



[2026] JMSC Civ 94

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2022CV02259

IN THE MATTER OF ALL THAT PARCEL OF LAND part of ACADIA part of NUMBER THREE ROXBURGH AVENUE in the parish of SAINT ANDREW containing by survey Thirteen Thousand Five Hundred and six square feet and Ninety-One Hundredths of a square foot of the shape and dimensions and butting as appears by the plan thereof and being all the land comprised in certificate of title registered at volume 1419 folio 129 of the register book of titles also known as 4 Roxburgh Avenue Kingston 8, St. Andrew

AND

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

Re: Number three Roxburgh Avenue

IN CHAMBERS, VIA VIDEO CONFERENCE

Ruel Woolcock instructed by Ruel Woolcock & Co, attorneys-at-law for the applicant

Peta-gaye Moncrieffe of counsel, attorney-at-law for the first objector - Charmaine Patterson

Dameta Franklin instructed by Gayle Franklin and Co, attorneys-at-law for the second objector - Kimberly Myers-Barnes

Heard: January 9, 2025 and July 10, 2026

Civil Procedure – Application for modification of restrictive covenants – Whether objectors to modification of restrictive covenants are required to file affidavit evidence – Whether a trial is necessary – Whether the trial should be held in chambers or in open court – The Jamaica (Constitution) Order in Council, 1962 – Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, section 13(3)(g) – The Restrictive Covenants (Discharge and Modification) Act, section 3(1) – Civil Procedure Rules, rules 15.3(c), 26.1(2)(c), 27.2 (7) and (8), 27.11(c)

K. Anderson, J.

INTRODUCTION

[1] This claim relates to an application by means of further amended fixed date claim form, which was filed on February 7, 2023, for restrictive covenants endorsed on certificate of title registered at volume 1419 folio 129 of the register book of titles, to be modified.

[2] The essence of the modifications sought, is that the applicant, Novlette White, wishes to construct, at number 4 Roxburgh Avenue, Kingston 8, in the parish of St. Andrew, an apartment complex. The covenants on the title for that premises, do not presently permit that to be done and moreover, if that is done, as is presently desired by Ms. White, who, according to the evidence given by her and which is not disputed, does not presently reside at number 4 Roxburgh Avenue, it will result in other covenants being breached. In total, will be breached if the apartment complex development, as presently proposed by Ms. White, is permitted by this court, to be proceeded with.

BACKGROUND

[3] The covenants that are now sought to be modified on the relevant title, are numbered as numbers 1, 2, 3 and 4 on that title. Those covenants read as follows:

1. *There shall be no sub-division of the said land.*
2. *No building of any kind other than a private dwelling house with appropriate outbuildings appurtenant thereto and to be occupied therewith shall be erected on the said land and the value of such private dwelling house and outbuildings be less than one thousand five hundred pounds.*
3. *The main building to be erected on the said land shall face the roadway or one of the roadways bounding the said land and no building or structure shall be erected on the said land nearer than thirty feet to any road boundary which the same may face nor less than ten feet from any other boundary and all gates and doors in or upon any fence or opening upon any road shall open inwards and all out-building shall be erected to the rear of the named building.*
4. *No building erected on the said land shall be used for the purposes of a shop, school, chapel, church or nursing home or for racing stables and no trade or business whatsoever shall be carried on upon the said land or any part thereof.'*

[4] Further undisputed evidence of Ms. White, has disclosed that those restrictive covenants were endorsed on the certificate of title and imposed as part of the conditions of approval of the Kingston and St. Andrew Municipal Corporation (formerly known as the, 'KSAC'), when the land comprised in the relevant certificate of title was sub-divided

in or about 1969. The conditions of approval were deposited in the office of titles in or about 1969.

[5] The registered proprietors of the respective premises with the civic addresses as numbers 1 and 3 Roxburgh Avenue, Kingston 8, in the parish of St. Andrew, being: Kimberly Myers Barnes, Emile Myers, Beverley Myers and Ruth-Ann Myers (owners of number 1 Roxburgh Avenue) and Charmaine Patterson (owner of number 3 Roxburgh Avenue), have respectively filed notices of objection to the application by Ms. White, for the modification of the relevant restrictive covenants. Ms. Patterson filed that objection of hers, first in time, from among the two such that have been filed. Hers was filed on April 11, 2023, whereas the one filed by Kimberly Myers and the other proprietors of number 1 Roxburgh Avenue was filed on March 5, 2024. Each of those objections were filed by different attorneys, who operate their law practices, in two separate law firms.

