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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E R/C 139 OF 1990

IN CHAMBERS

IN THE MATTER OF ALL THAT parcel of land known as No. 39 Wellington Drive in the parish of St. Andrew being the lot numbered 6 on the plan of Mona and Papine Estates deposited in the office of Titles on the 10th August, 1954, and being land comprised in Certificate of Titles registered at Volume 695 Folio 5 of the Register Book of Titles.

AND

IN THE MATTER OF Restrictions against subdivision and the distance of building from boundaries (affecting the user thereof);

AND

IN THE MATTER OF THE RESTRICTIVE Covenants (Discharge and Modification) Act.

Christopher Honeywell and Eleanor Joy Donaldson instructed by Clinton Hart and Company for the Applicant Central Mining and And Excavating Limited.

Michael Hylton and Alexander Williams instructed by Myers Fletcher and Gordon for Peter Croswell, Carl Croswell, Roy Anthony Bridge, Gloria Hope Bridge and Clive Morin - The objectors.

Heard: 30th April, 1st May, 1991, 31st May, 1991.

Delivered: 9th December, 1991.

COURTENAY ORR,J.

Arguments were heard in this matter on 30th April and 1st May 1991. On 31st May I visited the neighbourhood and promised to give my decision soon. I regret the delay but was unable to do so earlier, because of pressure of work and increasing evidence that I ought to obtain a period of rest.

This is an application by carlton DePass on behalf of Central

Mining and Excavating Limited under Section 3 of the Restrictive Covenants (Discharge and Modification) Act, to have certain restrictive covenants endorsed on the title of the Company's property at 39 Wellington Drive, Mona, Saint Andrew modified and/or discharged.

The restrictive covenants were imposed by application registered in 1954 when lands part of Mona and Papine Estates were registered by the Colonial Secretary of Jamaica. The applicant's lot forms part of a subdivision of over 80 lots. At present that lot is an open lot.

The lots of the objectors, and the applicant are in very close proximity.

Wellington Drive runs from east to south west and is numbered from east to west. On its eastern end it forms a junction with Mona Road and at its south western end it forms another with Munroe Road. Wellington Drive slopes upwards from Munroe Road to Mona Road, that is from south west to east. When one travels from south west to east along Wellington Drive the following roads form junctions with the left hand side of Wellington Drive in the following order: Canberra Crescent, Bamboo Avenue and Ottowa Avenue. There are no roads leading from the right hand side of Wellington Drive.

Concerning the lots on Wellington Drive, one comes first to the lot of the objectors Carl and Peter Croswell on the left at number 2 Canberra Crescent, that is at the eastern end of the junction of Canberra Crescent and Wellington Drive. Next, beside it on the left of Wellington Drive is Clive Morin's lot at number 2D Bamboo Avenue, at the junction of Bamboo Avenue and Wellington Drive.

On the right hand side and opposite Clive Morin's lot are the lot of the objectors, Roy Anthony Bridge and Gloria Hope Bridge at number 41 Wellington Drive and then the lot of the applicant at number 39 Wellington Drive. Clive Morin's lot fronts Wellington Drive for the combined lengths of the Bridges' lot and the applicant's

lot.

The restriction which the applicant seeks to have modified and discharged are as follows:-

1. The said land shall not be subdivided.
2. No building of any kind other than a private dwelling house with the appropriate out building appurtenant thereto and to be occupied therewith shall be erected on the said land and the value of such private dwelling house and out buildings shall in the aggregate not be less then TWO THOUSAND POUNDS.
3. The building to be erected on the said land shall not be erected nearer than twenty-five feet to any road boundary which the same may fall nor less than ten feet from any other boundary. Any out building to be erected on the said land shall not be nearer to the road boundary than the main building itself.
9. No building shall be erected on the said land if the said land fronts any roadway until the said roadway has been constructed to the satisfaction of the City Engineer and taken over by the Kingston and Saint Andrew Corporation.

