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Judgment Book

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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 97/95

BETWEEN	DELROY GREENWOOD REVOLENE GREENWOOD	PLAINTIFFS
AND	ARCHIBALD McINTYRE	DEFENDANT

Dr. L. Barnett instructed by Miss Leila Parker for Plaintiffs.

Miss A. Frankson instructed by Gaynair and Fraser for Defendant.

Heard: June 7,8,22,30, 1995

Coram: Harrison J. Ag.

JUDGMENT

Summons for Interlocutory Injunction

Arising from a Writ of Summons filed by the Plaintiffs on the 13th day of March 1995, an application for Interlocutory Injunction was heard on the 7th and 8th June, 1995 whereby the plaintiffs sought an order:

> "restraining the defendant either by himself, his servants and/or agent from continuing to build upon the top of his present house at Lot 211 Cumberland Housing Scheme, Gregory Prk in the Parish of St. Catherine and thus trespassing on the roof of the plaintiff's house at lot No. 210 Cumberland Housing Scheme in the Parish of St. Catherine."

At the hearing, the summons for injunction was amended on application of the plaintiff's to insert the words "above the height" in lieu of the words "upon the top" in line 1 of the above application. Judgment was reserved and as I had promised to expedite the matter I now seek to fulfil this promise.

Restrictive Covenants

The parties to this action are adjoining owners of what has been described as Puerto Rican Model houses. Both houses share a common wall

with the houses adjacent thereto. It is also undisputed that the two lots are part of the same subdivision scheme initially owned by The National Housing Trust Corporation. They both have identical and neutrally applicable restrictive covenants which run with the land binding the registered proprietors and enures to the benefit of and is enforceable by the registerd proprietors.

The plaintiffs land is registered at Volume 1213 Folio 100 of the Register Book of Titles and the defendant's at volume 1213 Folio 101 of the said Register Book of Titles. Of relevance to these proceedings are Restrictive Covenants Nos. 4 and 7 respectively. The former reads as follows:

> "All buildings to be erected shall not be less than fifty feet from the centre of adjoining main roads or thirty feet from the centre of adjoining parochial roads and streets and not less than five feet from adjoining fences. (emphasis supplied)"

The latter reads as follows:

> "No fence hedge or other construction of any kind nor any tree or plant of a height of more than four feet six inches above road level shall be erected grown or permitted along the boundaries of the said land and three feet six inches within fifteen feet of any road intersection." (emphasis supplied)

Affidavit evidence

The plaintiff Revolence Greenwood in an affidavit sworn to on the 13th day of March 1995 has deposed inter alia:

5. That the defendant has started to build on top of his house and in so doing he and/or his workmen stand on top of the roof of my house in order to erect the posts for the new structure he has planned.

6. That the structure that is being erected is blocking both air and light and is a nuisance to me and the other occupants of my house and is on the wall which is common to both the defendant and me.

7. That as a result of the work being done, damage has been done to my house, water seeps into my living room as a result of the construction work being done and moreso when rain falls.

8. That my house is damp and now resulted in my children becoming asthmatic.

9. That I verily believe that the defendant has no authority to build on top of his house as he is committing a breach of the restrictive covenant and I have not been served with any notification of an application for modification of any of the restrictive covenants."

The affidavit evidence of the Defendant sworn to on the 2nd March 1995 and which makes reference to suit No. E 14 of 1995 states inter alia:

"5. That sometime in or about November or December, 1993 I commenced construction work for an addition to the dwelling house situate at Lot #211 Cumberland Housing Scheme aforesaid.

6. That the construction was commenced pursuant to approval being applied for and obtained from the Parish Council for the Parish of St. Catherine and I exhibit hereto marked "A.M 3" a copy of the said approval.

7. That the construction that is being done as aforesaid is for the addition of four rooms which will make the resulting structure a two storey single family dwelling house.

.....

10. That it is untrue for the plaintiffs to say that in performing the said construction works myself and/or my workmen have stood on the plaintiffs' roof.

11. That the roofs of all the structures in the Cumberland Housing Scheme aforesaid, including the plaintiffs are constructed from concrete, otherwise known as slab roofs.

