Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION

CLAIM NO. 2008 HCV 0360

IN THE MATTER OF all that parcel of land part of RETREAT in the parish of SAINT ANDREW containing by survey Sixty-eight Thousand Seven Hundred and Fifty Square Feet of the shape and dimensions and butting as appears by the plan of the said land annexed to the Certificate of Title therefor and being the land comprised in Certificate of Title registered at Volume 1408 Folio 562 of the Register Book of Titles.

AND

IN THE MATTER of the restriction affecting the subdivision of lands and the distance of buildings from boundaries.

AND

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

HEARD WITH CLAIM NO. 2008 HCV 0361

IN THE MATTER OF all that parcel of land part of VALE ROYAL in the parish of SAINT ANDREW being the lot numbered FIVE of BLOCK P on the plan of Vale Royal aforesaid deposited in the Office of Titles on the 1st day of November 1927 of the shape and dimensions and butting as appears by the said plan and being the land comprised in Certificate of Title registered at Volume 1408 Folio 563 of the Register Book of Titles.

AND

IN THE MATTER of the restriction affecting the subdivision of lands and the distance of buildings from boundaries.

AND

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

HEARD WITH CLAIM NO. 2008 HCV 0362

IN THE MATTER OF all that parcel of land part of RETREAT in the parish of SAINT ANDREW being the lot numbered TWENTY-THREE on the plan of Retreat aforesaid deposited in the Office of Titles on the 18th day of August 1925 containing by survey Two Acres of the shape and dimensions and butting as appears by the said plan and being the land comprised in Certificate of Title registered at Volume 1292 Folio 183 of the Register Book of Titles.

AND

IN THE MATTER of the restriction affecting the subdivision of lands and the distance of buildings from boundaries.

AND

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

Re 23-25 Seymour Avenue and 14 Upper Montrose Road

IN CHAMBERS

Mr Vincent Nelson Q.C. and Ms Ky-Ann Taylor instructed by Myers Fletcher and Gordon for the Applicant.

Mr Emile Leiba, Ms Gillian Pottinger and Ms Candice Stewart instructed by DunnCox for the Objectors.

Land - Restrictive Covenant – Covenant restricting subdivision and use of land - Application to modify – Identifying the relevant neighbourhood for the land - Whether character of neighbourhood has changed – Whether covenant obsolete - Whether covenant impedes reasonable user of the land – Whether any injury to beneficiaries of the covenant would result from the modification of the covenant - Restrictive Covenants (Modification and Discharge) Act, section 3 (1)

10, 15 February and 7 September 2011

BROOKS J

[1] Premises 23 – 25 Seymour Avenue and 14 Upper Montrose Road are three plots of land located in, what is termed, the "Golden Triangle" in the parish of Saint Andrew. The applicant, Sagicor Pooled Investment Funds Limited, acquired these lands in or about the year 2007. It wishes to develop them as a composite by constructing thereon a multi-family, multi-unit, residential complex.

[2] Sagicor sought and secured planning and building permission to construct the units. The approvals were made subject to certain conditions, one of which required conformity with the relevant restrictive covenants which are endorsed on the respective registered titles for the lands.

[3] The commencement of construction has been stalled by the fact that the abovementioned restrictive covenants, affecting the use of some of the land, prevent the land being used for other than one single-family dwelling house per plot. There are also restrictions concerning the distances that the buildings, constructed on each lot, should be set back from the respective boundaries thereof. The relevant covenants are, however, different for each plot.

[4] Sagicor has filed these claims seeking the court's permission to modify the relevant restrictive covenants. Six residents in the vicinity of the properties have objected to the modification of the covenants. The objectors state a variety of reasons, including the fact that a development of this nature would not be consistent with the tenor of the neighbourhood in which they have chosen to live. They wish the neighbourhood to remain predominantly characterised by single family residential property. That, they contend, is what the restrictive covenants

were designed to achieve. They object to Sagicor's attempt to contravene that intention by the erection of a multi-family complex of the scale proposed.

[5] Sagicor contests all of these objections and asserts that it is entitled to the benefit of all of the four provisions set out in section 3 (1) of the Restrictive Covenants (Modification and Discharge) Act (referred to hereafter as "the Act"). Sagicor bears the burden of proof in this regard and I shall asses the evidence, which has been provided, in order to determine whether it has succeeded.

[6] It is, however, first necessary to outline the application with more particularity, and to ensure that the objectors are persons who are entitled to the benefit of the covenant. Without that entitlement, they may not properly object.

The applications

[7] The covenants which Sagicor has applied to modify are different for each plot. It filed a separate application in respect of each plot but the applications were ordered to be all heard at the same time.

[8] Claim No. 2008 HCV 3060 concerns No. 23 Seymour Avenue. In that claim Sagicor seeks to modify three covenants. The covenant numbered 1 restricts subdivision of the land to holdings of no less than one acre. The covenant numbered 2 restricts buildings on the land to private dwelling houses and the covenant numbered 4 prevents structures from being built within particular distances from the land's boundaries.