[6] The modifications now being sought of the covenants numbered 1 – 4 as quoted above, are as follows:

1. *There shall be no sub-division of the said land save and except into strata lots under and pursuant to the Registration (Strata Titles) Act.*
2. *No building of any kind other than a residential apartment complex with appropriate out-buildings shall be erected on the said land and the value of such apartment complex and out-buildings shall in the aggregate not be less than one thousand five hundred pounds.*
3. *The apartment complex to be erected on the said land shall face the roadway or one of the roadways bounding the said land and no building or structure shall be erected on the said land nearer than twenty-five feet to any road boundary which the same may*

face nor less than ten feet from any other boundary thereof save and except a guardhouse, garbage room/receptacle, electrical meter room/structure, water meter structure, absorption pit, reed bed, septic tank, external staircase of all gates and doors in or upon any fence or opening upon any road shall slide on a metal track or open inwards. For the purposes of this covenant, the eaves of any building or structure shall not be considered a part of such building or structure.

- 4. No building erected on the said land shall be used for the purposes of a shop, school, chapel, church, or nursing home, or for racing stables and no trade or business whatsoever shall be carried on upon part thereof save and except the management of a strata corporation.'*

[7] The proposed restrictive covenant changes as quoted above, are the latest in time, of such proposed changes, but are not the only iteration of same. There have been a few iterations of same and Ms. White's affidavit evidence, gives evidence pertaining to same, when considered in totality, bearing in mind that she has filed to date, four (4) separate affidavits in support of her application. There is one (1) separate affidavit, which specifies objections as raised by some of the objectors. The objectors have each filed respective, notices of objection.

NOTICES OF OBJECTION

[8] All of the objectors have filed notices of objection in support of their respective objections that being Ms. Charmaine Patterson, who is, I think it is at this juncture, worthy of note, an attorney-at-law, who practices law in Jamaica, as well as Kimberly Myers, Emile Myers, Beverley Myers and Ruth-Ann Myers. The latter four named persons filed their notice of objection, as a group/collective of persons.

[9] Ms. Patterson had, on April 11, 2023 filed a notice of objection to application for modification of restrictive covenant and in that notice, which was filed by her attorney-at-law, her attorney had stated therein, in the form as required by the **Restrictive Covenants (Discharge and Modification) Rules (1960)** that Ms. Patterson's objections are based on the following:

1. *The objector's property is located across the road from the applicant's property.*
2. *The benefit of the said restrictive covenants has existed since 1976; the covenants were endorsed to preserve the nature and character of the neighbourhood.*
3. *The provisions of the Restrictive Covenants (Discharge and Modifications) Act, which allows for modification of restrictive covenants, do not apply.*
4. *The objector was not served with a legal notice in relation to the said application and only became aware of the said application through a mutual neighbour.*
5. *The objector has no knowledge of the type of residential complex that the applicant intends to erect, and has not been served with any building approval outlining the building to be erected.*
6. *The objector notes that applicant is proposing to erect a residential apartment complex which will impede light to, view from and privacy of the objector's property.*
7. *The said proposed modification will also result in an increase in traffic and noise level in the neighbourhood.*

8. *The proposed modification will change the character of the neighbourhood, as there are no multi-dwelling houses/complexes located on Roxburgh Avenue.*

9. *The purpose and reason for which the objector purchased the property will be lost if the said restrictive covenants were modified.'*

[10] In that notice of objection, Ms. Patterson's attorney has gone on to state: *'Notwithstanding the above, should the court decide to exercise its discretion and modify the said restrictive covenants, the objector claims the sum of Twenty-Five Million Dollars (\$25,000,000.00) as compensation.'*

[11] For their part, the objectors – Kimberly, Emile, Beverley and Ruth-Ann Myers, collectively filed a single notice of objection. They did so, on March 5, 2024. Just as did Ms. Patterson before them, they have objected to the proposed discharge and/or modification of covenants numbers 1 to 4 as endorsed on their property title. They have objected on even more grounds than has Ms. Patterson, but some of those respective objections overlap and it is worthy of note that although being entitled by law, to seek financial compensation from the applicant in the event that this court decides to discharge/modify the relevant restrictive covenants, have not sought any financial compensation from her.

