NMCS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E.R.C. 80/90

RE: 48 NORBROOK AVENUE DRIVE SAINT ANDREW

Mr. David Muirhead Q.C. and Miss Anis Somers instructed by Messrs. Dunn, Cox & Orrett for Applicants

Mr. Ransford Braham and Miss Janet Francis instructed by Messrs. Livingston, Alexander and Levy for Objectors Anis and Shirley Haddeed.

Mr. Enos Grant, Mr. Maurice Long and Miss Susan Richardson for Objector Alice Chang.

HEARD: MAY 3, 1993, APRIL 19, 20, 21, 22, MAY 12 & JULY 27, 1994

HARRIS J. (AG.)

Carlton Fitzroy Livingston and Ruby Lee Livingston, by way of an originating summons sought the modification and discharge of certain restrictive covenants endorsed on Certificate of Title registered at Volume 804 Folio 1 in respect of premises known as 48 Norbrook Drive in the parish of Saint Andrew. These premises were subsequently sold to Regardless Limited which was substituted as applicants by virtue of an Order of the Court dated the 29th November, 1991. Objections to the application were filed by Alice May Chang the registered proprietor of No. 50 Norbrook Drive and Anis and Shirley Haddeed the registered proprietors of No. 46 Norbrook Drive.

These lands form part of a sub-division known as Constant Spring estates. The imposition of the restrictive covenants endorsed on the Certificate of Title was made on the 29th September, 1956.

"1. There shall be no subdivision of the said land."

"3. No building of any kind other than a private dwelling house with appropriate out-buildings appurtenant thereto and to be occupied herewith 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 than Two Thousand Pounds."

"4. 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 sixty feet to any road boundary thereof 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 main building."

"5. No building erected on the said land shall be used for the purposes of a shop, school, Chapel, Church or Nursing HOme or for stables and no trade or business whatsoever shall be carried on upon the said land or any part thereof.

"6. Water closets and cess or absorption pits for the purpose of receiving sewerage and sullage water shall be erected on the said land in accordance witht he regulation of the Public Sanitary Authorities and shall thereafter be maintained in good order and condition by the Registered Proprietor."

"7. No bath water or water used for domestic purposes in respect of the said land or any part thereof or any water except storm water shall be permitted or allowed to flow from the land or any part thereof on to any portion of the land now or formerly comprised in Certificate of Title registered at Volume 794 Folio 84 or on to any road street or land adjacent to the said land but all such water as aforesaid shall be disposed of by being run into an absorption pit or pits of by evaporation or percolation on the said land and nothing shall be done by the Registered Proprietor whereby the drainage or flow of storm water along any drain gully or water course may be obstructed or impeded."

"8. No fence hedge or other construction of any kind nor any tree or plant of a height of more than 4 feet 6 inches above road level shall be erected grown or permitted within 15 feet of any road intersection and the Road Authority shall have the right to enter upont he said land and to clean repair improve and maintain all or any of the drains gullies or water courses which may be thereon and to remove cut or trim any fence hedge or other construction and any tree or plant which may be erected placed or

grown upon the said land in contravention of this restrictive covenant without liability for any loss or damage hence arising and the Registered Proprietor shall pay to the Road Authority the cost incurred by reason of the matters aforesaid"

affecting the said land BE MODIFIED so that it shall read:-

"1. There shall be no sub-division of the said land into more than eight (8) lots."

"3. No building of any kind other than a private dwelling house with out-buildings appurtenant thereto and to be occupied herewith shall be erected on each of the said lots and the value of such private dwelling house and out-buildings shall in the aggregate not be less than One Hundred Thousand Dollars."

"4. The main building to be erected on each of the said lots shall face the roadway or one of the roadways bounding the said land and no building or structure shall be erected on each of the said lots nearer than twenty feet to any road boundary and all gates and doors in or upon any fence or opening upon any road shall open inwards and all out-buildings shall be erected to the rear of the main building."

"5. No building erected on each of the said lots 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 any of the said lots or any part thereof."

"6. Water closets and cess or absorption pits for the purpose of receiving sewerage and sullage water shall be erected on the said lots in accordance with the regulations of the Public Sanitary Authorities and shall thereafter be maintained in good order and condition by the Registered Proprietor."

"7. No bath water or water used for domestic purposes in respect of the said lots or any part thereof or any water except storm water shall be permitted or allowed to flow from the said lots or any part thereof on to any portion of the land nor or formerly comprised in Certificate of Title registered at Volume 749 Folio 84 or on to any road street or lane adjacent to the said lot but all such water as aforesaid shall be disposed of by being run into an absorption pit or pits or by evaporation or percolation on the said lot and nothing shall be done by the Registered Proprietor whereby the drainage or flow of storm water along any drain gully or water course maybe obstructed or impeded."