[9] Sagicor seeks to remove the restriction on subdivision and asks that the issue of subdivision be delegated to the "relevant [planning] authorities". It wishes to be able to build townhouses and apartments and it seeks to exempt from the operation of covenant numbered 4, the boundaries with the other two

plots and to also allow party walls and eaves to be exempted from the operation of the covenant.

[10] No. 25 Seymour Avenue is the subject of Claim No. 2008 HCV 3062. An examination of the certificate of title for that plot shows that there had been a previous application to modify the covenants and that application was successful. Pursuant to that application, this court ordered that subdivision of the land could be allowed provided it was with the approval of the relevant authorities. The covenant numbered 2 on the title was modified to allow townhouses and apartments to be built on the land. The covenant numbered 4 reduced a thirty feet boundary set-back restriction to ten feet from the boundaries other than the road boundary. The set-back from Seymour Avenue was retained at 30 feet.

[11] As a result of the previous amendments, the present application only seeks to modify covenant numbered 4. Sagicor wishes to amend the covenant to exempt from the restriction, the boundaries with the other two plots and to also allow party walls and eaves to be exempted from the operation of the covenant.

[12] Claim No. 2008 HCV 3061 concerns No. 14 Upper Montrose Road. As with the application for No. 23 Seymour Avenue, Sagicor seeks to remove the restriction on subdivision and asks that the issue of subdivision be delegated to the "relevant authorities". It wishes to be allowed to build townhouses and apartments and it wishes the boundary set-back to apply to boundaries other than party–walls and eaves.

[13] For completeness, the full text of the existing covenants and the proposed modifications are set out in the attached appendix. It would, however assist the understanding of the context if a portion of the planning approval were set out in

full. In a letter dated May 27, 2008, the Town Clerk of the local authority, the Kingston and Saint Andrew Corporation (the KSAC), said in part:

> "...the Council's Building and Town Planning Committee...granted planning and building permission in respect of your application to construct a multi-family residential development consisting of twenty-three (23) townhouse units – three (3) and four (4) bedrooms, four (4) blocks containing thirty-two (32) – three (3) bedroom apartment units and a single storey clubhouse consisting of lobby, office, store room, gym, two (2) sauna rooms, four (4) bathrooms, pool pavilion and port with a total floor area of 11,765m^2 on a lot area of 17,549m^2 ...on the following conditions."

Several conditions addressing a number of issues then followed. It is unnecessary to detail them at this point but some raised issues which are of concern to the objectors.

The objectors

[14] Nos. 23 and 25 Seymour Avenue are part of lands known as Retreat. The objectors, for the most part, owned properties which are also part of Retreat. It was not immediately obvious whether they were entitled to the benefit of the restrictive covenants affecting Nos. 23 and 25, because the evidence presented to the court did not contain a tracing of the titles to show which lands formed part of the same subdivision plan. The court faced additional challenges. The relevant instruments imposing the covenants affecting Nos. 23 and 25 were not exhibited. Nor was the deposited plan, referred to in the certificate of title for No. 25, exhibited. Despite these omissions (and no issue was made of them), I am prepared to accept that all the lands which are part of Retreat are the beneficiaries of the restrictive covenants endorsed on the titles for Nos. 23 and 25 Seymour Avenue.

[15] Based on that finding, all the objectors, except two, are entitled to object on the basis that they are proprietors of lands which are part of Retreat. The exceptions are Mr Robert Cartade and Mrs Carole Cartade whose lands are not part of Retreat. They are the proprietors of lands which are part of a different subdivision, namely, Hopefield.

[16] Although the lands, on which the Cartades have their residence, are nearby, and they would be physically affected by the proposed construction at Nos. 23 and 25, the Cartades have no standing for the purposes of objecting to the modification of the restrictive covenants. I shall, therefore, not consider their formal objection. I am not thereby, precluded from considering their affidavit evidence as relevant evidence may be taken from any person.

[17] It is to be noted that whereas Nos. 23 and 25 Seymour Avenue are part of Retreat, No 14 Upper Montrose Road is a part of the Vale Royal subdivision. The Vale Royal lands were apparently subdivided into a number of blocks. No. 14 is in block P. Although there were objectors from owners of Retreat lands, there was no objection or evidence from any proprietor of any lands forming part of Vale Royal.

[18] The evidence, which will be considered, is contained in a number of affidavits. Some were in support of the application and some against. I shall consider the relevant portions of the evidence in the context of each of the requirements of section 3 (1) of the Act.

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

[19] The Act requires applicants to satisfy at least one of four bases set out in section 3 (1) (see *Stannard and others v Issa* (1986) 23 JLR 489 at p. 494 D and following). The relevant portion of section 3 (1) states:

> "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 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..."

[20] Even if the applicant satisfies one or more of those requirements, it must also satisfy the court that it is just and equitable, in the circumstances, that the court should grant an application for discharge or modification of the relevant covenant. This is because the discharge or modification of restrictive covenants falls within the equitable jurisdiction of the court. In *Re Covenant Community*

Church (1990) 27 JLR 368, Theobalds J, in considering an application for the modification of restrictive covenants affecting lands situated at Old Hope Road, addressed this additional requirement. He said, at page 370 G:

> "However if the applicant succeeds on any one ground he may be entitled to the order as sought. There still remains a final discretion in the trial judge to refuse an application where one ground has been made out if in his view there are proper and sufficient grounds for such refusal."

