IN THE SUPREME COURT

IN EQUITY

SUIT NO. E R/C 274/84

RE: CONSTANT SPRING ESTATE - @ NORBROOK WAY

Michael Hylton instructed by Myers, Fletcher & Gordon, Manton & Hart for the applicant

L.F.D. Smith for the Objector

21st & 22nd November, 1985 &
19th December, 1986

DOWNER J.

The applicant Life of Jamaica Ltd a well known insurance company is the registered proprietor of the estate in fee simple known as 2 Norbrook Way which is part of the Constant Spring Estate. The property is sited at the corner of Norbrook Way and Norbrook Road and on it are two apartment blocks which were designed with such skill and cunning that in the words of the objector as recorded in his affidavit, it was stated:

> "17. That at the time when Bergson Limited purchased No. 1 Norbrook Way, neither I nor anyone else connected to Bergson Limited realised that there were two buildings on No. 2 Norbrook Way, that the same were rented out or that the same contained apartments.
>
> 18. That there was a separate entrance to each building - one on Norbrook Way to the building and in the front of the lot, and the other on Norbrook Road to the building to the rear of the lot, so that each building appeared to be on a separated lot.
>
> 19. That the said buildings are so designed and constructed as to appear to be dwelling-houses rather than apartment buildings.
>
> 20. That it was not until after Bergson Limited had purchased No. 1 Norbrook Way and after I had been living there for some time that I became aware of the true position regarding the said buildings."

It is of interest to note that Norbrook Way is a cul-de-sac and that the applicant wishes to obtain strata titles pursuant to the Registration (Strata Titles) Act which both parties agree would increase the value of the apartments. The applicant would reap a windfall as a result of a prudent purchase made on 28th July, 1980. They however are faced with incumbrances on the title of 2 Norbrook Way and it is useful to cite the two relevant ones. They are as follows:

> (1) The land above described (hereafter called 'the said land') shall not be subdivided.
>
> (8) No building shall be construed on the said land so as to be nearer than forty feet to the boundry on which it fronts nor nearer than twenty feet to any other boundary."

The dispute arises because in order to subdivide the applicant must come to this court pursuant to Section 3 of the Restrictive Covenants (Discharge & Modification) Act to discharge or modify the covenants.

<u>The basis of the application</u>

The applicant has prayed in aid all four grounds permitted by Section 3 of the Restrictive Covenants (Discharge & Modification) Act, They are as follows:

> 3 (1) (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
>
> (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

(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.

Bergson Ltd the objector who are the registered owners of 1 Norbrook Way which is directly opposite to No. 2 are determined objectors to any modification of the restrictive covenants. This company relies on the affidavit of Valentine Johnson their Managing Director, who resides there, and it is noteworthy that he is a civil engineer with some nineteen years of experience in the construction industry and housing development. They have traversed every ground relied on by the applicant and they were obliged to do this, as, if they are to be successful in these proceedings, they must succeed on every point. It is therefore important to rehearse their objections and they are as follows that:

"(i) There has been no change in the character of the property or neighbourhood to justify the modification of the covenants;

(ii) the continued existence of the restrictions would not impede reasonable user of the land for private purposes.

(iii) the objector has not nor has any other person entitled to the benefit of the restriction so far as the objector is aware agreed either expressly or by implication to the same being modified;

(iv) the proposed modification if carried out will result in depreciation of the value of No. 1 Norbrook Way aforesaid;

(v) the proposed modification would greatly affect the enjoyment of lands in the immediate neighbourhood and in particular of No. 1 Norbrook Way aforesaid.

It is by evaluating these claims for modification and discharge against the objections pleaded that the court must decide and in coming to a determination the evidence must be assessed and the provisions of the Act previously cited be correctly construed. It is appropriate to dispose of the incumbrance numbered 8 which was cited previously. The applicant stated that the buildings are nearer than forty feet to the front boundry and nearer than twenty feet to another boundry. The objector through his counsel does not object to the modification created by the existing buildings. By consent this application is granted. Pursuant to Section 7 of the Act the order of the Court in respect of this aspect of the matter should be forwarded to the Registrar of Titles so that the appropraite memorandum may be entered in the Register Book.

Different considerations arise however as regards the proposed sub-division of the apartments by strata-titles and to understand what is sought and why it is opposed the evidence must be considered. The chartered surveyor Lloyd Davis on behalf of the applicant deponed that 2 Norbrook Way is an half acre lot with an apartment complex of eight two-bedrooms and one studio apartment in two two storey blocks. The complex is rented and the apartments have all the appurtenancies which characterise modern luxury apartments. The site is reported to be beautifully landscaped with well trimmed ornamental plants and manicured lawns. This expert witness states that the value of the apartments would increase if strata titles were issued for them and this is the crucial factor behind the application.

The evidence of the objector is in the affidavit of Valentine Johnson and he has deponed that the reason for purchasing No. 1 Norbrook Way was that each lot had one dwelling house, thereby allowing privacy, and peace with the added advantage that it was a short distance from Kingston. He further contends that, that was a high class residential area and that the twenty buildings on Norbrook Way were single dwelling houses except that of the applicant. Importantly as indicated previously, neither he nor anyone else who resides in the area was aware that 2 Norbrook Wah had two buildings and three of his neighbours Herron Chung, Peter Fung and one of the Resident Magistrates of St. Andrew Her Honour Miss Joyce Bennett support him in his contentions. Here it ought to be pointed out that they would also have been objectors but for an error on their part in thinking that this application was connected with an earlier one of 1981 concerning the same property.