GROUND OF OBJECTION

[12] Their grounds of objection, are as follows:

1. *The character of the neighbourhood has not changed in any material way so that the court can conclude that the covenants are now obsolete and can no longer serve their original purpose.*

2. *The continued existence of the covenants does not prevent all the reasonable use for the property rendering it sterile.*
3. *The proposed change of the covenant will cause harm and loss to the persons entitled to enforce their benefit.*
4. *The proprietors entitled to have the benefit of the covenant have not agreed expressly or impliedly to the change in the covenants.*
5. *Traffic congestion and parking problems.*
6. *Health concerns abound regarding length of time and extensiveness of this multi-family dwelling constructions and the effect of dust and other pollutants/contaminants which will impact our families' respiratory health and well-being.*
7. *Loss of quiet enjoyment.*
8. *Privacy and security concerns.*
9. *Substantive change to the character of the community.*
10. *Impact of air quality and air flow.*
11. *Blockage and shading of existing residential dwelling houses.*
12. *Concern for waste disposal or sewage plans for this proposed development.'*

[13] Up until now, the only affidavit evidence filed by any of the objectors, has been the affidavit filed by the objectors who reside at number 1 Roxburgh Avenue. I will hereinafter describe them as the, 'Myers family.' That is the affidavit of Kimberly Myers, also it seems,

known as 'Kimberly Myers Barnes' which was filed on September 25, 2024. There was an order made by this court, on May 30, 2024, which stipulated in paragraphs 1 to 3, as follows:

- 1. The hearing of the notices of objection to the application for modification of restrictive covenants filed April 11, 2023 and May 3, 2024 is fixed for October 3, 2024 for 3 hours.*
- 2. The applicant is to file and serve affidavit in response to the objection on or before July 19, 2024.*
- 3. The objectors are to file and serve affidavit in reply on or before September 6, 2024.'*

[14] Due to the unavailability of the judge who was listed to have presided over the scheduled court hearing on October 3, 2024, that hearing was, on that date, adjourned for hearing on January 9, 2025, at 10:00 am, for three (3) hours. It was on that latter mentioned date, that I then presided over a court hearing in respect of this claim, for the first time.

[15] At that court hearing before me, the learned counsel for the objectors contended that no affidavit evidence needed to have been, or needs to be filed by any of the objectors. With respect though, I disagree with those counsel, in that specific respect. There exists an order that the objectors were to have filed and served affidavit in reply, on or before September 6, 2024. That order was not complied with, by any of the objectors. The only affidavit filed by any of the objectors, was not filed until September 25, 2024. That date of filing, is in breach of this court's order, in that regard. The order referred to, in that respect, was framed by the learned judge who made same, in mandatory terms. It ought to have been complied with. In that regard, see **Isaacs v Robertson** [1985] AC 97 (PC).

WHETHER THE OBJECTORS ARE REQUIRED TO FILE AFFIDAVIT EVIDENCE

[16] Accordingly, as things now stand in respect of this claim, there exists no lawfully filed and served, conflicting affidavit evidence, in respect of this claim. Whilst this court

can grant an extension of time to file and serve affidavit evidence in opposition to this claim and can do so, even after the time for compliance by the objectors in that regard, has passed, since such is permitted by **rule 26.1(2)(c) of the 'C.P.R.' (Civil Procedure Rules)** and whilst the opposing parties can, independently of the court and without needing this court's affirmation of same, agree upon that extension of time, if such agreement exists, it ought to be evidenced in writing and be filed in court. See **rule 27.11(6) of the CPR**, in that regard. Furthermore, and most importantly, if no such agreement exists, then an application has to be filed in this court, or made to this court by the objectors seeking distinct, extensions of time. At least, the Myers family objectors, have filed affidavit evidence, albeit, out of time. They would only need to seek this court's approval, to have that affidavit treated with by this court, as having been filed and served within time. On the other hand, the objector – Ms. Patterson would need to get some specified future time, to file and serve any affidavit evidence, upon which she intends to rely.

