[2020] **JMSC Civ 5**

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

**CLAIM NO. 2017 HCV 02997**

**IN THE MATTER of ALL THAT** parcel of land part of Vale Royal in the parish of Saint Andrew being the Lot numbered **THREE BLOCK P** on the Plan of Vale Royal of the shape dimension and butting as appears by the plan thereof ... and being the land comprised on Certificate of Title registered at Volume 394 Folio 3 of the Register Book of Titles and known as 18 Upper Montrose, Kingston 6 in the parish of Saint Andrew.

**AND**

**IN THE MATTER** of the Restrictive Covenants numbered 2, 4 and 5

**AND**

**IN THE MATTER** of the Restrictive Covenants (Discharge & Modification) Act

**AND**

**CLAIM NO. 2018 HCV 02906** (the Objectors)

**BETWEEN** **SARAH CHIN-JEN HSIA** **1st CLAIMANT**

| | | |
|---|---|---|
| **AND** | **MARVIN GORDON HALL** | **2nd CLAIMANT** |
| **AND** | **HENDERSON EMANUEL DOWNER** | **3rd CLAIMANT** |
| **AND** | **MARCOS HANDAL** | **4th CLAIMANT** |
| **AND** | **UNA PEARL WITTER** | **5th CLAIMANT** |
| **AND** | **BRENDA ROSE FRANCIS** | **6th CLAIMANT** |
| **AND** | **MARTIN LYN** | **1st DEFENDANT** |
| **AND** | **MELISSA ELIZABETH LYN** | **2nd DEFENDANT** |
| **AND** | **MARTYN MAXWELL LYN** | **3rd DEFENDANT** |

**IN CHAMBERS**

Miss Carol Davis and Mr. Seyon Hanson instructed by Carol Davis and Company for Martin Lyn, Melissa Lyn and Martyn Lyn, the claimants in 2017 HCV 02997 and the defendants in 2018 HCV 02906

Mr. Emile Leiba and Mr. Andre Marriot-Blake instructed by Messres. Dunn Cox, Attorneys-at-law for the claimants/Objectors in 2018 HCV 02906

**HEARD: July 23 and 24, 2019, October 15 and 16, 2019 and January 21, 2020**

**Coram: J Pusey J,**

**BACKGROUND**

**[1]** Mr. Martin Lyn and his two children, Martyn Mathew Lyn and Melissa Elizabeth Lyn, became the joint owners of Lot numbered Three Block P part of Vale Royal in the parish of Saint Andrew registered at Volume 394 Folio 3 of the Register Book of Titles, with civic address 18 Upper Montrose Road, Kingston 6, in April

2017. The acquisition of the land was subject to several restrictive covenants endorsed on the title. Covenants numbered 2, 4 and 5 are important for present purposes. They essentially restrict the user of the land to a single residences.

**[2]** By letter dated April 5, 2017 the Kingston and Saint Andrew Corporation (the KSAC) approved an application by the Lyns to construct a multiple residence complex comprising two, two bedroom town houses and four one bedroom apartments. The approval was made subject to a number of conditions including the following:

> *a) That this approval does not dispense with the obligation to apply for modification or discharge of any restrictive covenants where the approval is not in conformity with any covenants endorsed on the title and is subject to such modification or discharge as the case may be. The applicant shall, where the Restrictive Covenants (Discharge and Modification) Act applies, make the relevant application to the court.*
>
> *e) The failure to comply with the conditions as listed above and the approved plans will be considered a breach and will render this approval* ***NULL*** *and* ***VOID.***

**[3]** By Fixed Date Claim Form filed on September 18, 2017, (2017 HCV 02997) the Lyns applied to this court for the discharge and modification of restrictive covenants 2, 4 and 5.

**[4]** On February 27, 2018, by order of the court, a Legal Notice pursuant to the Restrictive Covenant (Discharge and Modification) Rules, 1960, was served by Registered Post on several residents of Upper Montrose Road, including Mrs. Sarah Chin-Jen Hsia and her husband Marvin Gordon Hall, two of the claimants in 2018 HCV 02906 and the registered owner of Lot 9 Block X with civic address number 7 Upper Montrose, registered at Volume 331 Folio 80, inviting objections to the modification of the covenants by the Lyns to be filed with the Registrar of the Supreme Court within 14 days. On March 7, 2018 Mrs. Hsia filed and served objections to the application.

**[5]** While the application was pending, the Lyns began the construction of their approved complex in August 2017. The 1st claimant through her attorneys, by letter dated May 16, 2018, wrote to the Lyns requesting that they 'cease and desist' the construction operations until the matter regarding the modification was resolved.

**[6]** Construction continued.

**[7]** On October 5, 2018 Mrs. Hsia and five other members of the Upper Montrose Road community who had been served with Legal Notices for objection, filed an Amended Fixed Date Claim Form, (2018 HCV 02906) opposing the modification of the covenants and seeking the following orders:

1. A Declaration that the claimants are entitled to the benefit of restrictive covenants numbered 2, 4 and 5 affecting the title of the land comprised on Certificate of Title registered at Volume 394 Folio 3 of the Register Book of Titles and known as 18 Upper Montrose Road, Kingston 6.
2. An injunction restraining the defendants whether by themselves or by their company, officers, representatives, employees and/or agents, contractors and/or workmen, assignees and successors or otherwise howsoever, from continuing construction or any form of development of the land comprised in Volume 394 Folio 3 of the Register Book of Titles and known as 18 Upper Montrose Road, Kingston 6 in breach of the restrictive Covenants attached thereto from which the claimants are entitled to benefit.
3. The defendants whether by themselves or by their company, officers, representatives, employees and/or agent, contractors and/or workmen, assigns and successors or otherwise howsoever, are to demolish, forthwith, the structure constructed on the subject land in so far as it is in breach of the restrictive covenants attached thereto, and/or restore/convert the subject land and/or the structure to a manner in conformity with the restrictive covenants attached thereto.

**[8]** An interim injunction was granted, pursuant to a Notice of Application for Court Orders filed on July 31, 2018 by the Objectors, on December 14, 2018

restraining the Lyns from continuing the construction and development on the land. It also forbade the occupation of the development. It was subsequently extended until the disposal of the matters by the court. In spite of this the Lyns completed the construction of the approved development and it is now occupied by tenants.

**THE LYN'S APPLICATION**

**[9]** The Lyns by their Fixed Date Claim Form filed September 18, 2017 seek the following orders:

> That the restrictive covenants numbered 2, 4 and 5 be modified. They are:
>
> 2. Not to subdivide the said land except in accordance with the aforesaid plan or in accordance with a plan approved by the Board under Chapter 26 of the Revised Laws, in which latter case, none of the lots shall be less than half an acre in area.
> 4. Only one residence shall be erected on any lot of the said land; such residence together with the buildings appurtenant thereto shall cost not less than Eight Hundred Pounds and shall be filled with proper sewer installation and no pit closet shall be erected for use on the said land.
> 5. No building shall be erected within thirty feet of any road and ten feet of any other boundary.

