96

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CHAMBERS

SUIT NO. ERC 248 of 1990

IN THE MATTER OF ALL THAT parcel of land part of FOREST HILLS in the parish of Saint Andrew being the lot numbered twelve (12) Block 'A' on the plan of FOREST HILLS deposited in the Office of Titles on the 11th day of November 1949 and being the land comprised in Certificate of Title registered at Volume 595 Folio 91 of the Register Book of Titles;

AND

IN THE MATTER of the Restrictive Covenant numbered one (1) affecting the registered proprietor for the time being of the said land;

AND

IN THE MATTER of the Restrictive Covenant (discharge and Modification) Act.

BETWEEN	CLAUDE BROWN BURLETT BROWN	APPLICANTS
AND	VAYDEN McMORRIS	OBJECTOR

Norman Wright and Mrs. Maureen Moncrieffe for the Applicants
Michael Hylton and Ms. Debbie Fraser for the Objector

HEARD: March 8, 9 and 12, 1993, July 28, 1993
July 29, 1994.

CHESTER ORR, J.

Mr. Claude Brown and his wife Burlett Brown the applicants, are the registered proprietors of land part of Forest Hills, St. Andrew, known as Lot 12 Block A, registered at Volume 595 Folio 91 in the Register Book of Titles. The lot measuring 30807.75 square feet is part of a large subdivision of land known as Forest Hills which was subdivided in 1949. The applicants acquired their lot in 1979 and seek to have restriction No. 1 which reads -

"There shall be no subdivision of the said land"

modified to read -

"There shall be no subdivision of the said land SAVE AND EXCEPT into two (2) lots for residential purposes."

The applicants propose to build a dwelling in addition to the existing one on the premises.

The sole objector is Mr. Vayden McMorris whose lot registered at Volume 585 Folio 90 in the Register Book of Titles, adjoins that of the applicants. Three of the owners of adjoining lots have consented to the application.

The application was granted by the Master-in-Chambers on the 8th day of March 1991, but was subsequently set aside as the objector Mr. McMorris had not been notified of the hearing.

In their Affidavit in support of the application the applicants exhibited 17 titles in the subdivision in which orders had been made modifying the restrictive covenants and indicated that some of the lots in respect of which these orders were made were in close proximity to their lot and that of the objector. He had made no objection to these modifications. His objection to the present application was therefore frivolous and vexatious.

The application is founded on section 3 of the Restrictive Covenants (Discharge and Modification) Act and the grounds correspond to the wording of the section.

Mr. Wright submitted that the application was unusual in that it had previously been approved by the Master, the maxim omnia praesumuntur rite acta esse applied and the burden had shifted somewhat to the objector to show that if the grounds on which he now seeks to rely had been before the Master, that Tribunal would have acted differently or would not have approved the application. Let me dispose of this contention. Mr. Hylton submitted and I agree with him that this argument is devoid of merit. It is trite law that the applicant must prove that one of the statutory grounds exist for the grant of the application. There is no corresponding burden of proof on the objector. The earlier hearing is not the concern of this tribunal.

GROUND 1

Section 3(1)(a) of the Act

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

Mr. Wright submitted that there had been 17 modifications of the covenants since they were imposed in 1949. The effect of these modifications

is that the purpose for which the original restriction was imposed can no longer be fulfilled and it can be said to have become obsolete. Further the objector made no objections to these modifications and must be taken to have agreed implicitly to all these changes in the character of the neighbourhood. He submitted that the neighbourhood comprises the following area:

Mayfair Avenue

Pembroke Terrace

Pembroke Road

Elmwood Terrace

Section 3(1) (b)

THAT THE CONTINUED EXISTENCE OF SUCH RESTRICTION WOULD IMPEDE THE REASONABLE USER OF THE LAND

He submitted that the result of the refusal of the application would impede the reasonable user of the applicants' land and sterilise the lot. The applicants would have idle land for which the only reasonable user would be the construction of a dwelling house as opposed to farming which would provide grounds for objection by the neighbours.

