1076

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. R/C 160 of 1982

IN THE MATTER of 48 NORBROOK DRIVE in the Parish of SAINT ANDREW being the land comprised in Certificate of Title registered at Volume 804 Folio 1 in the Register Book of Titles.

AND

IN THE MATTER of restrictions relating to subdivision thereof.

AND

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

Emile George, Maurice Tenn and Fern Chen for applicant.

R.N.A. Henriques, Bruce Barker, Alan Wood, Joy Bayley-Williams for Astec Limited, objector.

J. Sinclair and Maurice Long for Alice Chang objector.

Heard: February 6, 7, & 8, April 9 & 10, November 16, 1984.

MORGAN J:

Mr. Carlton Fitz-Roy Livingston and his wife Ruby Lee the applicants, are the registered proprietors of land known as 48 Norbrook Drive, St. Andrew registered at Volume 804 Folio 1 in the Register Book of Titles. It is a lot measuring approximately 1 acre more or less, is part of a subdivision of lands formerly known as Constant Springs Estate, and is adjacent to, and overlooks the Golf Links of the Constant Spring Course with its beautifully kept grass and shaded trees. This development was established in the early sixties for the upper-income group for residential purposes only, and single family houses. The applicants would now like to build eight town houses on their lot but are restricted by the covenants, and have made application to the court to have the restrictive covenants on the title, to which the other lot owners are entitled to the benefit thereof, modified.

The owners on either side of the applicants, Astec Limited through its Managing Director Mr. Ian McLean Murphy owner of No. 46 and Mrs. Alice Chang owner of No. 50 who own single-family architect-designed residences consistent with the

covenants and the proposed intention of the developers at its commencement, have filed objections to this application for modification of the covenants and have claimed compensation, in the event the court modifies same.

The covenants numbered 1, 3 and 4, which the applicants seek to modify read as follows:

" 1. There shall be no sub-division 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 which the same may face nor less than fifteen feet from any other boundary thereof 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."

The modifications sought read as follows:

"1. There shall be no sub-division of the said land except into lots not less than Two Thousand Nine Hundred Square Feet.

3. No building of any kind other than town houses shall be erected on any of the said lots and the value of each town house shall not be less than $50,000.00.

4. The buildings to be erected on any lot shall face one of the roadways bounding the said lots and no building or structure shall be erected on the said land nearer than Thirty Feet to Norbrook Drive 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.

The grounds on which the applicants rely are:

(a) That by reason of the changes in the character of the neighbourhood the restriction numbered 3 ought to be deemed obsolete;

(b) The continued existence of the restrictions without modification will impede the reasonable user of 48 Norbrook Drive for public or private purposes without securing to any person practical benefits sufficient in nature or extent to justify the continued existence thereof without modification; and

(c) That the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restrictions whether in respect to estates in fee simple or in lesser estates or interests in the property to which the benefit of the restrictions as annexed, have agreed, by implication, by their acts or omissions, to the same being modified or discharged; and

(d) That the proposed modifications and discharge will not injure the persons entitled to the benefit of the restriction.

As I understand the law in these matters, the burden is on the applicant to satisfy the court on the grounds he propounds, that the restrictions he seeks to be modified should be so modified. There is no burden of proof on the objectors inasmuch as they are exercising their right to preserve something to which they are entitled. If however the applicant is able to prove one ground only, he may be entitled to an order. However notwithstanding that one ground has been made out it still remains a discretion of the court whether or not to refuse the application if there is proper and sufficient grounds for refusal.

This burden the applicants sought to discharge by the contents of affidavits made jointly and singularly by themselves and dated 20th June, 1982 14th October, 1982, 8th June, 1983, 30th September, 1983, 6th December, 1983 of Carl Chen, Town Planner and Chartered Architect dated 6th October, 1982 and of David DeLisser, Valuator, dated 22nd April, 1983.