Coincidentally, the lands in that case also form a part of the Golden Triangle.

[21] I shall, for the format for this analysis, consider each requirement in turn, and thereafter, if necessary, consider the overall merit of the application.

Section 3 (1) (a) – Are the covenants obsolete

[22] The first stipulation is set out in section 3 (1) (a). It requires the applicant to demonstrate that, not only has the character of the neighbourhood changed, but also that, as a result of those changes, the covenants should be deemed obsolete (see *Stephenson v Liverant* (1972) 12 JLR 719 at page 732 C-D).

What comprises the neighbourhood?

[23] Essential to the analysis of the issue of the obsolescence, or not, of the covenants, is the identification of what comprises "the neighbourhood", for these purposes. In this vein, I have had the good fortune of having, in the recent decision of Anderson J in *Hopefield Corner Ltd v Fabrics De Younis* 2003 HCV 0961 (delivered 15 June 2011), a most comprehensive analysis of the relevant law and its application to the Golden Triangle.

[24] The property with which Anderson J was concerned in *Hopefield Corner* was in block Y of the Vale Royal subdivision, which is of course, a different block from that in which No 14 Upper Montrose Road falls. A comparison of the

relevant covenants endorsed on the certificate of title for No 14, with those considered by Anderson J for the block Y property, reveals that although not identical, they were of very similar structure and import. I would not consider the differences material, for these purposes.

[25] In *Hopefield Corner*, Anderson J, cited several well established authorities, which, in my view, outline, among others, the following principles:

a. the term "neighbourhood" was not necessarily restricted to the lands affected by the covenant in question;

b. the neighbourhood need not be large; it may be a mere enclave;

c. the test to determine what was the neighbourhood in any given case is the "estate agent's test". That test asks the question "what does the purchaser of a house in that road, or that part of the road, expect to get?"

d. the character of a neighbourhood, for these purposes, is derived from the style, arrangement and appearances of its buildings and from the social customs of its inhabitants, and,

e. in determining whether the covenants have been rendered obsolete, pragmatism is the watchword.

I respectfully accept these principles as accurately stating the relevant law.

[26] The learned judge, after examining the evidence in that case, came to the conclusion that, "the Golden Triangle, which falls within the Seymour Lands area, is bounded by Old Hope Road, Hope Road, Lady Musgrave Road to Seaview Avenue and along that road to Old Hope Road". He held that that was the neighbourhood for the purposes of that application. The lands in the instant case fall within the area defined by Anderson J; indeed they are in the very centre of

that area. I, however, have to decide whether the evidence provided in this case allow me to make a similar finding concerning the neighbourhood.

[27] Anderson J specifically based his findings as to the neighbourhood, on the evidence of Ms Norma Breakenridge, a professional realtor (see paragraphs 34 and 35 of his judgment). In the instant case, evidence was provided, supporting the application, by Mr Martin E. Lyn, a registered architect and planner, Mr Colin Steer, a chartered valuation surveyor and land economist. Mr Gordon Langford, a chartered surveyor deposed in objection to the application. These professionals not only differed between themselves as to the area which comprised the Golden Triangle, but their assessments also differed from the finding of Anderson J, as to what comprised the neighbourhood.

[28] Mr Lyn deposed that the Golden Triangle encompasses several subdivisions, including Retreat, Hopefield and Vale Royal. In paragraph 5 of his affidavit, he outlined the road boundaries for the Golden Triangle. He said:

> "The area surveyed is bound by the following major roads; Hope Road, Lady Musgrave Road and Old Hope Road and minor road, Fair Way (sic) Avenue."

It is noted that that area is larger than that accepted by Anderson J, though not dramatically so. Fairway Avenue runs parallel to Seaview Avenue but is one block south of that thoroughfare.

[29] Mr Steer used an even larger area than Mr Lyn, to define the Golden Triangle. He said at paragraph 15 of his affidavit:

> "Peripheral lots along **Old Hope Road, Hope Road** and **Trafalgar Road** defining the **'Golden Triangle'** were first conceded for residential re-development..." (Emphasis as in the original)

From the maps provided, Trafalgar Road is even further south than Fairway Avenue. Mr Steer's definition incorporated a number of commercial enterprises. That evidence, if accepted, would affect the consideration of acceptance of change to the character of the neighbourhood.

[30] Mr Langford did not seek to define the outer borders of the Golden Triangle. He, however, identified its centre. He said at paragraph 3 of his affidavit:

> "The area, bordered by Old Hope Road in the east, Montrose Road in the south and Hopefield Avenue in the North and west forms the centre of the area known as the Golden Triangle."

His analysis of the issues suggests that he treated that central area as the neighbourhood.

[31] Maps of the areas were exhibited by each of these professionals. In particular, Messrs Lyn and Langford each produced maps showing the density of building types for the relevant areas which they respectively defined as comprising the neighbourhood. An analysis of those maps shows that on either scenario, the density of single family residential properties outnumbered that of multi-family units. The percentage was overwhelmingly higher using Mr Langford's more restrictive definition of the neighbourhood.