Section 3(1) (d)

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

He submitted that "Injure" meant opening the floodgate to other applicants. The subdivision by the applicants of one lot into two lots cannot be regarded as the thin edge of the wedge by itself, but taken against the other 17 modifications may properly be regarded as de minimis.

Mr. Hylton submitted that the neighbourhood comprises the following six lots:

1. The applicants' lot Volume 595 Folio 91 and Volume 1238 Folio 968.
2. The objector's lot Volume 585 Folio 90.
3. Volume 585 Folio 81
4. Volume 585 Folio 82
5. Volume 585 Folio 83
6. Volume 1162 Folio 843 formerly Volume 585 Folio 84.

These lots are all situated on the same side of Red Hills Road. The covenants endorsed on the respective Titles read -

"there sahll be no subdivision of the said land".

On the other hand, the equivalent covenant on the Titles for the other lands in the subdivision reads -

> "there shall be no subdivision of the said land except with the approval of the Kingston and St. Andrew Corporation into lots of not less than one acre each with a road frontage of not less than 100 feet."

He also referred to the size and shape of these lots in comparison to the other lots in the subdivision. He submitted that as there have been no modifications at all to any of the covenants on any of the titles for the lots in the neighbourhood, the character of the neighbourhood has not changed.

The applicants had failed to show that the restrictive covenants as they exist prevent them from reasonably using their land. Because of the topography of the area the modifications did not affect the objector. His failure to object to these modifications is not relevant to the present application.

If the modification was allowed it would secure the privacy and view of the area which the restrictive covenant was designed to preserve and of which the objector benefits.

A photogrammetric Survey of the Forest Hills subdivision and sketch plan formed a part of the evidence. I visited the area and made observations. I do not agree with either of the areas submitted as the neighbourhood. In defining the meaning of neighbourhood the learned authors of Preston and Newsom's Restrictive Covenants, seventh edition, state at 230:

> "The test is thus essentially an estate agent's test: what does the purchaser of a house in that road, or that part of the road, expect to get? The matter was further elaborated by the Tribunal as follows:
>
> > 'Character derives from the style, arrangement and appearance of the houses on the estate and from the social customs of the inhabitants'.
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> The neighbourhood need not be large: it may be a mere enclave."

In my opinion the neighbourhhod comprises the six lots submitted by Mr. Hylton and in addition -

Volume 587 Folio 75

Volume 586 Folio 53

Volume 585 Folio 1

all on Pembroke Terrace.

The previous modifications do not affect the objector, most are out of sight and the view disclosed that there has been no change in the character of the neighbourhood, predominantly single dwelling houses. I hold that the restriction ought not to be deemed obsolete.

Section 3(1) (b) - The reasonable user of the land

In Re Henderson's Conveyance (1940) Ch. 835, Farwell J said at 845:

> "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. (emphasis added).

In Stannard v. Issa and Others (1986) 34 W.I.R. 189 Lord Oliver cited with approval an extract from the judgment of Carey J.A. in the Court of Appeal. He said at 195:

> "Carey JA in a powerful dissenting judgment observed that:
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> > 'An applicant for modification or discharge of a restrictive covenant where his ground is that provided for in section 3(1)(b) has a burden imposed on him to show that the permitted user is no longer reasonable and that another user which would be reasonable is impeded . . . . Lord Evershed MR in Re Ghey and Galton's Application [1957] 3 All ER 164 at page 171 expressed the view that in relation to this ground - '. . . it must be shown, in order to satisfy this requirement, that the continuance of the unmodified covenants hinders, to a real, sensible degree, the land being reasonably used, having due regard to the situation it occupies, to the surrounding property, and to the purpose of the covenants'.
> >
> > Put another way, the restrictions must be shown to have sterilised the reasonable use of the land. Can the present restrictions prevent the land being reasonably used for purposes the covenants are guaranteed to preserve? Accordingly, I would suggest that it would not be adequate to show that the proposed development might enhance the value of the land for that would demonstrate the [respondent's] proposals are reasonable and the restriction impedes that development. . ."

