



[2020] JMSC Civ 69

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019CV00424

IN THE MATTER OF all that parcel of land being part of **THE PINNACLE** now known as of **SAINT JAGO HILLS** in the parish of **SAINT CATHERINE** being the Lot numbered **FOUR HUNDRED AND SEVEN** on the plan of part of the Pinnacle now known as Saint Jago Hills aforesaid deposited in the office of Titles on the 25th day of November, 1993 and being the land comprised in Certificate of Title registered at Volume 1266 Folio 334 of the Register Book of Titles Vol 1266 Folio 334 in the Register Book of Titles

AND

IN THE MATTER OF the Restrictive Covenants affecting user of the said land Discharge and Modifications

AND

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

BETWEEN

THE PINNACLE

CLAIMANT/RESPONDENT

(now known as Saint Jago Hills)

AND

THE RESTRICTIVE COVENANT

DEFENDANT/APPLICANT

IN CHAMBERS

Ms Antonica L A Coore Attorney-at-law for the Applicant

HEARD: 26 March 2019, 7 May 2019, 18 October 2019, 13 December 2019, 4 February 2020 and 18 February 2020

Civil Procedure - Restrictive Covenants – Application to modify Restrictive Covenants

MASTER T. MOTT-TULLOCH-REID

BACKGROUND

- [1] The Claimant, Carol Angela Gooden has applied to the Court for a modification of restrictive covenant number 3 on the duplicate certificate of title for property registered at Volume 1266 Folio 334 of the Register Book of Titles. Restrictive covenant 3 reads as follows:

“No more than one building shall be erected on the said land and the same shall be used for residential purposes only.”

The Claimant is seeking a modification of the restrictive covenant and wishes the wording to be as follows:

"No more than two buildings shall be erected on the said land and the same shall be used for residential purposes only as approved by the Saint Catherine Parish Council in conditions of subdivision approval dated October 13, 2015"

- [2] The St Catherine Parish Council approved the subdivision of the property and the Lots are to be noted as Lot 407A and Lot 407B. The approval was exhibited to the Affidavit of Carol Gooden in support of the Fixed Date Claim Form filed on February 8, 2019. In paragraph 11 of the Affidavit the deponent states that although the Parish Council has given its approval for the subdivision of the said land into two lots, subject to the condition that no more than one building is to be erected on the

lots, without the modification to restrictive covenant 3, 2 buildings will be erected on the said land in breach of the said restrictive covenant 3.

- [3] What is before me however, is an application to modify a restrictive covenant to allow for 2 dwelling houses to be placed on one piece of land.
- [4] At the point in time when the application came before me for hearing, there were no splinter titles. There was just one piece of property which I understood from the application, the applicant wanted to have two buildings occupy, notwithstanding the Claimant's statement in paragraph 11 of her Affidavit in Support of Fixed Date Claim Form filed on February 8, 2019. No other interpretation could be given to that statement when at that point in time, there were no splinter titles and no application before me for the restrictive covenant which spoke to the subdivision of the property to be modified.
- [5] The application became somewhat more complex at the point in time when the Final Hearing came up for hearing. At that instant, the Duplicate Certificate of Title for land registered at Vol 1266 Folio 334 had been cancelled and two Duplicate Certificates of Title were issued as the property had been subdivided and splinter titles issued. The lots were assigned Lot 407A registered at Vol 1523 Folio 38 and Lot Vol 407B registered at Vol 1523 Folio 39. Carried over from the parent title was restrictive covenant 3, which was noted on the new Duplicate Certificates of Title as restrictive covenant 8. The covenant reads that "no more than one building shall be erected on the said land.".
- [6] The parent title has been cancelled so on the application before me I am unable to note the modification sought as the parent title no longer exists and so technically speaking there is no document on which the modification can be noted. Ms Coore is of the view that the modification to restrictive covenant number 3 is to be noted on the two new titles. I however note that the new titles i.e. the titles for Lots 407A and 407B already indicate that no more than one building shall be erected on the said land. I am therefore uncertain as to why Ms Coore is of the

view that the modification is to be noted on the splinter titles. In my opinion, the noting of the modification on the new titles would be unnecessary at this stage.

- [7] Ms Coore has also submitted that in order to obtain the splinter titles she had to give an undertaking to the Registrar of Titles to obtain orders to have the covenant number 3 modified. I will comment on the giving and the receiving of the undertaking later in my judgment. Ms Coore is interested in having the covenant modified in order that she may be released from her undertaking. Understanding the difficulty that Ms Coore faced, on December 13, 2019, I made an order requiring the Registrar of Titles to file an Affidavit explaining why the Office of the Registrar of Titles has required the Applicant to modify restrictive covenant 3 on the parent title which had already been cancelled and the modification sought did not apply to the splinter titles that have been issued. The Registrar of Titles, Ms Cherise Walcott, swore an Affidavit which was filed on February 4, 2020.
- [8] At paragraph 5 of the affidavit, Ms Walcott states that on the undertaking of counsel for the registered proprietor, the decision was taken to splinter the parcel into two lots. She exhibits the undertaking given by Ms Coore. Ms Walcott explains that because restrictive covenant 3 has not been modified on the parent title, the 2 new titles are still in breach of the restrictive covenants even though the parent title has been cancelled and even though restrictive covenant 8 which appears on both titles prohibit the construction of more than one building on each of the Lots. She further explains that

"the decision to surrender the parcel notwithstanding the breach of covenant was done out of expedience and on the strength of the undertaking of Counsel" (see paragraph 8 of her affidavit)".

Paragraph 10 is also important, Ms Walcott says the issue will be resolved if the modification is endorsed on the new certificates of title to the effect that

"condition No 3 endorsed on parent title has not been modified and remains an encumbrance on the property thereby preventing more than 1 building to be erected on the entire parcel registered at Vol 1523 Folios 38 and 39."

I do not believe that will assist because covenant 8 as endorsed on the new splinter titles already says that no more than one building is to be erected on the entire parcels. Having the notation as suggested by Ms Walcott, will in my opinion, do nothing but confuse the situation for any person who has to deal with the property who does not know the events which would have led to the endorsement as proposed by Ms Walcott being noted on the Duplicate Certificates of Title of Lots 407A and 407B.

- [9] Ms Coore gave her irrevocable undertaking to obtain an order of modification of restrictive covenant #3 on certificate of title Vol 1266 folio 334 by on or before February 28, 2020 in exchange for her issuing the two certificates of title as per the St Catherine Parish Council's approval for subdivision to facilitate her client's application for financing to build a single dwelling house on one of the lots. This undertaking ought not to have been given by Ms Coore or received by the Registrar of Titles as both persons should know that Ms Coore does not control the Court or the decisions that emanate therefrom. All Ms Coore can do is apply for the modification, she cannot promise to obtain an order of modification as it is the Court who will determine whether the order should be granted or not.
- [10] I am not of the view that the order sought in this application is to be granted and all that I can recommend is that the Registrar or Titles release Ms Coore from her undertaking.
- [11] Notwithstanding the undertaking given by counsel, I am unable to grant the orders sought by the Claimant and my orders are as follows:
 - a. Application to modify restrictive covenant 3 filed on February 8, 2019 is refused.
 - b. The Claimant's attorney-at-law is to file and serve the Formal Order on the Town and Country Planning Authority, the St Catherine Municipal Corporation and the Registrar of Titles.
 - c. Leave to appeal is granted.