The applicant seeks the modification of restrictions 1,2,3, and the discharge of restriction No. 9 as set out hereunder:

1. "There shall be no subdivision of the said land except with the approval of the Relevant Planning Authority."
2. No buildings of any kind other than private dwelling houses or Town Houses with the appropriate out buildings appurtenant thereto and to be occupied therewith together with a guard house and garbage disposal structure shall be entered on the said land and the value of such private dwelling houses or town houses and out buildings shall in aggregate not be less than TWO THOUSAND POUNDS.
3. The buildings to be erected on the said land shall not be

erected nearer than twenty-five feet to any road boundary which the same may fall nor less than ten feet from the back boundary SAVE AND EXCEPT a guard house and garbage disposal structure which shall not be deemed to be a breach of this covenant.

9. "RESTRICTIVE COVENANT NO. 9 BE WHOLLY DISCHARGED."

The summons was supported by a number of affidavits, in particular, two affidavits dated 25th June, 1990 and 8th February, 1991 by Carlton DePass a director of the applicant company. In paragraph 18 of his affidavit of 18th February, 1991 he sets out the purpose of this application as the intention of the company to erect "11 three bedroom units the market price for which was determined as at December, 1990 at $1,200,000.00 per unit which said price is subjected to a likely upward appreciation."

THE GROUNDS OF THE APPLICATION

In his first affidavit Mr. DePass outlined the following grounds which are taken from Section 3 of the Restrictive Covenants (Discharge and Modification) Act: hereinafter referred to as the "Act."

(a) The proposed modification will not injure the persons entitled to the benefit of the said restrictions.

(b) The continued existence of restrictions would, unless modified and discharged, impede the reasonable user of the land for private purposes without securing to any person practical benefits of the continued existence of such restrictions without modification.

(c) That by reason of the changes in the character of the neighbourhood the restrictions ought to be deemed obsolete."

These grounds correspond to Section 3(1)(d), 3(1)(b) and 3(1)(a) respectively of the Act.

Section 3(1) empowers a Judge in Chambers to discharge or modify covenants by providing so far as is material:

"3(1) A Judge in Chambers shall have power from time to time on the application of the Town and Country Planning Authority or any person interested in any freehold 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 the Judge may think material, the restriction ought to be deemed obsolete; or

(b) That the continued existence of such restriction of the continued existence thereof without modification would impede the remarkable 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 as such restriction, or, as the case may be, the continued existence thereof without modification; or.....

(d) That the proposed discharge of modification will not injure the person entitled to the benefit of the restriction; provided that no compensation shall be payable in respect of the discharge of modification of a restriction by reason of any advantage thereby accruing to the owner of the land affected by the restriction, unless the person entitled to the benefit of the restriction also suffers loss in consequence of the discharge of modification, nor shall

any compensation be payable in excess of such loss".

At the close of his submissions Mr. Honeywell while not abandoning the second ground (that the continued existence of the restrictions would impede the reasonable user of the land) admitted that the other grounds were those on which "the applicant relies .....most heavily." This was wise, and reflected the emphasis of his submissions.

It must be borne in mind that where an applicant seeks to modify or discharge a restrictive covenant the onus is on him to prove that at least one of the grounds set out in Section 3(1) (a-d) of the Act exists. But that is not an end of the matter, for even if facts necessary to establish a ground are proved, the applicant is not entitled as of right to an order discharging or modifying the relevant restriction. The Court has a discretion to refuse an application where there are proper and sufficient grounds for doing so.

There is no burden of proof on the objectors, as in objecting they are merely exercising their right to preserve their entitlement to the benefit of the covenants which they enjoy.

The affidavits disclose that the covenants have been modified by orders of the court in respect of 8 lots.

They are as follows;

33 Wellington Drive, and numbers 2A - 2B Bamboo Avenue together, as a result of which six town houses have been erected on the former and 14 on the latter. There was also a reduction in the minimum value of the houses which may be erected on the latter.

Number 23 Wellington Drive, 35 Wellington Drive, 33A Wellington Drive and 1 Ottawa Avenue. These now contain 2, 2, 3, and 4 dwelling houses respectively.

