JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 16/92

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (Ag.)

BETWEEN	CENTRAL MINING AND EXCAVATING LIMITED	APPLICANT/APPELLANT
AND	PETER CROSWELL	
AND	CARL CROSWELL	
AND	ROY ANTHONY BRIDGE	
AND	GLORIA HOPE BRIDGE	
AND	CLIVE MORIN	OBJECTORS/RESPONDENTS

Dr. Lloyd Barnett and Christopher Honeywell, instructed by Messrs. Clinton Hart & Company, for appellant

Michael Hylton and Debbie Fraser, instructed by Messrs. Myers, Fletcher & Gordon, for respondents

November 3, 1992 and November 22, 1993

WRIGHT, J.A.:

This is an appeal against the decision of Courtenay Orr, J. refusing an application by the appellant to modify certain restrictive covenants numbered 1, 2, 3 and 9 endorsed on the Certificate of Title registered at Volume 695 Folio 5 which are in the following terms:

"(1) The said land shall not be sub-divided.

(2) No buildings of any kind other than a private dwelling house with the appropriate out-buildings appurtenant thereto and to be occupied therewith shall be erected on the said land and the value of such private dwelling house and out-buildings shall in the aggregate not be less than TWO THOUSAND POUNDS.

"(3) The building to be erected on the said land shall not be erected nearer than twenty-five feet to any road boundary which the same may face nor less than ten feet from any other boundary. Any out-building to be erected on the said land shall not be nearer to the road boundary than the main building itself.

(9) No building shall be erected on the said land if the said land fronts any roadway until the said roadway has been constructed to the satisfaction of the City Engineer and taken over by the Kingston and Saint Andrew Corporation."

The modifications sought read thus:

"(1) There shall be no sub-division of the said land except into eleven (11) three (3) bedroom units.

(2) No buildings of any kind other than private dwelling houses or town houses with the appropriate outbuildings appurtenant thereto and to be occupied therewith together with a guard house and garbage structure shall be erected on the said land and the value of such private dwelling house or town houses and outbuildings shall in aggregate not be less than TWO THOUSAND POUNDS.

(3) The buildings to be erected on the said land shall not be erected nearer than twenty-five feet to any road boundary which the same may face nor less than ten feet from the back boundary SAVE AND EXCEPT a guard house and garbage disposal structure which shall not be deemed to be a breach of this covenant.

(9) THAT RESTRICTIVE COVENANT NO. 9 BE WHOLLY DISCHARGED."

The premises in question are described as:

"All that parcel of land known as No. 39 Wellington Drive in the parish of St. Andrew being the lot numbered 6 on the plan of Mona and Papine Estates aforesaid deposited in the Office of Titles on the 10th August, 1954 and being the land comprised in Certificate of Title registered at Volume 695 Folio 5 of the Register Book of Titles."

The application was made under section 3(1)(a)(b) and (d) of the Restrictive Covenants (Discharge and Modification) Act, which reads as follows:

> "3--(1) 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--
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> (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Judge may think material, the restriction ought to be deemed obsolete; or
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> (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 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
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> (d) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction."

These provisions are similar to those in section 84(1) of the Law of Property Act, 1925 (U.K.) and, accordingly, decisions by the Lands Tribunal under the latter are relevant to the consideration of applications under the former. The purpose of

the application is to allow for the construction of eleven three bedroom town houses with the approval of the planning authority. Planning permission had been secured for the construction of fourteen two bedroom town houses but the appellant now wishes to build instead eleven three bedroom town houses to cost $1,200,000 each, subject to an upward appreciation.

Each ground of the application was considered by the learned judge but he rejected the application on each ground. However, before us Dr. Barnett announced that his submissions would be confined to section 3(1)(a) (supra), which is quite permissible since the provisions of section 3(1) (supra) are disjunctive. It is sufficient, therefore, if the application succeeds on any one of the grounds provided.

Dr. Barnett submitted that in order to apply the provisions of the Act under contemplation, it is essential to come to a determination of the neighbourhood and to assess the changes which have occurred with respect to their impact on that neighbourhood as a whole. He criticized the trial judge's determination of the extent of the neighbourhood. He contended that the trial judge had not a fixed perception of the neighbourhood and so was in no position to make a proper determination of the relevant legal factors which fall for his determination.
Dr. Barnett was not present at the hearing of the application. There the applicant was represented by Christopher Honeywell while the respondents were represented by Michael Hylton. In resolving the issue of the extent of the neighbourhood, the trial judge, at page 9 of his written judgment, said:

> "Mr. Honeywell submitted that the court should regard the whole area of Mona and Papine Estates as the neighbourhood. To this Mr. Hylton for the objectors agreed and I agree also."

It is essential, therefore, to ascertain what lots are included in this agreed area. In alluding to the extent of the area, the trial judge said (at page 6):

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

His detailed description of the area under consideration (page 8 of the record) is as follows:

> "The restrictive covenants were imposed by application registered in 1954 when lands part of Mona and Papine Estates were registered by the Colonial Secretary of Jamaica. The applicant's lot forms part of a subdivision of over 80 lots. At present that lot is an open lot.
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> The lots of the objectors, and the applicant are in very close proximity.
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> Wellington Drive runs from east to south west and is numbered from east to west. On its eastern end it forms a junction with Mona Road and at its south western end it forms another with Munroe Road. Wellington Drive slopes upward from Munroe Road to Mona Road, that is from south west to east. When one travels from south west to east along Wellington Drive the following roads form junctions with the left hand side of Wellington Drive in the following order: Canberra Crescent, Bamboo Avenue and Ottawa Avenue. There are no roads leading from the right hand side of Wellington Drive.
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> Concerning the lots on Wellington Drive, one comes first to the lot of the objectors Carl and Peter Croswell on the left at number 2 Canberra Crescent, that is at the eastern end of the junction of Canberra Crescent and Wellington Drive. Next, beside it at the left of Wellington Drive is Clive Morin's lot at number 2D Bamboo Avenue, at the junction of Bamboo Avenue and Wellington Drive.
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> On the right hand side and opposite Clive Morin's lot are the lot of the objectors, Roy Anthony Bridge and Gloria Hope Bridge at number 41 Wellington Drive and then the lot of the applicant at number 39 Wellington Drive. Clive Morin's lot fronts Wellington Drive for the combined lengths of the Bridge's lot and the applicant's lot."