"8. No fence hedge or other construction of any kind nor any tree or plant of a height of more than four feet six inches above road level shall be erected grown or permitted within fifteen feet of any road intersection and the Road Authority shall have the right to enter upon the said lots and to clean repair improve and maintain all or any of the drains or water courses which may be thereon and to remove cut or trim any fence hedge or other construction and any tree or plant which may be erected placed or grown upon the said lots in contravention of this restrictive covenant without liability for any loss or damage hence arising and the Registered Proprietor shall pay to the Road Authority the cost incurred by reason of the matters aforesaid."

AND SECONDLY that the Restriction which reads:-

"2. Within 12 months from the 27th day of September, 1956 the Registered Proprietor of the said land shall erect a good and sufficient fence between the said land above described and the remainder of the land now or formerly comprised in Certificate of Title registered at Volume 794 Folio and shall thereafter at its sole cost keep up and maintain the same in good order and condition be wholly discharged."

Reliance was placed by the applicant on grounds which were couched in the following terms:-

(a) by reason of changes in the character of the neighbourhood the restrictions without modification ought to be deemed obsolete;

(b) the continued existence of the said Restriction without modification and discharge respectively would impede the reasonable user of the said lands for residential purposes without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of the said Restrictions without modification and discharge;

(c) the proposed modification and discharge respectively will not injure the persons entitled to the benefit of the said Restrictions as it will in no way affect the privacy, view, light or value of any adjacent property or any other property entitled to the benefit of the restrictions.

In support of the application the following were filed:-

(a) Affidavit of Carlton Fitzroy and Ruby Lee Livingston dated the 11th April, 1990 with copy certificate of title, copy deposited plan, copies of letters from Town Planning Department and Kingston and Saint Andrew Corporation.

(b) Affidavit of Don Crawford a director of Regardless Limited dated the 16th July, 1993 with photographs exhibited.

(c) Affidavits of Roosevelt Thompson a Commissioned Land Surveyor dated the 26th June 1991, 26th March 1993 and the 16th July 1993 with maps and photographs exhibited thereto.

(d) Affidavits of Stephen Jameson an architect dated the 9th June and 18th March 1994 with plans attached.

(e) Affidavits of Herman Grace, a paralegal clerk exhibiting copies of the duplicate certificates of title in respect of premises No. 42 and 66 Norbrook Drive.

The Livingstons deposed that the premises are subject to restrictive covenants imposed on the 29th September 1956. They recited the names and addresses of certain persons who are entitled to the benefit of the restrictions. They further deposed that it was their intention to develop the land by the construction of a

maximum of 7 town houses and that the Town Planning department had stipulated that it had no objections to such a proposal and in July 1982 the K.S.A.C. granted approval for erection of 8 three bedroom town-houses on the land.

It was further stated that the character of the neighbourhood had changed as buildings similar in type and scope to those to be constructed have been erected on adjoining lands, such as 45E, 33A, 33, 36, 29, 32 and 34 Norbrook Drive. Approval had been given for erection of town houses and apartment on 42 Norbrook Drive. They outlined the covenants to be modified and discharged and the grounds on which they were relying which were similar to those already recited in the originating summons save and except ground 2 was stated as follows:-

> "The continued existence of the said restriction without modification and discharge respectively would impede the reasonable user of the said land for <u>commercial</u> purposes without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of the said Restrictions without modificationa nd discharge."

Donovan Crawford, in his affidavit, deposed that he was advised by his architect that for better development of the land and to complement the tone and character of the Norbrook area, it would be more asesthetically pleasant to build 6 instead of 8 town houses. 48 Norbrook Drive contains an area of 46422 square feet and erection of 6 town houses would result in a density of one housing unit to 7,737 square feet of land. Each unit would be elegantly designed and built at a cost not less than 3 million dollars.

In his affidavit, Roosevelt Thompson averred that he made certain field observations and searches at the office of the Titles which revealed that multiple dwelling units had been

established, or covenants modified to permit the establishment of multiple units on the following premises:-

(1) Six town houses each have been built on 41 and 43 Norbrook Drive. These premises appear to be referred to as 45C and 45E Norbrook Drive.

(2) Multiple cottages have been erected on Nos. 20 - 26 Norbrook Drive.

(3) On Nos. 34 and 36 Norbrook Drive 3 town houses on each have been erected.

(4) On No. 14 Norbrook Drive an apartment building comprising multiple units have been constructed.