The modifications being sought are:

> 2. The land above described shall not be subdivided save and except into lots for the erection of Townhouses and or apartments in accordance with the statutory approvals.
>
> 4. No building other than Townhouses and or apartments with the necessary outbuildings appurtenant thereto shall be erected on the said land and such buildings shall be used for no other purpose other than for private residential use.
>
> 5. No Townhouse and or apartments house to be erected on the said land shall be erected at a distance of less than Twenty Feet from any road boundary thereof and eight feet of any other boundary save and

except that this shall not apply to the Guardroom, Swimming Pool, Gazebo and Garbage receptacle.

**THE OBJECTIONS AND THE OBJECTOR'S CLAIM**

**[10]** The objections filed by Mrs. Hsia are:

1. The Provisions of section 3(1)(a), (b), (c) and (d) of the Restrictive Covenants (Discharge and Modification) Act do not apply to this case.
2. The Vale Royal subdivision was laid out as an upper-middle class residential scheme more than eighty (80) years ago when the restrictions which the Applicant now seeks to modify were imposed with the clear object of preserving to the owners of the lots in the sub-division certain residential amenities such as the size of the lot, the type and size of dwelling houses with appropriate out-buildings appurtenant thereto and to be occupied therewith to be erected on each lot and the distance of any building or structure from the road and other boundaries so as to ensure the high quality and character of the area.
3. The modifications applied for are likely to interfere substantially with and be detrimental to the comfort and convenience of the occupiers of the adjoining lands and in particular will lead to an increase in traffic and noise because of the potential increase in the number of persons living on the land the subject of this Application.
4. The proposed modification by allowing the land the subject of this Application to have multiple residences thereon, namely TWO (2) townhouses and FOUR APARTMENTS comprised in TWO apartment blocks of TWO STORIES each, including FOURTEEN parking spaces and TWO double garages, with entrance and exit onto Upper Montrose Road, will injure financially the persons owning lands in the surrounding area by changing the density and character of the neighbourhood and thereby depreciating property values.
5. Construction on the land the subject of this Application has already commenced, and provisions for SIX (6) electrical meters are visible from the exterior of the property.
6. The lands in the Vale Royal sub-division were developed so as to comply with the restrictions set out on the titles therefore so Vale

Royal which is considered a part of the "Golden Triangle" would develop in the manner envisaged by the city planners.

7. The modifications applied for are not consistent with the further orderly development of the type of neighbourhood of which Vale Royal, Retreat and the rest of the Golden Triangle form a part.
8. The modifications requested will depreciate the saleable value of 7 Upper Montrose Road and other neighbourhood holdings. The benefits which purchasers believe they are obtaining when buying properties in the Vale Royal area subject to existing restrictions are a commodity which they are willing to pay extra for.
9. The owners of Vale Royal lands developed their properties in accordance with the restrictions which the Applicant now seeks to modify which restrictions were designed to promote the creation of single family homes on spacious lots which homes were to be a comfortable distance from their neighbours.
10. The Applicant is seeking to modify the restrictions to develop the said land for its personal gain to the discomfort, loss and expense of the other owners of lands in the Vale Royal sub-division.
11. That similar applications were considered in claims 2008 HCV 03060, 2008 HCV 03061 and 2008 HCV 03062. In those matters the applications were refused and, on appeal the SCCA No. 115 of 2011, the decision of Justice Patrick Brooks was upheld and therefore still stands in law and should be applied in this Application. Applicant Martin Lyn was the architect and planner for the development that was subject of the aforementioned claims.

**[11]** A case management order was made for both claims to be heard together, although not consolidated.

**ISSUES**

**[12]** The issues for determination are:

- Whether the Objectors are entitled to the benefit of the restrictive covenants endorsed on the title.
- Whether the restrictive covenants should be modified in accordance with section 3 of the Restrictive Covenants (Discharge and Modification) Act.
- Whether, the injunctive relief and/or compensation being sought by the objectors ought to be granted.

**[13]** In seeking to resolve of the issues raised in this application for modification of the restrictive covenants encumbering the Lyn's title, questions arise, which, when answered will direct the outcome of the application.

**Are the Objectors entitled to the benefit of the restrictive covenants**?

**[14]** According to **Preston and Newsom's Restrictive Covenants Affecting Freehold Land, 10th Edition,** at common law, where a restrictive covenant is personal between the original covanantor and covenantee, it never runs against the freehold land and does not bind anyone else. Where subsequent purchasers acquire the land there is no privity of contract or estate between them and the original covenanting parties. For the burden of the covenant to run with the land, the equitable jurisdiction of the court is invoked, as decided by Lord Chancellor Cottenham in ***Tulk v Moxhay*****,** 41 ER 1143, to create an equity which is binding on the land and enforceable against it for the protection of the covenantee's land.

**[15]** It can be said that it is now settled law that for the Objectors, who are not original convenantees, to assert that they are entitled to the benefits of the restrictive covenants they must establish, to quote from **Preston and Newsom's Restrictive Covenants affecting Freehold Land,** 10th Edition, the following, as decided by Neuberger J in ***Whitgift Homes Ltd. v Stocks***:

> *(a) The covenant must be negative in nature;*
> *(b) The covenant must be **either***
> *(i) For the protection of land retained by the covenantee **or***
> *(ii) Part of a scheme; and*
> *(c) The subsequent purchaser must have notice of the covenant."*
>
> *Emphasis mine*

**[16]** The evidence in this matter discloses that originally the lands from which the Applicants and the Objectors lands derive, was a plantation that was sub-divided in the 1920's into large tracts of land and eventually further sub-divided into half acre lots. All the lands in the locale where the relevant lots are located came

from a parent title registered at Volume 283 Folio 92 of the Register Book of Titles and were cut off from the parent title with covenants encumbered on the title regarding, among other things, the type of residence allowed on the land.

**[17]** The Applicant and the Objectors are successors in title as evidenced from the transfers endorsed on their respective titles.

**THE APPLICANT'S SUBMISSIONS**

**[18]** Both the Objectors and the Lyns are *ad idem* that the material covenants are negative in nature.

**[19]** However, the Applicants argue that the restrictive covenants must be for the benefit of land retained by the covenantor. For the restrictive covenant to burden persons other than the original covenantor there must be a dominant and a servient tenement. Where, it was argued, the covenant is not for the benefit of any land, the said land (the servient land) is not burdened by the covenant.

**[20]** Counsel relied on the decision in ***London County Council v Allen*** [1914] 3 KB 642, to support her contention that restrictive covenants will not be enforced against parties other than the original covenantors, save for the benefit of protected land. As there is no reference to a dominant or a servient land on the titles herein, she argued, there is no land to be protected and therefore the covenant is not for the benefit of the Objectors as the land is not burdened with the covenant.

**[21]** Counsel for the Applicant further argued that there is no scheme of development in the instant case. It was urged that the requirements for a scheme of development were set out in ***Elliston v Reacher*** [1908] 2 Ch 374 as;

(a) Both plaintiff and defendant must derive title from a common vendor;
(b) Before the sale the vendor must have laid out his estate in lots subject to the restrictive covenants intended to be imposed on all the lots, consistent with some general scheme;

(c) The restrictions were intended for the benefit of all the lots sold;
(d) The original purchasers bought their lot with the understanding that the restrictions were to inure to the benefit of the other lots;
(e) The geographical area of the scheme must be ascertainable with reasonable certainty.