Having regard to the agreement of the parties as to the extent of the neighbourhood and the trial judge's concurrence therewith, it seems somewhat unclear as to whether Dr. Barnett's

criticism represents a resiling from that agreement. This would be impermissible. And yet it is worthy of note that Mr. Hylton, in an apparent endeavour to clarify the finding, conceded that the way in which the judge has worded his finding on the issue may lead to some confusion to the extent that he referred to the Mona and Papine Estates. His suggested clarification is that since the judge states specifically that he accepts as the neighbourhood the area agreed by both sides, this court should find the neighbourhood as being constituted by Wellington Drive, Canberra Crescent, Bamboo Avenue and Ottawa Avenue but that Wellington Glades ought not to be included on any test. This submission commands respect, particularly so because the judge did not regard Wellington Court and Wellington Glades as being included in the neighbourhood, an inclusion for which Dr. Barnett now contends. In his skeleton argument, Dr. Barnett had submitted:

> "The appellant contends that the relevant neighbourhood here encompasses the whole of Wellington Drive and those roads which intersect or meet with it, namely, Bamboo Avenue, Ottawa Avenue, Canberra Crescent and the part of Monroe Road which commences at the foot of Beverley Hills. This includes Wellington Court, Wellington Glades and all the properties on the eastern side of Wellington Drive."

It would seem to me that the definition of neighbourhood submitted by Dr. Barnett against the backdrop of which he made his criticism of the determination of the neighbourhood in this case does not support his claim for the enlargement of the agreed area. Said he:

> "The appellant contends that the proper definition of the neighbourhood, as illustrated by principles laid down in the authorities, is an area which is so clearly defined as to attract to itself and maintain a peculiar reputation for quality and amenity. See **Re Knotts Application** (1953) 7 P & C R 100; **Re Lings Application** (1956) 7 P & C R 233."

To begin with, the disputed areas are not and were never a part of the clearly defined area, that is, the Mona and Papine Estates,

which was made subject to the covenants on August 10, 1954, and which, until December 14, 1966, when the first of several modifications was approved, developed as a single-dwelling private residential sub-division. The record discloses that during that time the land on which Wellington Glades and Wellington Court were subsequently established were just open rugged hillside lands. Both Wellington Glades, consisting of seventy-six town houses, and Wellington Court, consisting of five town houses, are recent developments and are not subject to any of the covenants imposed on the sub-division in the agreed area. Apart from their proximity to each other, the sub-division and the disputed areas are not subject to any common bond which would make them a part of the same neighbourhood. Nevertheless, it will be necessary to consider whether these disputed areas have such an impact upon the neighbourhood so as to qualify as "other circumstances" which may be taken into account under section 3 (1)(a) of the Act.

It is now necessary to consider the nature of such changes as are claimed to have taken place within the neighbourhood and their effect on the character of the neighbourhood. The first modification of the covenants operating in the neighbourhood took place on December 14, 1966, when without any objection the covenant prohibiting sub-division on premises situated at 8 Wellington Drive was wholly discharged. On July 26, 1967, the covenant against sub-division of 33 Wellington Drive was modified to permit sub-division into lots of not less than 12,000 square feet. There are now six town houses on this lot. Then on October 9, 1968, a similar covenant on 33A Wellington Drive was, without objection, modified to allow for "dwelling houses." Three houses now stand on this lot. Next to be affected was 29 Wellington Drive. Unfortunately, however, the evidence is not specific as to the nature of the modifications permitted. Modifications have also been allowed at 35 Wellington Drive resulting in there being two dwelling

houses on the lot. On April 28, 1989, the covenant against sub-division on 23 Wellington Drive was modified so that there are now two dwelling houses on that lot. Whereas the covenants prohibited buildings in the sub-division below a value of two thousand pounds, the modifications on lots 2A and 2B Bamboo Avenue granted on May 16, 1975, permit the construction of dwelling houses of a value not less than $1,600. The result is that there are now six town houses on the former and fourteen on the latter. Modifications at 1 Ottawa Avenue on June 23, 1972, resulted in there being four single-storey dwelling houses there. Further, there are illegal modifications at 15 Wellington Drive and 24 Wellington Drive resulting in the erection of multiple buildings. In addition, both the planametric map and aerial photographs taken by J. S. Tyndale Biscoe show that there are multiple buildings at 19 Ottawa Avenue and it appears from the planametric map that this was the result of legitimate modifications though the date of those modifications has not been stated.

This much, therefore, is clear from the evidence that within thirteen years of the imposition of the covenants, to wit, on December 14, 1966, when the covenant against sub-division was wholly removed from 8 Wellington Drive, changes affecting the benefits secured by the covenants had set in. The latest of the modifications for which the date is disclosed was made at 23 Wellington Drive on April 28, 1989. Accordingly, there are in all modifications to twelve lots in the neighbourhood - seven on Wellington Drive of which two are illegal, three on Ottawa Avenue and two on Bamboo Avenue, and it is relevant to note the location of the objectors' lots with reference to the lots on which modifications have taken place. In this regard, it is also important to observe that although the evidence does not disclose the length of Wellington Drive, the road which runs the full length of the sub-division, it is not in fact a long road bearing in mind that the highest number of a lot is

forty-seven - the even-numbered lots being on one side of the road and the uneven on the other.

