



[2016] JMSC Civ. 92

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

**CIVIL DIVISION**

**CLAIM NO. 2013 HCV 00294**

**IN THE MATTER** of **ALL THAT** parcel of land part of **MONA AND PAPINE ESTATES** part of **BAMBOO PEN** containing by survey Sixty - One Thousand Nine Hundred and Thirty - Nine square feet of Fifty Seven Hundredths of a square foot, of the shape and dimensions and butting as appears on the plan annexed and being as to part thereof of the land comprised in Certificate of Title registered at Volume 675 Folio 14 also known as 1 Bamboo Avenue, Kingston 6.

**AND**

**IN THE MATTER** of **ALL THAT** parcel of land part of **MONA AND PAPINE ESTATES** part of **BAMBOO PEN** containing by survey Forty-Three Thousand Five Hundred and Twenty square feet and Seventy- Five Hundredths of a square foot, of the shape and dimensions and butting as appears by the plan annexed and being the land comprised in Certificate of Title registered at Volume 983 Folio 219 formerly comprised in Certificate of Title registered at Volume 675 Folio 13 also known as 1B Bamboo Avenue, Kingston6.

**AND**

**IN THE MATTER** of **ALL THAT** parcel of land of **BAMBOO PEN** in the parish of Saint Andrew being the Lot numbered Three on the plan of Pen deposited in the Office of Titles on the 25<sup>th</sup> of June 1934 of the shape and dimensions and butting as appears by the plan annexed unto and being part of the land comprised in Certificate of Title registered at Volume 294 Folio 82 and being all the land comprised in Certificate of Title registered at Volume 345 Folio 69 also known as 3 Bamboo Avenue, Kingston 6.

**AND**

**IN THE MATTER** of the Restrictive Covenant (Discharge and Modifications) Act

**IN OPEN COURT**

Gordon Robinson and Jerome Spencer Instructed by Patterson Mair Hamilton for the Applicant.

Symone Mayhew and Kimberley Morris for the Objectors.

***Restrictive Covenants - Whether Obsolete***

**Heard: 11<sup>th</sup>, 12<sup>th</sup> May 2015 & 3<sup>rd</sup> June, 2016**

**CRESENCIA BROWN BECKFORD J.**

**PRELUDE**

[1] I wish to apologise most profusely to the parties and to Counsel for the delay in delivering this judgment. I also wish to thank Counsel for their submissions which, while not repeated for the sake of brevity in this judgment, have been fully considered, and they have assisted me greatly in my determination of this matter.

## **BACKGROUND**

- [2] The Applicant, Desnoes Estate Limited (Desnoes) is the registered owner of lands registered at Volume 675 Folio 14, Volume 675 Folio 13, and Volume 345 Folio 69 known as Lots 1, 1B and 3 Bamboo Avenue, Kingston 6. Desnoes has obtained the requisite governmental approvals, subject to objections, to develop these lots into a multi-family dwelling complex. It is proposed that the lots will be merged to accommodate a residential complex of four-story apartments, townhouses and semi-detached units. There are several restrictions endorsed on the titles with which this proposed development would conflict. Consequently, Desnoes has applied to the court to modify the restrictions on the several titles.
- [3] Residents of Bamboo Court, 2A-2B Bamboo Avenue, namely Angela Templar of Townhouse 6, Maria La Yanoca and Jacqueline Gannie, residents of Townhouse 10, and Celico Limited of Townhouse 11 (the Objectors) have objected to the application to modify the restrictive covenants in the terms sought.
- [4] The issue to be resolved is whether the restrictive covenants should be modified to facilitate this development. The decision of the court is that the restrictions are to be modified to permit the development by the erection of town homes. This is on the basis that the Objectors have consented by implication to the modifications sought limited to townhouses and this modification will not injure the persons entitled to the benefit of the restriction.

## **LOCUS STANDI OF OBJECTORS**

- [5] Desnoes contends that the Objectors have no locus standi and their objection should be struck out. It was submitted that the Objectors have not established that they are entitled to the benefit of the covenants. They have not shown that the benefit of the covenant was annexed to the land and expressed to run with the land when the covenant was first entered into, or that the covenant was entered into as part of the creation of a scheme of development. The Objectors, who are not initial purchasers, but bought their properties subsequently, have not

proven that they are entitled to the benefit of the restrictive covenant. Desnoes further submitted that for the Objectors to have the benefit of the covenants they have to be annexed to land and must be expressed to run with the land. It was advanced that the necessary words of annexation did not exist. The title shows that the words “run with” are used, and not “annexed”. The covenant ought to state both the terms “annexed to” and “run with” the land.