Additionally he pointed out that there being no change in the character of the neighbourhood the covenants were not obselete. With respect to the contention about reasonable user he pointed out that the applicnat could continue to rent the apartments as was done during the past thirteen years and that the undivided title would not preclude the applicant disposing of the property by way of sale or otherwise. Further, he emphatically stated that there was no express or implied agreement by the applicants or the neighbours to the modification sought to be granted and there was evidence to support that.

In support of his opposition the objector points out the likelihood of effective control of a single owner by Life of Jamaica and stated that that the probability of a lowering of standards if there was multiownership. Counsel for the objector stressed the likelihood of screening potential

tenants and terminating their tenancy if they proved unsatisfactory. It is true that there is a special Management Committee to compel each title holder under the Strata Title Act to contribute to maintenance, but despite this I preferred the opinion of the objector that there is a real risk of deterioration to that of the chartered Surveyor on behalf of the applicant who saw improvement flowing from owner occupiers. It is against this background of evidence that the statute law and the relevant authorities must be considered.

THE RESOLUTION OF THE ISSUES

Firstly it ought to be stated that what the applicant seeks to establish in substance is that because of the architectural ingenuity which created a design for the apartment blocks to resemble two dwelling houses that, that breach should entitle the applicant to have the covenants modified or discharged. But is this a sound contention?

Firstly as to the contention that there are changes in the character of the property or the neighbourhood, I accept the objector's evidence that there are no changes. The two apartments block are designed as houses and all the other buildings on the cul-de-sac are single dwelling residences nor would I accept that because the applicant's dwellings are apartments/this has been so material a change to make the covenants obselete. The approach of Romer L.J. in re: Truman, Hanbury, Buxton & Co. Ltd's Application (1956) 1 Q.B. 261 at 271 is so well stated that I quote in full.

> "It seems to me that the meaning of the term 'obsolete' may very well vary according to the subject-matter to which it is applied. Many things have some value, even though they are out of date in kind or in form - for example, motor-cars or bicycles, or things of that kind - but here we are concerned with its application to restrictive covenants as to user, and these

> "covenants are imposed when a building estate is laid out, as was the case here of this estate in 1898, for the purpose of preserving the character of the estate as a residential area for the mutual benefit of all those who build houses on the estate or subsequently buy them. It seems to me that if, as sometimes happens, the character of an estate as a whole or of a particular part of it gradually changes, a time may come when the purpose to which I have referred can no longer be achieved, for what was intended at first to be a residential area has become, either through express or tacit waiver of the covenants, substantially a commercial area. When that time does come, it may be said that the covenants have become obsolete, because their original purpose can no longer be served and, in my opinion, it is in that sense that the word 'obsolete' is used in section 84 (1) (a)."

This approach to the law was followed in Driscoll Church Commissioners for England (1957) 1 Q.B. 330. I therefore rule against the applicant on his first ground.

Regarding the contention that the continued existence of the covenant would impede reasonable user without securing any benefit to the objector; the applicant must show that the permitted user is no longer reasonable and that another user which would be reasonable is impeded: Stannard v. Issa P.C. Appeal No. 3/85. It is to be noted that the applicant has rented the property for upwards of thirteen years and that the objector testifies to the fact that the applicant is a good landlord and good neighbour, in that there has always been a prompt response to complaints from the objector and presumably other neighbours. No restriction inhibits Life of Jamaica from selling the property although anyone who purchases does so with notice of the incumbrances. There is no impeding of reasonable user of land here. As to the other aspect of the matter the objector does have practical benefits. He can make complaints to one landlord. He states and I accept that there

is real risk that separate owners may not contribute readily to the upkeep as one landlord. He further states that there is a real risk that the number now in occupancy is effectively controlled but that it may not be so if there are nine landlords and I think on balance of probability he is right. Moreover increased traffic and noise may disturb the peace and tranquility of the area. I find these arguments sufficiently persuasive to reject the applicant's prayer on this ground. Although the issue in the Constant Spring and Norbrook Estate 3 W.I.R. 270 was a proposed subdivision to cater for half acre lots where there was a restrictive covenant which permitted subdivision of not less than an acre, the approach is similar to that adopted in the case and further subdivision as applied for was refused. The decision by Waddington J. in the Supreme Court was approved by the Privy Council in Stannard v. Issa.

Concerning the ground that there has been express or implied consent to the modification sought this runs counter to the evidence of the objector and his supporting witnesses, Her Honour Miss Joyce Bennett, Herron Chung and Peter Fung. Therefore on this ground also I reject the applicant's contentions.

So far as the fourth ground of the application is concerned it is not true to say that the objector as a person entitled to the benefit of the covenant would not be injured. I have already noted the benefits which accrue to the objector from having one landlord as a neighbour. I accept that this and others if modified would injure the objector. I would summarize by citing Ghey & Galton's Application (1957) 3 All E.R. 164 at 171. Lord Evershed M.R. said: 'Equally for similar reasons I should be prepared to say that there is no sufficient evidence to support the conclusion that the modification proposed will not injure the persons entitled to the benefit from the restriction viz. the

objector. Nor could the objector be regarded as frivivalous or vexations so as to permit the relief sought. See Ridley v. Taylor (1965) 1 W.I.R. 611.

In the light of the foregoing reasons the application is refused and costs go to the objector which are to be agreed or taxed. Before parting may I say that I was greatly assisted in this case by the submission of counsel on both sides.