IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. R/C of 1966.

IN THE MATTER OF ALL THAT parcel of land known as No. 8 Marescaux Road being part of Up Park Villa Pen in the parish of Saint Andrew and being the land comprised in Certificate of Title registered at Volume 89 Folio 40 of the Register Book of Titles

AND

IN THE MATTER of restrictions (relating to the position where erections may be placed on the land and the type of buildings and the nature of business thereon) affecting the user thereof

AND

IN THE MATTER of the Restrictive Covenants (Discharge and Modification) Law, Law 2 of 1960.

--J U D G M E N T -

By Section 3(1) of Law 2 of 1960 a Judge in Chambers shall have power from time to time on the application of ..... any person interested in any freehold land affected by any restriction arising under covenant .... as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction ..... on being satisfied -

(a) that by reason of changes in the character of the property or neighbourhood or other circumstances of the case which the Judge may think material, the restriction ought to be deemed obsolete; or

(b) that the continued existence of such restriction or the continued existence thereof without modification would impede the reasonable user of the land for public or private purposes without securing to any personal practical benefits sufficient in nature and 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.....

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

(d) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.

By the originating summons herein the applicant, Federal Motors Limited, the registered proprietor in fee simple of the land, the subject of this application and known as 8 Marescaux Road, part of Up Park Villa Pen, St. Andrew, registered at Volume 89 Folio 40, seeks an order that two restrictions affecting the user of this land be discharged. The restrictions are:-

(1) That no buildings other than showrooms and offices of a value of not less than £25,000 in connection with the business of dealers in motor vehicles and buildings for business or professional offices shall be erected on the said land or any part thereof.

(2) That no trade or business other than the sale of motor vehicles which shall be displayed in a showroom and that of business and professional offices shall be carried on upon any part of the said land.

These restrictions (inter alia) were imposed by an Order of this Court, Duffus J. (as he then was) in Suit E. 76 of 1960, made on the 14th March, 1961 and are themselves modifications of restrictions which were imposed by covenant in 1893 and endorsed on the parent title to Volume 89 Folio 40.

The grounds on which this application is founded are that:-

(i) the proposed discharge will not injure the persons (if any) entitled to the benefit of the said restrictions;

(ii) the continued existence of these restrictions would impede the reasonable user of the said land for private purposes

/without securing.....

without securing to any person practical benefits sufficient in nature and extent to justify the continued existence of the said restrictions;

(iii) by reason of the changes in the character of the neighbourhood or other circumstances of the case, the restrictions ought to be deemed obsolete;

(iv) the persons (if any) of full age and capacity for the time being or from time to time entitled to the benefit of the restrictions have agreed either expressly or by implication, by their acts or omissions, to the same being discharged.

In support of the application, Mr. Keith Roberts the applicant's managing director states in paragraph 9 of his affidavit:

> "Since the month of March 1961 the said premises... has been used for:- (a) The sale and servicing of new and used motor vehicles. (b) The sale and servicing of Carrier air conditioners. At the said address are also to be found the registered offices of Condition Air Corporation Limited and Federal Motors Limited. My company desires to continue to use the said land for industrial purposes and particularly forthe sale of new and used motor vehicles and the servicing of new vehicles sold by it and used vehicles traded in by the company."

With the consent of all parties Mr. Roberts was allowed to give oral evidence and was cross-examined.

In further support of the application he says, inter alia, in examination-in-chief, that:-

(i) for some two years and six to nine months the applicant has been doing heavy servicing of vehicles at 8 Marescaux Road, and that during this time and prior to the several objections filed herein, no objection to this user was made by anyone;

(ii) the applicant began this heavy servicing because "we broke off with Henriques and had no other premises on which to work."

(iii) "I have brought the application because we want to continue the user and regularise the position. If the covenants are not discharged or modified we will not readily be able to get a loan on the business, and future development will be hampered."

/A number.....