[17] Interestingly enough though, the objectors' counsel have both contended that no affidavit evidence needs to be filed by any of the objectors and counsel on behalf of the objectors who filed that single affidavit, albeit out of time, informed this court at the hearing on January 9, 2025, that same was filed, only as a matter of caution, this as distinct from necessity.

[18] I have already stated why it is that I disagree with that particular contention of the respective objectors' counsel and that disagreement has arisen, given the prevailing context of relevance for that purpose, in respect of this particular claim. I feel it necessary though, to go further on this particular, legal point, since by doing so, my opinion in that regard, may be of assistance to legal practitioners generally and to judicial officers, generally.

[19] There exists case law from both **Jamaica and England, addressing either the actual, relevant legislation, that being the Restrictive Covenants (Discharge and Modification) Act**, or in England, legislation in that area of law, which is very similar to our nation's legislation.

[20] In that case law, it has been made clear that someone who is objecting to an application for the modification and/or discharge of a restrictive covenant, does not need to lead evidence in support of that/those objection(s) of theirs. See: **Ministry of Housing v Raynor and Anor** [2016] JMCA Civ 31, especially at paragraphs 24 – 40, per Brooks JA (as he then was), and **Ridley and Anor v Taylor** [1965] 2 All ER 51, especially at 55 – 56, per Harman LJ.

[21] For present purposes though, in respect of this claim which is now at hand, that general position that the objector does not need to file affidavit evidence, does not apply, because this court had earlier made an order, expressly requiring the objectors to file affidavit evidence by a specified date. That order, ‘unfortunately’ (to phrase the nature of my disappointment with that course of action that was taken by them, as mildly as I think that I can) was not complied with, by either of the objectors. The Myers family, only particularly complied with that order and Attorney Patterson did not comply with same, in any respect

[22] I wish at this juncture though, to go on and state why I believe that it will, although unnecessary, at least in some disputed cases, in respect of which the subject matter before this first instance court for that purpose, is an application to modify or discharge restrictive covenant(s), nonetheless be useful for an objector to adduce affidavit evidence in support of that/those objection(s).

[23] To my mind, that is so for a practical reason, that being that there being no contrary evidence, other than that of the applicant who is seeking to have the relevant restrictive covenants either discharged or modified, this court would be obliged to accept the applicant’s evidence, unless any of same is deemed by this court, to either be irrelevant, inadmissible, or on the face of it, simply incapable of belief.

[24] Of course though, it ought always to be recognized, as regards this area of law, that by virtue of the provisions of **section 3(1) of the Restrictive Covenants (Discharge and Modification) Act**, the burden that is cast on an applicant is not an easy one, this

notwithstanding that the standard of proof cast upon that applicant, is that of a balance of probabilities. This court can always draw reasonable inferences from proven facts. It is worthy of note that from an evidentiary perspective, the statement in proposed evidence by a deponent, that for instance, a particular restrictive covenant, is or is not obsolete, is not admissible evidence, since that amounts to the statement of a conclusion which it is for this court to decide on. Moreover, such is nothing more than a statement of the deponent's opinion, which is inadmissible, unless that deponent has been permitted by this court, to state his or her opinion as to same, on the basis that he or she is deemed by this court to be an expert in that regard.

[25] Furthermore, if an applicant seeks to have the presiding judge rely on **section 3(1)(d)** of the relevant Act, in order to conclude that, the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction, in essence, it should be noted by all concerned, that the presiding judge, in order to be properly able to rely on that section and sub-section (3(1)(d)), in order to grant the application, over the objection(s) raised, would have had to conclude on a balance of probabilities, that the objection(s) raised, is/are frivolous, or in other words, trifling/insubstantial. In that regard, see **Ridley and Anor v Taylor** [1965] 2 All ER 51, at 58, per Russell LJ and **Re System Sales Ltd.'s Applications** [1992] 43 WIR 19, at 27, per Sir Denys Williams CJ.