(5) 27 - 31 Norbrook Drive contains an apartment building with multiple units.

(6) The covenants on 25 Norbrook Drive were modified on 28th May, 1976 to permit the erection of apartments.

(7) 42 Norbrook Drive which comprises an area of 48,248.6 square feet, has erected thereon, 7 town houses, creating a density of one housing unit for each 6,892.6 square feet of land.

(8) The covenants on 64 and 66 Norbrook Drive were modified in September 1984 to allow sub-division of the land comprising 92684 square feet into lots not smaller than 2,100 square feet. Approval was granted from the KSAC for the erection of 17 town houses. The density which will result from the erection of town houses on the land will be one housing unit to 5,452 square feet of land.

(9) 56 Norbrook Drive covenant was modified, sub-dividing the land into 2 lots.

It was his opinion that the proposed development would not adversely affect the neighbourhood, or, vicinity of Norbrook Drive and it would be in keeping with the general trend towards re-subdivision in the area. It would be of a very high standard and would positively contribute to the neighbourhood and enhance the value of property in the surrounding area.

He further averred that there is no depression on or near to the applicant's land nor are there any circumstances or topographical situations which would create or enhance flooding of the objectors' lands. There would be no impairment of the view of the mountains overlooking Norbrook Drive of the objectors Anis and Shirley Hadeed by the erection of the proposed town houses by the applicants.

Stephen Jamieson deponed that he prepared a preliminary schematic designed plan for the site of the proposed town house development which plan has not yet been developed to the working stage for submission for building approval. The plan shows six luxury town houses three bedroom semi-detached units with a common pool, recreation area and guard house arranged to provide generous open spaces between the buildings. He also prepared a plan showing the area of the site, ground area of buildings, site density, number of habitable rooms and parking spaces as well as location of several town houses sited in the vicinity of the applicants' land. The proposed development he stated contemplates a luxurious standard of housing with extensive land scaped grounds.

The following affidavits were file in support of the objectors:

(a) Affidavits of Anis Hadeed dated 2nd January 1992 and 22nd September 1993.

(b) Affidavits of Oscar McDaniel, Real Estate Broker and Auctioneer dated the 12th July 1991, the 22nd January 1992 and 29th April 1993, with Report, copies certificate of title and copy deposited plan and photographs.

(c) Affidavit of Alice Chang dated 29th November, 1993, with copy judgment and copy affidavit exhibited.

(d) Affidavit of Owen Pitter, Chartered Surveyor, dated 16th November, 1993, with ectract map exhibited.

(e) Affidavits of Keith Lumsden, Architect Planner with Urban Planning Group dated 13th January, 1994 and 19th April, 1994.

Anis Hadeed deposed that all lots bordering the golf links inclusive of his and the applicants, are premium lots for which premiums prices were paid and the erection of 7 town houses would result in the increase of the number of persons residing on the applicant's land. There would consequently be an increase in pedestrian and vehicular traffic, which, would destroy the privacy, quietude and serenity currently enjoyed by his wife and himself.

He further averred that the applicant's land is for the most part about 6 to 8 feet in elevation above his land and construction of town-houses on the applicant's land would block his view of hills and surrounding area and would also impede the flow of air.

He also deposed that on construction of the town-houses the occupants and their visitors would have an unobstructed view of his swimming pool and recreational area.

At the rear of the applicants' land there is situated a gully course in which earth has been compacted to make the terrain of that part of land even. If applicant carries out his construction of town-houses the majority of land would be occupied by building and pave areas This would obstruct the percolation of rainwater, causing a drainage problem, which could be exacerbated by the gully course resulting in damage to life and property.

The affidavit of Oscar McDaniel, confirmed that the applicants' land is for the most part at a level higher than the Hadeeds'. He stated that the erection of a two storey complex on the applicants' land would result in depriving the Hadeeds of the privacy and seclusion of their property and would prohibit their enjoyment of the mountains and the surrounding scenery.

He also made reference to the gully course which runs to the rear of most of the properties which face the golf course and expressed fear that flooding might result after construction of building on the applicants' land, as, there would be inadequate natural surface area for percolation of rain water.

He averred that there would be increase in density of the area if the town houses were built and this would result in corresponding increase in noise, which would destroy the quietness now enjoyed by the Hadeeds.

He further stated that he inspected the area and noted that major changes had taken place in the relevant area on the western side of Norbrook Drive but the nearest was 350 yards south of

48 Norbrook Drive, the only exception being No. 45E Norbrook Drive which is below road level. The only other development on the eastern side of Norbrook Drive were of low density and south of 44 Norbrook Drive.