A number of objections to this application have been filed by persons entitled to the benefit of the restrictions now sought to be discharged:

(1) The Misses Baxter - three sisters - allege in relation to 6 Leinster Road, that (a) as a result of the operations carried on by the applicant involving the repairing and servicing of motor vehicles, "a nuisance is currently being created on the said premises by the clanging and banging of tools, the loud tooting of horns, the screeching of brakes..... and the use of loud and at times indecent language, to the great annoyance and embarrassment of ourselves....." and (b) that the discharge of these restrictions will adversely affect the value of their premises, and the user thereof as business and professional offices which they now enjoy.

(2) In substance, the objections filed by (a) The Church in Jamaica in the Province of the West Indies, (the proprietors of No. 2 Leinster Road); (b) Doris Butt (a joint proprietor of No. 1 Caledonia Avenue); (c) the several persons headed by Miss Arabel Baxter (in a collective objection); and (d) Mabel Cotterell (the proprietor of 4 Leinster Road), are to the same effect as those at (1) above. In relation to the ~~objectives~~ objectors at (c) I observe that, apart from Arabel Baxter and Mabel Cotterell, it does not appear from the Notice of Objection whether they come within Section 3(1)(c) or Section 3(1)(d) as persons entitled to the benefit of the restrictions. I must therefore assume that these persons have no locus standi in respect of this application.

The Town and Country Planning Authority has submitted a report which indicates that there has been no change in the character of the area including 8 Marescaux Road except that resulting from "the development" of 8 Marescaux Road in breach of the restrictions as to user to which it is subject, that this area is zoned for business and professional offices in the Kingston Provisional Development Order, and that all the other users in the area conform to this zoning.....

zoning.

Now Section 3(1) in very clear terms states that a Judge in Chambers shall have power by order wholly or partially to discharge or modify a restriction on being satisfied as to the matters specified in paragraph (a), (b), (c) or (d).

An examination of the several authorities on this branch of the Law shows that it is for the applicant to bring his case within one or other of the paragraphs (a), (b), (c) or (d). With this in mind, I now I now pass on to consider each of the four paragraphs in the order in which they are set out in the affidavit of Mr. Roberts.

The first is paragraph 8(a) and this reads: "The proposed discharge will not injure the persons (if any) entitled to the benefit of the said restrictions". This corresponds with Section 3(1)(d). I confess to come difficulty in appreciating the significance of the words "if any" in brackets in this sub-paragraph. It seems quite clear that the applicant, by the very fact of making this application, says and admits in effect that 8 Marescaux Road is, in the terms of Section 3(1) of Law 2 of 1960, "affected" by these restrictions as otherwise there would be no jurisdiction in a Judge in Chambers to entertain the application. I will therefore assume, in the absence of any evidence to the contrary, that those objectors herein (e.g. the Misses Baxter and Doris Butt,) who by their Notice of Objection allege that they are so entitled as registered proprietors are entitled to the benefit of the two restrictions sought to be discharged.

Now the only evidence before me in support of this part of the case is the evidence of Mr. Roberts who says, and I quote:-

> "The proposed discharge will not affect adjoining owners..... the discharge of the covenants will not result in a nuisance to adjoining owners"...

These are the only two positive assertions he makes. When cross-examined, however, he admits that the applicant's repair shop in its heavy servicing would be a source of noise to the surrounding owners. There is too, the evidence of Inez Williams that on several occasions she has had to speak to Mr. Roberts about the loud and

/indecent.....

indecent language used by the applicant's workmen. Admittedly, these complaints were made during 1964. Miss Williams ceased her complaints because she felt they did no good. I refer to this evidence, not in the context of any onus to be discharged by the objectors, but merely as providing some indication of the extent to which the applicant has failed or succeeded in establishing that the proposed discharge will not injure those persons entitled to the benefit of the restrictions. The vital question for me is - Am I satisfied that the proposed discharge will not injure the persons entitled to the benefit of these restrictions? It is to be observed that it is not the project contemplated by the applicant, i.e. "to use the land for industrial purposes (whatever is meant by this expression) and particularly for the sale of new and used motor vehicles and the servicing of new vehicles sold by it and used vehicles traded in by the Company", but the discharge or modification itself which must be shown to be uninjurious to those persons. In Re Henderson's Conveyance (1940) Ch. 835 Farwell J. observed:-