Number 29 Wellington Drive. Here the affidavit is unclear as to the nature of the subdivision allowed. As regards number 8

Wellington Drive, the covenant against subdivision was wholly discharged.

There are 2 lots, 15 Ottawa Avenue and 24 Wellington Drive on which multiple dwellings have been erected illegally - without the authority of the court.

The affidavits of the Carlton DePass were supported by a planometric map and aerial photographs of the area. These revealed that the Mona and Papine estates subdivision is comprised of more than 80 lots and that there are at least 25 lots on Wellington Drive itself.

THE SUBMISSIONS ON BEHALF OF THE APPLICANT

Mr. Honeywell contended:

1. The court has granted modification of covenants allowing multiple dwellings on some 7 lots and further on 8 Wellington Drive the covenants against subdivision have been wholly discharged.
2. The objectors have all been in occupation of their lands since 1950's and may therefore be taken to have been aware of these applications. Yet they did not object to them.

   Clive Morin consented or acquiesced in the modification to allow 14 Town Houses at 2A and 2B Bamboo Avenue, a mere 2 lots away and on the same side of Bamboo Avenue as the entrance to his home. And these were of a lower value than previously permitted. There are also 2 illegal modifcations in the erection of multiple dwellings on 15 Ottawa Avenue and 24 Wellington Drive.
   The objectors have either waived or abandoned their rights by their actions and omissions.
3. The neighbourhood encompasses the whole of Wellington Drive and those roads which meet it namely Bamboo Avenue, Ottawa Avenue and Canberra Crescent.

4. Applying the estate agent's test a resident of that neighbourhood would expect a community of single dwelling houses on lots interspersed with multiple dwelling houses on some lots.

5. Wellington Glades, a Housing Scheme marked by some 76 two storey apartments proximate to Wellington Drive, constitutes a relevant circumstance and together with changes in the neighbourhood should assist the court in finding that the restrictions are obsolete.

6. The applicant's original application was for 14 two bedroom houses, this had been changed to 11 three bedroom houses. This means the proposed erection of substantially more valuable Town Houses than first intended.

7. The proposed modification would not injure the objectors as the covenants no longer secured any practical benefits to them - the privacy and value of their property.

8. To refuse the application would sterilize the use of the land.

THE PURPOSE OF THE RESTRICTIONS

Before proceeding to examine the merits of the grounds of the applicant, it is important to identify the benefits which the restrictions are intended to secure and the changes which they are disigned to prevent.

I find that Covenant number one against subdivision seeks to prevent low cost development by prohibiting the fragmentation of the land into smaller lots.

Covenant number two aims to prevent density of housing and to ensure that each lot is restricted to single family dwelling and thus to provide privacy and quietude.

Covenant number three also seeks to preserve privacy and quietude by setting out the distances at which an owner may build.

from the adjoining neighbours.

Covenant number 9 is designed to preserve the quality of the development and especially that the roadways should be of a high standard before any building is erected.

I now turn to the question whether the applicant has discharged the burden which rests upon him. I shall deal with the grounds in reverse order.

GROUND C:

THAT BY REASON OF THE CHANGES IN THE CHARACTER OF THE NEIGHBOURHOOD THE RESTRICTIONS OUGHT TO BE DEEMED OBSOLETE.

In addition to the principles governing the burden of proof and the nature of the Court's discretion in applications of this nature, I wish to mention two other guidelines.

Firstly, Mr. Honeywell in his submissions said "The Court should have regard to aesthetic values but the primary consideration is raw economics". Further in his affidavit of 25th June Carlton DePass states:

> "That there is at present, a great demand for housing and a shortage of prime land for residential purposes in the Corporate Area and the proposed development will help to meet the pressing demand for housing thereby making the said land more useful to the community than they are at present as the said land is now overgrown with bush which harbour (sic) thieves and criminals who prey on the community".