[32] The maps mentioned above show a difference between the character of Upper Montrose Road and that of Seymour Avenue. The former was comprised entirely of single family units. One multi-family unit bordered on Upper Montrose Road, but it fronts on Hopefield Avenue and apparently bears a Hopefield Avenue address. Along Seymour Avenue it was single-family units which

immediately bordered and faced Nos 23 – 25. There were, however, in fairly close proximity, a townhouse complex and an apartment complex.

[33] It is ironic that two of the objectors seeking to enforce the covenant, are proprietors of units in the abovementioned townhouse complex. That complex is at No 19½ Seymour Avenue; two doors away from No 23. The objectors are Ms Matthies and Mr and Mrs John Otway. Of those two objections, it was only Ms Matthies' which was supported by evidence.

[34] Based on the difference in the characters of the roads, I find that a purchaser of property would expect to get something different along Upper Montrose Road from that which would be expected along Seymour Avenue. Along Upper Montrose Road the purchaser would expect to get a single-family residential property in a first-class neighbourhood. In contrast to that, whereas, along Seymour Avenue, the purchaser would expect to acquire a residential property in a first-class neighbourhood, the property could either be single-family or in a multi-family complex. The residential density that the purchaser would expect to get would, however, be no more than 74 habitable rooms per hectare or 30 habitable rooms per acre.

[35] The density just mentioned was the density which the professionals all deposed as being the norm for multi-family developments in the Golden Triangle. In fact, Ms Matthies exhibited a copy of her certificate of title which showed that, in 2001, the KSAC had imposed a covenant which required a maximum density of 30 habitable rooms per acre.

[36] Based on that evidence, I hold that, using the estate agent's test, mentioned above, Upper Montrose Road comprises a different neighbourhood

from Seymour Avenue. This is so 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 some of the properties on Seymour Avenue.

[37] I am of the view that such a finding is supported by the decision in *Regardless Ltd v Haddeed and others* (1996) 31 JLR 417. In that case, the Court of Appeal upheld the finding of Harris J (as she then was) that properties along a portion of the south side of a road comprised a different neighbourhood from the properties on the north side and the rest of the south side. That finding was due to the difference in the character of the respective sets of properties. Harris J's judgment was under the case name, *Re 48 Norbrook Drive* E.R.C. 80/90 (delivered 27 July 1994).

[38] In making this finding I have the misfortune of differing from the finding made by Anderson J as to what comprises the neighbourhood for premises No 3 Hopefield Avenue. It may be that the evidence provided in each case differed. If, however, I am wrong in this finding then I am prepared to accept that Upper Montrose Road is an enclave in the Golden Triangle neighbourhood. In that enclave, a purchaser would expect to secure property of a different category from that which generally obtains throughout the wider neighbourhood. Upper Montrose Road is, therefore, a neighbourhood by itself.

[39] In making this finding, I am cognizant that the approval granted to Sagicor by the KSAC, for the development, stipulated that there should be no entrance to, or exit from the property, by way of Upper Montrose Road. To that extent, it

may be that the Upper Montrose Road neighbourhood is not entirely significant for this assessment.

Change in the character of the neighbourhood

[40] In addressing the issue of the composition of the neighbourhood, Mr Nelson, Q.C., appearing for Sagicor, submitted that regardless of which area was used as comprising the neighbourhood, that is, whether it be Retreat, Vale Royal or the Golden Triangle, the evidence suggested that there had been changes which rendered the covenants obsolete.

[41] The issue of obsolescence was dealt with in both *Stephenson v Liverant* and *Regardless Ltd v Haddeed* which have both been cited above. In *Stephenson v Liverant*, Smith JA (as he then was) pointed out that a change in the character of a neighbourhood did not necessarily result in the covenant being deemed obsolete. The test of determining obsolescence, he said, "is whether the original proposes for which the covenants were imposed can or cannot still be achieved". The learned judge explained the matter further at page 732 D:

> "In other words, the question is whether the object to attain which the covenants were entered into can or cannot be attained. If it can, the covenants are not obsolete, while if it cannot, they are."

[42] The evidence in the instant case is that the covenants in issue were imposed in the late 1920's. At that time the emphasis was for single family dwelling houses on fairly large lots and well set back from the roadway and from the other boundaries.

[43] Undoubtedly there have been changes since that time. With an expanding urban population, there has been an increasing demand for residential property in this highly sought-after area. In order to meet this demand, several

upscale townhouse and apartment developments have been built. The question to be determined, at this stage, is whether this demand and these developments have made the covenants obsolete.

[44] It must be pointed out that it is not the demand for housing which the court considers. Both counsel appearing before me accepted that principle. Mr Leiba, appearing for the objectors, cited as authority for the principle, the judgment of Courtney Orr J in *Central Mining and Excavating Ltd v Crosswell and others* E.R.C. 139 of 1990 (delivered December 1991). In addressing a submission and evidence concerning the demand for housing and the shortage of land, Orr J said, at page 7 of the judgment:

> "I regard both [the] submission and the [evidence] as irrelevant. The general economic state of the country is not a basis for regarding a restrictive covenant as obsolete, for this is not one of the criteria for applying the test of what constitutes obsoleteness (sic)."