- [6] The Objectors respond that there was an admission in the affidavit of Steven Facey on behalf of Desnoes that the Objectors are entitled to benefit of the covenant. Further, legal notice was served on the Objectors. The encumbrances expressly states who are entitled to the benefit of the covenant and that the burden runs with the land. The encumbrances are therefore clearly annexed to land.
- [7] The Objectors asserted that the case of **Lamb v Midac Equipment Limited** Privy Council Appeal No. 57 of 1997 is wholly distinguishable from the instant case as it was an action to enforce a covenant and not for a modification of covenant.
- [8] Brooks J (as he then was) considered this issue in Claim No 2005 HCV 1767 (**Re Norbrook Heights**). Relying on *Lamb v Midac*, as did the Applicant, he noted at pages 10 -11

*“A person seeking to enforce a restrictive covenant on another must show either that the benefit of the covenant was attached to his land (the dominant land) when that other person entered into the covenant, or that the covenant was entered into as a part of a scheme of development. Where that other person is not the original covenantor, the would-be enforcer must also show that the burden of the covenant was not personal to the original covenantor, but was attached to the land said to be the servient land, so that the burden passed to successive owners.” This is the essence of the decision of their Lordships in *Lamb v Midac Equipment Ltd. PCA 57 of 1997 (delivered 4/2/1999)* which was a decision of the Privy Council on an appeal from this jurisdiction.”*

He went on to find that it need not be specifically stated that the benefit of the covenant runs with the land if it was the intention that the benefit should so run.

He found that the words 'for the time being' meant the benefit was not personal to any individual proprietor nor did it require a specific act of assignment by such a proprietor for his successor to enjoy that benefit.

**[9]** The words used in the instant case are even clearer. In Volume 675 Folio 13 it is stated as follows;

*“The land comprised in this certificate (hereinafter called “the said lands”)is subject to the undermentioned restrictive covenants which shall run with and shall bind not only the present registered proprietor as such for the time being of the said land but any purchaser or purchasers from the present registered proprietor or proprietors and shall enure to the benefit of and be enforceable by the registered proprietor or proprietors for the time being of lands or any portion thereof now or formerly known as Mona and Papine Estates”*

In Volume 294 folio 82 it is stated as follows:

*“The above encumbrances being in pursuance of a general building scheme affecting the eight lots forming part of Bamboo Pen subdivision shall be binding upon the registered proprietor or proprietors and the occupier or occupiers for the time being of the lots comprised in this certificate and shall enure for the benefit of and be enforceable by the registered proprietor or proprietors for the time being of any or all of the lands originally comprised in this Certificate”*

**[10]** I would agree therefore that it is not fatal that the specific words “annexed to” and “run with the land” were not used. The words used clearly show an intention that the benefit of the covenants be annexed to the land.

**[11]** It is conceded by Mr. Facey for Desnoes that the persons appearing to be entitled to the benefit of the covenants are the persons now holding lands which were formerly on the certificates of Title registered at Volume 675 Folio 13 and Volume 294 Folio 82. His partial listing of these persons include the Objectors.

**[12]** A restrictive covenant is a burden on the land of the covenantor which runs with the land. It is enforceable against assignees of the original covenantor. I find that the Objectors have locus standi. They are entitled to the benefit of the covenants and may seek to enforce them.

## THE LAW

- [13] The applicable law is The Restrictive Covenants (Discharge and Modification Act). A judge is given the power to discharge or modify a restrictive covenant if satisfied that any of the following circumstances exist.

*3.-(1) A Judge in Chambers shall have power, from time to time on the application of the Town and Country Planning Authority or of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) 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*
- (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 time being or from time to time entitled to the benefit of the restriction whether in respect of estate 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:*

**[14]** In **Re Lots 12 and 13 Fortlands** (1969) 11 JLR 387 referred to by the Objectors, Parnell J deduced the following propositions:

(1) that the burden is on the applicant to prove that the restriction arising under a covenant which affects his freehold land should be discharged or modified;

(2) that the extent of the burden of proof is to satisfy the judge on a balance of probabilities that at least one of the matters stipulated under a - d has been established;

(3) that even if the applicant shows the judge that one of the matters required to be established by him for the removal or modification of the covenant has been made out, the application may still be refused if, in the court's discretion, there is proper or sufficient ground for so doing;

The evidence is considered against this background.