I regard both Mr. Honeywell's submission and the statements in the affidavit of Carlton DePass 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. It was so held In Re Reid's Application 105 LJ 317, (1955) 7 P.CR

and followed by Morgan J, as she then was, in Re 48 Norbrook Drive Suit No. E/RC 160 of 1982 (unreported).

Secondly, the fact that the applicant recently acquired the land (the transfer being registered on 24th April, 1990) is no ground for the Court to exercise its discretion adversely to his application for the restrictions to be modified.

Mr. Honeywell submitted that the Court should regard the whole area of Mona and Papine estates as the neighbourhood. To this Mr. Hylton for the objectors agreed, and I agree also.

Having decided what is the neighbourhood, I must now ask "have there been changes in Character of the neighbourhood?". It is not enough that there are changes in the neighbourhood. I accept and apply the definition of "Character" propounded in Re Davis Application (1050) 7 P & CR 1, cited in Preston and Newsome, Restrictive Covenants, Seventh Edition, P 230 as follows:

> "Character..... derives from the style, arrangement and appearance of the houses on the estate and from the social customs of the inhabitants".

It is well established that the test to be applied in assessing whether the character of the neighbourhood has changed is the "estate agent's test", that is to ask "what does the purchaser of a house in that road or that part of the road expect to get?". It requires a practical approach.

I hold that such a purchaser especially one in the immediate vicinity of the objectors' lots expects to get privacy and quiet by reason of the predominance of single family houses. I have come to this conclusion because my visit revealed that the physical features of the area have minimised the effect of those modified dwelling houses on Wellington Drive to the east of the objectors, because of the distance of those houses from the objectors lots, and the fact that Wellington Drive curves at No. 37 Wellington Drive.

The result is that Clive Morin and the Bridges can see only up to No. 35 Wellington Drive from their lots and the Croswells can see none. Moreover save in circumstances which would be a breach of law of nuisance, the objectors, are because of these factors, unlikely to be affected by the normal noises occasioned by occupants in a dwelling house, the playing of radios, music systems and television sets, the starting of motor vehicle engines, laughter, conversation, the arrival and departure of Guests, the collection of garbage and even the playing of outdoor games.

The nearest modification on Bamboo Avenue is a complex of fourteen (14) Town Houses erected on two (2) lots Nos. 2A and 2B Bamboo Avenues they are two (2) lots away from Clive Morin's lot at 2D Bamboo Avenue. No doubt the presence of this complex has increased the traffic on Bamboo Avenue and Wellington Drive, but the Croswells and the Bridges are not likely to be affected significantly, because of the location of their lots. The size of Clive Morin's lot and the lot beside his should reduce somewhat the noise which comes from the complex to Clive Morin's lot.

In light of the foregoing, I find that there has been no change in the character of the neighbourhood as the state of affairs which the covenants are designed to protect, particularly in the case of the Croswells is still substantially intact.

Even if I am wrong in holding that there has been no change in the character of the neighbourhood, it would not be necessarily concomitant that the applicants would have proved their case. The cases of Re Truman, Hanbury, Buxton & Company Limited [1956] 1 Q.B. 261 (cited by Mr. Honeywell) and Driscoll v Church Commissioners for England [1956] 3 All E.R. 802 are authority for the proposition that a change in the character of the neighbourhood does not necessarily result in the covenants being deemed obsolete.

The Court must go on to ask itself the question whether the changes are such that the Covenants ought to be deemed to be obsolete.

In this connection Romer LJ., in Re Truman, Hanbury, Buxton & Company (Supra) said that the test to be applied is whether the original purposes for which the covenants were imposed can or cannot still be achieved.

The applicants have not proved that the purposes of quiet and privacy cannot be achieved. I find that they can still be achieved by the objectors and that the covenants still afford real proctection to the objectors.

Again, further support is found in the dictum of Farwell J. in Re Henderson's Conveyance [1940] 4 ALL E.R. page 7. He said that in order to prove obsoleteness, the applicant must show, "that the existence of that restriction is one which ought to go because the requirements of the neighbourhood make it proper that there should no longer be any restricion in existence". Mr. Honeywell submitted that the objectors by their actions or omissions must be taken to have either waived or abandoned their right to object, having regard to the nature and number of modified lots to which they did not object. I do not agree.