Counter affidavits by Astec Limited (objector) were made by its Director and Secretary dated 13th July, 1983; Ian Murphy, its Managing Director dated 3rd August, 1983, 14th October, 1983 by Owen Pitter, Chartered Surveyor dated 31st January, 1984 and on the other part by Alice Chang (objector) dated 30th November, 1983, supported by Roy McDaniel, Real Estate Broker Appraiser dated 7th December, 1983.

The objectors hold that:

1. The restrictions were imposed for the purpose of preserving to them the amenities of an exclusive and quiet area, with lawns and gardens affording seclusion from adjoining premises.

2. That the making of the order would be the "thin edge of the wedge" as it would result in fragmentation of more lots substantially increasing the density and devaluing their property.

3. That the proposed modification will detract from the present reputation of quality, depress and adversely affect this reputation enjoyed by the neighbourhood and lower the value of the homes.

4. That in respect of No. 46 Norbrook Drive the view of the hills will be blocked, there will be undue noise from traffic, that there will be drainage problems from the peculiar situation of his own land, that it will destroy the tone and character of the area.

5. That other sub-divisions that are in the area have consisted of single dwelling houses with lot sizes of half acre and upwards with single dwelling houses and/the proposed development could be so confined. That the density proposed is inconsistent with the neighbourhood and will change the character thereof.

6. That the character and privacy of the Astec Limited property will be destroyed as the recreation area and swimming pool are on the side which will be overlooked by the eight families as also by persons using the proposed open area of the sub-division.

It is my view that what these covenants are designed to prevent and preserve are in respect of No. 1 - to prevent fragmentation of the land thereby eliminating low cost development; No 3 - to prevent density by ensuring single-family dwellings only and No 4 - to preserve privacy and peace by fixing stated distances from the adjoining neighbours and from the roadway for buildings. As the proposed modifications in fact eliminate what the original covenants were designed to prevent and preserve, the onus of proof now falls on those who seek to remove them.

Now to a consideration as to whether or not the applicants have satisfactorily discharged their burden I will look at the first grouhd on which the applicants rely

> That by reason of changes in the character of the neighbourhood the restriction 3 (that is, no building 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) ought to be deemed obsolete.

These lands are orignnally part of Constant Spring and Norbrook Estates St. Andrew and this part of the sub-division consists of lots divided by Norbrook Drive running from East to West. At the south side of Norbrook Drive the lots face the Constant Spring Golf Links and are all lots of one acre more or less They have a view of the golf course with its natural beauty and quiet peaceful atmosphere and were intended to accommodate one house on each lot. The objectors state that the purchaser because of the size of the lots were assured of the amenities of an excellent and quiet area; that in fact the area has achieved an unquestionable character of its own and is renowned for its architectually designed houses of grace and elegance. Each area affords seclusion from the adjoining premises and the entire area is of a restful character. These lots at the time of sale were regarded as premium lots for which premium prices were demanded and

On the north side of Norbrook Drive the sub-division consists of lots of half-acre only more or less as indicated on the Planametric map exhibited. These lots face the Spring Garden gully and the land slopes downward thereby causing those houses to be below the level of the street. The topography of this side is different to the south side. Whereas on the south side a compartively high/

was paid, it was not so on this side. Both sides enjoy the same restrictive covenants but they are so sited, and in area and features so different that it can be readily seen that they do not enjoy the same amenities and were designed and developed to fill different needs.

The property for which the applicant seeks the modification of the covenant is on the south side and is in size one acre more or less. Mr. George Q.C. for the applicant, submitted that "neighbourhood" in this context must include houses on both sides of the road in the vicinity of the land in that the same type of buildings were contemplated, that is, residential but that the only difference is in "small houses" on one side as against "large houses" on the other side in keeping with the character of the property.

Mr. Wood for one of the objectors argued that the tone and character of the north side does not fit in with that of the south side, that "neighbourhood" is considered in a restricted manner, and that the golf side ought to be regarded as an area by itself.

What then is a "neighbourhood?" In these matters the test is said to be essentially an estate agent's test that is: "What does the pruchaser of a house in that road or that part of the road expect to get?" (Restrictive Covenants affecting Freehold land by Preston and Newsom 3rd Ed. p. 162).