### **APPLICANT'S REASONS**

**[15]** Desnoes contends that the restrictive covenants have been rendered obsolete. Therefore, the proposed modifications will not injure or affect the persons entitled to the benefit of the said restriction. It was highlighted that the relevant restrictive covenant was imposed in 1934. With that in mind, it was submitted that the Court should consider the modern public policy requirement for more housing structures and the national imperative for growth in the economy. When the national imperative is balanced with the purpose for which the restrictive covenant was imposed, one would find that over the years the relevant area has become so changed, and the national imperative has also become so changed, that the 1934 covenant is more of a hindrance rather than a benefit. Consequently, the 1934 purpose may be obsolete.

**[16]** Desnoes is of the view that the Objectors are under the false impression that Bamboo Avenue exists as an independent area. Bamboo Avenue used to

connect Wellington Drive and Mona Road but it was converted to a cul-de-sac. This was done due to modern development, particularly the construction of the United States Embassy, in an attempt to stop traffic from accessing the United States Embassy via Bamboo Avenue and in order to prevent encroachment of trade and business. Notably, the construction of the Embassy was protested against on ground that it would destroy the neighbourhood.

- [17] Desnoes further submitted that the Objectors have stated that they are not opposed to the modification of the restrictive covenants which prevent subdivision and permit only a single dwelling house to enable the construction of townhouses. The objection only related to the modification of the restrictive covenant to permit the construction of apartments. It was submitted that the Objectors are objecting to this modification when the covenants on their own titles were modified to permit apartment buildings. There was no objection to subdivision or multi-family dwellings.

## **THE OBJECTION**

- [18] **The Objectors have objected to the proposed modifications on the grounds that:**

- (a) The continued existence of the restrictive covenants do not impede the reasonable user of the land and secure benefits sufficient in nature and extent to justify their continued existence without modification*
- (b) The persons being from time to time entitled to the benefit of the restrictions have not agreed expressly or by implication, by their acts or omissions to the same being discharged or modified*
- (c) That the proposed discharge or modification will injure the persons entitled to the benefit of the restriction*
- (d) That there have been little changes in the character of the neighbourhood to render the restriction obsolete*



[19] The Objectors also note that Desnoes is unable to satisfy any of the grounds set out in the **Restrictive Covenant (Discharge and Modification) Act**. The Objectors outlined that Desnoes must satisfy at least one of the grounds to get the order sought. Thereafter there then needs to be a determination of whether it is just and equitable.

[20] The Objectors asserted that Desnoes has not satisfied any of the conditions. Their only hope of satisfying one of the conditions lies in part (c) regarding implied consent. The restrictive covenant on the title prevents subdivision generally. The applicants are asking for a modification which would include more than townhouses so it remains that they must satisfy one of the four conditions.

## **EXPERT REPORTS**

[21] There were two Expert Reports for the court's consideration. Phillips JA in **Joan Allen and Louise Johnson v Rowan Mullings** [2013] JMCA App 22 said this of how expert reports are to be viewed.

*"What must be recognised always, as stated by Harris JA in this court in **Cherry Dixon-Hall v Jamaica Grande Limited**, SCCA No 26/2007 delivered 21 November 2008, is that the role of the expert is to assist the trial judge, and he must put before the court all the material necessary for testing the accuracy of his findings and conclusions. It is also trite law that the findings of the expert are never binding on the judge and he can accept or reject the expert's opinion."*

### (i) EXPERT REPORT OF MR. KENNETH ALLISON

[22] Mr. Kenneth Allison considered a larger geographical area, of which Bamboo Avenue forms a part, for analysis. There are townhouse and apartment developments within this area though there remain single family dwellings. The quality of this development was mostly middle income being previously middle to upper middle. He expects the trend to continue. This change in the neighbourhood he considered to be substantial and irreversible.

**[23]** In his answers to questions posed on behalf of the Objectors he described Bamboo Avenue as an enclave in the neighbourhood and not a neighbourhood of itself. He noted that it is incongruent that a single road could be a neighbourhood for the purposes of modification. He outlined that a neighbourhood requires connectivity and utility, and cannot exist by itself. A feature of modern development is an increase in noise pollution. He further described Bamboo Avenue as “a grand parking lot” for the Embassy.