I accept as correct and apply the following statement by the learned authors of Preston and Newsome (supra) p. 237.

> ".....the mere fact that the objectors may have been supine in not objecting to a state of affairs which is in conflict with the restriction does not mean that the restriction ought necessarily to be deemed obsolete".

I find it perfectly understandable that the objectors may well have taken the approach that they would not object to modifications which were not opposed by those landowners who were nearest to the lots which were intended to be modified, and

in circumstances where by reason of the distance of these lots from their own and the geography of the area they were unlikely to be affected, or would be only minimally affected by the proposed changes.

I think that the objectors may properly have taken such an approach to all the modifications except those at 2A and 2B Bamboo Avenue, and I would not therefore deprive them of their rights because they have been less than diligent in the case of Bamboo Avenue.

To my mind the changes which have occurred in the neighbourhood are so limited in nature and extent that they have not occasioned a change in the character of the neighbourhood.

For example if one travels north eastwards along Wellington Drive one will find that out of a total of 25 lots only 5 have been legally modified, and there is one illegal modification, number 15. Of the legal modifications only one has two storey dwellings, and then only three units.

On the left hand side, the side on which Clive Morin and the Croswells live, only 3 lots which are bounded by Wellington Drive have multiple dwellings as follows: Number 1 Ottowa Avenue, at the junction of Ottowa Avenue and Wellington Drive, has four single storey dwelling houses. As regards number 8 the Court wholly discharged the covenants against subdivision. Number 24 was illegally modified. There are no dwellings within the neighbourhood further to the right of Wellington Drive. On the left hand side between Wellington Drive and Mona Road and Canberra Crescent are the rest of the lots. Of these a mere 5 have been modified with town houses at 2A and 2B Bamboo Avenue, and 1 Ottawa Avenue.

The ratio of modifications is therefore 15 modified lots out of more than 80 within the neighbourhood, and of the 15 no more

than 4 have more than four dwelling houses or apartments. It is also relevant to note that the modified lots are not concentrated in any one area but are dotted over the neighbourhood.

Mr. Honeywell submitted that the presence of two recently constructed housing schemes, Wellington Glades and Wellington Court, could be regarded as another circumstance which the Court could take into account, although they are located outside the neighbourhood, in deciding whether the covenants were obsolete. I agree that regard may be had to such matters and apply a pragmatic test to decide the issue. The test is this: Whether events in the vicinity have stultified the covenant. I am aware that such events may be considered even where (as here) they are on land never affected by the restrictions in question or any related restriction.

I visited Wellington Glades and Wellington Court. The latter is a small complex of 5 town houses on eastern end of Wellington Drive, near the entrance to Wellington Glades. For the following reasons I am convinced that these schemes are not such as in the words of the Land Tribunal in Re Escritts Application (1954) 7. P & CR 134 at 139,

"could spread a blight over a wide area....."

(i) The distance of these schemes from the objectors homes, and the whole neighbourhood.

(ii) Wellington Glades and Wellington Court are very new, well kept, well designed middle income housing schemes. I formed the impression that the occupants take great pride in their surroundings. I am acquainted with what those areas were like before those schemes were constructed; and I am of the opinion that the creation of the schemes has enhanced the appearance of their sites which, in the case of Wellington Glades was just rugged open hillside land.

(iii) Wellington Glades is situated at a much lower level than Wellington Drive and there is only one entrance to Wellington Glades, and that is at the very end of Wellington Drive and chains outside the neighbourhood at the junction of Wellington Drive and Munroe Road. But for that entrance there is no other access between the two areas, as they are separated by a gully which runs the full length of the scheme.

In light of the above I hold that the presence of those schemes had little or no effect on the character of the neighbourhood of Wellington Drive, and that therefore the covenants have not been stultified.