**[22]** In the modern law, she argued, as distilled in ***Jamaica Mutual Life Assurance v Hillsborough,*** [1989] WLR 1101, two additional requirements were made –

(a) That the land to which the scheme relates must be identified and,
(b) That there must be a common intention for 'reciprocity of obligations' by the purchasers.

**[23]** In the absence of a defined area for the scheme, it is not possible to find reciprocity of obligation, she urged.

**[24]** In the instant case, counsel submitted, there is no evidence from the Objectors that there is a scheme of development. It is agreed that the Objectors and the Applicant's titles come from a common title with similar covenants. However, the existence of common restrictive covenants on the titles is not enough – it must be more than conjecture, as enunciated in ***Wembley Park Estate v Transfer London Sephardi Trust v Baker et al*** [1968] Ch 91 [I], it was argued.

**[25]** Counsel further urged that there is no evidence that the restrictive covenants were for the benefit of any other or all the lots. Also there is no mention of dominant and servient titles, or land to be protected by the covenants. In their absence the restrictive covenants do not run with the land.

**[26]** Further, counsel argued that there is no evidence of annexation or assignment of the covenants to anyone by the original covenantor, so that they run with the land. There is also no evidence that the original purchasers must have bought the lots with the understanding that the restrictions were to inure to the benefit of other lots. Neither is there any geographical area to which the scheme extends, which according to **Preston and Newsom (10th Edition),** must be decided at the

inception of the scheme and known to the predecessors in title. It should be noted that the Applicants, through their Expert Witness, Mrs. Norma Brackenridge, described the neighbourhood as the entire Seymour Lands, subdivided into 129 lots in 1927 with DP 363 deposited in the Office of Titles on November 1, 1927.

**SUBMISSIONS OF THE OBJECTORS**

**[27]** The Objectors traced the history of the land to establish how the covenants came to be on the land. The parent title for the land is registered at Volume 283 Folio 92 of the Register Book of Titles. It was sold to Charles Costa et al subject to five restrictive covenants endorsed on the title. Charles Costa died in 1940 and Harold Herbert Dunn was added to the title as joint tenant with John Henry Cargill. In 1942 they transferred a portion of the land to Thelma Agnes Morin by transfer No. 49445. The resulting title registered at Volume 394 Folio 3 is known as 18 Upper Montrose. The transfer endorsed the same restrictive covenants on the title. After a number of transfers, the title was transferred to the Applicants herein in April 2017 with the same restrictive covenants endorsed thereon. Several other transfers were effected from the parent title. After a series of other transfers, some of these lots are now owned by the Objectors. Similar covenants were endorsed on the titles.

**[28]** Counsel defined restrictive covenants as an agreement which restricts user of land. He referred, in furtherance of the definition of restrictive covenants, to **Preston and Newsom's Restrictive Covenants** (4th Edition) where the learned authors said;

> *'.....it is a burden upon the land of the covenantor, enforceable against his assigns: conversely, it confers an interest upon the covenantee, transmissible in some circumstances to his assignee.....It is because restrictive covenants are capable of being enforced by and against the assignees of the land of the*

> *original contracting parties that they are said to "run with the land....."*

**[29]** Counsel argued that at common law the burden of any covenant never runs with land. Any person, other than the original covenantee must rely on the rules of equity to enforce the restriction. In equity the enforcement of restrictive covenants against a person taking the burdened land is based on the decision in **Tulk v Moxhay** *Supra,* which restrained the breach of the covenant although the defendant was not liable at law.

**[30]** Counsel made the distinction between the benefit and the burden of a covenant. He argued that in order for the burden of the covenant to run in equity, there are two requirements –

- the covenant must be negative in nature (e.g. a covenant not to subdivide); and
- must be made for the benefit and protection of land as decided in **London County Council v Allen** *Supra.*

**[31]** There must be, he argued, a dominant land capable of deriving a benefit from the restrictions on the use of the servient land. If the covenantee retains no land, the covenant is treated as a personal contrast between the original covenantor and covenantee. Counsel referred to dictum by Lord Millet *in* ***Half Moon Bay Ltd. v Crown Eagles Hotels Ltd****. [*2002] UKPC 4 where he said,

> *"Whether the party seeking to enforce the covenant owns land capable of being benefitted by it is a question of fact. It is not to be confused with the different question whether he has the benefit of the covenant. In the case of a successor in title of the original covenantee this may depend on whether the benefit of the covenant has been sufficiently annexed to land so as to pass on a conveyance of the land without separate assignment, which is a question of construction."*

**[32]** Counsel posited that unlike the burden, the benefit of a covenant can run with the land at common law, but given the limitations of the common law requirements for the running of the covenant, the equitable principles are relied on. He referred to **Preston and Newsom** *Supra* to establish that the benefit of a restrictive covenant may be enforced in equity by someone who is not the original covenantee if;

- he is an assignee of the land to which the covenant has been annexed;
- he has an express assignment of the benefit of the covenant; or
- he and the defendant own land in a scheme of development.

**[33]** What is apparent from the foregoing is that on the interpretation of and history of the covenants, both the Applicant and the Objectors agree that there is no assignment of the restrictive covenants nor is there any annexation of the covenant to the titles. It follows that for the Objectors to succeed they must establish that the land is part of a scheme of development.

**[34]** Counsel for the Objectors set out the requirement for a scheme of development. Relying on **Lamb v Midac Equipment (Jamaica) Ltd.** [1999] UKPC 4 where Lord Nicholls said;

> *"The essence of a scheme of development is reciprocity of obligation and benefit: each purchaser from the common vendor was intended to be subject to similar obligations, and each was intended to have the benefit of obligations entered into by his fellow purchasers..... The existence of this intended reciprocity is a matter of proof by evidence, having regard to the circumstances of each case. Proof, as here, of the division of land by a common vendor into several lots, and the taking of similar covenants from each purchaser, goes some way towards the desired goal. By itself however, this evidence is insufficient...."*

and ***White v Bijou Mansions Ltd*****,** [1938] Ch 351, where Lord Green MR opined that;

> *'.....there are certain matters which must be present before it is possible to say that covenants entered into by a number of persons, not with one another, but with somebody else, are mutually enforceable. The first thing that must be present in my view is this, there must be some common regulations intended to apply to the whole of the estate in the development. When I say common regulations, I do not exclude, of course, the possibility that the regulations may differ in different parts of the estate, or that they may be subject to relaxation. The material thing I think is that every purchaser, in order that this principle can apply, must know when he buys what are the regulations to which he is subjecting himself, and what are the regulations to which other purchasers on the estate will be called upon to subject themselves. Unless you have that, it is quite impossible in my judgement to draw the necessary inference, whether you refer to it as an agreement or as a community of interest importing reciprocity of obligation.'*

**[35]** He concluded his submissions by urging the court to find that the benefit of the restrictive covenants herein run with the land and the Objectors are entitled to the benefit of the covenant because when the subdivision, the subject matter of DP 363 was created, it was intended that the titles were bound by the restrictive covenants recited in the transfer, in a scheme of development. This scheme of development is evidenced by the description of the land in the First Schedule to the agreement for sale which shows the restrictive covenants that eventually were endorsed on the title and importantly that the land was one of several lots laid out on the Vale Royal lands and that the predecessors in title must have known they were purchasing land in this defined area. In addition, the parent title

for the land shows the division of the land into lots from a common vendor, with common or near common covenants, with an intention that the covenants were for the benefit of the other lots in the subdivision.