(ii) EXPERT REPORT OF MR. EASTON DOUGLAS

**[24]** Mr. Douglas was requested to provide information to the court to assist the court in considering the effect of the proposed modification to allow the proposed development, in particular for town homes. To that end he was asked to identify the relevant neighbourhood and whether there are changes which would render the existing covenants obsolete. He concluded that the likely impact of the proposed development would be traffic congestion at peak hours, lifestyle and pollution in the form of noise incongruity and traffic congestion. This he considered would injure the remaining owner’s privacy, quietness, peace of mind and possibly value of their property.

**[25]** The Objectors relied on the expert report of Mr. Easton Douglas where he noted that the restrictive covenants continue to be relevant and are certainly not obsolete. It was asserted that the restrictive covenants were provisions for the protection enjoyed by the owners of property in Bamboo Pen against development and buildings that will infringe on their rights. They also protect the existing ambiance, privacy, overwhelming increase in traffic and parking where the development agencies fail to offer protection under the Town and Country Planning Act and complimentary legislation.

## **VISIT TO THE LOCUS**

**[26]** The court visited the locus. The following observations were made on the visit. From Matilda’s Corner Police Station, traversing Old Hope Road onto Hope Road

there is a commercial area. Towards Wellington Drive there is a gully on the left, and Beverly Hills on the right. From Beverly Drive there is a school, small commercial area and single family dwellings. Wellington Glade is on the right. There are single family homes and construction.

- [27] On Wellington Drive there are apartments and single family homes, some manorial, including Wellington Landing and Wellington Springs, and an abandoned house before Wellington Manor. Overall, there were older houses and newer apartments.
- [28] Mona Road consisted of single family dwellings. The neighbourhood did not appear affluent. Some housing looked as if they were multi-family. Mona Mews had older apartments and townhouses, and some older single family dwellings.
- [29] The area towards the United States Embassy is a commercial area. The parking on the street was massive, bundled toward Embassy Structure. Munroe Road was commercial and included, a medical centre, the Embassy commercial and professional offices.
- [30] Canberra Crescent was quieter. It had single family homes on the left and Canberra Mews on the right. The rest of the road maintained single family homes. It seemed untouched by commercial development.
- [31] **The following observations were made on Bamboo Avenue.** There were two persons were walking on the avenue. A townhouse complex named Bamboo Court existed. The setback was not obvious. The proposed development was across from Bamboo Court. There was curbside parking along the length of the avenue. Lot 1B was a large lot. The length of Embassy wall was  $\frac{1}{2}$  -  $\frac{2}{3}$  the length of the road. Lot numbers 5 and 7 Bamboo Avenue are single family dwellings. There was no intrusion of Embassy building development except for on the right and the last two lots. Lot 1 was subdivided. The subdivided lot still had the character of single family house. The Bamboo Court area was quiet. It

seemed to be in the higher socio-economic bracket. There were some cars, two parking spaces each, it was setback from the road.

[32] Ottawa Avenue had single family and multi-family homes. There was construction of a three story building. There were mostly single family homes, some of which had been renovated. There was a 2 story building. The character appeared middle to upper-middle socio economic. The public area of the Embassy situated in this area was not busy at 3:00 p.m.

### **ISSUES AND ANALYSIS**

[33] The questions for the court's consideration are:

- (i) Is Bamboo Avenue a neighbourhood or part of a neighbourhood?
- (ii) Has the character of the neighbourhood changed?
- (iii) If so has it changed sufficiently to render the covenant obsolete?
- (iv) Would the proposed modification injure the Objectors?
- (v) Have the Objectors consented to the modifications sought?

[34] One Objector describes Bamboo Avenue as a top class residential area and a private quiet neighbourhood. This is in keeping with Mr. Allison's description as middle to upper middle class. Mr. Facey for the Desnoes describes the proposed development as a top class residential development. The observation of the court on its visit to the locus was that of middle to upper class residential street, despite the presence of the Embassy buildings. I agree with the Objectors therefore that Bamboo Avenue has remained relatively quiet residential and has been so maintained by being turned into a cul de sac instead of a through way. It is certainly not as described by Mr. Allison, 'a grand parking lot for the United States Embassy'. There is no denying however that there have been changes to the locale where Bamboo Avenue is situated.