12. That my construction works have not caused any damage to the plaintiffs' house thereby resulting in water seeping into their living room and if there is any such damage it is a result of the Plaintiff's own construction of an enclosed verandah which reaches from the ceiling to the floor of their house.

.....

15. That I have carried out checks at the Parish Council for the Parish of St. Catherine whose records do not show that the plaintiffs ever applied for or obtained permission to construct verandah aforesaid....."

Construction by Defendant

It was contended by Dr. Barnett on behalf of the plaintiffs that the defendant had carried out construction to his house which was out of character with the original scheme. Dr. Barnett argued that the affidavit evidence revealed that some of the construction was on the common wall or dividing fence between the two premises. The affidavit evidence of Rennick Augustus Hall, Quantity Surveyor, sworn to on the 27th day of April 1995 states inter alia:

> "2 That on the instructions of the plaintiff, the owner and occupant of a dwelling house at Lot 210 Keswick Track, Cumberland in the Parish of St. Catherine, I inspected the said premises on the 19th day of April, 1995.
>
> 3. That as a result of this inspection I noticed that there is a structure being erected on the adjoining dwelling house - that is Lot 211 Keswick Track Cumberland in the Parish of St. Catherine which shares a common wall with the plaintiffs' dwelling house.
>
> 4. That this addition consists of a wall about 11/2" from a wall similarly constructed on Lot 210 Keswick Track and as a result rain and/or storm water is trapped between the walls causing damage to the internal face of the wall on the said Lot 210 Keswick Track.
>
> 5. That there is damage to the wall which consists of peeling of the paint and flaking of the rendering a total area of approximately 56 square feet.
>
> 6. That in another portioned (sic) of the house on the side aforesaid the inclusion of the additional structure has weakened the roof and wall at the particular point of construction - a total length of approximately 12 feet.
>
> 7. That the structure which is being erected is over six feet in height and results in making dark the open space of the plaintiffs' home."

Submissions

Dr. Barnett submitted that the construction which the defendant had embarked on was in contravention of the restrictive covenants limiting the height to which any construction may be erected along the boundary or in proximity to the the dividing fences. He also argued that the construction restricted the plaintiffs' right to light and air and that it was causing and threatened to cause a nuisance and to adversely affect the plaintiffs' enjoyment of their property.

Dr. Barnett further submitted that where there is a negative covenant as in the instant case, a party is entitled to an injunction to restrain any further infringement of that covenant. He argued that it was no excuse for infringing a covenant nor is it a ground for modification that the person who seeks to disregard the covenant may put his property to a more economic or beneficial use. The issue he says was whether the covenant provided any benefit to the persons in whose interest it was impose - see Stannard v Issa [1987] 2 WLR 188. He also referred to the learned authors Preston and Newsome on "Restrictive Covenants" 7th Edition paras 6 - 01 and 6- 02; Krehl v Burrell (1877) Ch. Div. 551; Redland Bricks v Morris [1970] A.C. 652 and Charrington v Simons [1971] 1 WLR 598.

Dr. Barnett finally submitted that having regard to the facts deposed to on behalf of the plaintiffs and even those relied upon by the defendant, the structure constructed by the defendant contravened the negative stipulation of the covenants referred to above and the injuction prayed for should be granted.

Miss Frankson submitted on the other hand, that the plaintiffs did not produce sufficient evidence in order to satisfy the Court that they are entitled to the injuction as prayed. She contended that they have not made full disclosure of all the circumstances and that they were coming to Equity with "unclean hands". She submitted that the structure under construction was not on top of the house and was therefore not resting on any common wall peculiar to the duplex structure. Reliance was sought on the Affidavit of Duel Thames, Commissioned Land Surveyor, sworn to on the 8th May, 1995 which states inter alia:

> "...I also noticed a structure being constructed to the front and rear of the pre-existing dwelling house on Lot 211 Keswick Track aforesaid. This structure, being to the front and rear of the pre-existing building does not rest on the common wall between lots 210 and 211 aforesaid."