It was his contention that lots 41 - 43 Norbrook Drive contain single family units and not 6 town houses each as stated by Roosevelt Thompson. No.36 Norbrook Drive contained 3 units built on 50,852.7 square feet of land and not several town houses as stated by Thompson. Nos. 27 - 31 Norbrook Drive were combined, and divided into 3 lots of which, Lot 2 contains a single family residence and lots 1 and 3 comprise 18 apartments. No.25 Norbrook Drive housed a single family residence. Nos. 34 and 36 Norbrook Drive are approximately 800 feet from objector's land and these 2 premises comprising over 2 acres have town houses which are set far back from the road. Nos. 64 - 66 Norbrook Drive are approximately 600 feet from Hadeed's land, No. 56 Norbrook Drive is about 600 feet away and No. 42 approximately 150 feet away.

The lots on that side of Norbrook Road opposite the objector's land are approximately ½ an acre each, they are situated at a lower level than that of the roadway. The lots which are on the side of the road where the objector's land is situated border on the Constant Spring Golf links. These lots were one acre in dimension when originally sub-divided and form a quiet and exclusive area. It was his opinion that the town houses would detract from the present reputation of quality enjoyed by the neighbourhood, will depress and adversely affect its quiet and exclusive reputation, lower the value of the houses, and destroy the amenities they now enjoy.

The affidavit of Alice Chang made reference to, among other things, a Judgment delivered by Morgan, J refusing previous

application made to this Court for the modification of restrictive covenants 1, 2, 3, 4.

She deponed that construction of two houses by the applicant would create far greater level of noise than she envisaged, would lead to invasion of her privacy and would spoil her view of surrounding area and obstruct the flow of air. She stated also that if she had been aware of the proposed development prior to purchase of the land she would have designed her house in a different manner to make allowances for the problems she envisaged. The proposed development is a threat to amenities she carefully created and maintained at great expense.

She also stated that factors which created the gully course on the southern boundry of the land, which has been filled with earth over the years, were to resurface, incalculable harm could be caused by flooding.

Owen Pitter, in his affidavit, deposed that No. 50 Norbrook Drive comprises an area of 47943 square feet with a frontage of 167 feet and average depth of 350 feet and is slightly above road level with 4 bedroom residential bungalow set back less than the permitted 60 feet from Norbrook Drive. This breach was rectified by modification of the relevant covenant. The residence enjoy privacy and tranquility of a quiet garden area.

He also stated that No.50 Norbrook Drive is evenly graded and at its upper end above the elevation of 48 Norbrook Drive. By its setting, it offered a view of the lower southern end of the garden area of adjacent premises. It also commands a view of Norbrook Mount of 46 and 52 Norbrook Drive, and the hills framing Cherry Gardens through to Jack's Hill and Dallas.

He further averred that there is a predominance of single family residential developments on the golf course side of the Norbrook Drive loop. There had recently been developments comprising town houses, or, apartments as 'in-fill' projects, maintaining a standard and finish sympathetic with the neighbourhood.

It was his opinion that if the applicants were allowed to proceed with erection of the six (6) townhouses, this would be more aesthetically pleasant and more environmentically compatible than the eight (8) townhouses earlier proposed, and may result in some amelioration of the anticipated injury in the use and enjoyment of 50 Norbrook Drive. The six (6) units, however, posed a threat to the enjoyment of the peace and quiet of the neighbourhood by increase in noise expected to be generated by normal domestic activity, the invasion of privacy and the impairment of the view of the owners of 50 Norbrook Drive.

The grounds on the which the applicants rely are based on the Restrictive Covenants (Discharge and Modification) Act S. (1) (a) (b) & (d) which provide:

> "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 Judg may think material, the restriction ought to be deemed obsolete; or

(b) that the continued existence of such restriction or that 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 proposed discharge or modification will not injure the persons entitled to the benefit of the restriction".

It is the duty of the applicants to satisfy me that the evidence advanced by them is sufficient to warrant modification and discharge of covenants 1,3,4,5,6,7 & 8. If they succeed in establishing any one of the grounds on which they have placed reliance, they may be entitled to the order. I will now proceed to examine the grounds propounded by them, to determine whether they have discharged the onus which has been placed on them.

The first question to be considered is whether there has been a change in the character of the neighbourhood which would render the restrictions imposed by the covenants obsolete. What is the neighbourhood? The generally accepted test in determining a neighbourhood is the "estate agent's test" as stated in Preston & Newsone's Restrictive Covenants 7th Edition page 230:

> "The test is thus essentially an estate agent's test; what does the purchaser of a house in that land, or that part of the land expect to get."