I respectfully adopt that statement as correct and based on sound authority. Orr J's decision was upheld by a majority at the Court of Appeal (*Central Mining and Excavating Ltd v Crosswell and others* (1993) 30 JLR 503), but none of the judgments included any adverse comment on that aspect of the judgment.

[45] In assessing the question of obsolescence, I must make reference once again to the maps exhibited by Mr Lyn and Mr Langford which show that even in the area designated as the neighbourhood by Anderson J, single family residential properties outnumber multi-family developments. None of the professionals have indicated otherwise. They have all deposed to the fact that the trend is toward multi-family developments.

[46] If, however, single family units still exist in numbers and the residential character of the neighbourhood remains, I can see no reason to depart from the assessment which Smith JA expressed in *Stephenson v Liverant*, when he said at page 732 D:

> "Applying this test to this case, there is no valid basis, in my view, on which to justify a finding that the original object of the covenants cannot still be achieved."

[47] In *Regardless Ltd v Haddeed* the Court of Appeal was considering covenants which were similar in character to the ones in issue in the instant case, namely, a restriction on subdivision of the land, a restriction to use as a single family dwelling house and a restriction on the set-back of the building from the boundaries of the relevant land. The Court of Appeal concluded that the Harris J had applied the correct principles in refusing the application to modify the covenants.

[48] In the Court of Appeal, Downer JA referred to the constitutional right of property owners to have their property rights represented by the restrictive covenants protected by the law. He concluded on the point, that the covenants in question were not obsolete. He said at page 425 A:

> "It would be difficult to contend successfully that the present covenants do not preserve the peaceful character of the neighbourhood. Therefore, the covenants cannot be said to be "obsolete" in relation to the "neighbourhood" or objectors who own property there."

[49] Mr Nelson sought, however, to distinguish the instant case from *Re 48 Norbrook Drive* and *Regardless Ltd v Haddeed*. Whereas he supported the principles on which Harris J came to her finding, Mr Nelson submitted that the learned judge was considering a different fact situation from the instant case.

Among the distinctions to which Mr Nelson pointed, is the fact that the objectors in that case were the immediate neighbours of the applicant. Learned Queen's Counsel submitted that Harris J had placed much emphasis on that proximity. He pointed out that there is no such objector in the instant case.

[50] I respectfully disagree with Mr Nelson's restricting Harris J's findings to the effect that modification of the covenants would have had on the immediate neighbours. After finding that there had been changes in the character of the neighbourhood, Harris J went on to decide whether the changes had rendered the covenants obsolete. In respect of the principle, she said at page 19:

> "The test of obsolescence...is whether the original object of the covenant is capable of fulfilment. To succeed therefore, the applicants must establish that the object for which the covenants were imposed are (sic) incapable of achievement....
>
> There are (sic) a plethora of the decisions which demonstrate that the courts are reluctant to regard a restrictive covenant as useless if its purpose can be achieved and it forms a real protection to the amenities of the neighbourhood on which the residents of that neighbourhood are entitled to place reliance."

[51] When the learned judge went on to apply the principle to the case she was considering, she was not restrictive in that application; she spoke to the entire neighbourhood. She said, at page 20:

> "Although over the years orders have been made by the Court permitting the subdivision of several of the original lots to accommodate the construction of townhouses and apartment complexes, that act in itself did not render the restrictions valueless.
>
> On my visit to the neighbourhood I observed that single family residence is still the prevailing feature of development in the area. The evidence proffered showed that the majority of the lots have not been made subject to re-subdivision....
>
> The discharge or modifications of covenants on some lots have not caused the area to have lost its private residential character, which affords

> the owners of the lots in the neighbourhood the benefit of privacy, tranquillity, peace, seclusion and a view."

[52] I accept that Harris J did specifically address the deleterious effect that the proposed development would have had on the immediate neighbours. It is my view, however, that her consideration of the wider neighbourhood was clearly a part of her decision-making process. She concluded at page 23:

> "The applicants did not establish that the character had been so entirely altered that it would be inequitable and useless to insist on the observance of covenants which are valueless. The covenants cannot therefore be said to be obsolete."

[53] Mr Nelson had still another arrow in his quiver. He submitted that this court having previously granted similar, if not identical, modifications, to those sought by Sagicor, it would be rare for it to depart from those findings in a later case. According to Mr Nelson, "first is the worst".

[54] It is not known whether there were any objections to the successful applications for modifications to which Mr Nelson pointed but the decision of Anderson J in *Hopefield Corner* would be powerful support for Mr Nelson's submission. As I have already pointed out, however, my analysis of the evidence before me has led me to a different conclusion to that reached by Anderson J. The court must rely on the evidence which is led before it in order to arrive at its decision. I must follow that principle.

[55] My departure is, however, not without precedent. Harris J, in deciding that the restrictive covenants, which she had to consider, were not obsolete, recognized that decisions to the contrary had previously been made. In that regard, she said at page 17 of her judgment in *Re 48 Norbrook Drive*:

> "...over the years orders have been made by the court discharging or modifying covenants to accommodate construction of multi-family residence by splintering of the lots."