Carey JA concluded:

> "I would make one final comment. If the evidence indicates that the purpose of the covenants is still capable of fulfilment, then in my judgment the onus on the [respondent] would not have been discharged."

At 197, Lord Oliver said:

> "What the court exercising this jurisdiction is enjoined to do is to consider and evaluate the practical benefits served by the restrictions . . . . The question is not 'what was the original intention of the restriction and is it still being achieved?' but 'does the restriction achieve some practical benefit and if so is it a benefit of sufficient weight to justify the continuance of the restrictions without modification?'"

The applicants have not shown that the restriction has sterilised the reasonable use of the land. In an Affidavit of the 15th November, 1992 the applicants state:

> Par. 5 - "That because of the severe shortage of prime land for residential purposes in the corporate area and the fact that the land to the rear of our existing house which comprise approximately one-half acre is under-utilised and usually in ruinate we proposed to subdivide the land to make the same more useful . . . . ."

Further -

> "Also because of the economic circumstances and the acute housing shortage the needs of the population would be more adequately served by dividing large lots into smaller lots. There is also the added benefit of greater security occasioned by living on smaller lots."

The economic circumstances are irrelevant to the consideration of this application. In Hector Earl and others v. Victor Sepnce CA 68/89, June 22, 1992 (unreported), Rowe P said at p.4.

> "There was no allegation that the restrictions were obsolete and before us counsel for the respondent could not meet the challenge that the learned trial judge in his reference to the Suppression of Crimes Act and the state of crime in the society took a wholly irrelevant consideration into account when determining whether to exercise his discretion in favour of modification of the convenants. In addition the presumed security which neighbours could provide was quite irrelevant to the only live issue on the Summons, viz., that the proposed modification would not injure the persons entitled to the benefit of the restriction."

The objector states that the benefit of the restriction is the preservation of the private residential character of the area by restricting the number of dwelling houses which can be erected in a given area. This is a practical benefit which would justify the continuation of the restriction without modification.

Section 3(1)(d) - THAT THE PROPOSED MODIFICATION WILL NOT INJURE THE PERSONS ENTITLED TO THE BENEFIT OF THE RESTRICTION.

The objector states that his right to privacy and his view would be affected by the proposed modification.

In Stannard v. Issa supra Lord Oliver said, at 198 in reference to this section.

> "As regards this latter consideration, it was observed by Russell L.J. in Ridley v. Taylor [1965] 1 W.L.R. 611 that the equivalent of this paragraph in the law of Property Act 1925 appeared to have been 'designed to cover the case of the proprietorially speaking, frivolous objection'."

In Stephenson et ux v. Liverant et al [1972] 18 W.I.R. 323 Smith JA as he then was, said at 337.

> "Learned Counsel for the applicants contended that the test whether injury will be caused by the modification is whether it will be caused by the project. For the objectors, it was submitted that in strict law it must be proved not that the project will not occasion injury but that the modification itself will be uninjurious. This submission accords with the terms of the statutory provision and is supported by a passage from PRESTON & NEWSON ON RESTRICTIVE COVENANTS (4th edn.) on which reliance was placed. At page 5 the learned authors said.
>
> > 'It is not the applicants' project that must be uninjurious. . . . 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 restriction 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.'
>
> It seems clear from this passage and as a matter of interpretation that it may be shown that an order for the discharge or modification of a covenant will be injurious either by the mere existence of the order or because of the implementation of the project which the order authorises. There is, therefore, a burden on an applicant to show that the discharge or modification will not injure in either respect."

The objector has stated that the modification will injure in either respect. I agree. The applicants have failed to show that the modification will be uninjurious.

The application is therefore dismissed with Costs to the Objector to be agreed or taxed.

Finally, let me apologise for the delay in delivering this judgment which arose from a combination of factors. The ensuing inconvenience to the parties is regretted.