Further there is not a shred of evidence to suggest that the social customs of the inhabitants have changed; and my visit revealed that apart from the modified lots, the style, arrangements, and appearance of the vast majority of houses remain unchanged, so that the state of affairs which the covenants were imposed to ensure, remains substantially intact. For all these reasons therefore the application on this ground fails.

The Ground Under Section 3(1)(b) That the continued existencer of the Covenant impedes reasonable user.

It is not surprising that in his closing arguments Mr. Honeywell indicated that he would be relying more heavily on the other two grounds filed. I find no merit in this ground.

As Lord Oliver implied in delivering the opinion of the Privy Council in John David Stannard vs Lorraine Marie Issa, [1987] A.C. 175 at p. 187, the approach to this subsection is not to regard the expression "The Reasonable User" as if it were "Some Reasonable User" which is the position regarding the Corresponding English Act as now amended. The Courts in Jamaica have regularly

applied the dictum of Lord Evershed in re Ghey and Galton's Application [1957] 2QB650 at p. 663 where he propounded the test to be applied under English equivalent of Section 3(1)(b). He said:

> "It must be shown in order to satisfy this requirement, that the continuance of the unmodified covenants hinders, to a real, sensible degree, the land being reasonably used, having due regard to the situation it occupies, to the surrounding property, and to the purpose of the Covenants".

Or again as Carey J.A. said in the Court of Appeal, in a powerful dissenting judgment which was cited with approval by Lord Oliver in Stannard vs Issa (supra) at p. 186 E.

> "Put another way, the restrictions must be shown to have sterilized the reasonable use of the land."

And so I ask the question which Carey J.A. asked in the Issa case: "Can the present restrictions prevent the land being reasonably used for the purposes the covenants are guaranteed to preserve?".

My answer is no. I find the present restrictions do not prevent the reasonable user of the applicant's lot as a single family residence of high quality - the cumulative purpose of the restrictions. Indeed the plan of the area tendered in evidence in support of the application clearly shows that the vast majority of the houses are still single storey, single family residences, and this was confirmed by a view of the neighbourhood.

It is important to note that the applicant's lot is an open lot, and there has not been the slightest suggestion that the applicant would be unable to build and maintain a dwelling house compatible with the restrictions or to keep a lawn as well kept as those of the objectors. I also find therefore that the applicant would have no difficulty in disposing of his lot with

the existing restrictions, and hence the restrictions have not sterilized reasonable user of the land.

The next question to be considered is whether the existence of the restrictions confers a practical benefit on the objectors sufficient in nature to justify the continued existence of the restrictions without modification.

I accept that the presence of multiple houses on some lots in the neighbourhood of Wellington Drive, will have caused it to become more used by traffic, but to my mind this makes the existing covenants all the more valuable.

As Lord Oliver pointed out in Stannard vs Issa (supra) at page 188D the question which the Court must ask is not "What was the original intention of the restriction, and is it still being achieved?" but "Does the restriction achieve some practical benefit, and if so, is it a benefit of sufficient weight to justify the continuance of the restrictions without modifications?"

Having regard to the factors outlined under the previous ground, and my earlier finding that the covenants still provide quiet, privacy for the objectors and other landowners in the neighbourhood, I find that these are very real and practical benefits and that they are of sufficient weight to justify the continuance of the restrictions without modifications.

I am fortified in this conclusion by a consideration of the burden which is cast upon an applicant under this section. Farwell J, in Re Henderson's Conveyance [1940] 4 ALL E.R. 7. speaking of the effect of a section in which the wording is similar to that of the Jamaican statute on this ground, said

> "If a case is to be made out under this section there must be some proper evidence that the restrictions is no longer necessary for any purpose of the purchaser who is enjoying the benefit of it".
>
> (emphasis mine)

Before parting with this ground I wish to refer to the submission of Mr. Honeywell that the proposed development would enhance the value of the objector's lands. The short answer to that is to be found in a portion of the judgment of Carey J.A. quoted with approval by Lord Oliver in Stannard vs Issa (supra) he quoted thus:

> "...I would suggest that it would not be adequate to show that the proposed development might enhance the value of the land, for that would demonstrate that the applicants' proposals are reasonable and the restriction impedes that development...."