I am fortified by that precedent as well as the decision of Orr J, in *Central Mining*.

[56] In light of my understanding of the principles to be gleaned from the cases cited above and in light of my abovementioned observations concerning the preponderance of single family residences, I cannot find that the covenants are obsolete. It is still eminently feasible for a purchaser in the Golden Triangle, Seymour Avenue and Upper Montrose Road areas 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. I, therefore, find that Sagicor has failed to satisfy paragraph (a) of section 3 (1).

[57] Mr Nelson cited, among others, the cases of *Re Hathaway's Application* (1969) 20 P. & C.R. 505 and *Re Associated Property Owners Ltd.'s Application* (1965) 16 P. & C.R. 89. In both these cases the English Land Tribunal, which is charged with adjudicating on applications to modify restrictive covenants, ruled that covenants restricting subdivisions, were obsolete. I did not find these cases helpful. In the first, the objectors produced no evidence in opposition to the application and in the second, the Land Tribunal found that a ministerial decision amounted to "other circumstances of the case" (a term used which is also used in section 3 (1) (a)) which would render the restrictive covenant obsolete.

The issue of density

[58] Before moving on to paragraph 3 (1) (b), I wish to briefly address the issue of density which was mentioned above. Mr Nelson has couched a very disturbing submission in very civil and polite terms. He submitted that once the

court accedes to an application made to this court, in equity, to amend the restrictive covenant to allow subdivision of land "with the permission of the relevant authorities", the court has no further jurisdiction over that matter.

[59] In Mr Nelson's submission the modification, once acceded to by the court, would vest the jurisdiction of assessing the propriety of any subdivision proposal, solely in those authorities. On learned Queen's Counsel's submission, the court would only have jurisdiction, thereafter, if there was an administrative law challenge to a decision of those authorities. It is to be noted that No 25 Seymour Avenue is already the beneficiary of an order vesting the jurisdiction over subdivision applications, in "the relevant authorities".

[60] The submission is, I find, as compelling as it is disturbing. The covenants were, in my view, originally drawn up with the understanding that only the court, in its equitable jurisdiction, could deprive the beneficiaries of the covenants of their entitlement. Is it a dereliction of duty or a breach of that confidence, when this court accedes to applications to vest that jurisdiction in executive bodies? It is accepted that, in England, the modification of restrictive covenants is vested in an executive body. That, however, is as a result of a legislative decision of the parliament of that country, namely section 84 of the Law of Property Act 1925.

[61] The parties to restrictive covenants may decide that they wish to vest an executive body with the authority to assess the propriety of applications. This was done in respect of prospective subdivisions of No 14 Upper Montrose Road. Restrictive covenant No 2 on the title for that property specifically allowed subdivisions based on plans approved by a Board appointed pursuant to Chapter 26 of the Revised Laws of Jamaica. Chapter 26 was the, then, Local

Improvements Law 1914 (now the Local Improvements Act). The "Board" at that time, in respect of these lands, was the KSAC. Where no such, or similar authority, is given to an executive body, it is the court's duty to enforce, as far as is possible, the intentions of the parties.

[62] My understanding and experience is that applications to allow modifications to vest in "the relevant authorities", the consideration of the propriety of subdivisions are not infrequent. Masters in Chambers and Judges who are charged with considering such applications should bear the consequence, which Mr Nelson has identified, in mind.

[63] What does that discussion have to do with density? I have pointed out above, that the evidence is that the traditionally accepted density for the Golden Triangle is 74 habitable rooms per hectare. Despite that standard, the evidence from Mr Steer is that the KSAC is prepared to allow a density of up to 123 habitable rooms per hectare (50 habitable rooms per acre) for Sagicor's proposed development. This is on the basis that sewer mains have been laid along nearby Hopefield Avenue. The KSAC stipulated that the sewerage and waste water disposal should be by connection to the sewer grid for the area.

[64] That indication represents a dramatic difference in density and the objectors have identified that possibility as deleterious to their comfort, as it must inevitably be. In my view, if the covenant is to be modified as Sagicor has asked, the court should keep its control of the issue of density. It would safeguard the trust which the original covenantees vested in the court when the covenant was imposed against the titles for these lands. I agree with the submission of Mr Leiba, that the question of the proposed density is a relevant consideration in

determining the character of a neighbourhood. I now turn to paragraph (b) of section 3 (1).

Section 3 (1) (b) – Do the covenants impede reasonable user?

[65] In respect of paragraph (b), in order to succeed the applicant must show:

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

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

[66] Two quotations from the Privy Council's judgment in *Stannard v Issa* cited above, in my view, may be applied to the instant case to succinctly summarize the status of Sagicor's application in respect of this ground. The first addresses the aspect of reasonable user:

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

The second addresses the aspect of the practical benefits secured:

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

[67] I gratefully adopt these observations as being relevant to the instant case. Sagicor has not said that the properties cannot be developed in accordance with the existing covenants. To put it plainly, Sagicor has not said that building single family residences on each of the three plots would amount to unreasonable user of the land. Such an assertion would fly in the face of the evidence provided by

the existence of the many single family dwellings along Upper Montrose Road, Seymour Avenue and generally in the Golden Triangle.