The author also states:

> "The neighbourhood need not be large. it maybe a mere enclave nor need it, be so far as definition goes, be conterminous with the area subject to the very restriction that is to be modified, or other restrictions forming part of a series with that restriction."

I am of the opinion that this appraoch is correct. The original subdivision in which the lands of the applicants and objectors are

sited is divided by Norbrook Drive which runs from east to west. The lands to the north of Norbrook Drive face the Spring Garden Gully. The terrain of these lands is of a sloping nature. This physical feature of the lands has resulted in the houses being built below street level. The lots in this section of the sub-division were originally approximately a half an acre in size.

On the southern section of Norbrook Drive are situated much larger lots, the vast majority of which are approximately an acre in size. The terrain of these lots is fairly even although some parts slightly undulating, the greater portion offer expansive level surface space on which elegantly designed houses have been sited, with much room for spacious lawns and gardens. These lots on the south are contiguous with the Constant Spring golf links. The golf links provide a scenic view. The sizes of the majority of these lots dictate that the distances between each registered proprietor grants an assurance to each of them, the enjoyment of far greater measure of privacy from those on the north. The panoramic view of the golf links which is available to the owners on the south is not enjoyed by those on the northern section of the subdivision. An extensive pleasant view of the surrounding hills which is accessible to owners on the south is restricted to those on the north. The amenities which accrue to owners of lots in the south are markedly superior to those in the north. It follows therefore, that the distinquishing characteristics between the two sections of the subdivision lead to the conclusion that the north and southern segments of the subdivision ought to be regarded as two distinct neighbourhoods.

Morgan J. as she then was, in an unreported judgment delivered on the 16th November, 1984 in a previous application made for the

modification and discharge of several restrictive covenants endorsed on the applicants' certificate of title in her description of the neighbourhood, stated:

> "To satisfy the estate agents test I would say that a purchaser of a house on the south side of Norbrook Drive expects to get privacy, seclusion, a view on either side of his house of beautiful gardens and ro enjoy peace and quiet occasioned by low occupany in a place where private single-family dwelling houses exist. If that is right, then I an constrained to find that there are special peculiarities in features and amenities which redound to the benefit of the south side, amenities which are not available to and could not have so been intended for the north side. These lots are on a higher level than the north side which would tend to give then a special view; there are facilities for walking on the golf course with its beautiful green grass and lush vegatation. The spaciousness of these lands and that of the golf couse in front of them attracting privacy, seculusion and quietude creating an enormous aura of clam and peace, all these are undoubtedly amenities not available to the north side. This area must have been intended by the covenants to create and possess a tone and character of its own far different from the area on the other side to which many of these amenities are limited if at all.
>
> I therefore conclude that "neighbourhood" in the context of this case consists of those houses only in the sub-division on the south side of Norbrook Drive numbers 20 to 74 being even numbers only and fronting the Constant Spring Golf links as appears on the planametric map. I further conclude that the houses on the north side do not form a part of this "neighbourhood" but belong to distinctly different one of their own, and therefore need no consideration for the determination of this matter."

I feel constrained to state that Morgan J's approach was correct. I must however differ with regard to that part of her finding in which she confined the neighbourhood to lots 20 - 74. In my opinion, the neighbourhood incorporates all lots facing the golf links which are lots 2 to 74 (even numbers only).

The next issue to be decided is whether there have been any changes in the character of the area extending from lots 2 to 74. It has been established that the character of a neighbourhood derives from its style, arrangement and appearance of its houses and from the social customs and habits of its inhabitants.

The neighbourhood was originally designated to be occupied by single family residence only. It has been shown by the applicants, that over the years orders have been made by the court discharging or modifying covenants to accomodate construction of multi-family residence by splintering of the lots.

It has been further established by the applicants that consequent on the fragmentation of lots, an apartment complex has been constructed on No. 14 Norbrook Drive, multiple cottages, have been built on 20 - 26 Norbrook Drive three sets of town houses have been erected both on 34 and 36 Norbrook Drive and seven town houses have been erected on No. 42 Norbrook Drive. They have also shown that 42 Norbrook Drive which has an area of 48,248.6 square feet was sub-divided to create a density of 6,892.6 square feet to each housing unit. 64 and 66 Norbrook Drive which are still empty lots, comprise 92,684 square feet but the covenants have been modified for its sub-division into lots not smaller than 2100 square feet and approval had been granted by the Kingston & St. Andrew Corporation for the erection of 17 townhouses thereon. The density resulting from erection of the townhouses would be 5,452 square feet of land to one housing unit. Premises No. 56 Norbrook Drive had been sub-divided into 2 lots.