The applicant has therefore not proved this ground.

GROUND A:

> THAT THE PROPOSED DISCHARGE OF MODIFICATION WILL NOT INJURE THE PERSONS ENTITLED TO THE BENEFIT OF THE RESTRICTION.

The learned authors of Preston and Newsome on Restrictive Covenants (supra) at p. 221 in a passage which has been cited with approval by the Courts define the issues that arise under this ground thus:

> "It is not the applicant's project that must be injurious but the proposed discharge or modification. i.e. the order which the Tribunal is invited to make. Cases arise in which it is very difficult for objectors to say that the particular thing which the applicant wishes to do will of itself cause anyone any harm but in such a case harm may still come to the persons entitled to the benefit of the restrictions if it were to become generally allowable to do similar things. Or such harm may flow from the very existence of the order making the modification through the implication that the restriction is vulnerable to the action of the Tribunal.
>
> (emphasis mine)

I accept this as a correct statement of the Law. Further

in Stephenson et/ux vs. Liverant et al 18 W.I.R. 323 at 337 E, Smith J.A., as he then was, has this to say:

> "It seems clear .....that it may be shown that an order for the discharge or modification of a Covenant will be injurious either by the mere existence of the order or because of the implementation of the project which the order authorises. There is, therefore, a burden on an applicant to show that the discharge or modification will not injure in either respect".

In Ridley v Taylor [1965] 1 W.I.R. 611 at 622 Russell LJ. speaking of a paragraph which sets out the identical ground in the corresponding English legislation, section 84(1)(c) of the Law of Property Act 1925, said that it appeared to have been "designed to cover the case of the proprietorially speaking, frivolous objection".

Of course if there are really practical benefits which the covenants secure to the objectors, and if these are likely to be reduced or altered by the project, then injury would be caused and the objections cannot be regarded as frivolous.

I will deal first with the second aspect of proof of injury as set out by Smith J.A.

In this connection I pose this question: "Would the implementation of the proposed scheme reduce the practical benefits enjoyed by the objectors by virtue of the covenants?" It has been the applicant's argument that the project would enhance the value of the objectors' lands and that the scheme would be so carefully designed that aesthetically no one would be harmed.

The objectors counter by urging that the project would bring about an increase in the density, traffic and noise in the area, would strain the amenities and remove the privacy and tranquility of the area.

I have already held that by virtue of the covenants the objectors enjoy the practical benefits of privacy and quiet. I agree with Mr. Hylton's submission that to allow 11 town houses to be erected on the applicants lots would increase the density and traffic in the area. There would inevitably be a substantial increase in noise levels. One can confidently expect that each town house would be occupied by at least two persons and that it is more likely than not that the average would be three persons per house.

In all probability this would mean at least 11 more cars being driven in an out of the lots and it may well be more as it is not unusual for there to be two cars in a family.

To these considerations must be added the likelihood of visitors the use of radios, televisions sets, music systems, and children playing games outdoors.

So the applicant fails on the first leg of this ground, as I find that the project would significantly alter the density, privacy and quiet in the area and would therefore cause injury to the objectors.

Secondly, I now turn to the question whether the mere existence of the order would be injurious. I have already found that the restrictions are substantially intact, that the objects of the covenants can still be achieved, and that they afford a real protection for the objectors, in giving them the power to ensure that the area remains one of single family dwelling houses, thus enhancing peace and quiet. To remove this power would be injurious.

It therefore follows that if this application were allowed it would further drive a wedge in the protection offered by these covenants.

I find that the objectors are sincere, and acting reasonably

and that the objections are not brought frivolously. Hence in all the circumstances this ground fails also.

The order of the court is therfore that the application is dismissed with costs to the objectors to be agreed or taxed. Certificate for counsel.