[68] Insofar as the benefit to be lost if Sagicor's application is successful is concerned, it need only be pointed out that the number of units in Sagicor's proposed development would exceed that referred to by their Lordships in Stannard v Issa. The principle to be extracted from those quotations is still very relevant in the context of this neighbourhood. The covenants are still of substantial benefit to its residents. The objectors all pointed to the significant increase in noise and traffic that 55 additional families would bring to the area.

[69] I find that there is nothing akin to a sterilization of the subject lands. Sagicor has to satisfy both requirements mentioned above in order to establish this ground. It has satisfied neither. It cannot, succeed on this ground.

Section 3 (1) (c) - The beneficiaries of the covenant have consented.

[70] In respect of this third ground provided for in section 3 (1) (c), Mr Rohan Miller deposed, in support of Sagicor's application, that the persons who are entitled to the benefit of the covenants "have agreed either expressly or by implication by their acts or omissions" to the covenants being discharged or modified. Mr Nelson, however, realistically submitted that that ground was not being pursued.

[71] Learned Queen's Counsel was no doubt cognizant of and informed by, the decision in *Re Gainsborough Development Company Limited's Application* (1990) 27 JLR 491. In that case, Bingham J (as he then was) addressed the effect of the existence of objectors to an application under the Act. He said at page 495 D:

> "...having regard to the six affidavits sworn to by the objectors...all of whom are persons who have the benefit of the covenant and hence a proprietary right in having the same enforced, [ground c] is untenable."

[72] The learned judge then quoted paragraph (c) and explained his position at page 495 F:

> "These words [in paragraph c] when examined in my opinion clearly and unequivocally imply and when properly construed refer to all the covenantees who qualify as benefiting therefrom and not to some of them. Once the rights of these six proprietors to object to the application is recognized then this ground is unmeritorious and must fail...."

[73] I respectfully adopt the reasoning of the learned judge. I would, however, add that it would be open to the applicant to demonstrate that even the objectors had agreed to the modification or discharge (see *In Re No 13 Norbrook Crescent* 2005 HCV 1767 (delivered 30 July 2009)). Sagicor also fails on this ground.

Section 3 (1) (d) – The proposed modification will not cause injury

[74] Section 3 (1) (d) provides the fourth and final ground by which the Act seeks to govern the jurisdiction of the court in this area of the law. In order to satisfy the requirement of this section the applicant must show that the proposed modification or discharge of the covenants would not cause injury to the beneficiaries of the covenants.

[75] In *Stephenson v Liverant* mentioned above, Smith JA opined that an applicant relying on section 3 (1) (d) has to show, in order to succeed, that neither the mere existence of the order for modification or discharge, nor the implementation of the project which the order authorises, will cause injury to the beneficiaries of the relevant covenant (see page 733 E). The learned judge of appeal was, at that time commenting, with approval, on a quote from the 4th (1967) edition of Preston v Newsom"s *Restrictive Covenants Affecting Freehold*

Land. In the 9th (1998) edition of that work, the learned authors have cited authority which maintains that stance as being the law. They concluded their discussion on the English equivalent of section 3 (1) (d) by saying, at paragraph 12-64:

> "If, then, the proposed development will injure the objector, the application fails....If it would not, then the application might still fail because an order for modification would undermine an intact system of restrictions."

[76] I have already pointed out the detrimental effect that having a development comprising of 55 families being introduced to a neighbourhood would cause. There would be increased noise from the additional families which will occupy the units and increased road traffic from the fact that persons from 55 new households will be utilizing the Seymour Avenue thoroughfare. Mr Langford opined that the planned development would cause an additional 100 cars per day using Seymour Avenue. He said that that would greatly congest the immediate area, particularly affecting the residents to the immediate south and east of Nos 23 and 25. Mr Langford's opinion is given credence by the evidence of Mr Miller, who deposed in his affidavit, filed on 2 October 2009, that the proposed development will have 140 parking spaces.

[77] Another result that the number of parking spaces will have, when added to the number and sizes of the buildings which Sagicor proposes to construct, is the increased runoff of rainwater from this 17,549m^2 (four-plus acre) property. The increased runoff will adversely affect the neighbouring properties. Mr Langford's report identifies and assesses this problem. He says at page 6:

> "...The planning approval [given to Sagicor] calls for soak-away pits to accommodate the water runoff from the new development, but it is expected that whatever plans are made, the runoff will be increased once

most of the development land is sealed off by buildings or asphalted driveways, this will increase the quantity of water that runs south."

[78] Mr Langford also opined that the development would cause a decline in the values of the surrounding lands. He did not, however, give any basis for that view but merely pointed to the fact that a development along Constant Spring Road had resulted in a depreciation of values in that area. I was not convinced by Mr Langford's opinion in this regard, especially as Mr Steer expressed a completely contrary opinion in respect of the effect on land values, which Sagicor's development would have had.

[79] Despite my scepticism in respect of that last issue, I find, for all the other reasons expressed above, that ground (d) has not been satisfied.

