JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 69/89

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN	HECTOR EARL IRENE WALTER DR. NOEL BROWN GLORIA LILLY YAP DR. PETER GLAZE ALGREGG ENGINEERING CON- STRUCTION COMPANY LIMITED	APPELLANTS
A N D	VICTOR SPENCE	RESPONDENT

Michael Hylton instructed by Myers, Fletcher & Gordon for Appellants

Dennis Morrison instructed by Jennifer Messado & Company for Respondent

May 19 and June 22, 1992

ROWE P.:

Section 3(1) of the Restrictive Covenants (Discharge and Modification) Act enables a Judge in Chambers inter alia, on the application of a person interested in any freehold land affected by any restriction arising under covenant as to the user thereof, by order to modify any such restriction on being satisfied:

> "(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Judge may think material, the restriction ought to be deemed obsolete; or
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> (b) that the continued existence of such restriction or the continued existence thereof without modification would impede the reasonable user of the land for public or private purposes without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of such restriction, or, as the case may be, the continued existence thereof without modification; or

"(c) that the persons of full age and capacity for the 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; or

(d) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction."

A parcel of land now known as McAuley Heights was sub-divided into thirty-five residential lots in about 1975 by instrument Miscellaneous No. 76012 and the sub-divided Plan No. 4375 was deposited in the office of the Registrar of Titles on February 10, 1975. Each lot was sold subject to restrictive covenants which were expressed to run with the land. Covenants numbered 1 and 8 provided that:

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

8. Not to erect more than one private dwelling house on the said land and the area of such private dwelling house shall not be less than Two Thousand One Hundred Square Feet (2,100 Square Feet)."

The respondent acquired Lot 10 in the sub-division and became the registered owner on May 8, 1986 by virtue of Transfer No. 447614 endorsed on title registered at Volume 1163 Folio 780 of the Registered Book of Titles. One year later, on July 8, 1987 the Building and Town Planning Committee of the Kingston and St. Andrew Corporation granted approval for the sub-division of Lot 10, which has an area of 15,308.70 square feet into two lots numbered 10 and 10A with sizes 8,305 square feet and 7,500 square feet respectively.

On March 30, 1988 the respondent applied to the Court for modification of Covenants 1 and 3 to enable Lot 10 to be sub-divided into two lots of not less than 7,500 square feet each and to permit one dwelling house to be built on each such lot sharing a common wall with the dwelling house on the adjoining lot. Two grounds were filed in support of the application, viz.:

> "(a) The persons of full age and capacity for the time being entitled to the benefit of the said Restriction have by implication of their acts or omissions, agreed to the same being modified.
>
> (b) The proposed modification will not injure the persons entitled to the benefit of the said Restriction."

A number of affidavits were filed by the respondent which made the point that a building intended to be two semi-detached, two-storey houses was being constructed in the centre of the land, that single dwelling houses were built on ten of the lots in the sub-division and that the neighbourhood is one of high quality residences. The respondent claimed too, that the value of existing houses in the sub-division would not depreciate by reason of the proposed modification, nor would it affect the general character of the neighbourhood or the amenities enjoyed by any of the persons entitled to the benefit of the restrictions.

Five of the registered proprietors of lots in the sub-division on which valuable houses have been constructed, and one registered proprietor who proposes to build on his lot filed objections to the modifications sought. A seventh registered proprietor who did not file a formal objection swore to an affidavit supporting the six objectors. The single ground of objection relied upon by the appellants was that none of the provisions of the Restrictive Covenants (Discharge and Modification) Act applied to the instant case.

In the Court below no effort was made by the respondent to adduce evidence to support his allegation that the persons entitled to the benefit of the restrictions had impliedly agreed to their modifications and Edwards J. said, at page 3 of his judgment, that this ground was not pursued.