The author continues:

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

He examines a number of authorities to support this principle and state in summary that the pragmatic approach 'must clearly be right' (p 164) I accept and adopt this approach of the author.

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 to enjoy peace and quiet occasioned by low occupancy in a place where private single-family dwelling houses exist. If that is right, then I am constrained to find that there are special pecularities 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 them a special view; there are facilities for walking on the golf course with its beautiful green grass and lush vegetation. The spaciousness of these lands and that of the golf course in front of them attracting privacy, seclusion and quietude creating an enormous aura of calm 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 76 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 a distinctly different one of their own, and therfore need no consideration for the determination of this matter.

Having thus settled the limits of the neighbourhood I turn now to the changes in the character of it. It is well settled that "character" here means style, arrangement, appearance of the house on the Estate and the social customs of the inhabitants.

Mr. Roy McDaniel, Managing Director and Chairman of C.D. Alexander Ltd. Co. Ltd. and International Limited whose affidavit of the 7th December, 1983 has not been challenged in this area deposed in part:

Para 6. "That on inspection of Norbrook Drive I have observed that the dwelling houses situated from No. 40 through to No. 76 are all very substantial modern and attractively designed residences enjoying pleasant views of the surrounding areas including the Constant Spring Golf Course."

My own observations fit in with this statement.

Appended to the affidavit of David DeLisser, Managing Director of David DeLisser and Associates Limited is a Schedule "G" setting out the changes in the neighbourhood. In this same area (Lots 40 - 76) there has been six sub-divisions of two lots to each sub-divisions. Notwithstanding this from Mr. McDaniel's observations and my own the character of this neighbourhood has not changed. The schedule also sets out the changes in the remaining lots in this area from twenty through to thirty-eight (even numbers only) and the only changes thereon are lots nos. 36 and 34.

In paragraph 10 of Mr. McDaniel's affidavit he says in part

> "With regard to the townhouses development on premises known as numbers 34 and 36 Norbrook Drive it should be borne in mind that five townhouses were built on a development encompassing two lots (2 acres)."

Surely this is a vastly differnt situation from eight houses on one acre.

I subsequently visited the area along with the parties. The entrance to Norbrook Drive is by Manor Park. From general appearance the houses are of average sizes for approximately nine to ten houses up the road. This seems to have been one stage of development as the houses do not appear to be as new as those upon which I afterwards came. Among these was an apartment building at No. 14 of near average size which was set at the very back of a lot and behind a dwelling house. This was not at first glance visible from the road.

At number 34 I saw what appeared to be a single dwelling house which on closer examination revealed two townhouses joined together. Similarly at No. 36 three townhouses were joined together in a style and manner which frontwise affected a single dwelling. These are the townhouses development referred to in paragraph 10 of Mr. McDaniel's affidavit.

I completed the entire length of the roadway to the end of Norbrook Drive and apart from a couple of empty lots all that was visible were single architect-designed dwelling houses with well-kept lawns and gardens set at a distance in from the roadway. It was obvious that there was a distinct and similiar pattern of development on this side of the road, probably so done to fit in with the Golf Course. From what I perceived on my visit everything has been done to retain the privacy and arrangement which make up the character of this "neighbourhood."

In the affidavit of Mr. DeLisser there are three applications pending in the court for townhouses to be built on Lots No. 66 and 64 that is, lots adjoining each other. These applications have not yet been heard by the court and I cannot therefore take that into account.

I would therefore hold that there are no changes in the character of the neighbourhood. If however, I am wrong and the townhouses of five houses built on numbers 34 and 36 and otherwise do in fact effect "changes," are they such that the restriction ought to be deemed "obsolete"?

Mr. Justice Farwell in Re Henderson's Conveyance (1940) 4 All E.R. at page 7 thus defined "obsolete"

> "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 "restriction in existence."

That is, that the original objects of the covenants cannot be achieved.