**ANALYSIS AND CONCLUSION**

**[36]** The formulation in **Preston and Newsom** of what the Objectors must show to establish that they are entitled to the benefit of the covenant, has been applied and approved in several cases including ***Jamaica Mutual Life Assurance v Hillsborough Ltd.*** [1989] 1 WLR 1102.

**[37]** In the instant case it is clear there is no dispute between the parties that the restrictive covenants are negative in nature. Where the issues are joined is with whether the covenants are for the protection of retained land or whether they are part of a development scheme. It is instructive to note that the formulation says **either** for the protection of land **or** part of a development scheme, so either will suffice.

**[38]** In the instant case the registered titles do not indicate that the covenants are for the protection of land retained by the original covenantor. So that basis is untenable. In fact, it says the very opposite in for example the 5th covenant on the title of Mrs. Hsia and the 4th on the Lyns title where it says,

> *'.....only one residence shall be erected* ***on any lot of the said land..."***

**[39]** The covenants therefore speak to obligations between 'any' lot in the subdivision and not with land retained in the parent title by the original covanantor. The upshot of this is that the covenants relevant to this application are not in place for the protection of retained land but rather for the protection of lots created in the subdivision.

**[40]** **Preston and Newsom** also refers to "***'or' a scheme of development****".*

**[41]** The requirements for a building/development scheme enunciated in **Elliston v Reacher** *Supra* and are set out above. I will examine their application to the matter at Bar.

**[42]** A good starting point is to examine the title and the covenants on the title. The Lyns' title describes the land in these terms:

> *Thelma Agnes Morin, the wife of John Eric Morin of Kingston, Mercantile Clerk is now the proprietor of an estate in fee simple subject to the incumbrances notified hereunder in ALL THAT parcel of land part of Vale Royal situate in the parish of Saint Andrew being the Lot numbered Three Block P on the plan of Vale Royal aforementioned deposited with the office of Titles on the 1st of November 1927 of the shape and dimension and butting as appears by the plan thereof hereunto annexed and being part of the land comprised in Certificate of Title registered in Volume 283 Folio 92.....*

**[43]** This description of the lands is the same on all the title of the Objectors, save for the lot number.

**[44]** What is clear from this is, that the relevant lands all come from the same parent title and from a common vendor and are part of the Vale Royal Lands which was subdivided into lots by a plan that was deposited in the Office of Titles on the same day – November 1, 1927. The lots were subject to the same three restrictive covenants under consideration which, as alluded to above, were for the benefit of all the lots in the subdivision. The covenants or 'incumberances' are endorsed on the title. By virtue of this, the original purchasers had notice of the covenants and, ipso facto, took subject to them and intended to be bound by them. The geographical area was defined on the title as part of the Vale Royal lands.

**[45]** ***Jamaica Mutual Life Assurance v Hillsborough*** *Supra* has been cited as deciding that for a building/development scheme, reciprocity of obligation is essential. It is instructive to examine the wording of the covenants concerning the number of residences permitted on the land to ascertain if reciprocity of obligation was created when the covenants were endorsed on the titles. It says;

> *Only one residence shall be erected on any lot of the said land and such residence together with the buildings appurtenant thereto shall cost not less than eight hundred pounds and shall be fitted with proper sewer installation and no pit closet shall be erected for use on the said land.*

**[46]** The wording of this covenant is similar in all the titles of the Objectors and the Applicants. The use of the words *'on any lot of the said land',* to my mind denotes that the framers of the covenant intended all the lot owners to observe this covenant for their mutual benefit, namely to create a homogenous community with similar housing infrastructure. This homogeneity could only be maintained if all owners honoured this obligation reciprocally. Each land owner became the owner by the title reciting '*is now the proprietor of an estate.....subject to the incumbrances notified hereunder...'*, and is bound by it.

**[47]** In light of the foregoing I therefore find that a building scheme/development was created with reciprocal obligations in 1927 when the plan generating the subdivision was deposited. The obligations thus created passed to successors in title and are not personal to the original covenantor, but enforceable by the lot holders *inter se*.

**[48]** Even if I am not correct in the above assessment other factors support such a conclusion.

**[49]** Mrs. Norma Breakenridge, the Expert Witness of the Applicants, in her report agrees that the Objectors are entitled to the benefit of the restrictive covenants

herein. She said at page 35, dealing with section 3(1)(c) of the Act concerning acquiescence and consent to the modification,

> *.....Considering that there is now only one objector imply that the other proprietors* ***who are entitled to the benefit of the same covenants*** *have agreed to the modification of the covenants.*
>
> *Emphasis mine.*

**[50]** Mr. Martin Lyn in his first affidavit filed on September 18, 2017 gave evidence that the Objectors are entitled to the benefit of the covenants. The tenor of the affidavit was that although they were entitled to the benefit of the covenants, the covenants were obsolete. It is on this basis that the Notices of Objection were served on the Objectors and gave rise to this matter. He, however, later changed his mind about this in his affidavit filed on September 19, 2018, when he acquired new counsel following the death of Mrs. Lanza Turner-Bowen and deposed that the objectors were not entitled to the benefit of the covenants. I do not agree with the latter position.

**[51]** More importantly in **Sagicor Pooled Investment Fund v Robertha Matthis et al,** claim Nos. 2008 HCV3060, 3061 and 3062, a decision of the Supreme Court in 2011, with which the Court of Appeal agreed and which is alluded to in Mrs. Hsia's affidavit, it was decided that registered proprietors of Upper Montrose Road are entitled to the benefit of the covenants.

**[52]** For these reasons I find that the answer to the first question is yes, the Objectors are entitled to the benefit of the covenants.

**Are the Applicants entitled to have the relevant restrictive covenants modified pursuant to section 3 of the Restrictive Covenant (Discharge and Modification) Act?**

**[53]** The burden of proof of the respective parties in an application such as this and the duty of the court in exercising the powers given under section 3 of the Act was affirmed in **Re 39 Wellington Drive** Suit No. ERC 139 of 1990 (unreported) by Orr J and stated thus by Bingham J in **Re Gainsborough Development Company Limited's Application,** [1990] 27 JLR491, 494;

> *It is trite law that in seeking to establish a basis for 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 is 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 discretion in the court as to whether to grant or refuse the application if there is proper and sufficient grounds for refusal.*

**[54]** I will examine each of the provisions of section 3 of the Act and their application to the matter at Bar.

> ***3(1)(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:***

**[55]** The Applicants' argument is that the because of changes in the character of the neighbourhood, the restricted user of their lot to a single residence is obsolete. They contend that Seymour Avenue, Hopefield Avenue, Braemar Avenue and other surrounding roads in the Golden Triangle area, including the building that is

hard-up on and line and line with the rear of 18 Upper Montrose Road, all part of the Vale Royal Lands and Seymour lands, have modified restrictive covenants similar to the one in question and have constructed upscale multiple residence complexes on them. These residences, they argue, enhances the value of the entire area and are in keeping with changes in the density requirements under new provisional density regulations, published in 2017; and modern trends in real estate development, fuelled by increased demand for housing in the Kingston Metropolitan area.