[35] But is it a neighbourhood? In **Central Mining and Excavating Limited v Peter Crosswell & Others** 30 JLR 503 it was held that the test to be applied in resolving the extent and nature of the neighbourhood is the 'Estate Agents Test' which asks what does a purchaser on that road or part of road expect to get. Considering the same covenant under consideration in the case at bar, the Court of Appeal by a majority found that though the neighbourhood had changed in character from solely single family dwelling houses to include the erection of townhouses the covenant had not become obsolete.

[36] In determining whether the neighbourhood had changed its character the style, arrangement and appearance of the houses, social customs of the inhabitants, the increase in population density were considered. The court found that the restrictions were imposed (1) to protect against low cost development of the lots into smaller lots and (2) to prevent the density of housing thus ensuring privacy and quietude.

[37] In **Hopefield Corner Limited v Fabrics De Younis Limited** Claim HCV 0961 of 2003 Brooks J (as he then was) considered the meaning of 'neighbourhood' for the purposes of an application for modification of covenant. He contended that a neighbourhood is a relatively homogenous area in so far as its physical appearance and socio-economic definition are concerned. He accepted as a correct statement of the law this excerpt from Preston and Newsom's *Restrictive Covenants Affecting Freehold Land* 7<sup>th</sup> Edition

*"The neighbourhood need not be large, it may be a mere enclave"*

I accept these statements as correct.

[38] Against this background I find that Bamboo Avenue is dissimilar to its surroundings save for Canberra Crescent. I find that Bamboo Avenue is an enclave and thus itself a neighbourhood. The dominant characteristic of this neighbourhood is low key, low density development. Some development was portended for Bamboo Avenue by the development of Bamboo Court when the

modification was sought and granted for the erection of townhouses and apartments. However by reason of the number of years, some forty one, that have elapsed since modification of the covenants to permit apartments at Bamboo Court without same being built, the Objectors have reason to expect the neighbourhood would remain relatively quiet. A purchaser today on Bamboo Avenue would not be surprised to find low density townhouses on a upscale street. The changes in the neighbourhood are not so extensive as to render the covenant which would restrict the density of housing obsolete.

- [39] Insofar as Mr. Allison's report is premised on the view that Bamboo Avenue cannot be a neighbourhood and has concentrated on the larger neighbourhood as generally known, Mr. Douglas' report is to be preferred.
- [40] The size of proposed development would be 44 units in total (as opposed to 14 units in the Bamboo Court Development). There is no doubt that such a development vis-a-vis Bamboo Avenue and its surrounding would change the entire character and would be dominant feature on Bamboo Avenue. Such a development is likely to bring all the features as found by Mr. Douglas. I find that Desnoes has not shown that the development as proposed would not be injurious to the Objectors.
- [41] The Objectors have no objection to the proposed townhouses which would number 16 in total. This in my view adequately meets the need for development and housing while retaining as close as possible the original character of Bamboo Avenue and the original purpose of the restrictive covenant to prevent density of housing to ensure privacy and quietude. Use of the lands would not be impeded. I note that Mr Allison opines that this is not the "best" use of the land but it would certainly be a **reasonable user** of the lands. I find in all the circumstances that modifying the covenants to permit the construction of the 16 townhouses will not injure the persons entitled to the benefit of the restriction.

[42] The Objectors object to the modification of the restrictive covenants to permit the construction of the four story apartment building. By so particularizing and limiting their objection (Affidavit of Helen Christian), they could be said, and I so find, to have impliedly consented to the other modifications sought. The Act provides that the modification can be granted on this basis.

[43] In **Re Lots 12 and 13 Fortlands** Parnell J also indicated that

*“any compensation payable as a result of loss suffered or to be suffered by an interested party as a consequence of the discharge or modification of the covenant in favour of the applicant is limited to an amount proved by the person claiming the said loss as traceable to the benefit which the applicant will obtain as a result of the order.”*

There is no indication that the objectors will be adversely affected as it regards property values or any other way financially. No compensation will be awarded in relation to the modifications.

## **CONCLUSION**

[44] The applicant has partially succeeded in its application that the covenants should be modified. The court is satisfied that the Restrictive Covenants ought to be modified as sought, save that the development is to be limited to townhouses.

[45] The orders sought in the Amended Fixed Date Claim Form are granted save to remove the words “strata lots for apartments and” and “under the Registration (Strata Titles) Act” where they appear.