The lot of objectors Roy Anthony Bridge and Gloria Bridge - 41 Wellington Drive - adjoins 39 Wellington Drive, the subject matter of the application under consideration. Lots 33, 33A and 35 Wellington Drive which together accommodate a total of eleven houses instead of the three required by the covenants are separated from the Bridges' lot by only lots 37 and 39. The objector Clive Morin's lot at 2D Bamboo Avenue, which is at the corner of Bamboo Avenue and Wellington Drive, is directly opposite to the Bridges' lot and the Wellington Drive frontage of Morin's lot equals the total frontage of the Bridges' lot and the disputed lot, 39 Wellington Drive. The Croswells' lot at 2 Canberra Crescent adjoins Morin's lot at the back and those two lots occupy the length of Wellington Drive between Bamboo Avenue and Ottawa Avenue. Number 2D Bamboo Avenue, Clive Morin's lot, is separated from 2A and 2B Bamboo Avenue where there are now a total of twenty town houses instead of the two single-family dwelling houses contemplated by the covenant by only 2C Bamboo Avenue. Then, too, 2D Bamboo Avenue is separated from 1 Ottawa Avenue where legal modifications resulted in the erection of four dwelling houses by only the width of Bamboo Avenue and lot 1D Bamboo Avenue which adjoins 1 Ottawa Avenue in the back. It is clear, therefore, that not only have there been evident changes in the agreed neighbourhood but even more significantly in close proximity to the objectors whose lots form a little cluster. It is amazing, therefore, that neither against the permitted nor the illegal changes did any of them raise any objection and none of them has said why they remained silent. Apparently the proximity of the objectors' lots to one another justify the similarity of their complaints contained in paragraphs 3 to 6 of each affidavit. The Bridges' alone has a paragraph with an additional complaint. Here is what they say:

"3. The modifications applied for are not consistent with the development of the subdivision or with the further orderly development of a single family residential scheme.

4. The applicants are seeking to be freed of restrictions which may make their property more convenient for their own private purposes without regard for the owners of other lots in the subdivision and the damage which will be caused to the Applicant and other lot owners in the subdivision if the restrictions which are sought to be modified were in fact to be modified.

5. If this application were to be allowed, the applicants would be permitted to erect an indeterminate number of townhouses on their lots. Such a development would be totally inconsistent with the general character of the subdivision, and would greatly increase the density, traffic and noise in the area.

6. If this application were to be allowed, it would be of assistance to other persons who own lots in the subdivision and who might wish to make similar applications which, if allowed, would further deteriorate the character of the neighbourhood and render the restrictions valueless to the remainder of the persons including ourselves who are at present entitled to the benefit thereof.

7. Our said land adjoins the Applicant's land. The Covenants now endorsed on the title (Covenant No. 3) prevent the Applicant from building nearer than 10 feet to the boundary of our land. If the application were to be allowed, the Applicant could build right up to the boundary with our land, which would further greatly diminish the value and enjoyment of that land."

None of the objectors has disclosed in his affidavit the date on which they acquired their lots but the affidavit of Carlton DePass on behalf of the appellant states that the Bridges' lot, 41 Wellington Drive, had from October 28, 1951, been owned by Novelty Trading Company Limited of which both the Bridges are directors and shareholders and that from 1954 Roy Anthony Bridge has been in possession of the said lot. Accordingly, he cannot

plead ignorance of the significant changes which have taken place in the neighbourhood. Indeed, none of the objectors have pleaded ignorance of the changes; they have simply maintained a baffling reticence. To my mind, it is impossible for them to capitalize on their silence. If they had acquired their lots prior to the changes then they, at least, acquiesced in the changes, and if their acquisitions were subsequent to the commencement of the changes then they would be fixed with notice of the changes which had occurred and of the trend which had become evident in the neighbourhood.

In his effort to justify the attitude of the objectors regarding the changes which have occurred, the trial judge, without a word from the objectors, advanced a reason which does not seem to be warranted, having regard to the evidence. Said he:

> "I find it perfectly understandable that the objectors may well have taken the approach that they would not object to modifications which were not opposed by those landowners who were nearest to the lots which were intended to be modified , and in circumstances where by reason of the distance of these lots from their own and the geography of the area they were unlikely to be affected, or would be only minimally affected by the proposed changes.
>
> I think that the objectors may properly have taken such an approach to all the modifications except those at 2A and 2B Bamboo Avenue, and I would not therefore deprive them of their rights because they have been less than diligent in the case of Bamboo Avenue."

On the question of distance, I have already shown the relative positions of the objectors' lots to the lots where modifications have taken place and with special reference to premises 35, 33A and 33 Wellington Drive the affidavit of Carlton DePass states that those lots are 100 to 150 feet from the objectors' lots. The attitude attributed to the objectors by the trial judge is akin to the kind of laissez-faire attitude which would allow a householder to be unconcerned about a fire raging a few doors away until it reaches his gate. I do not

think it is a legitimate assumption. The reference to geography appears to stem from the following to be found at page 9 of the judgment (page 95 of the record):

> "I hold that such a purchaser especially one in the immediate vicinity of the objectors' lots expects to get privacy and quiet by reason of the predominance of single family houses. I have come to this conclusion because my visit revealed that the physical features of the area have minimised the effect of those modified dwelling houses of Wellington Drive to the east of the objectors, because of the distance of those houses from the objectors' lots, and the fact that Wellington Drive curves at No. 37 Wellington Drive. The result is that Clive Morin and the Bridges can see only up to No. 35 Wellington Drive from their lots and the Croswells can see none."