**[56]** The Applicant also gave evidence that at number 5 Upper Montrose Road a hotel called The Mikuzi Hotel comprising 10 rooms has been in operation for 'many years'. Also number 18 Upper Montrose Road was tenanted and operated a six family dwelling with the main house and outhouses with six Jamaica Public Service Company light meters evident. Therefore the character of the neighbourhood is changing from single residence to multiple residence complexes.

**[57]** The Applicant also called Mr. Danny Kelly, an Attorney-at-law and owner and former resident on South Hopefield Avenue, to establish that he had subdivided his lot. However, the lots are for single dwelling houses. This was posited as further evidence of change in the character of the neighbourhood.

**[58]** The Objectors, through the affidavit of Mrs. Hsia, deposing on behalf of all the Objectors, argue that the restrictive covenants on the land were designed to preserve to the owners of the lots in the sub-division certain residential amenities such as size of the lots, the distance of the houses from the boundaries ensuring privacy and the type and size of dwelling houses with appropriate out-buildings appurtenant thereto. If the modification is permitted it is likely to be substantially detrimental to the comfort and convenience of occupiers of adjoining lands as there will be increased traffic, noise from increased density and will change the character of the neighbourhood. It will also militate against the orderly development of the area which has been preserved for over 80 years.

**[59]** The Objectors further argue that Upper Montrose Road and South Hopefield Avenue is an enclave, sustained by the covenants endorsed on the respective titles.

**[60]** In response to the submissions of the Applicants, the Objectors further argue that there is no conclusive evidence that Mikuzi Hotel is a hotel. It operates more like a private Bed and Breakfast operation. It is still a single family dwelling house and is not in breach of the covenants under consideration.

**[61]** They further contend that the six electricity meters on 18 Upper Montrose Road did not result in the breach of the covenants as it remained a single family dwelling in character, even if it was tenanted.

**[62]** Mrs. Hsia says she purchased her lot expecting that the covenants would be respected and purchasers like her are willing to pay extra to maintain single residences for the privacy and quietude.

**ANALYSIS AND CONCLUSION**

**[63]** In order to properly ascertain if there is a change in the character of the neighbourhood it is instructive to decide whether Upper Montrose Road constitutes a neighbourhood. In **Preston and Newsom** neighbourhood is defined citing the following quotation from in **Re Davis Application** [1950] 7 P & C R 1:

> *"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 process and nature of the development outside its boundaries is of little consequence."*
>
> ***The test is thus essentially an estate agent's test: what does the purchaser of a house in 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 this definition goes, be coterminous with the area subject to the very restrictions that is to be modified or other restrictions forming part of a series with that restriction.....*
>
> *The test is a pragmatic one: if the events in the vicinity have stultified the covenant, those events may be considered even if they are on land never affected by the restriction in question or any related restriction.....*
>
> *....this part of the subsection seems to be directed not to matters of title and the right to enforce the restriction, but to the question whether the restrictions affecting a given property, situated where it is situated, have been stultified by events on the surrounding premises.*
>
> *Emphasis mine*

**[64]** This test was applied and approved in numerous cases including the **Sagicor case** by Brooks, J and in the Court of Appeal by Panton P, the **Hopefield Corner case** by R. Anderson J and Orr J in **Re 31 Wellington Drive** Suit No E R/C 139 of 1990.

**[65]** The Applicants have adopted wide parameters to delineate the relevant neighbourhood as set out by their expert witness, Mrs. Norma Brackenridge, in her report where she says on page 11;

> *The neighbourhood in which 18 Upper Montrose Road falls is the section of Vale Royal that is bounded by Trafalgar Road to the south, ten lots on the eastern side of Upper Montrose Road and seven lots to the west of Seymour Avenue adjoining the Retreat subdivision to the east; eleven lots on the western side of Braemar*

*Avenue following along a gully course to the west; thirteen lots on the northern side of Hopefield Avenue to the north.*

**[66]** The Objectors have used a narrower area restricted to Upper Montrose Road itself and South Hopefield Avenue. Mr. Gordon Langford, their Expert Witness describes the area thus;

*'Upper Montrose Road itself has remained unaffected by the multiple property subdivision up until the construction of the Townhouses and apartment units at No. 18. The homes on Upper Montrose Road are single homes giving the road an orderly appearance.....*

**ANALYSIS AND CONCLUSION**

**[67]** On the 27th July 2019 I visited the *locus in quo* and found that Upper Montrose Road is characteristically different from the other roads in the immediate Vale Royal area, famously known as the Golden Triangle because of their proximity to Vale Royal, the official home of the Prime Minister of Jamaica. Seymour Avenue, Hopefield Avenue, Montrose Avenue and Braemar Avenue all surround Upper Montrose Road and are all interlaced with single residence and multiple residence apartments and townhouses. It would not be a mis-description to say that the area of Upper Montrose Road and South Hopefield Avenue is like an oasis in a desert of roads with multi-residences and single residence interspersed, surrounding it. It has maintained its unique large single residences with large garden areas and appropriate out buildings.

**[68]** Based on the foregoing the question of what a purchaser of a lot on Upper Montrose Road would expect to receive, can still be answered in line with the covenant regarding user – namely, a single residence dwelling house with a value commensurate with the eight hundred pounds value prescribed in 1927 when the restriction was imposed, and sufficient distance from the roadway and boundaries to ensure privacy. That is the stated expectation of Mrs. Hsia when

she purchased her lot in 2014. Is it still achievable, despite the many multi-residence subdivision in the surrounding community outside of Upper Montrose Road? The answer, I find, is yes. Any objective factual look at Upper Montrose Road by foot or from the air, as reflected in the aerial photographs attached to the expert reports, reveals a preponderance of single residences with one dwelling house and appropriate out buildings. The fact that one is used as a Hotel/bed and breakfast or another has six electricity meters does not affect the fact that the structure on the lot is a single residence with the requisite layback of boundaries and is not prohibited by the covenants that the Applicants want to modify. In light of the foregoing, I find that Upper Montrose Road is an enclave and a distinct neighbourhood. It is open to the Applicants to develop the lot they purchased in line with the restrictive covenants endorsed on their tile.