It was further her view that covenant No. 7 has now been rendered void and of no effect because it effect were to be given to this Covenant

the present houses themselves being in excess of 4ft. 6 ins. in height would be in breach. But, she says if the Court were to find that this covenant subsists and further, if the Court were to find the defendant to be in breach, it should also find that the plaintiffs are in breach themselves, they having constructed their verandah and have encroached upon the defendant's land by one foot. Interestingly, she submitted that covenant No. 7 did not apply to the common boundary but related to the other three boundaries. She was of the view that this covenant contemplated a class of construction which would fit in with fences, hedges, trees and plants.

In relation to covenant No. 4, she submitted that it would be unreasonable to interpret it to mean that where any addition is contemplated by either party, that party should step in 5ft. from the point where the houses are joined.

On the issue of the right to air and light, Miss Frankson submitted that there was no common law right to them (See Chastey v Aukland) (1849 Ch 389). Furthermore, she argues that that there is no express covenant for them in the instant case.

She also submitted that there has been inordinate delay and acquiescene on the part of the plaintiffs. Affidavit evidence of the Defendant revealed that to the front and top, construction was 70% complete and 60% complete to the rear. She pointed out that there is evidence showing where one-half million dollars have been expended to date and if the work had not been interrupted by an interim injunction in the matter, it would have taken some further six months to complete. The plaintiff she says waited some one year and three months after construction started to file the writ of summons and to make an application for an injunction. These factors she argued, were extremely relevant and ought to be material when the Court comes to exercise its discretion.

Finally, Miss Frankson submitted:

i) The party who is in breach of a covenant is not entitled to eqitable relief against another party who is committing the same breach.

ii) Where a plaintiff is claiming specific performance of restrictive covenants he is not entitled as of right and the Court is obliged to consider all the principles governing the exercise of its equitable jurisdiction.

iii) The plaintiffs in this case have acted unreasonably, unconscionably and are oppresive in their claim against the defendant. Further, because the plaintiffs have completed their construction the defendant cannot bring a claim against them.

iv) The plaintiffs' hands are unclean and they ought to be barred from eqitable relief in the form of injunction prayed.

The Law

In relation to negative covenants, the normal remedy for breach of an express stipulation is an injunction restraining acts in breach of it - see Preston and Newson's on "Restrictive Covenant" 7th Edn. at para. 6 -01 page 160. In Doherty v Allman (1878) 3 App. Cas 709, Lord Cairns said this of a negative covenant at page 719:

> "If there had been a negative covenant, I apprehend according to well-settled practice, a court of equity would have no discretion to exercise. If parties for valuable consideration, with their eyes open, contract that a particular thing shall not be done; and in such case the injunction does nothing more than give the sanction of the court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or injury - it is the specific performance, by the court, of that negative bargain which the parties have made, with their eyes open, between themselves."

On the issue of negative covenants David Bean on "Injunctions" 3rd Edn. states:

> "...Such an injunction is described as issuing 'as of course', but the court's ultimate discretion remains and an injunction may be refused on the ground, for example, of sharp practice by the plaintiff."

Findings

On the basis of the affidavit evidence presented it does seem that there is little or no dispute on the facts. Both parties have accepted the respective titles referred to above. The parties have for valuable consideration contracted inter alia, that all buildings to be erected shall not be less than 5ft. from adjoining fences and no construction of any kind of a height of more than four feet six inches above road level shall be erected along the boundaries of the said land. It is abundantly clear that the defendant has admitted that he is building a structure at the second level and the plans which he has exhibited indicate that the new structure will rise above the existing building and will be adjacent to or linked with the common wall. I therefore agree with Dr. Barnett that the height of the new structure has been proven without any doubt to be in excess of 4ft. 6 ins. and therefore contravenes the negative stipulation of the covenants. I hold that it is really not a question as to the balance of convenience or inconvenience. Rather, it should be the specific performance of the negative bargain which the parties have made between themselves.

Delay Acquiescence and Breach

The question which arises now for consideration is whether or not there are grounds for the refusal of an injunction. Has there been any inordinate delay and/or acquiescene by the plaintiffs? Are the plaintiffs guilty of breaching these negative convenants themselves and if so to what extent?