[26] Those cases though, only addressed, where extracted from, in that regard, the wording of **section 3(1)(d)** of Jamaica's relevant statute. That learning therefore, should not be construed by anyone as being of general application to each of the grounds as set out in **section 3(1)(a), (b), (c) and (d)** since those grounds are disjunctive, not conjunctive and only one of those four stated grounds in that relevant legislation, needs to be satisfied by an applicant, in order for the applicant to succeed. If neither of those four (4) specified grounds are proven though, the applicant cannot succeed, regardless of whether there is any objection or not.

WHETHER A TRIAL IS NECESSARY

[27] I will therefore, at this juncture, now move on to address the next issue which needs to be addressed by this court, in respect of this claim. It is as to whether a trial is

necessary. The applicant's counsel, has on the one hand, contended that such is, in fact, unnecessary, whilst on the other hand, the respondent's counsel have respectively contended that such is necessary.

[28] There is presently, as already addressed herein, no affidavit evidence before this court at this time, which can properly be taken into account, on behalf of any of the objectors not only can, but ought to be heard by this court, in respect of the application which constitutes the subject of this claim, they cannot, at this stage, cross-examine the applicant, who is the sole affiant in support of her claim for discharge/modification of restrictive covenants numbers 1 to 4 on the relevant titles. They cannot cross-examine, because they have no contrary case that either they, or anyone else, for their benefit, will give evidence of, or which the applicant can properly prepare for, or be required to respond to.

[29] So, whilst it is that the applicant has the burden of proof and in order to succeed in meeting and ultimately, overcoming that burden, it is the applicant who must satisfy this court, on a balance of probabilities, that at least one of the requirements as prescribed by **section 3(1) of the Restrictive Covenants (Discharge and Modification) Act**, exists in this case, in the presently prevailing context, the objectors are not able to put forth any evidence and will not be able to cross-examine the applicant. The objectors though, must be heard. That is not only their right, by virtue of the relevant legislation, once they have filed an objection, which of course, they have, but also, is their constitutional right.

[30] I cannot think of any good reason why the legal situation that now faces the objectors in respect of this claim, would be any different, solely because this is a fixed date claim proceeding. After all, our nation's **Charter of Rights** now provides to everyone in Jamaica, the right to equal protection of the law – that being a right which did not exist in Jamaica, prior to the enactment of **Jamaica's Charter of Rights**. See **section 13(3)(g) of Jamaica's Charter of Rights**.

[31] The hearing by this court, of the objectors, will enable the objectors to make objections to proposed evidence and also submissions as to how this court should conclude upon this claim, ultimately. The court's affidavit evidence has been filed. Is all of that evidence, admissible? I do not know and do not need to adjudicate on that now. Sufficient until the day, for this court.

[32] While the objectors have a right to be heard, as regards those objections of theirs and while it is not according to **rule 15.3(c) of the CPR**, possible for a party to obtain summary judgment in respect of a fixed date claim proceeding, which this is, I do not believe that bearing in mind the particular context of this particular type of fixed date claim proceeding, that this is an undefended claim. Once the required notices of objection were filed by the objectors, as per the relevant statute, those objectors thereby began their respective defences in response to this claim, which was filed on July 19, 2022 and therefore, proceed with their respective objections. The objectors therefore, for the purposes of this claim, are not merely, 'interested parties.'

[33] So the question still remains to be answered: Does a trial of this claim, need to be held? To my mind, the simple answer to that query, is: '**Yes.**' Even if, in a fixed date claim form proceeding, that claim is a defended one, as I have already concluded that this claim is, the court may treat with a, '**first hearing**' of that claim, or in other words, a case management conference hearing in respect of that claim, as the trial of that claim. It is also the law in Jamaica, that in respect of an undefended fixed date claim proceeding, the court may also then treat with the first hearing, as the trial of that claim. See **rule 27.2(7) and (8) of the CPR** in that regard. Those rules of court specify as follows:

(7) At the first hearing, in addition to any other powers that the court may have, the court shall have all the powers of a case management conference.

(8) The court may, however, treat the first hearing as the trial of the claim if it is not defended or the court considers that the claim can be dealt with summarily.'