But I doubt very much that this is a legitimate manner of resolving the issue because in so doing almost all the evidence of modifications would be rendered irrelevant. What is more, that method would produce several neighbourhoods along Wellington Drive, each extending from one of its curves to another curve. That certainly is not the basis on which the case was presented. Indeed, the criticism that he had resorted to a personal rather than a neighbourhood basis would be justified. And, further, support for such criticism is to be found at page 9 of the judgment:

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

When the estate agent's test is applied to the agreed neighbourhood in order to resolve the question, "What would a purchaser of premises in the neighbourhood expect to get?" the answer must be that the purchaser of premises in that neighbourhood , on traversing the area and checking the covenants on the

title of any premises therein, would be expected to observe that there have been great changes in the neighbourhood. There are at least two houses where one was covenanted for and up to fourteen houses on one lot. He would be confronted with the stark fact that the neighbourhood was no longer one of single-family dwellings. Rather, and this trend is likely to continue, it had become a neighbourhood of single-family dwelling interspersed with town houses. This is certainly not what was sought to be achieved by the imposition of the covenants. I am, therefore, in disagreement with the trial judge who held that:

> "...there has been no change in the character of the neighbourhood as the state of affairs which the covenants are designed to protect, particularly in the case of the Croswells is still substantially intact."

In discussing the change of the character of the neighbourhood, an important factor to bear in mind is that despite the very obvious changes the neighbourhood has remained residential but not the type of residential neighbourhood contemplated by the covenants. The trial judge did not take cognizance of this fact and by failing to observe that distinction he may have been induced to find as he did. But as an alternative he said that even if he is wrong in coming to that conclusion the application would not logically succeed. Authority for that view is supplied by the decision of the Lands Tribunal in Re Truman, Hanbury, Buxton & Co. Ltd.'s Application [1956] 1 Q.B. 261; 7 P & C R 348. And that is so because the court must then consider whether the covenant ought to be deemed obsolete. Because of the distinction to which I have referred earlier, it is my opinion that great care must be observed when it is sought to apply the decisions of the Lands Tribunal in cases where the change in the character of the neighbourhood has resulted in a residential neighbourhood becoming commercial. Re Truman etc. (supra) was one such case in which the Lands Tribunal, guided by the decisions in Chatsworth Estates Co. v. Fewell [1931] 1 Ch. 224;

7 P & C R 284 and Re Henderson's Conveyance [1940] Ch. 835; 7 P & C R 332, held that the test of obsoleteness was whether the restriction had become absolutely valueless. On appeal it was held that such a test was too strict and held instead that "the real question is whether the original object of the covenant can or cannot still be achieved. If it cannot the covenant is obsolete."

Before resolving the question of obsoleteness, I think there are factors which may validly be considered under "other circumstances of the case which the judge may think material." Reference is made to a peculiarity of the sub-division which Dr. Barnett submitted is of great moment, viz, there is no sub-division road. Rather, there is a major linkage road, Wellington Drive, which is a high-use road frequently used by traffic to and from Mona, Mona Heights, University of the West Indies (U.W.I.), August Town, Elletson Flats, etc. some of which, for example U.W.I., pre-dated the sub-division while others like Mona Heights (a large housing estate) came later. But the fact to bear in mind is that expanding developments inevitably brought an increase of traffic along that road, thus affecting the peace and quiet which the covenants sought to guarantee. The other factor to which I refer is the effect of Wellington Glades and Wellington Court. These two developments now occupy what were the only remaining lands in the vicinity of the neighbourhood and while they cannot properly be included in the neighbourhood they do confirm the trend in land usage in the area which is definitely high-density residential usage, a trend signalled by authorized modifications (and aggravated by the illegal modifications) in the neighbourhood. This view is not unlike Re George Reed (Builders) Ltd.'s Application [1956] 7 P & C R 227, in which the Lands Tribunal held that the establishment of a housing estate, close to but not included in the neighbourhood, had resulted in a change in the character of the neighbourhood.

The question of obsoleteness arose for determination in **Stephenson v. Liverant** [1972] 18 W.I.R. 323. In that case, the neighbourhood was held to consist of twenty lots in a sub-division at Portlands, Discovery Bay, in the parish of St. Ann. It was contended that covenant number 3, which is similar to covenant number 2 in the instant case, was breached in that, instead of the private dwelling house permitted by the covenant, of the fifteen lots which had been built upon, eight or nine were in breach of the covenants by having more than one dwelling house built upon it. However, the evidence was imprecise because it failed to show the nature of the additional building on each lot, that is, whether it was a building appurtenant to the main building and occupied therewith. With the evidence in that state, the Court of Appeal upheld the finding of the trial judge that there had been no changes in the character of the neighbourhood. There was, accordingly, no basis for holding that the covenant could no longer achieve its intended purpose and was, therefore, obsolete.

To my mind, there is a clear distinction between **Stephenson v. Liverant** (supra) and the instant case. The evidence of the changes which have taken place in the neighbourhood is undisputed and it cannot be assumed that a neighbourhood which has been transformed from being a quiet single-family neighbourhood to one which is now interspersed with high-density dwellings would retain its character unchanged. In some instances several families now occupy the land space which the covenant reserved to a single family. With the infusion of town houses the style, arrangement and appearance of the houses have changed. This is evident from the planametric map. And it is unlikely that the social customs of multiple family dwellings would be the same as those of the single-family envisaged by the covenant.

I am of the view that it has been demonstrated by the evidence that, by reason of the changes which have taken place

in the character of the neighbourhood, the restriction ought to be deemed obsolete. In the circumstances, I would allow the appeal with costs to the appellants to be agreed or taxed.

DOWNER J A

The issue to be resolved in this appeal is whether the respondent/objectors are correct that the restrictive covenant which runs with their property ought not to be modified or discharged so as to permit the appellant/applicant, Central Mining & Excavating Limited (the Company), to erect eleven town houses at 39 Wellington Drive. The resolution of this issue depends firstly, on the true construction of "neighbourhood" within the intendment of the Restrictive Covenants (Discharge and Modification) Act, (the Act) and secondly, whether the facts as found "or other circumstances of the case" showed that there were changes in the neighbourhood which made the covenants obsolete.