**[69]** I find great support for this conclusion in **Sagicor Pooled Investment Funds v Robertha Ann Matthies et al** [2017] JMCA Civ 35 where the Court of Appeal in a judgment delivered by Panton P concerning lots including 14 Upper Montrose Road, approved the finding of Anderson J in **Hopefield Corner Limited v Fabric De Younis**, Claim No. 2003 HCV 0961, that Upper Montrose Road is an enclave in the Golden Triangle Area. Panton P in dealing with the issue said at paragraphs [8] and [9] of the judgement the following, with which I concur:

> *[8] The learned judge considered the affidavit evidence against the background of section 3(1) of the Restrictive Covenants (Discharge and modification) Act ('the Act'). He accepted as an accurate statement of the relevant law, the principles set out by R Anderson J in the case of **Hopefield Corner Limited v Fabric De Younis Limited** (unreported), Supreme Court , Jamaica, Claim No 2003 HCV 0961 judgement delivered 15 June 2011. He found that Upper Montrose Road comprises a different neighbourhood from Seymour Avenue. He said he was making that finding "despite the fact that these roads run immediately parallel to each other and that the backs of the properties on the east side of Upper Montrose*

*Road, adjoin the backs of properties on Seymour Avenue." He added that if he was wrong in making that finding, he was "prepared to accept that Upper Montrose Road is an enclave in the Golden Triangle neighbourhood". Upper Montrose Road, he said is "a neighbourhood by itself".*

*[9] In considering whether the covenants were obsolete, Brooks J took into account that there have been changes since the covenants were imposed in the 1920s. At the time of their imposition, "the emphasis was for single family dwelling houses on fairly large lots and well set back from the roadway and from the other boundaries". The changing times have seen the erection of "upscale townhouse and apartment developments", he said. However, once the original object of the covenant can still be achieved, the learned judge was of the view that the covenant was not obsolete. In the instant situation, he observed that there was a preponderance of single-family residences which made it impossible for him to find that the covenants are obsolete. At paragraph [56] he said:*

> *[56] .....It is still eminently feasible for a purchaser in the Golden Triangle, Seymour Avenue and Upper Montrose area to buy or build a single-family residence with ample set-backs from the boundaries thereof, and that such a residence would not be out of step with the surrounding environment."*

**[70]** This appeal was decided in 2017. Nothing has changed since that decision except the construction of the Applicants' multiple residence complex on 18 Upper Montrose Rose. The Applicants have failed to establish that the character of the neighbourhood has so changed that the purpose of the restrictive covenant has been stultified rendering it obsolete.

> **3(1) (b) That the continued existence of such restrictions 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;**

**[71]** In **Stannard v Issa & others** 34 WIR 189 the Privy Council enunciated the tested to be applied in deciding whether the Applicants have satisfied section 3(1)(b) of the Act. Panton P in the **Sagicor Pooled Investment case** in discussing the Privy Council's decision in **Stannard v Issa & others** said at paragraph [39];

> *In dealing with the question of whether the existence of the restrictions conferred a practical benefit on the objectors sufficient to justify their continuation without modification, the Privy Council said that the question is not "what was the original intention of the restriction and is it still being achieved?" but "**does the restriction achieve some practical benefit and if so is it a benefit of sufficient weight to justify the continuance of the restrictions without modification?"***
>
> *Emphasis mine*.

**[72]** The Applicants argue that their expert witness Mrs. Norma Brackenridge in her report has stated that the proposed user of 18 Upper Montrose Road as a multiple residence complex with approval for 14 habitable rooms is in keeping with the increased density permitted under the provisions of the **Town and Country Planning (Kingston and St. Andrew and the Pedro Cays) Provisional Development Order 2017.** This Order increased the habitable rooms per acre to 150 habitable rooms per acre from 74 habitable rooms per hectare or 30 rooms per acre. This she explained is in response to a change in the town planner's view of the area, reacting to increased need for housing to

stem urban sprawl. The overall effect of this, according to Mrs. Breckenridge, is that property values will increase fuelled by demand and the proprietors will be allowed to privately use their property in a manner,

> *....which is physically possible, legally permissible, financially feasible and which will also result in the highest value of the property hence securing the most profitable returns for the proprietors. It would also be in conformity with the residential tone of the area.*

**[73]** Counsel further argued that Mr. Danny Kelly on South Hopefield Avenue in the enclave has subdivided his land into four lots; the proprietors of 5 Upper Montrose have been operating a multi-residential facility called the Mikuzi Hotel; at number 8 Upper Montrose there is a commercial operation known as Madhappy Recording Studio and Comfort Design Upholstery. These manifestations demonstrate a change in user in the enclave that has been accepted by the Objectors as they have not objected to them. In addition counsel repeats that 18 Upper Montrose Road was operating as a multiple residence before it was acquired by the Applicants with six tenanted areas.

**[74]** Counsel concluded that the modification would therefore bring practical benefits to the Objectors as their assertions, through their expert witness Mr. Langford, that property values would decrease is not supported by any objective valuation by him and would in fact be increased. In any event, counsel argued, the Objectors are not entitled to the benefit of the covenants and therefore modification should not affect them.

**[75]** The Objectors argue that the test propounded in **Re Ghey and Galton's Application**, [1957] 2 Q B 560 and approved by the Privy Council in **Stannard v Issa et al** *Supra* is applicable. That test asks the question: '*Does the restriction achieve some practical benefit and, if so, is it a benefit of sufficient weight to justify the continuance of the restrictions without modification?'* In light of this

counsel argued that the Applicants have failed to establish that they would be prevented from the reasonable use of the land as a single residence or that they would be impeded in disposing of the property as a single residence home, and therefore the restrictions should remain.

**[76]** Counsel further argued that the building approval of the Kingston and St. Andrew Municipal Corporation was conditional on the Applicants getting the relevant covenants modified. The Applicants went ahead and completed the construction, despite objection and are now asking the court to rubber stamp their deed. This in itself, he argues, is a basis for refusing the application. He submitted that the restrictions still achieve practical benefits to the Objectors including privacy, low density of occupation, peace and quiet, security and maintenance of high property values. For these reasons the restrictions should be retained.

**ANALYSIS AND CONCLUSION**

**[77]** The test for whether the continued existence of the restrictions impede the reasonable user of the land without securing practical benefits to other persons in the locale is that expounded by Panton P at para [73] herein.

**[78]** Carey JA in his dissenting judgment in ***Stannard v Issa & others*** *Supra* stated the test in these terms, with which the Privy Council agreed:

> *'Put another way, the restrictions must be shown to have sterilized the reasonable use of the land. Can the present restrictions prevent the land being reasonably used for purposes the covenants are guaranteed to preserve?*

**[79]** In the instant case the imposition of the restrictive covenants under consideration has led to the creation a particular kind of community which is well described by Mrs. Norma Brackenridge in her report on page 9 section 3.1 in these terms;

> *.....the development of the area, which started as early as the 1920's and continued to date, comprises residential subdivisions*

> *that were designed to cater exclusively to upper-middle income earners. Over the years the area has boasted a very high residential prestige and up to forty (40) years ago, the whole area was considered to be exclusive with its low residential density of seventy-four (74) habitable rooms per hectare or thirty (30) habitable rooms per acre and permitted development being single-family houses. The development pattern of the area has created an environment of upper-class households with large houses on large lots. Properties within the area were single-family up-market houses and over the years they have been maintained with attention paid to their aesthetics.*

Further on page 11 of the report she says;

> *Despite the growth of multi-family complexes, in particular townhouses, there are still enclaves that have retained their single-family exclusive characteristics with composition of upper-class households having large dwelling houses on large lots in sections.*

**[80]** The restrictive covenants have been the backbone of this creation as they limit the development to a single residence, delineate the minimum value and the footage from the boundaries ensuring privacy, quietude or orderly development of the community. The Objectors fear that the modifications will result in more traffic, noise and inconvenience as the population density will increase. The level of privacy will be compromised as many more persons will be in the limited space. The question that arises is, is this a benefit of sufficient weight to justify continuation of the covenant without modification?