The provisions of section 3(1)(b) of the Act were not raised in the Originating Summons, nevertheless, having regard to the contents of the respondent's affidavit evidence, Edwards J. considered the decision of the Privy Council in Stannard v. Issa [1966] 34 W.I.R. and held that the respondent had not discharged the burden which was on him to show that the restrictions had the effect of sterilizing the reasonable user of the land. Against this finding there has been no appeal.

During the hearing of the Summons, the learned trial judge visited the locus in quo and satisfied himself that Lot 10 was situated in a partly developed hilly area which appeared quite isolated and lonely, and because of the rough and uneven nature of the terrain, it was out of sight and hearing of other houses in the area and was adjoined by empty lots. He was impressed with the design and layout of the building on Lot 10. He went on to take judicial notice of the state of violent crime in lower St. Andrew and held that:

> "The insistence that Lot 10 should remain isolated without next-door neighbours in this potentially dangerous period of the country's history (which would be the effect of refusing the application) appears to me to be unreasonable and anachronistic."

There was no allegation that the restrictions were obsolete and before us counsel for the respondent could not meet the challenge that the learned trial judge in his reference to the Suppression of Crimes Act and the state of crime in the society took a wholly irrelevant consideration into account when determining whether to exercise his discretion in favour of modification of the covenants.

In addition the presumed security which neighbours could provide was quite irrelevant to the only live issue on the Summons, viz., that the proposed modification would not injure the persons entitled to the benefit of the restriction.

However pleasing was the design of the building on Lot 10, that was not determinative of the issues, as the respondent was required to show that the modification would not injure the persons entitled and not merely that the proposed building or development would not cause such injury. In Stephenson et ux v. Liverant et al [1972] 18 W.I.R. 323, Smith J.A. said at p. 337:

> "Learned counsel for the applicants contended that the test whether injury will be caused by the modification is whether it will be caused by the project. For the objectors, it was submitted that in strict law it must be proved not that the project will not occasion injury but that the modification itself will be uninjurious. This submission accords with the terms of the statutory provision and is supported by a passage from **PRESTON & NEWSON ON RESTRICTIVE COVENANTS** (4th edn.) on which reliance was placed. At p. 185 the learned authors said:
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> > 'It is not the applicants' project that must be uninjurious. ... Cases arise in which it is very difficult for objectors to say that the particular thing which the applicant wishes to do will of itself cause anyone any harm: but in such a case harm may still come to the persons entitled to the benefit of the restriction if it were to become generally allowable to do similar things. Or such harm may flow from the very existence of the order making the modification through the implication that the restriction is vulnerable to the action of the Tribunal.'
>
> It seems clear from this passage and as a matter of interpretation that it may be shown that an order for the discharge or modification of a covenant will be injurious either by the mere existence of the order or because of the implementation of the project which the order authorises. There is, therefore, a burden on an applicant to show that the discharge or modification will not injure in either respect."

When one recalls that the area of Lot 10 is 15,808 square feet, that the terrain is hilly, difficult, and slopes down to a gully, there seems to be no evidence on which the "restrictions" that the lot remain unsub-divided could be termed unreasonable and anachronistic.

Edwards J. held that the proposed modification would not injure in any way the persons entitled to the benefit of the restriction. In so doing he applied the provisions of section 3(1)(d) of the Act. The learned trial judge came to his conclusions by (a) disposing of the "thin edge of the wedge" argument in one sentence:

> "This argument assumes that the Judiciary is incapable of exercising the discretion which parliament saw fit to entrust to it,"

and (b) by holding that the objectors gave no serious individual consideration to their objections, which were each made "out of a sense of duty or moral obligation to others" and were of an insubstantial nature and a mere formality.