The Facts

The lot in issue - 39 Wellington Drive, is part of Mona and Papine Estates and when the estate was subdivided, the restrictive covenants made provisions that the lots would not be subdivided and that the buildings should be private dwelling houses. Town houses and apartments were prohibited by necessary implication.

The evidence reveals that ten land owners have obtained modifications of their covenants while there are at least two illegal modifications. The central issue in this case is to determine whether these changes are so significant so as to alter the characteristics of the neighbourhood as the appellants contend. The respondents, on the other hand, are submitting that the predominant characteristics of the neighbourhood are still that of single dwellings on substantial lots and that the covenants should be inviolate, so that the objectors can preserve the social and physical characteristics of the neighbourhood and enjoy the peaceful atmosphere protected by the covenants.

The area under consideration is described in the original title - part of the Mona and Papine Estate. It was an area of reasonable size as it is upwards of 33 acres with over eighty lots. Wellington Drive is the main thoroughfare. From the Western end, on the left hand side, the feeder roads are, Canberra Crescent, Bamboo Avenue and Ottowa Avenue. There are no side roads on the right hand side. Southwest there is a gully which separates the Wellington Drive neighbourhood from a new and pleasant development of town houses and apartments, known as Wellington Glades and Wellington Court. These were not part of the original sub-division and the covenants do not extend to that area.

Courtenay Orr J, who tried the case rightly considered these schemes to be outside of the neighbourhood. He visited the area and did not consider that these developments could, in any way, affect the neighbourhood. It was not a "blight" so as to be considered under "other circumstances in the case" which could make the covenants obsolete. The onus was on the applicant, the Company to persuade the court that the covenants should be modified or discharged. The appellant owns the empty lot adjoining one of the objectors, the Bridges, on Wellington Drive. The other two objectors are the Creswells on the corner of Wellington Drive and Canberra Crescent and Clive Morin at the corner of Bamboo Avenue and Wellington Drive. They are immediately opposite to the appellant. All four objectors and the appellant are therefore in close proximity. Courtenay Orr J, in the Supreme Court, in a closely reasoned judgment, refused the modification requested and as a result, the applicant has appealed.

The first issue to be decided is the extent of the neighbourhood in which the applicant and the objectors have holdings. It is a question of mixed law and fact. The generally accepted test is the "estate agents test." It is

generally put thus - "What does a purchaser of a house on that road or part of the road expect"? When considering this approach, it must be against the training and experience of an estate agent. He generally has expertise in valuation and a feel for the qualities which make for good real estate. He is a professional who brings buyer and seller together. He must understand features which make up a neighbourhood. He would have a knowledge of the original subdivision. He would know of the covenants which exist. He would know the area of the subdivision, the flow of traffic and he would know that the Wellington Drive neighbourhood was an upper middle class area. He would know of the changes in the area since 1958 when the neighbourhood was laid out. Using the test, I think he would come to the conclusion that the area exhibited in the various plans and aerial photographs has distinct physical and social characteristics which make up a neighbourhood. It has a style, privacy and atmosphere as well as amenities which persuaded the learned judge that the original subdivision was and still is a neighbourhood within the meaning of the Act.

The learned judge so found, and I think his approach and findings were correct. At this stage it is pertinent to set out the modification sought:

> "(1) 'There shall be no subdivision of the said land except into 11, 3 bedroom units with the approval of the Relevant Planning Authority.'
>
> (2) 'No buildings of any kind other than private dwelling houses or town houses with the appropriate outbuildings appurtenant thereto and to be occupied therewith together with a guard house and garbage disposal structure shall be erected on the said land and the value of such private dwelling houses or town houses and

> outbuildings shall in the aggregate not be less than TWO THOUSAND POUNDS.'
>
> (3) 'The buildings to be erected on the said land shall not be erected nearer than twenty-five feet to any road boundary which the same may face nor less than ten feet from the back boundary SAVE AND EXCEPT a guard house and garbage disposal structure which shall not be deemed to be a breach of this covenant.'
>
> (9) 'RESTRICTIVE COVENANT NO. 9 BE WHOLLY DISCHARGED.' "

The covenants may be implied from the modifications sought. They barred subdivision, permitted the erection of private dwelling houses of a value not less than two thousand pounds. They provide for the distance between buildings and roadway, and specified the quality of roadway which was to be constructed.

The issue on Appeal

It is against this background that Dr. Barnett for the applicant/appellant developed his submission to set aside the order made below. The thrust of his contention was that, the learned judge below fell into error because he failed to determine the relevant neighbourhood pursuant to section 3 (1) (a) of the Act. That section reads:

> "3(1) A judge in Chambers shall have power, from time to time on the application of the Town and Country Planning Authority or any person interested in any freehold affected by any restriction arising under covenant or otherwise as to the User thereof or the building thereon, by order wholly or partially to discharge or modify any such restriciton (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 Judge may think material, the restriction ought to be deemed obsolete; ..."

Were there sound reasons for Courtenay Orr J to be satisfied that the restriction in the covenant sought, ought not to be discharged?

The learned judge visited the locus and decided that given the geographical contours, in particular, the gully which separates the neighbourhood from the new developments of Wellington Glades and Wellington Court, that they could not be material circumstances which ought to make him decide that the covenants were obsolete. Moreover, the covenants which gave the objectors proprietory rights, did not extend to these areas.