**[81]** It has been strongly argued that some alien uses have occurred on two lots on Upper Montrose Road, that is, the Hotel and the recording studio. Upon my visit to the location there is nothing that is physically observable that has changed on those lots that have resulted in the breach of the covenants under consideration.

The premises retain the single residence structure dictated by the covenant, with appropriate out buildings and no independent evidence has been placed before the court that there is multiple residential use of the lots for commercial purposes.

**[82]** In ***Stannard v Issa et al*** *Supra* Lord Oliver of Aylmerton said in relation to the court's duty at this juncture;

> *What the court exercising this jurisdiction is enjoined to do is to consider and evaluate the practical benefits served by the restrictions.*

**[83]** Would the enclave of Upper Montrose Road be significantly impacted by the development of a multiple residence complex in the community? Counsel for the Applicants argues that the habitable space permitted by the building approval does not exceed the 1966 Town and County Act requirements of 30 habitable rooms per acre. Two things from the evidence come to mind – firstly although only two bedroom townhouses and one bedroom apartments were approved by the KSAC, Mr. Lyn gave evidence that the floor plan was altered, without approval, allowing a third bedroom to be created by enclosing the study area. The potential for increased number of persons inhabiting the complex is self evident. Secondly, if the modification is allowed there is the potential for other applications to follow suit and the floodgates would be open resulting in even greater increase in the density, noise and lack of privacy feared by the Objectors. This idea is not farfetched as one only has to look to Seymore Avenue, Hopefield Avenue, Breamar Avenue and other surrounding avenues to see how they have speedily metamorphosed into a substantial mixture of single and multiple residences in recent times.

**[84]** The real point, I find, is that privacy, a quiet neighbourhood, less density are real benefits which consumer/home buyers are willing to pay for and those who own, including the Objectors, have preserved. They carry sufficient weight to justify the continuation of the restrictions. The imposition of a multiple-family complex in

this enclave has the potential to increase traffic, noise levels, reduce privacy and change the density of the population which will change the nature of the community. The Applicants have failed to show that the existing covenants impede the reasonable user of the land. It is still open to the applicants to develop a single dwelling residence and it must not be “out of step” with the community. Neither have they shown that the presence of the current restrictions do not secure any practical benefit to other persons.

> **3(1)(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 less 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;**

**[85]** The Applicants argue that there is only one Objector in this claim, despite the affidavit of Mrs. Hsia deposing, without objection, that she is speaking on behalf of the other five Objectors and with their consent and permission. The Applicants argue that Mrs. Hsia was well aware that premises located at 18 Upper Montrose Road was being used for years as a multiple residential premises as six electricity meters were located near the gate in full view of the public and she made no objections to this.

**[86]** They further argue that there have been many modification of covenants and the construction of townhouses and apartments in the surrounding area without objection from Mrs. Hsia, the point being that the failure of the Objectors to intervene to stop other modifications, together with there being no objection to six residential accommodations at 18 Upper Montrose Road prior to the acquisition by the Lyns, means that the Objectors have acquiesced to the modifications and cannot now object as too much time has passed. There is no evidence to support this conclusion. There were objectors to other proposed modification in

for example the **Sagicor** case. The reliance on ***Hepworth v Pickes*****,** [1900] Ch. 108 where 24 years had passed while the breach of the covenant was notoriously being carried out, does not advance the argument as there is no proof of an existing breach ongoing on Upper Montrose Road that is analogous to or open and notorious as the breach in **Hepworth's** case. Also approved modification of covenants allowed in the area is not in the enclave of Upper Montrose Road.

**[87]** The Objectors argue that they have done what is required to establish their objection. Championed by Mrs. Hsia, they placed their objections before the court pursuant to the Notice of Objection ordered by the court to be served on them, within the fourteen day period stipulated; they contacted the Town Clerk to have the construction halted until the matter was determined by the court; they wrote to the Applicants requesting a cease and desist posture until the matter was resolved and they filed the present claim. I agree with counsel for the Objectors that there has been prompt action after the Objectors became aware of the proposed subdivision and there is no evidence of any act or omission on their part that can be interpreted as acquiescence. In addition the very fact of the filing of objections is evidence that there is no consent. The Applicants have therefore failed to establish consent by the Objectors to the modification.

**3(1)(d)that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction**

**[88]** In relation to this subsection the Applicants repeat that the Objectors are not entitled to the benefit of the covenants and therefore cannot be injured by the modifications being sought. Relying on the definition in **The Hopefield Corner case**, where Anderson J referred to an Australian case from New South Wales Supreme Court ***Lolakis and another v Konitas*** [2002] NSWSC 889, where Campbell J defined injury in these terms:

> *The kind of injury contemplated in the section is injury to the relevant person in relation to ownership of (or interest in) the land benefitted. The injury may be of an economic kind, e.g. reduction in the value of the land benefit, or of a physical kind e.g. subjection to noise or traffic, or of an intangible kind, e.g. impairment of views, intrusion upon privacy, unsightliness, or alteration to the character or ambience of the neighbourhood. These arbitrary categories, while serving to illustrate the ambit of the concept of injury for the purpose of the section, are neither mutually exclusive nor necessarily exhaustive and what I have described as injuries of a physical or tangible kind could well also affect the value of the land in question. However it is clear that a person may be "substantially injured" within the meaning of section 89(1)(c) notwithstanding that the value of his land would be unaffected or even increased by the proposed modification.*

Counsel argued that none of the injuries above described has been suffered by the Objectors and therefore the Applicants have established this ground.

**[89]** The Objectors, relying on observations of Orr J in **Re 39 Wellington Drive** that if there are really practical benefits which the covenants secure to the Objectors and if these are likely to be reduced or altered by the applicant's project, then injury would be caused and the objection cannot be regarded as frivolous. Counsel cited ***Ridley v Taylor*** [1956]1 WLR 611 where Russell LJ mentioned that the ground was designed to prevent frivolous and vexatious claims. The Applicants, they submitted, must therefore show that the objections are not trifling or insubstantial.

**ANALYSIS AND CONCLUSION**

**[90]** The formulation by Campbell J in **Lolakis**, *Supra* adopted by R. Anderson J in the **Hopefield Corner** case that what constitutes injury can be sensible or tangible injury or aesthetic injury and can occur even if the value of the benefitted land is increased, has manifested itself in the matter at Bar. Having found that there are practical benefits secured to the Objectors by the continuation of the restrictions, these benefits, if disturbed, will result in the kind of injury to which the section beckons. Increase noise, increased population density and reduction in privacy are material changes which will alter permanently the character of the neighbourhood. I therefore find that the Applicants have also failed to establish this ground.

**[91]** The Applicants, I find, have not satisfied any of the grounds stipulated in section 3 of the Act. If I am not correct in my assessment of the section, there is a discretion in the court, referred to by Bingham J in the **Re Gainsborough Development Company Limited's** above, that can be exercised, if sufficient grounds exist, to determine the outcome of this application. While it may not be necessary to exercise that discretion in the case at Bar, as none of the grounds in section 3 have been satisfied, it is worthy of comment how I would apply that discretion in the circumstances of this case.

**[92]** In the exercise of a discretion, regard must be had to the conduct of the Applicants in carrying out their development. A chronology of the activities surrounding this development is instructive.