There is a general tendency towards resub-division of the lots in the neighbourhood. The fragmentation of the lots have to some degree altered the physical state of the neighbourhood. These

alterations have resulted in certain developments having taken place or about to take place in the neighbourhood which have created a difference in the style, appearance and arrangement of the houses. Whereas, previously where there were single family dwellings on some lots, there are now multiple dwellings. On other lots where single family units ought to have been built, multi-family residence in accordance with existing orders for modification and discharge of covenants will be constructed. The social customs and habits of the residents in the neighbourhood is developing along the paths of erecting units to accommodate duplexes and apartment complex instead of single family residence.

The changes of several of the original lots by virtue of subdivision, re-subdivision of these lots and by the construction of, or, proposed construction of multi-family units and the layout and designs of the units have had a remarkable impact on the character of the neighbourhood. It is also obvious from the affidavits of both Mr. McDaniel and Mr. Pitter that they recognized that significant changes have taken place in the neighbourhood. Mr. McDaniel went as far as stating that "major changes have taken place in the relevant area to the applicants' land" but proceeded to add a caveat by introducing an element of distance between the applicants' land and premises numbered 34, 36, 42, 56, 64 and 66 Norbrook Drive (all of which have been re-subdivided) as a measure to counter his acknowledgement of changes in the neighbourhood. The fact is, changes have taken place in the character of the neighbourhood. It is immaterial whether these changes had taken place 350 yards or 150 - 200 feet from applicants' land. In my opinion the applicants have demonstrated that there have been changes in the character of the neighbourhood, and I am satisfied that there have been such changes.

A further issue to be determined, is whether these changes in

the character of the neighbourhood are such that the covenants ought to be deemed obsolete. The test of obsolescence as laid down by Romer J in Truman, Hanbury, Buxton & Co. Application 1956 1 Q.B. is whetherthe original object of the covenantis capable of fulfilment. To succeed therefore, the applicants must establish that the object for which the covenants were imposed are incapable of achievement. In Re Henderson's Conveyance 1944 4 A.E.R. page 7 Farewell J stated:

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

A submission put forward by Mr. Muirhead was that the character of neighbourhood has changed and the covenants ought to be deemed obsolete.I would say that this is not necessarily so. There are 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.

The cases or Re Truman, Hanbury, Buxton & Co. Application (supra) and Driscoll v Church Commissioners for England 1957 1 Q.B. 330 indicate that although the character of a neighbourhood might have changed it does not follow that covenants ought to be rendered obsolete.

In Re Truman, Hanbury, Buxton & Co. Application, the court refused to discharge a covenant that an estate should be preserved as a residential area in favour of applicants who sought to erect a public house although there had been a finding that there was a change in the neighbourhood.

Similarly, in Driscoll v Church Commissioners the tribunal refused to discharge as obsolete a covenant which had been in existence for 91 years, notwithstanding that they had found that there were changes in the neighbourhood.

What is the object of the restrictions which were imposed? The object is that the neighbourhood be retained and maintained as a private residential one. This area is an exclusive residential area in Norbrook and the purpose of the imposition of the restrictions could only be to preserve the tone and quality of the neighbourhood. The neighbourhood is a private high-class residential one and the amenities offered ought to be guarded jealously.

Although over the years orders have been made by the court permitting the sub-division of several of the original lots to accomodate the construction of townhouses and apartment complexes, this act in itself does not render the restrictions valueless.

On my visit to the neighbourhood I had 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. Even in a case where houses were built at a greater density than originally contemplated in the later stages of a development of an estate which had developed over a long period, the scheme was not rendered obsolete as the inhabitants were broadly on the same footing as those for whom the estate had originally catered, see Re Harris application (1964) 16 p & C.R. 185. 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 lots in the neighbourhood the benefit of privacy, tranqulility, peace, seclusion and a view. In Stannard v. Issa 1986 34 W.I.R. page 197 it was asserted:

> " 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, just as for instance, was the ability in Gilbert v. Spoor 1983 Ch 27 to preserve a view by restricting building."

The right to these amenities enures to the benefit of persons who are entitled to the benefit of the restrictions. This is so, whether covenantee is claiming this right through a building scheme or otherwise. It is irrelevant whether the right to these amenities were expressly prescribed by the covenants.

