IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E.R. R/C 222 OF 1991

IN THE MATTER OF ALL THAT parcel of part of EBONY GLADES in the Parish of SAINT ANDREW being the Lot Numbered FORTY-NINE on the plan of Ebony Glades aforesaid deposited in the Office of Titles on the 6th day of October, 1959 of the shape and dimensions and butting as appears by the plan thereof annexed to and being the whole of the land comprised in Certificate of Title registered at volume 1031 folio 447 of the Register Book of Titles

AND

IN THE MATTER of the restriction affecting the subdivision thereof

AND

IN THE MATTER of the Restrictive Covenants (Discharge and Modification) Act

Michael Hylton and Mrs. Robertha Mattis for Applicant
Rudolph Francis and Mrs. Norma Harrison for objectors,
Joyce Davis and Dian Davis
Frank Williams for Objectors, Andrew Thwaites, Catherine Thwaites,
Franklyn Bennett and Jeanne Bennett

Heard: July 19, 20, 28, 1993,
January 25, 1996.

CHESTER ORR, J.

Let me at the outset offer my profound apologies for the inordinate delay in the delivery of this Judgment.

This is an application by Gwyneth Moore on behalf of Morua Limited, the registered proprietor of land No. 8 Edam drive part of Ebony Glades in the parish of St. Andrew, for modification of Restrictive Covenant No. 3 endorsed on the Title to the said land.

The Covenant reads as follows:

3. "Not to subdivide the said land"

The modification sought as amended at the hearing reads:

> "Not to subdivide the said land into more than 4 lots of not less than 3,000 square feet each for the erection of one dwelling house or town house and facilities appurtenant thereto on each additional lot."

There is at present one building on the premises and a vacant lot measuring over 34,000 square feet at the rear of the premises on which the applicant proposes to build additional buildings.

Covenant No. 2 reads:

> "Not to erect buildings of any kind on the land above-described (hereinafter called "the said land") other than private dwellings with appropriate offices and out buildings appurtenant thereto to be occupied therewith to an aggregate value of not less than TWO THOUSAND FIVE HUNDRED POUNDS (L2,500)"

This Covenant is identical to Covenant No. 3 on the Title of the objectors Davis' land.

The application was made on the following grounds which correspond to section 3(l)(a)(b)(c) and (d) of the Restrictive Covenants (Discharge and Modification) Act hereafter referred to as "the Act".

(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 lesser estates or interest 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.

The objectors were Michael Thwaites and Catherine Thwaites, Franklyn Bennett and Jeanne Bennett joint owners respectively of two (2) lots situated to the north of the applicant's premises and Joyce Davis and Diane Davis owners of one lot to the south.

The Affidavits filed by the objectors were similar in substance and form. They contended that none of the provisions of the Act applied to this case. That the objectors each bought land on which is erected a valuable home which conforms with the general character of the neighbourhood on the understanding that the applicant's land and other lots in the sub-division were of a certain size and could only be used for the erection thereon of one dwelling house. They raised the "thin edge of the wedge" argument and on behalf of Davis it was stated that the subdivision would have the effect of lowering the value of their premises, that soil erosion could result from the construction of Town Houses and the disposal of waste water containing chemicals from the swimming pool on the proposed development through the adjoining property of the objectors could damage or destroy plant life in that property.

Mr. Williams withdrew the objection by Thwaites and Bennett after the amendment was made to restrict the number of lots to four (4) lots.

Mr. Hylton relied heavily on ground (b) that the continued existence of such restriction or the continued existence thereof without modification would impede the reasonable user of the land.

He submitted that the existing Covenant placed a restriction on the value of the buildings which could be erected on the premises but there was no such restriction on the number of permitted buildings. The practical benefit of the Covenant does not lie in the

number of buildings. The owners of adjourning premises are better off with buildings occupied by persons in any other capacity. Restricted ownership was not a benefit.

The objection to the consequences of the subdivision, the additional buildings and erection of a swimming pool are irrelevant as these are permitted by the existing Covenant.

The modification would not cause injury to the persons entitled to benefit.

As regards the "thin edge of the wedge" argument this would depend on whether the Court came to the view that the modification sought would be detrimental. Another applicant who does not have similar Covenants could not rely on the modification.

No evidence was offered in support of ground (c) - Consent.

Mr. Francis submitted that the application if granted would change the physical features of the locality considerably.

Any act done on premises which is likely to injure an objector in the use of his land ought to militate against the grant of the modification. The addition of town houses on the applicant's premises would increase the vehicular traffic and there would also be an increase of water flowing from the applicant's premises to the objector's Davis premises.

The applicant had not adduced any evidence to show that the covenant was obsolete nor was there any evidence to satisfy the provisions of section 3(1)(b) of the Act.

I visited the area and made the observations from the roof of the applicant's house. The proposed addition of three town houses would not seriously alter the physical appearance of the neighbourhood.

There was a lot on Edam Drive, Gresford Jones' premises which contained two buildings, and a subdivision at 7 Edam Drive which was incomplete. Edam Drive begins from Hymille Road and ends in a cul-de-sac. The majority of houses on Edam Drive were two storey. The disposition of the area to the rear of the applicant's premises is the gravamen of the application.

The existing Covenant permits the erection of more than one dwelling house on the premises subject to the value of such buildings. The modification by subdivision

would only permit a change of ownership of the buildings. The proposed roadway and swimming pool are not prohibited by the existing Covenant so the objection to these are irrelevant.

Mr. Hylton concentrated on section 3(b) of the Act and this section in my opinion is the deciding factor in this application. Two questions arise for consideration.

(a) Does the continued existence of the Covenant without modification impede the reasonable user of the land?

In *Stannard v. Issa and Others (1986) 34 W.I.R. 189, Lord Oliver* cited with approval at 195 the dictum of Carey J.A. in the Court of Appeal as follows:

"Carey J.A. in a powerful dissenting judgment observed that:

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

The Affidavit of Gwyneth Moore on behalf of the applicant states that Covenant No. 4 prevents the use of any building for a shop and no trade or business can be carried on, on the land. This prevents the land from being used as a farm. If additional buildings

were erected and rented it may be construed as a commercial usage of the land and that the covenants effectively sterilize the reasonable use of the land. This assertion was unchallenged.

Having regard to the situation of the applicant's premises to the surrounding property the restriction sterilises the land. It would not be reasonable to permit any commercial activity in a residential area.

(b) "Does the restriction achieve some practical benefit and if so is it a benefit of of sufficient weight to justify the continuance of the restrictions without modification?"

per *Lord Oliver at 197 in Stannard v. Issa* supra.

It is difficult to envisage the practical benefit derived from the restriction against subdivision in light of the absence of any restriction on the number of dwelling houses which may be erected on the premises. I answer the question in the affirmative.

Section 3(d) - Injury to persons.

In light of my findings, I hold that the proposed modification will not injure the persons entitled to the benefit of the restriction.

The application is granted with Costs to the applicant to be agreed or taxed.