Mr. George urged very forcefully that because of the economic state of the country the trend today was for small houses, like town-houses, because large ones were no longer economically feasible, that whether or not it is "obsolete" must be ascribed to the Jamaican situation and where once large houses and grounds were necessary the present trend is for apartment buildings and townhouses and in those circumstances the covenant is "obsolete."

In Re Reid's Application / 1955-/ 7 P.C.R. 165 it was held that the general economic state of the country in itself is not enough to ground the Tribunals action, economic considerations being not a test for "obsolete."

It is true that some people can probably not afford to keep these large houses as private residences today but it does not mean that there are not those who can afford to own or live in them if even for the benefits and amenities which they offer, and having bought them, are entitled to enjoy what they expended money to receive. Applying the above to the Jamaican situation I accept the authority that economic considerations are not a test for "obsolete."

The applicants have not satisfied me that the objects of the covenants cannot be achieved and should therefore be deemed "obsolete". In fact they have so far been ninety eight percent (98%) achieved.

I find therefore that there are no changes in the character of the neighbourhood which makes the restrictions ought to be deemed "obsolete." This ground therefore fails.

The second ground urged

> "That it impeded the reasonable user for public or private purposes without securing practical benefits to any person sufficient in nature or extent to justify its continued existence without modification."

Mr. Justice Farwell on this ground in Re Henderson's Conveyance (supra) had this to say:

> "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."

It is not enough for the applicant to show only that he proposes to use the land in a particular way, that the use he proposes "is a reasonable" one and the restriction prevents it, rather he must show that the restriction has become so obsolete and is of such a hampering nature that it prevents any proper development of the property (adopting the principles in Preston and Newsom p. 173)

The questions which are appended to this aspect are:

1. What is the "user" of the land contemplated by the applicants which they complain will be impeded by the continued existence of the restrictive covenant without modification?

Mr. Livingston the applicant, disclosed that he proposes to erect eight townhouses, one of which he will own. He cannot erect any less number, he cannot afford to do that, in other words the profit he would make from erecting two houses would not be sufficient to afford him the ownership of one house. To make enough money it must be eight houses.

It seems to me that he desires a density which fits in with his own convenience and projections. Is this a reasonable user? I would think not.

The next question is:

2. Is there any evidence that the continued existence of the restrictive covenant without modification will impede the applicants in their contemplated user of the land?

On all the facts it cannot be said that the restriction of one private dwelling house only is of such a hampering nature that it prevents a proper development of the applicant's lot. The objectors have stated that they would not object to two dwelling houses therefore the lot cannot be said to be sterilized.

The applicant has said that he proposes to use the land in a particular way and the restriction prevents it but he has certainly not shown that the use he proposes is a reasonable one. On my part I find it an "unreasonable" one. To propose a use of eight houses where the covenant speaks of one, taking into account the intention of the covenant which has so far been 98% effective is to my mind unreasonable. The density thus created would destroy everything the covenants were designed to protect. The objectors have suggested two houses which would be a reasonable use of the land. In view of this, the land is not being sterilized.

So the third question:

3. Are there any practical benefits?

It is for the applicants to show that the sterilisation of the land is of no practical benefit to other persons. There is evidence which I accept that the value of both objectors properties will be decreased, that they will lose the enjoyment of privacy, peace and quiet, that the noise level will be considerably increased by the presence of eight households of a minimum of four and a maximum of five to each household, that is, thirty-two to forty persons, a possible eight stereograms, disco, or sound systems, eight television sets, a possible movement of sixteen motor cars, trucks or vans on a narrow roadway which commences by the fence of one objector then across the lot down the fence of the other objector there narrowing to 5ft. with every likelihood of creating parking problems. The master bedroom of this objector has a small private balcony. This proposed access roadway and the frontage of possible six townhouses will overlook this balcony and into the bedroom also the swimming pool below. At its furthest point parked cars on this roadway could be a mere 25ft. away and at its nearest point lower down about 5ft. away. A part of the proposed public open space for all occupants will fall between this roadway and the objectors boundary. True enough the level of the objector's lot is considerably lower than that of the applicant as a result of the objector's desire to level his land for building. But it is also true to say that had he not been aware that he was protected by the covenant he might possibly have arranged his building otherwise and in a manner where his privacy would be unhindered. It is a practical benefit in having a bedroom, private balcony, swimming pool not overlooked by houses immediately adjoining it. It is of value to the owner of the property and if he desires to sell it, it would be an amenity which ought well enhance the value of the property. (following Farwell J in Re Henderson Conveyance (supra) p. 9.) The objectors have shown that in the eyes of a reasonable person the peace and quiet which they enjoy from the covenant unmodified are a real amenity and convenience to them and are sufficient in nature and extent to justify their continued existence without modification.