The applicant's land for the most part stands at an elevation of 6 - 8 feet above the Hadeeds' land. To the rear of the Hadeeds' house is situated a master bedroom from which a balcony extends. Immediately below the balcony is sited a swimming pool and a recreational area. If three sets of townhouses were to be built on the applicant's land, there is the likelihood that each unit would be occupied by a minimum of four persons. The occupants of these townhouses, their domestic helpers, their visitors would stare directly on the Hadeeds' balcony and possibly, in their master bedroom. At any given time the Hadeeds would also always be exposed to the gaze of at least six sets of families occupying the townhouses. Mrs. Chang would also be subject to the gaze of these persons but to a far less extent than the Hadeeds. Although Mr. Jameson's plan has shown the front of the townhouses facing Mrs. Chang and the entrance to the complex immediately adjoining her premises, the Hadeeds would still be at a greater disadvantage than she would be.

There is no question that the presence of a single family unit on No. 48 Norbrook Drive would interfere with the privacy of the objectors. However, the effect of the interference with the objectors' privacy by persons in occupation of a single family unit would be far less than in the case of six separate families in addition to their visitors and employees.

There is evidence that the objectors enjoy a pleasant view of the mountains and surrounding scenery from their respective premises. The plan showing the proposed townhouses to be erected indicate that the units running from north to south across the applicant's land with spaces between each unit, would occupy the greater portion of the land. When one stands at the back of the Hadeeds' residence, looks to the east, there is a pleasant view of the mountains. Surely, if these townhouses are built they would substantially, or, wholly exclude the view of the hills of the Hadeeds to the east. This would certainly deprive them of a right to which they are entitled.

It must be acknowledged that there is a distinct possibility that, a single family dwelling, which the covenant permits, if constructed on the land, might be so designed as to cause some diminution of the objectors' view. However, it cannot be perceived that a single unit of the size and extent of three separate townhouses would be erected on the applicant's land to cover the same area as would be occupied by three units. The obstruction of the view by three sets of townhouses would be far greater than that by a single dwelling house.

It is also important to point out that the presence of six townhouses on the applicants' land indicate that there would be at least 24 persons occupying the land, there being a minimum of 4 persons in each house.

This would dictate that there would be an increase in noise which would have been far in excess of that coming from a single family and would consequently, disturb the peace and quiet of the objectors.

The applicants have not shown that the privacy and peace of the objectors would not be eroded, or, that view would not be impeded. The preservation of the high quality and tone of the neighbourhood as a private high-class residential one is still attainable. The right to peace, privacy and a view still affords a real protection to those who were entitled to compel obedience to the covenants. The applicants have not established that the character of the neighbourhood has so entirely been 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.

The next issue to be decided is whether the continued existence of the restriction would impede the reasonable user of the land and if so impeded, practical benefits are not secured to other persons. There are two questions to be answered. The first is whether the continued existence of the covenants would impede the reasonable user of the land. The second is whether any practical benefits are served by the existence of the restrictions. The test to be applied in these circumstances was laid down by Lord Evershed M.R. in Re Gheys & Galton's Application 1957 3 A.E.R. page 171 where he stated:-

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

It follows therefore, that the applicants must prove that failure to modify or discharge the covenants would stultify the reasonable user of the land and that no practical benefit would be served by the continued existence of the restrictions. Has the applicant shown that the permitted user of the land is no longer reasonable? The evidence is that the applicants propose to build six townhouses on land on which covenant permits only one house. There is no evidence that the applicants would encounter any difficulty in erecting a single family unit on their land in conformity with the terms of the restrictions. It has not been proven that building a single family residence on the applicant's land would amount to an unreasonable user of the land. Similarly, there is no evidence that a single family unit on the applicant's land would sterilise the land.

Further the affidavit of the Livingstons stated that the continued existence of the restriction without modification would impede the reasonable user of the land for commercial purposes. It is evident that there is a **desire** and intention on the part of the applicant to erect 6 townhouses to satisy their own financial exploits. This could not be regarded reasonable user of the land. A party is not free to expropriate the private rights of another merely for his own advantage.

There is no proof that the applicant's property cannot be developed or used in accordance with the conditions imposed by the covenants. The ~~proposed~~ **use** of the land must increase the housing density in the area, **consequent** on which, the privacy and peace of the objectors would be destroyed. This user therefore, cannot be regarded as reasonable.

The next issue to be determined is whether there are any practical benefits to be served by the restrictions. The manifest

intention of the framers of the covenants was to insure the preservation of the privacy of each purchaser in the sub-division as well as the quality of the sub-division.

As stated earlier, ... privacy, quietude and a view are features which conduce to the material comfort of the objectors and which enure to their benefit and this can still be so, even if the character of the neighbourhood has been changed. In Re Mason 78 W.N. 926 it was held that the matter of view and privacy are some of the purposes of a covenant which could be practically secured although the character of a neighbourhood had been changed.