Miss Frankson has submitted that the plaintiffs have waited for one year and three months after construction started, to file their writ and to apply for an injunction. It was therefore her view that this type of delay and also acquiescence on their part ought to debar them from the grant of an injunction.

The Affidavit evidence of the plaintiff Delroy Greenwood sworn to on the 20th April, 1995 reveals that he had reported the matter to the National Housing Trust and that a Mr. DaCosta from that organisation had visited the premises and spoken to the defendant. It has also been deposed that he had complained to the St. Catherine Parish Council and one Mr. Smikle visited the scheme. He further deposed that he initiated legal proceedings and had served the writ of summons on the defendan[illegible] -

and "That prior to and since these notice of proceedings the defendant has endeavoured to steal a march by hurrying on the building as his workmen are still rendering walls and material is still being transported in vehicles marked Police."

Kekewich J. in Goddard v Midland Railway Co. (1891) Chan. Div. 126 had stated at p. 127:

> "... The real question to be considered was whether the plaintiff had done anything which debarred him from suing; and in considering that question His Lordship had to bear in mind that what the plaintiff is seeking was specific performance of the covenant in the conveyance under which the company were entitled, and when the court was asked to exercise that discretionary jurisdiction, one was bound to remember that he who came into equity for relief must come with clean hands - that is to say, with his own character clear with regard to the subject-matter of the action. Was the plaintiff in that position? He was also himself bound by a covenant which was in form so precisely similar to that entered into by the defendants..."

His Lordship then continued:

> "...The question here was whether the plaintiff, or his predecessor, had so performed his covenant that the plaintiff was entitled to say he had the right to sue other persons for breaches of a similar character; and his Lordship must also consider whether if there had been a breach, the breach was one of substance..."
> (emphasis supplied)

The defendant was also contending in the instant case, that the plaintiff, had constructed an enclosed verandah to their house which had encroached on the defendant's land by one foot. Miss Frankson therefore submitted that a party in breach of a covenant is not entitled to equitable relief against another party who is committing a breach.

Miss Frankson who referred to Goddard's case (supra) had submitted that in the instant case, the breach committed by the plaintiffs could not be considered trivial and that the defendant here had a stronger case than the defendant in Godard's case. In that case Kekewich J. had considered a projection of 16 inches as trivial whereas, a bow window which had projected some 4ft. beyond the line was by no means trivial. The plaintiffs here have constructed a verandah and which has encroached upon the defendant's land by one foot. This encroachment has not been

denied by the plaintiffs. But, does the encroachment constitute a bar to the grant of an injunction? I adopt the words of Kekewich J and consider this extension trivial. I am of the view that the construction of a verandah would fall within such additions as are contemplated within the original approved plans.

I also accept the plaintiff's evidence that by nature of the construction carried on by the defendant, water flows from the new additions to the plaintiffs' building and this construction also restricts their right to light and air.

Dr. Barnett did opine that the principles of law were very clear in their protection of the plaintiffs' proprietary rights and that protection has been given to them by restrictive covenants. For that reason, he says the Court will not allow a modification of such covenants especially where the restrictions were imposed. It was further his view that there was no excuse for infringing the covenant nor is it a ground for modification that the person who seeks to disregard the covenant may put his property to a more economic or beneficial use. It made no difference that the person in breach has received approval from the local authority to build. The Restrictive Covenants (Discharge and Modification) Act required a discharge and/or modification of covenants before any construction commences..

When one looks at the approved plans exhibited by the defendant, the extent to which construction has reached, and the overall cost that the defendant expects it will cost him, I am reminded by the words of Jesses M.R. in Krehl v Burrell (1876) Chan. Div. at page 555 where he states inter alia:

> "...from the days in which the Bible was written until the present moment, ... the man of large possessions has endeavoured to deprive his neighbour, the man with small possessions, of his property, with or without adequate compensation."

It is therefore my view that the injunction prayed in aid ought to be granted until the trial of the action or until further order.

There shall be costs of this application to the Plaintiffs to be taxed if not agreed.

Certificate for Counsel granted.

Leave to appeal granted.