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

This observation was made in considering an application under the first branch of Section 3(1)(b) but is, in my view, equally applicable in principle in a consideration of an application under 3(1)(d). It is also clear that the test to be applied involves not merely a monetary consideration, but also questions whether the reasonable comforts of the objectors will be adversely affected if the restrictions are discharged. See Re Munday's Application (1954) 7 P. & C. 130.

It is for the applicant to satisfy me in any way it can that the persons entitled to the benefit of the restrictions will not be injured. It is not for the objectors to prove any prospective injury to themselves. It seems quite clear from the evidence of Mr. Roberts that the applicant is really more concerned to raise a substantial loan and to extend its operations than with the question whether the proposed discharge would injure the persons entitled to

/the benefit.....

the benefit of the restrictions. This may well have accounted for the somewhat vague and indeterminate evidence he gave in support of this ground and I hold that I am very far from satisfied that the applicant has made out its case under Section 3(1)(d) of the Law.

I pass on to consider paragraph 8(b) - corresponding with paragraph Section 3(1)(b) - and this reads: "The continued existence of the said restrictions would impede the reasonable user of the said land for private purposes without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of the said restrictions." This paragraph clearly involves two branches.

In Preston & Newsom's Restrictive Covenants - 3rd Edition at p. 172 the relationship between paragraphs (d) and (b) of Section 3(1) is expressed this way: "....while paragraph (d) is directed to the effects of the proposed discharge or modification, paragraph (b) looks to the effects of the undischarged or unmodified covenant. But in practice an applicant has to prove substantially the same facts in order to show either that the proposed (discharge or) modification is harmless or that the restriction secures no practical benefits to other persons."

In Re Ghey and Galton's Application (1957) 2 Q.B. 650, Lord Evershed M.R. said (at p. 663):-

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

See also the observation of Farwell J. in Re Henderson's Conveyance (above quoted).

A close examination of these and other authorities reveals the application of certain well defined principles and I list six of the more important:-

(i) The paragraph clearly states that a restriction may be discharged if its continued existence would impede the reasonable user of land....., it does not state that the restriction may be discharged if its continued existence

/would impede.....

would impede the more or the most reasonable user of the land. Re M. Howard (Mitcham) Ltd.'s Application (1956) 7 P. & C.R. 219.

(ii) Reasonable user in this context does not import "more profitable" user. Re St. Alban's Investments Ltd.'s Application (1958) 7 P. & C.R. 536.

(iii) The applicant must show that the permitted user is no longer reasonable and that another user which would be reasonable is impeded.

(iv) The applicant must show that the use to which the land is restricted by the covenants is such that there is no reasonable prospect of it being applied to such use. Re Sloggetts (Properties) Ltd.'s Application (1952) 7 P. & C.R. 78.

(v) If one particular use which the applicant wishes to adopt is impeded the onus is not discharged. It must satisfy the Tribunal that that use is reasonable and that no other reasonable use is available.

(vi) The permitted user may still be reasonable in spite of the fact that it would not be a source of greater profit to the applicant. Reasonable user is not to be gauged by financial profit.

Now what is the evidence on this aspect of the case? I think it is fairly summed up by Mr. Roberts himself in these words:-

> "We could not get a substantial loan to carry on the present user without a discharge of the covenants. We require a loan of £75,000 to build more showrooms, to stock more cars, and to sell car parts."

He says further that the continued existence of the restrictions will impede the user of the land for private purposes. Applying the principles above listed, I find it quite impossible to hold that I am satisfied that the continued existence of these restrictions will impede the reasonable user of the land. Taking this view, I find it unnecessary to consider the second branch of the paragraph which requires me to be satisfied that no practical benefits sufficient in nature and extent to justify the continued existence of the restrictions will be secured to any person.