[34] Thus, even if this court is of the view that this claim can be dealt with summarily, this especially since, at present, there is only one witness whose proposed evidence can properly be considered for the purposes of this claim, that being the applicant and also, she cannot be cross-examined, nonetheless, a trial of this claim, can be held, if the court so orders. That would have been so, also if this claim was undefended. The relevant legislation, makes it clear to my mind, that a trial of a claim such as this, should be held in chambers, as distinct from open court. The relevant portion of a lengthy section of the **Restrictive Covenants (Discharge and Modification) Act**, that being **section 3(1)**, reads as follows: '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...'

[35] A trial of a fixed date claim though, can be summarily held. **Rule 27.2(8) of the CPR**, makes that clear.

[36] If such is so held then no witness can or will give oral evidence. In the present matter, as things presently stand, there cannot and will not be any cross-examination of the applicant. This court however, does not presently know whether the applicant, through her counsel, may wish to amplify her affidavit evidence, at trial. If so and if no further affidavit evidence is permitted to be provided by her, that would then require the applicant to seek this court's leave to provide further evidence to this court, orally. This court will always have the discretion to either grant or refuse such leave, whenever same may be sought, if sought at all. If same is sought and granted though, that would then mean that the trial will not be summarily held. To my mind though, the making of submissions, whether by way of objecting to proposed evidence, or in closing, will not result in the trial, not having been summarily held.

WHETHER THE TRIAL SHOULD BE HELD IN CHAMBERS OR IN OPEN COURT

[37] Another issue which arose though, at this court's last hearing of this claim, is whether the trial of this claim, ought to be held in open court. There also exists and there was expressed to this court, by the respective, opposing parties' counsel, a patent difference of opinion, in that regard. For their part, counsel for the objectors, orally submitted to this court that the trial of this claim, must be held in open court, whereas, on the other hand, counsel for the applicant submitted that trial may be held, in chambers – if a trial is needed at all, which he did not think to be the case. I have just expressed my disagreement as to whether a trial needs to be held and my reason for that disagreement with the applicant's counsel and as a consequence, the next issue which arose, was this one: Does a trial of this claim, have to be held, in open court?

[38] I agree with the submission which was advanced before this court, by Mr. Woolcock, for the applicant, on this particular point.

[39] Based on that wording therefore, whilst I am satisfied that a trial is to take place, I am also firmly of the view that said trial must take place, in chambers. The relevant legislation which is applicable, expressly so requires, by having referred to – '*A Judge in Chambers...*'

CONCLUSION

[40] In the final analysis therefore, the issues which were disputed before me, while presiding in this court, are all of import, as regards this matter. To my mind though, all of those issues ought to have been addressed to this court, at the case management conference which was earlier held. All of those issues have not been resolved in favour of the objectors. One of same, has been resolved in favour of the applicant – Novelette White, that being as to whether trial can or should be held in chambers. Accordingly, the costs of the hearings before me, on January 9, 2025 and today – July 10, 2026, shall be costs in the claim.

ORDERS

1. A trial of this claim shall be held before a judge in chambers, during an in person hearing on April 14, 2027, commencing at 10:00 am, for one day.
2. There shall be a pre-trial review hearing held in respect of this claim, before a judge in chambers, on February 17, 2027, commencing at 2:00 pm, for 90 minutes and at that hearing, any court application filed by either party in accordance with order number 3 below, shall be heard and concluded on, by this court.
3. By or before August 31, 2026, either party wishing to file and pursue any application before this court, shall file and serve said application and is permitted to insert as the hearing date and time for any such application, the following: February 17, 2027 at 2:00 pm for 90 minutes. Any such application shall be served on all other parties to this claim, by no later than September 30, 2026.
4. The objectors shall have a right to be heard by this court at trial, but not to lead any evidence upon the trial of this claim, unless this court has expressly permitted such to be done, or the parties have expressly agreed to permit same to be done.
5. All objectors and the applicant – Novelette White, shall be present at the court hearing for the trial of this claim.
6. The costs of this court's hearings on January 9, 2025 and July 10, 2026, shall be costs in the claim.

7. The applicant shall file and serve this order.

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Hon. K. Anderson, J.