Let me deal with the "thin edge of the wedge" argument. At the time of this application for modification of the covenant, there had been no change whatsoever in the neighbourhood. Magnificent single family houses had been constructed on ten lots, leaving twenty-five lots or more than two-thirds of the development as vacant land. If a speculator bought the lot adjoining Lot 10 and applied to the Court for modification of restrictions 1 and 2, would he not have a sense of grievance if his application were refused? Would not judicial comity persuade a judge that he should exercise his discretion in a manner similar to that of the judge who considered the application to modify the restriction in respect of Lot 10? Would not such a proliferation of modifications encourage other speculators to be more creative, each one pointing to the changes introduced into the neighbourhood. In a relatively small sub-division of thirty-five lots can it be said that a proprietor at one end of the sub-division

is not concerned with what occurs at the other end. It is as if a slum were created at the entrance to the sub-division but because a proprietor is half-a-mile away, his land cannot be injured. I am quite convinced that nothing in the standard form in which the objections were couched could lead to the logical inference that these house holders were acting out of a sense of moral obligation rather than in protection of their proprietary interests. One is led to ask: To whom were these objectors morally obliged and to whom did they owe this sense of duty if not to themselves?

The objectors all say that the modifications whereby two separate residences could be erected on one lot of the present sub-division would be totally inconsistent with the general character of the sub-division and could eventually render the restrictions valueless to the present householders.

Fox J.A. when faced with a consideration of whether a proposed modification would injure the objectors said:

> "The answer to this question is by way of another question, namely, is the objection frivolous? Obviously it is not. The covenants are substantially intact. They secure to the objectors a distinctly recognisable right whereby the overt conduct of business in the area is excluded, and its residential character preserved. Consequently, even though the proposed project of the applicants is highly estimable, and is compatible with the trend within the sub-division towards tourist commercial activity, the worthiness of the proposed development is not the criterion in determining whether it will be uninjurious." Stephenson v. Liverant (supra) at p. 332.

Smith J.A. in a clear statement of the law with which I respectfully agree, said:

> "The benefit of the restrictions is a proprietary right vested in the owner of each lot of land in the subdivision which can be enforced in order to preserve the private residential character of the subdivision. In my judgment,

> "there can be no doubt that a project, which, if implemented, will destroy or cause a change in this character is bound to cause injury to any owner who objects to the change."

And later he added:

> "Since the restrictions are substantially intact and their objects can still be achieved, they do indeed, as the judge held, afford a real protection to the objectors in that they give them the power to ensure that the private residential character of the area shall be maintained. To deprive them of this power, or weaken it, by modification of the covenants will surely be injurious. A modification in these circumstances could, justifiably, be said to be 'the thin edge of the wedge' and is another ground of injury."

It is plain as plain can be that the respondent could not satisfy the learned trial judge that the objections were frivolous or vexatious in that they would suffer no injury from the proposed modifications. In the instant case the modifications sought went to the splintering of a moderate-sized plot of land in a superior residential area, at a time when the restrictive covenants were wholly intact. Compare this with the situation in Stephenson v. Liverant (supra) where there had been considerable breaches of the covenants, nevertheless the Court did not hold the covenants to be obsolete.

Mr. Hylton in his written submissions drew our attention to the fact:

> "The written reasons [for judgment] were not handed down until November 1991, ... Indeed, it may be inaccurate to describe them as having been 'handed down' as their existence was brought to the attention of Counsel for both the Applicant and the Objectors when they were sent out by the Supreme Court Library in the month of November 1991, along with other current Judgments."

We desire to say that whenever a judge prepares a written judgment, that judgment should be handed down in open Court or in Chambers as the case may be in the presence of the parties or in their absence if they had been given reasonable notice to attend. In no case should a written judgment be placed on the files without the knowledge of the parties. As the Privy Council restated in Richer vs. Edmond Voyer et al [1873-74] Vol. V, L.R. Privy Council Appeals 461 at p. 481, Reasons for judgment "ought to be stated publicly at the hearing below."

For these reasons we allowed the appeal, set aside the Order of the Court below and order that the respondent's application for modification of the Restrictive Covenants be dismissed, with costs to the appellants here and in the Court below to be agreed or taxed. Certificate for Counsel in the Court below.