Then the impact of existing modifications must also be considered. It seems there are twelve modifications - two town houses and ten instances where there were sub-division which accommodated more than one dwelling house as the original restrictions called for. It should be noted that the original lots were of different shapes and sizes. So that the general impression of the lots which were further subdivided would not give the appearance of significant change. A town house which the modification and discharge of the covenants propose is a different proposition altogether. For instance, the size of the common garden would be markedly different from that which would be obtained in the normal household in the neighbourhood. The fact that the objectors were not vigilant when those alterations occurred, does not preclude them from objecting successfully now. These alterations are scattered and are not of such an extent or difference to change the essential character of the neighbourhood. Specifically, seven of the modifications are on Wellington

Drive. One set of town houses is at 38 Wellington Drive and the other set on Bamboo Avenue. Further, if this alteration were permitted despite the objections, the court would be deliberately assisting in altering the character of the neighbourhood with a further intrusion of town houses. The appellant's lot adjoins one of the objectors and is opposite to two others. This is, in itself, a strong objection as if it were not, it would mean the covenants were of little value. It is clear that the covenants are of great value to the objectors.

Since the appellant contends that the covenants are obsolete, it is pertinent to seek guidance from the authorities in this regard. In Re Truman Hanbury Buxton & Co. Ltd. Application [1956] 1 Q B 261, two objectors succeeded in preventing a public house from being erected on two lots adjoining them. The neighbourhood was residential although there were shops in the area. The significant point to note is that the objectors owned houses adjoining the applicant which is comparable to the instant case. The general principle to be culled from this case was that the object of the restriction could still be achieved, having regard to the facts of that case.

Shortly after, there came Driscoll v. Church Commissioner for England [1957] 1 Q B 330 or [1956] 3 All E R 802 like the instant case prohibited user otherwise than for single private dwelling houses. The Court, (Denning, Hodson, Morris)LJJ upheld the objector lessor although many of the houses had been converted into flats.

A comment by Morris L J at p. 813 of the All England Reports is useful as he held that the covenants were still capable of fulfilment "even though there may not be many people who could afford to keep these rather large houses." Preston and Newsome Restrictive Covenants 7th edition at p. 219, suggests that this approach is derived from the test

used by Lindley L J in Knight v. Simmonds [1896] 2 Ch. 294 at p. 297 where he stated that equitable relief will be refused if, looking at the object to attain which the covenant was entered into, the object could not be attained.

Another aspect illustrating that a number of alterations which make some change does not preclude objectors from being successful is - Chatsworth's Estates v. Fewell [1931] 1 Ch. 224. The headnote is sufficient to explain the principle. It reads in part:

> "(b) In order to succeed on the second ground the defendant must make out a sort of estoppel by showing that the plaintiffs' acts and omissions were such as to justify a reasonable person in believing that the covenants were no longer enforceable.
>
> In order to keep their estate purely residential the plaintiffs' predecessors had imposed covenants preventing any house being used 'otherwise than as a private dwelling-house.' They or the plaintiffs had however licensed a number of schools, some blocks of flats, a hotel, and, in certain exceptional circumstances, three boarding houses, and without the plaintiffs' knowledge about half a dozen other boarding houses were being carried on in the area, which however still remained mainly residential.
>
> Held, that these acts and omissions did not prevent the plaintiffs from restraining the defendant from using his house as a guest house."

The whole issue is well illustrated in a passage from Stephenson v. Liverant [1972] 18 W I R 323. At p. 336, Smith J A as he then was, said:

> " Even if I am wrong and the user to which the houses have been put can be said to amount to a change in the character of the neighbourhood in that it has lost its private residential character, this would not necessarily entitle the applicants

> to succeed under para. (a) of s. 3 (1) of the Law of 1960. The cases of Re Truman, Hanbury, Buxton & Co. Ltd's (1956) 3 All E R 559; (1956) 1 Q B 261 and Driscoll v. Church Commissioner for England (1956) 3 All E R 802; (1957) 1 Q B 330; (1956) 3 W L R 996, show that a change in the character of the neighbourhood does not necessarily result in the covenant being deemed obsolete. The court is obliged to consider the further question whether the changes are such that the covenants ought to be deemed obsolete. The test laid down by Romer L J, in the Truman, Hanbury case (supra) for resolving this question is whether the original purposes for which the covenants were imposed can or cannot still be achieved. In other words, the question is whether the object to attain which the covenants were entered into can or cannot be attained. If it can, the covenants are not obsolete, while if it cannot, they are. Applying this test to this case, there is no valid basis, in my view, on which to justify a finding that the original object of the covenants cannot still be achieved. All the physical characteristics necessary for a private residential neighbourhood seem to be still substantially intact. In my opinion, there is no reason to disturb the finding of the learned judge that the covenants cannot be deemed obsolete."

Conclusion

In a careful judgment, Courtenay Orr J considered the three grounds on which the applicant based its submissions for modification and discharge. In this appeal, Dr. Barnett confined his submission to the third ground namely:

> "(c) That by reason of the change in the character of the neighbourhood the restriction ought to be deemed obsolete."

I have confined my reasons to the submission advanced, but I wish to state that I agree with the learned judge's approach as a whole. Therefore, I confirm the order below that the objectors have succeeded and the taxed or agreed costs go to them as respondents.

WOLFE, J.A.:

This is an appeal from the judgment of Courtenay Orr, J. delivered on 9th December, 1991, whereby he dismissed the application by the appellant to modify certain restrictive covenants in respect of premises No. 39 Wellington Drive in the parish of Saint Andrew.

The appellant sought to have modified Restrictive Covenants numbers 1, 2, 3 and 9 endorsed on the Certificate of Title registered at Volume 695 Folio 5 to the effect that:

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

The modifications sought are as follows:

> "(1) There shall be no subdivision of the said land except into 11, 3 bedroom units.
>
> (2) No buildings of any kind other than private dwelling houses or town houses with the appropriate outbuildings appurtenant thereto and to be occupied therewith together with a guard house and garbage disposal structure shall be erected on the said land and the value of such private dwelling houses or town houses and outbuildings shall in the aggregate not be less than TWO THOUSAND POUNDS.