Conclusion

[80] Although there was a recent decision in which it was held that, the covenants restricting subdivision of lands in the Golden Triangle and preventing the use of those lands for multi-family developments, had become obsolete, the evidence in this case does not allow me to arrive at a similar finding. It is my view that it is still eminently feasible for Sagicor to use the properties at 14 Upper Montrose Road and 23 and 25 Seymour Avenue in a manner consistent with the requirements of the restrictive covenants, without that usage being out of step with the general character of the neighbourhood. The evidence, including maps of the Golden Triangle, shows that there are still more single-family residences than multi-family complexes in the Golden Triangle.

[81] Based on the large number of single-family units which still exist, it cannot be said that maintaining the restrictive covenants would sterilize the use of the

land. I have also found that if the application to modify the covenants were granted, the resulting 55 additional residential units being added to the area would cause injury to the beneficiaries of the covenants. This is because there would be a significant increase in noise, traffic and water runoff, resulting from such a development.

[82] It is therefore ordered that:

1. The applications in Claims 2008 HCV 03060, 2008 HCV 03061 and 2008 HCV 03062 respectively, are refused.

2. Costs to the objectors to be taxed if not agreed.

APPENDIX

Claim 2008 HCV 3060 – Re 23 Seymour Avenue (Volume 1408 Folio 562 of the Register Book of Titles):

The covenants sought to be modified are:

1) The land above described (hereinafter "the said land") shall not be so subdivided that any portion thereof shall form part of a holding the total area of which shall be less than one acre.

2) No building other than a private dwelling house of a value of not less than Eight Hundred Pounds with the necessary outbuildings appurtenant thereto shall be erected and such building shall be used for no purpose other than a private place of residence.

4) The dwelling house to be erected (sic) that portion of the said land which adjoins Seymour Avenue shall face that Avenue and shall be erected at a distance of not less than thirty feet from the said roadway and not less than fifteen feet from the other boundaries thereof and all outbuildings and other buildings used in connection therewith shall be built to the rear of such dwelling house and not nearer than fifteen feet to any boundary.

The modified covenants would read as follows:

1. The land above described (hereinafter" the said land") shall not be subdivided save and except with the permission of the relevant authorities.

2. No building other than townhouses and apartments with the necessary outbuildings appurtenant thereto shall be erected and each such building shall be used for no purpose other than a private place of residence.

4. Any buildings to be erected on the said land shall be erected at a distance of not less than forty feet from the centre line of roadway now known as Seymour Avenue and not less than fifteen feet from the boundaries thereof SAVE AND EXCEPT for Townhouse Type B2 which shall be ten feet from the southern boundary and PROVIDED THAT this restriction does not apply where the said land adjoins lands registered at Volume 1292 Folio 182 and Volume 1408 Folio 563 and all outbuildings therewith shall be built to the rear of such buildings and PROVIDED THAT this covenant shall not apply to the guard house and garbage receptacles and PROVIDED HOWEVER that the party walls and the eaves shall not be regarded as a breach of this covenant."

Claim 2008 HCV 3061 – Re 14 Upper Montrose Road (Volume 1408 Folio 563 of the Register Book of Titles):

The covenants sought to be modified 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 of Jamaica which latter case none of the lots shall be less than half an acre in area.

5) 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 installations and no pit closet shall be erected for use on the said land.

6) No building shall be erected within thirty feet of any road boundary nor (sic) within ten feet of any other boundary.

The modified covenants would read as follows:

2. Not to subdivide the said land save and except with the permission of the relevant authorities.

5. No building other than townhouses with the necessary outbuildings appurtenant thereto shall be erected and each such building shall be used for no purpose other than a private place of residence.

6. No building to be erected within forty feet from the centre line of roadway now known as Upper Montrose Road nor within ten feet from any other boundary and PROVIDED THAT this restriction does not apply where the said land adjoins lands registered at Volume 1292 Folio 183, Volume 1292 Folio 182 and Volume 1408 Folio 562 and PROVIDED THAT this covenant shall not apply to the guard house and garbage receptacles and PROVIDED HOWEVER that the party walls and the eaves shall not be regarded as a breach of this covenant."

Claim 2008 HCV 3062 – Re 25 Seymour Avenue (Volume 1292 Folio 183 of the Register Book of Titles):

The covenant sought to be modified is:

4) Any buildings to be erected on the said land shall be erected at a distance of not less than 30ft from Seymour Avenue and 10ft from any boundaries of the land formerly registered at Volume 223 Folio 98 of the Register Book of Titles and the outbuildings used in connection therewith

shall be erected to the rear of such buildings PROVIDED HOWEVER that this covenant shall not apply to the guard house and garbage receptacles.

The modified covenant would read as follows:

4. Any buildings to be erected on the said land shall be erected at a distance of not less than forty feet from the centre line of roadway now known as Seymour Avenue and not less than ten feet from the boundaries thereof PROVIDED THAT this restriction does not apply where the said land adjoins lands registered at Volume 1292 Folio 182 and Volume 1408 Folio 563 and the outbuildings used in connection therewith shall be erected to the rear of such buildings PROVIDED HOWEVER that this covenant shall not apply to the guard house and garbage receptacles and PROVIDED that the party walls and the eaves shall not be regarded as part of the buildings for the purposes of this covenant."