- The Applicants acquired the lands in April 2017.
- They applied for and received building approval in April 2017 which was made subject to an application to the court for modification of any relevant restrictive covenants.
- Without making any application to the court, the Applicants began construction in breach of the building approval and the restrictive covenants above discussed in August 2017.
- The Fixed Date Claim Form for modification and discharge of the covenants was filed September 18, 2017 after construction had commenced.

- The Objectors were served with Legal Notices in February 2018 and filed their objection on March 7, 2019, within 14 days of receipt.
- A letter dated May 16, 2018 to cease and desist construction until the matter of modification had been determined was sent to the Applicants.
- Consequently on the July 31, 2018 the Objectors filed claim number 2018 HCV 02906, seeking, among other things, injunctive relief to stop construction until the modification issue was determined.
- On December 14, 2018 an injunction was granted in the Supreme Court mandating that construction should cease and forbidding occupation of the premises until the matter of the modification was decided.

**[93]** In spite of all this objection and intervention the Applicants completed the construction and occupation of the property before this matter, which they placed before the court, was heard and in breach of the building approval and the Orders of the court made on the application for interim injunction.

**[94]** In giving evidence Mr. Martin Lyn said that at the time when the injunction was imposed the building was 90% complete and he had spent in excess of $100,000,000.00 and could not stop construction at that juncture, as windows and door were not in place and the structure would be exposed to the elements and to pilfering. He also, upon completion, engaged the services of a Realtor and rented the entire complex at the time of trial.

**[95]** Further Mr. Martin Lyn gave evidence that he left the matter of the modification and discharge of the covenants to his attorneys, obviously trying, I find, to represent that he did not appreciate the significance of the requirements of the building approval for modification of the covenants or was not going to be impeded by it in developing his land. This posture cannot escape the fact of full knowledge and appreciation of the significance of the application, as he was a witness and the Architect in ***Sagicor Pooled Investment Funds Ltd. v Robertha Ann Matthies*** *Supra* and is well aware of the outcome of that case

and the fact that that development was abandoned as the court had refused to modify similar covenants. His rapid pursuits to complete this development and his statement that he had spent substantial amounts of money have to be evaluated in this context.

**[96]** In ***Redland Bricks Ltd. V Morris*** [1969] 2 ALL ER 576 the House of Lords (albeit dealing with quia timet injunction, the effects of which can operate in the same way as a mandatory injunction), made it clear that where a defendant has acted wantonly and quite unreasonably in relation to his neighbour, he may be ordered to do positive work even if the expense to him is out of all proportion to the advantage thereby accruing to the plaintiff. In ***Central Mining and Excavating Ltd. v Crosswell et al*** E.R.C. 139 (delivered December 1991) Orr J in commenting on the issue of the demand for housing and the economic benefits that a modification is reputed to bring, dismissed economic advantage/dilemma as irrelevant in assessing an application of this type.

**[97]** The purport of the conduct of the Applicants attains greater significance when one examines the remedies being sought by the Objectors. They seek an injunction to compel the Applicants to demolish the structure and make it conform to the covenant for single dwelling house with appropriate outhouses, or damages.

**[98]** The Applicants I find, with full knowledge that the application for discharge and modification had a strong probability of being refused, based on the outcome in the **Sagicor** Case in 2017, went ahead and built. They thereby took the risk that if the application was refused then their development was in jeopardy. Before the buildings were completed they were aware of the remedy of demolition that was being sought by the Objectors. They ploughed on, completed their development so as, to use the jargon, ‘steal a march’ on the Objectors and now want the court to rubber stamp their effort because of the amount of funds expended.

**[99]** The building approval stipulated that if there was noncompliance with the approval, the approval would be null and void. In effect the Applicants have built without building approval as they operated in breach of the approval by constructing in two ways (a) without discharging or modifying the covenants and (b) changing the layout to accommodate a third bedroom. This Mr. Lyn says, is done all the time without the approval of the KSAC so he just went ahead and did it. He clearly has little regard for the KSAC and its building approval provisions and injunctions granted by this court to stop construction and occupation. This unlawful conduct and the advancing of self-interest over the right of others cannot be ignored by any court exercising its discretion. Such conduct flies in the face of the maxims of equity '***he who comes to equity must come with clean hands'*** and **'*he who seeks equity must do equity.'*** As Bingham J said in **Re: Gainsborough Development Ltd. Application** *Supra at page 497* letters B – C;

> *In so far as the immediate area in question had remained in effect one which the user has been in conformity with the existing covenants by the erection of a single dwelling house on each lot, it would be idle to contend that such use to which the applicants propose to develop the lot, which is the subject of the present application,* ***has any other objective but to benefit the personal interest of the developers to the exclusion of the overall interest of the existing covenants.***
>
> *Emphasis mine.*

This cannot be allowed. So were I to exercise this discretion in the matter at Bar, I would be impelled to exercise it against the Applicants and refuse the application.

**[100]** In relation to the remedy of demolition which is being sought, I see no reason to refuse it, as the Applicants acted with full awareness that they were operating contrary to law, in defiance of an injunction of this court and the building approval granted by the KSAC. In addition they had prior knowledge of refusal by the courts of similar applications. It would not be an over-statement to infer that their actions were designed to tie the hands of the court by spending a large sum of money and to rely on the decision in ***Wrotham Park Estate Limited v Parkside Homes Ltd***. [1974] 1 WLR 798, where Brightman J refused an injunction to demolish houses constructed in breach of restrictive covenants because of shortage of houses in the area and made an award of damages instead. It should be noted that the facts were substantially different, involving purchasers in a new scheme of development who obtained insurance which covered the damages substantially. It was also possible for the insurance to allow them to purchase other homes elsewhere. The Objectors herein have no such protection. In addition there is no evidence of chronic shortage of houses in the area. They objectors would be stuck with the wonton and unlawful behaviour of the Applicants and the permanent fundamental alteration of their community for self interest.

**ORDERS**

**[101]** In all the circumstances the following order are made:

**[102]** Regarding claim number 2017 HCV 02997:

1. The application for modification of Restrictive Covenants numbers 2,4 and 5 endorsed on Certificate of Title registered at Volume 394 Folio 3 of the Register Book of Titles is refused.
2. Cost to the Objectors to be agreed or taxed.

**[103]** Regarding claim number 2018 HCV 02906:

1. It is declared that the claimants are entitled to the benefit of Restrictive Covenants numbered 2, 4 and 5 affecting the title of the land comprised in

Certificate of tile registered at Volume 394 Folio 3 of the Register Book of Titles and known as 18 Upper Montrose Road, Kingston 6.

2. The defendant whether by themselves or by their company, officers, representatives, employees and/or agents, contractors and/or workmen, assignees and successors or otherwise howsoever, are to demolish forthwith the structure constructed on the subject land in so far as it is in breach of the restrictive covenants attached to Certificate of Title registered at Volume 394 Folio 3 of the Register Book of Titles and convert the structure to a single residence dwelling house with appropriate out buildings in a manner to conform with the restrictive covenants.
3. The court will entertain submissions on the specific work to be done to ensure conformity with Order number 2 herein, within 90 days of the date hereof.
4. Cost to the Objectors to be agreed and if not, taxed.