/The next ground.....

The next ground I must consider is paragraph 8(c) - corresponding with paragraph (a) of Section 3(1) - and which reads: "By reason of changes in the character of the neighbourhood or other circumstances of the case, the restrictions ought to be deemed obsolete."

For the applicant to succeed under this paragraph, I am required to be satisfied that the restrictions ought to be deemed obsolete and for this purpose I am required by the applicant's paragraph 8(c) to consider two of the three classes of fact mentioned in Section 3(1)(a), namely, changes in the character of the neighbourhood, and other circumstances of the case.

In dealing with the meaning of the word "obsolete", Romer L.J., in Re Truman, Hanbury, Buxton & Co. Ltd.'s Application (1956) 1 Q.B. 261, expressed the view that where the word was used in relation to a restriction imposed for the purpose of preserving the residential character of an estate, the time will come, after gradual changes, when it can be said that the restriction is obsolete in the sense that the residential area has become substantially a commercial area. The important question is whether the original object of the restrictions may be said to be obsolete.

There is, in this case, no evidence of any change in the character of the neighbourhood from March 1961, except, perhaps, that part of the evidence of Mr. Roberts to the effect that he has seen the area develop from residential to industrial in the last few years. To say that this is supremely vague would be a gross understatement. If in fact there has been a change I would not be so satisfied merely on the ipse dexit of Mr. Roberts. Apart from this, there is no evidence of "other circumstances of the case" which appear to me to be material so that it can be said that the restrictions ought to be deemed obsolete. Accordingly, the application fails on this ground also.

I come now to the paragraph 8(d) which reads: "The persons (if any) of full age and capacity for the time being or from time to time entitled to the benefit of the restrictions have agreed either

/expressly or by.....

expressly or by implication, by their acts or omissions, to the same being discharged." This corresponds with Section 3(1)(c).

There is, with regard to this particular ground, certainly no evidence of any express agreement, and I therefore turn to a consideration of an implied agreement. Section 3(1)(c) obviously contemplates an agreement by implication to a specific factor, namely, an agreement "to the same being discharged". What then does the evidence reveal? Before I answer this question I pause to observe that it is the contention of the applicant that for some 2½ years the surrounding owners had done virtually nothing to indicate to the applicant their disapproval of its operations in breach of the restrictions imposed in 1961. It is therefore argued that this demonstrates acquiescence in such operations. Even if this is so, it certainly does not in my view follow that it indicates agreement by implication to the discharge of the restrictions. It seems to me, however, that it would be quite unreal to hold, in the particular circumstances of this case, that an omission to complain, or to take proceedings for the enforcement of the restrictions must necessarily be equated with an implied agreement to the discharge of those restrictions. The learned author of Preston & Newsom's Restrictive Covenants 3rd Edition says, at p. 184:-

> "It is sometimes argued that the consents have been given impliedly. But the evidence to support that plea is likely to be that the neighbourhood has changed radically since the restriction was imposed."

He cites only one case in which a restriction has been discharged on this ground. This is Re Child's Application (1958) 10 P. & C.R.71.

It may be said that a person has impliedly agreed to a restriction being discharged when, having been served with a notice of application for its discharge, such person fails to become an objector. Again, there may be other circumstances in which it could be held that, from certain acts or omissions on the part of those entitled to the benefit of restrictions, an agreement to their discharge ought to be implied. I cannot and do not see any such circumstances in this case.

/I now answer.....

I now answer the question I posed earlier. My answer is that the evidence before me does not in any way reveal any implied agreement to the discharge of the restrictions herein.

I hold therefore that on none of the four grounds on which the applicant relies am I satisfied that the restrictions herein ought to be either wholly or partially discharged; nor am I satisfied that they ought to be modified.

The applicant will pay the costs, to be agreed or taxed, of those objectors who have appeared, and there will be a Certificate for Counsel who appeared.

Dated this 25th day of March, 1966.

Chas St G Graham Jr Ld
JUDGE (ACTING).