As it has been shown, if the units are built, the masterbedroom, balcony and recreational area of the Hadeeds would be in full view of the residents of 48 Norbrook Drive. They would be under constant scrutiny of possibly 24 or more persons occupying six townhouses. This would mean, the use of their balcony and recreational area would be restricted and they might even be forced to keep their bedroom door closed. It must surely be a practical benefit to have a balcony, bedroom and a recreational area not being exposed to the view of six different families.

A density introduced by six separate family units was certainly not contemplated by the covenants. It is interesting to note that the applicants had stated that the proposed development is below the permitted density. Mr. Jamieson stated that the complex would not exceed a density of 30 habitable rooms. However, there is evidence to show that whereas a density of 32 - 33 habitable rooms was allowed by the local authorities, the plan of Mr. Jamieson shows a density of 36 habitable rooms. This situation clearly indicates that the noise would not only exceed that emanating from 30 habitable rooms but from persons occupying 36 habitable rooms. The disturbance to the objectors would even be far greater than anticipated. The ability for the objectors to relax in a peaceful

atmosphere in their homes is a practical benefit which is worthy of preservation.

It is also a practical benefit for the Hadeeds to be able to enjoy the mountain scenery to the east of their residence. The view of the hills in the north-east and east of their home, is one which is capable of being put to use by the Hadeeds.

The applicants have failed to show that the construction of multiple dwelling units on their land is a reasonable user of the land, or, that the continued existence of the restrictions do not secure practical benefits which enure to the objectors.

There remains for consideration the last ground, namely, whether the proposed modification will injure persons entitled to the benefit of the restrictions. The test applicable was stated by the authors of Preston & Newsone Restrictive Covenants page 221:-

> " It is not the applicants project that must be uninjurious but the proposed discharge or modification, that is, 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."

In an analysis of the foregoing, Smith J.A. as he then was, in Stephenson v. Liverant 1972 18 W.I.R. 337 said:-

> " It seems clear from this passage and as a matter of interpretation that it may be shown that an order for 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."

The contention of the objectors had not only been limited to the fact that the modification or discharge of restrictions to build the proposed complex will detract from their enjoyment of the amenities of the neighbourhood but also that the values of their homes would be decreased and that it would create a potential hazard to life and property.

I had earlier concluded, that if the covenants are modified or discharged to enable the applicants to proceed with their project the privacy of the objectors would be greatly reduced. This reduction of privacy would diminish the appeal of the objectors' premises to prospective purchasers.

It cannot be said that the desire to have a view is frivolous. As was shown earlier, judicial authority supports the fact that a view is important. It has been established that the blocks of units to be built by the applicants would extend over the greater portion of their land and would wholly or substantially exclude the view of the objectors. A view which is a substantial amenity would be no longer available and this would in fact lower the attraction to purchasing the objector's premises.

There is evidence which dictates that the presence of six townhouses on the applicant's land would greatly increase the occupational density of the area. The noise radiating from at least 24 persons, their visitors, employees, their televisions and radios would be without doubt, a nuisance and would be extremely disturbing to the objectors.

It is unmistakenably patent that a prospective purchaser taking all these factors into consideration, would either decline

from purchasing either objectors' house or, would buy at a reduced value. The applicants have not negated charges of injury to the objectors. Making of an order for modification of covenant would be injurious to the objectors as the restrictions are not obsolete and they still afford protection to each registered proprietor in the neighbourhood for its maintenance as a private exclusive residential area.

The objectors made reference to a dry gully which runs along the southern section of the applicants' and objectors' premises. That part of the gully on the applicant's land has been filled with earth. The objectors stated that if the applicants are permitted to build the townhouses, the surface would be paved and this would prevent the natural percolation of rain water which would result in flooding. They had also asserted that if the factors which created the gully should arise again, this would cause damage to life and property.

There is no evidence to warrant fear of anything catastrophic resulting from the existence of the dry gully or the compacting of the gully with earth by the applicants. Further, it had been observed on my visit to the area, that the Hadeeds had constructed a substantial concrete wall, running from the main road towards the golf links, several feet high along the boundary between the applicant's land and theirs. The presence of this wall renders it impossible for the flow of water to escape from the applicant's land to the Hadeeds. These assertions by the objectors are speculative and devoid of merit.

In my opinion the applicants have adduced sufficient evidence to show that there have been changes in the character of the neighbourhood. They have, however, failed to satisy me that the covenants are obsolete. There has also been failure on their

part to discharge the burden placed on them in proving any of the other two grounds propounded.

The application therefore fails. The summons is dismissed with costs to the objectors.