The applicants have not been able to show that these benefits do not exist, or that their proposals will not injure the objectors. The applicants have not been able to show that unmodified it will injure them to any degree. They may not be able to use their land to the extent to which they now seek but their land is there and available for use on the terms they were acquired.

I would hold that the restrictions are of practical benefit to the objectors and are sufficient in nature and extent to justify the continued existence without modification of the covenant. This ground also fails.

The third ground is

> "that persons of full age and capacity entitled to the benefit of the restriction have agreed expressly or by implication by their acts or omissions to the same being modified or discharged."

This was not argued and as I understood it Mr. George placed no reliance on this limb. Nothing more need be said of it.

The last ground is

> "that the proposed discharge or modification will not injure persons entitled to the benefit of the restriction."

There was evidence from both objectors that the values on their homes would depreciate. Mr. McDaniel says that where there is a townhouse complex between a group of residential type single house lots, it sticks out and depreciates the single houses. Add to that the likelihood of movement of twenty four persons, noise of twelve cars starting early morning, of screaming children in a compact area; also the movement and noises of visitors and occasional persons like garbage collectors, servicemen and dogs from eight families taken altogether, a single family would not wish to buy into that. It is my belief that a person who is able to afford a house of the size of the objectors at its real value would not buy that liability also. I would think the logic is that it would attract or satisfy only a person who is buying at a much decreased value.

I hold that there is much evidence here that if the covenants are modified or discharged it would injure persons entitled to the benefit of the restrictions.

Mr. George for the applicants argued that it was not the quantity of neighbours but the quality in terms of discipline, social consciousness that matters, that the price of the houses $400 - $450 thousand will deter persons of such sort as it is a very high class development which is proposed. There is no basis I find on which quality, discipline and social consciousness can be guaranteed, particularly in a society as complex as the Jamaican society.

It is my view that a development at a much reduced density may not create objection in that the objectors have shown that they would have given their consent on reasonable conditions to a reasonable change in use. Mr. Ritter stated that on the golf course side of Norbrook Drive there has not been any approvals for development above a density of fifteen habitable rooms per acre, that is, at Nos. 34 and 36. It is instructive that the Town Planning Department has granted conditioned approval in this case subject to the modification of the covenant procided that the density does not exceed thirty habitable rooms per acre. In spite of this, the applicant seems willing to proceed as shown on the plan, with thirty-two habitable rooms on 1.06 acres, a density still in excess of the grant. The only conclusion that I can draw as to the object of the applicants in making this application, is that they wish to derive a particular financial benefit for themselves only, merely in order, in the words of Counsel, "to make a killing." I adopt the words of Farwell J. in Re Henderson's Conveyance (supra) at p. 7:

> ".....the Act was not designed.....to enable one owner to get a benefit by being free of the restrictions imposed upon his property (which he bought with full notice that he was under such a restriction) in favour of a neighbouring owner, merely because in the view of the person who desires the restriction to go it will make his property more enjoyable or more convenient for his own private purpose." (underlines represent words inserted by me).

I find that the character of this neighbourhood has not changed. It may gradually change and then the time will come when the purpose for which the covenants are intended can no longer be achieved either through implied, expressed or tacit waiver of them. As it is now, the applicants have failed to satisfy me, in that they have not discharged the burden placed on them.

The application is dismissed.