"(3) The buildings to be erected on the said land shall not be erected nearer than twenty-five feet to any road boundary which the same may face nor less than ten feet from the back boundary SAVE AND EXCEPT a guard house and garbage disposal structure which shall not be deemed to be a breach of this covenant.

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

The bases on which the modifications were sought in the court below are as follows:

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

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

(c) That by reason of the changes in the character of the neighbourhood or other circumstances of the case which the judge may think material the restrictions ought to be deemed obsolete.

The appellant intended to build eleven three-bedroom town-houses on premises 39 Wellington Drive.

Objection was taken to the application by the respondents, registered proprietors of land in close proximity to the said land in respect of which the application is made. The bases of the objections by all the respondents are identical, viz:

1. None of the provisions of the Restrictive Covenants (Discharge and Modification) Act apply to this case.

2. That the continued existence of the present Restrictive Covenants will not impede the reasonable user of the said land for private purposes.

3. That the modifications are not consistent with the development of the sub-division.

4. That the modifications will cause damage to the respondents in the user of their land.

5. The modifications, if allowed, would increase the density, traffic and noise in the area.

6. To allow the modifications might have the effect of triggering off similar applications resulting in the deterioration of the character of the neighbourhood thereby rendering the restriction valueless to the persons entitled to the benefit thereof.

Dr. Barnett, for the appellant, indicated at the outset of his arguments that his submissions would be confined to sub-paragraph (c) of the affidavit of Carlton DePass in support of the Originating Summons, viz:

> "That by reason of the changes in the character of the neighbourhood or other circumstances of the case which the judge may think material the restrictions ought to be deemed obsolete."

The first complaint in this regard is that Orr, J. failed to make any or any proper determination as to what constituted the relevant neighbourhood and, therefore, he erred in law. Such a determination, it is contended, is an essential pre-requisite to a decision of the court whether or not to exercise its power under section 3(1)(a) of the Restrictive Covenants (Discharge and Modification) Act.

In **Re Ling's Application** [7 P & C R] 233 at 234 the view was expressed that in considering an application of this nature "it is necessary to decide what constitutes the neighbourhood, what is the character of the neighbourhood and if there have been any changes in it." The learned trial judge, in addressing the question of what constituted the neighbourhood, said:

> "Mr. Honeywell submitted that the court should regard the whole area of Mona and Papine Estates as the neighbourhood. To this Mr. Hylton for the objectors agree, and I agree also."

Before us Mr. Hylton conceded that the above passage tends to be confusing, as the agreed neighbourhood was "Wellington Drive, Ottawa Avenue, Canberra Crescent and Bamboo Avenue." He further urged this court to hold, notwithstanding the likely confusion raised in the judge's wording of the neighbourhood, that the neighbourhood does not include Wellington Glades.

Dr. Barnett, however, has submitted that the neighbourhood ought to include Wellington Court, Wellington Glades and all the properties on the eastern side of Wellington Drive.

This extension of the agreed neighbourhood cannot, in my view, be supported as there is no evidence to show that Wellington Court and Wellington Glades at any time formed a part of the Mona and Papine Estates, the area subject to the covenants and which the appellant now seeks to have modified. Further, there is nothing to support the view that Wellington Court and Wellington Glades are subject to the covenants governing the area agreed upon, by the parties, as the neighbourhood. On the contrary, the plan attached to Certificate of Title registered at Volume 924 Folio 44 undoubtedly shows that Wellington Court and Wellington Glades were never a part of the same sub-division which is protected by the covenants. In the light of the foregoing, I would hold that Wellington Court and Wellington Glades do not form a part of the neighbourhood which is protected by the covenants.

Having concluded that the trial judge correctly determined what constituted the relevant neighbourhood it now falls to be considered whether Orr, J. was correct in holding that:

> "There has been no change in the character of the neighbourhood as the state of affairs which the covenants are designed to protect particularly in the case of the Croswells is still substantially intact."

In answering the question whether there have been changes in the character of the neighbourhood, there can be no doubt that Orr, J. applied the proper test, namely, the "estate agents test." That test requires the judge to ask, "What does the purchaser of a house in that road or that part of the road expect to get?" The approach to be used in answering this question is a practical one. It follows, therefore, that the question is answered not by looking at the existing restrictions but by the physical character of the neighbourhood. In **Re Davis' Application** [7 P & C R] 1, the Lands Tribunal observed that:

> "Character (for the purpose of section 84(1) of the Law of Property Act 1925 [UK])derives from the style, arrangement and appearance of the houses on the estate and from the social custom of the inhabitants."

What, then, would a purchaser viewing the area see? Certainly he would be confronted with:

1. 8 Wellington Drive - covenants against sub-division wholly discharged.

2. 33 Wellington Drive - covenant against sub-division modified to allow sub-division into lots of not less than 12,000 square feet. Six town-houses have now been erected on this lot.

3. 33A Wellington Drive - covenant modified to allow for erection of "dwelling houses" on the lot. Three houses have now been erected on this lot.

4. 29 Wellington Drive - covenant modified to allow for sub-division into lots of 8,500 square feet.

5. 35 Wellington Drive - covenant modified to allow for erection of two dwelling houses on the said lot.

6. 23 Wellington Drive - covenant modified to allow for two private dwelling houses on the lot.

7. 1 Ottawa Avenue - modifications to allow for erection of dwelling houses as opposed to dwelling house. In the result, there are now four dwelling houses on this lot.

8. 2A Bamboo Avenue and 2B Bamboo Avenue - covenants modified to allow for erection of town-house lots and or strata plan lots as well as for erection of dwelling houses of a value not less than $1,600 as opposed to £2,000. In the result, there are now six town-houses on 2A and fourteen town-houses on 2B.

9. 1 Ottawa Avenue - covenant modified to allow for erection of dwelling houses as opposed to a dwelling house on the lot. There are now four dwelling houses on this lot.

