has failed to satisfy me of the need to modify this covenant.

Costs

Although it is usual for costs to follow the event, in my view Millard, is, by its late application, not entitled to have its costs paid by the objector.

Conclusion

The land at No. 13 Norbrook Crescent is subject to the restrictive covenants endorsed on the titles therefor. Those covenants are enforceable by the occupants of No. 11A whose lands enjoy the benefit of the covenants borne by No. 13. Millard has been successful in demonstrating that the persons who enjoy the benefit of the covenants have consented, either expressly or impliedly to the activity, i.e. the construction, which resulted in the breach of the covenants.

There is, however, insufficient evidence to approve the proposed amended covenant addressing the distances to the boundaries. Millard is therefore at liberty to submit a more detailed plan and a redrafted covenant to address that deficiency.

It is therefore ordered that:

1. the Restrictive Covenants endorsed on the titles registered at Volume 1370 Folio325 and Volume 1385 Folio 124 of the Register Book of Titles which now read:

"With respect to Volume 1385 Folio 124

1. There shall be no sub-division of the said land save and except into 2 lots in accordance with plans approved by the Kingston and Saint Andrew Corporation and in which case the lots shall not be less than 20,000 square feet

And with respect to Volume 1370 Folio 325

1) There shall be no subdivision of the said land.

and with respect to both Volume 1385 Folio 124 and Volume 1370 Folio 325

2) No building of any kind other than a private dwelling house with appropriate offices, out buildings appurtenant thereto and to be occupied therewith shall be erected on the said land and the value of such private dwelling house and out buildings shall in the aggregate not be less than Two Thousand Pounds.

4) No building erected on the said land shall be used for the purpose of a Shop, School, Chapel, Church or Nursing Home or for racing tables and no trade or business whatsoever shall be carried on upon the said land or any part thereof.

be modified to read, in respect of each certificate of title, as follows:

1. There shall be no subdivision of the said land except as may be approved by the relevant authorities

2. No buildings of any kind other than private dwelling houses, townhouses and/or apartments with appropriate offices appurtenant thereto and to be occupied therewith shall be erected on the said land.

4. No building erected on the said land shall be used for the purpose of a Shop, School, Chapel, Church or Nursing Home or for racing stables and no trade or business whatsoever shall be carried on upon the said land or any part thereof, save and except the use of the said land or any building thereon for the purpose necessary and incidental to the management and operation of any townhouse or apartment building.

2. The restrictive covenant numbered "3" on the said Certificates of Title should also be modified. The Applicant shall be at liberty to file, within thirty days of the date hereof, a further subdivision plan and a draft order, prepared by Counsel, concerning the modification of the said Restrictive Covenant numbered "3", upon which submission a further order may be made in respect of the said covenant.

3. The Applicant shall file, within thirty days of the date hereof, a draft order, prepared by Counsel concerning the imposition of a covenant to prevent any laundry, washing, clothing, bedding or similar article being hung or displayed from any window, balcony or other part of the building visible from the exterior thereof, which shall be imposed as a restriction on each certificate of title resulting from a surrender or partial surrender of Certificates of Title registered at Volume 1370 Folio 325 and Volume 1385 Folio 124 of the Register Book of Titles.

4. Each party shall bear its own costs.