10. 15 Ottawa Avenue - multiple buildings erected on this lot without modification of the covenants.

11. 24 Wellington Drive - multiple buildings erected on this lot without modification of the covenants.

Viewing these modifications, a purchaser could not reasonably say he expects a community of single-dwelling houses. Does this inevitably lead to the conclusion that the neighbourhood has changed in character? The erection of town-houses certainly affects the population density of the neighbourhood but that is not the sole factor to be considered in the determination of the question as to whether the neighbourhood has changed in character. Other factors such as the style, arrangement and appearance of the houses as well as the social customs of the inhabitants must be considered along with the increase in population density, which leads me to consider for what purpose or purposes were the restrictions designed. In this regard, I agree with the conclusions of Orr, J. that the restrictions were imposed:

(a) to protect against low cost development of the land into smaller lots.

(b) to prevent density of housing thus ensuring privacy and quietude.

Can it, therefore, be said that the subsequent modifications have negated these objections? Has the neighbourhood changed in its character from that of a residential neighbourhood? While the neighbourhood has not changed as residential the neighbourhood can no longer be regarded as a residential community of single-family dwelling houses which is primarily what the covenant sets out to achieve.

I would, therefore, differ from the trial judge in his conclusion that the neighbourhood has not changed in its character. That, however, does not effectively dispose of this appeal because Orr, J. proceeded to hold that even if he were wrong on the question of change in the character of the

neighbourhood he was satisfied that the objectives of the covenants could still be achieved and, therefore, the covenants could not be deemed obsolete.

There is support for this approach in **Re Truman, Hanbury, Buxton & Co. Ltd.'s Application** [1956] 1 Q.B. 261; 7 P & C R 348 and **Driscoll v. Church Commissioners for England** [1956] 3 All E.R. 802, where it was held that a change in the character of the neighbourhood does not necessarily result in the covenants being deemed obsolete. The court must go on to ask itself whether the changes are such that the covenants ought to be deemed to be obsolete.

Romer, L.J. in **Re Truman, Hanbury, Buxton & Co. Ltd.'s Application** (supra) stated that the test to be applied in determining whether the covenants ought to be deemed obsolete is whether or not the original purposes for which the covenants were imposed can still be achieved. This was a question of fact for the trial judge.

The principles on which an appellate court will interfere with a finding of fact by a trial judge are well settled. The court will only do so if the judge has misdirected himself or if it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain the judge's conclusion. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses. In such circumstances, the matter will then become at large for the appellate court. See **Watt (or Thomas) v. Thomas** [1947] 1 All E.R. 582. However, where it is not so much a question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge and should form its own independent opinion, though it will give weight to the opinion of the trial judge. See **Benmax**

v. Austin Motor Co. Ltd. [1955] 1 All E.R. 326; **Hicks v. British Transport Commission** [1958] 2 All E.R. 39. Orr, J. found as a fact that the original purposes for which the covenants were imposed can still be achieved. Is such a finding so erroneous in that it is not supported by evidence or based upon some wrong principle of law that it ought not to be allowed to stand?

What were the factors taken into consideration by the learned trial judge in dealing with the question of obsoleteness? Firstly, he considered the attitude of the objectors in remaining inactive at the time when previous modifications were sought. Having examined the circumstances of their indolence, he concluded that the covenants were not made obsolete relying on a passage from **Preston and Newsome, Restrictive Covenants, Seventh Edition**, page 237 which states:

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

Secondly, he then considered the extent of the modifications and said:

> "The ratio of modifications is therefore 15 modified lots out of more than eighty within the neighbourhood and of the 15 no more than 4 have more than four dwelling houses or apartments. It is also relevant to note that the modified lots are not concentrated in any one area but are dotted over the neighbourhood."

Thirdly, he considered the question of other circumstances, namely, the development of Wellington Glades and Wellington Court which he had the benefit of seeing for himself and concluded that their presence was not such as "could spread a blight over a wide area."

Fourthly, he had regard to the social customs of the inhabitants concluding that there was no evidence which could support a change or likely change as a result of the modifications which had already taken place. Further, his visit to

the neighbourhood revealed that, apart from the modified lots, the style, arrangements and appearance of the vast majority of the houses remain unchanged.

Having given due consideration to all these relevant factors, he concluded that "the state of affairs which the covenants were imposed to ensure remains substantially intact." Supported as they are by the evidence, this court ought not to disturb the conclusion at which the learned judge has arrived, namely, that the covenants ought not to be deemed obsolete.

I would, therefore, dismiss the appeal and affirm the judgment of the court below with costs of the appeal to the respondents to be taxed if not agreed.

WRIGHT, J.A.:

By a majority the appeal is dismissed and the judgment of the court below affirmed with costs to the respondents to be taxed if not agreed.

Cases referred to

(1) Re Knotts Application (1953) 7 P&CR 100
(2) Re Lings Application (1956) 7 P&CR 233
(3) Re Truman, Hanbury, Buxton & Co Ltd's Application (1956) 1 Q.B 261; 7 P&CR 328
(4) Chatsworth Estates Co v Fawcett (1931) 1 Ch 244
(5) Re Henderson's Conveyance (1940) Ch 835
(6) Re George Reed (Builders) Ltd's Application (1956) 7 P&CR 227.
(7) Stephenson v Liverant (1972) 18 W.I.R 323.
(8) Driscoll v Church Commissioners for England (1957) 1 Q.B. 330 (1956) 3 All ER 802.
(9) Re Davis' Application 7 P&CR 1
(10) Re Watt (or Thomas) v Thomas (1947) 1 All ER 582.
(11) Benmax v Austin Motor Co Ltd (1955) 2 All ER 326
(12) Hucks v British Transport Commissioners (1958) 2 All ER 39