In the Supreme Court of Judicature of Jamaica

In Equity

Suit No. E.R.C. 61 of 1975

IN THE MATTER OF all those parcels of land being the lots numbered 7 and 8 Block D on the plan of Monaltrie in the parish of Saint Andrew now known as numbers 16 and 18 Cargill Avenue respectively and being the land comprised in Certificate of Title registered at Volume 412 Folio 55 and Volume 392 Folio 42 respectively of the Register Book of Titles

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

THE GLEANER COMPANY LIMITED — Applicants

ENGINEERING AND CONSTRUCTION SERVICES LIMITED — Respondents

Mr. Norman Hill, Q.C. — for Applicants
Mr. R. N. Henriques — for Respondents

May 7, 1976

Melville, J.:

The applicants, the Gleaner Company Limited, seek by this notice of motion an Order that the land known as numbers 16 and 18 Cargill Avenue, comprised in Certificates of Title registered at Volume 412 Folio 55 and Volume 392 Folio 42 of the Register Book of Titles is no longer subject to any of the restrictive covenants endorsed in the said Certificate of Title may be discharged as being irregular on the following grounds:

(a) the Order was made irregularly as the issue of the enforceability of the covenants for premises 18 Cargill Avenue, Saint Andrew was res judicata between the applicant, Engineering and Construction Services Limited and Gleaner Company Limited;

(b) the Order was made irregularly as the applicant failed or refused to disclose to this honourable court the existence of the judgment in suit C.L. 1009 of 1972 or to notify the Gleaner Company Limited of his application or invite the

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Gleaner Company Limited to intervene notwithstanding that their premises 22 Cargill Avenue was in close proximity to the applicant's premises 18 and 16 Cargill Avenue;

(c) the Gleaner Company Limited seeks to present fresh evidence to this honourable court namely the judgment in suit C.L. 1009 of 1972 and the applicant's knowledge of such judgment the absence of which evidence resulted in a substantial miscarriage of justice and an abuse of the process of the Court or alternatively such evidence if presented would have had an important influence on the result of those proceedings;

(d) the Gleaner Company Limited has been injured by the order made as the order made declares that the Gleaner Company Limited are not entitled to enforce the covenants affecting 18 Cargill Avenue.

Apparently the background of this matter is that on the 20th of June, 1973, the Gleaner Company Limited, the applicants in this motion, obtained an order from the court - the Honourable Mr. Justice McCarthy - the effect of which was that the then plaintiff, the Gleaner Company Limited, were entitled to enforce against the then defendants, Engineering and Construction Services Limited, the restrictive covenants appearing on the Certificate of Title for 18 Cargill Avenue which was registered under the Registration of Titles Law at Volume 392 Folio 42, and in addition they also obtained an injunction restraining Engineering and Construction Services Limited from using or permitting the said premises, 18 Cargill Avenue, to be used as a day nursery or to carry on any business on the said premises. In particular, the premises should not be used as a day nursery and/or school in breach of the said restrictions.

In that motion which, apparently, was obtained in default of any defence being filed by Engineering and Construction Services Limited, Mr. Patrick Cook of the firm of Milholland, Ashenheim and Stone represented the plaintiff and Engineering and Construction Services Limited were represented at that hearing by Derrick Jones of the firm of attorneys, Myers, Fletcher and Gordon. It seems quite clear that from

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the affidavit of Mr. Cook filed in this action that that order was served on Engineering and Construction Services Limited and a copy order was received by a Mr. Brown who was then apparently a director of Engineering and Constructions Services Limited. This seems to be so from page 7 of the bundle where service was admitted on Friday the 6th July, 1973 and the order was signed for by this gentleman, Mr. Brown. In the present application before me Mr. Brown has also filed an affidavit in which he states that he is a director of Engineering and Construction Services Limited, so the inference seems to be that at the time of the judgment, that is, on 20th June, 1973, Mr. Brown was then a director of Engineering and Construction Services Limited and apparently so continued up to the time of these proceedings.

From the evidence filed in the bundle the costs of that action were paid by Messrs. Myers, Fletcher and Gordon as this is also stated in the affidavit of Mr. Cook, Anyhow, there is a letter from Myers, Fletcher and Gordon forwarding this amount to Milholland, Ashenheim and Stone, so the clear inference seems to be that Myers, Fletcher and Gordon who acted for Engineering and Construction Services Limited were well aware also of this judgment of Mr. Justice McCarthy or ought to be so aware. Thereafter, sometimes prior to the 8th of May, 1975, Engineering and Construction Service Limited applied by motion under Section 5 of the Restrictive Covenants (Discharge and Modification) Act, for an order that the said restrictive covenants were not enforceable. That motion came before the Honourable Mr. Justice Chambers on the 8th of May, 1975, and an order was made declaring that the lands, the subject of the previous order were no longer subject to any of the restrictive covenants endorsed on the said Certificates of Title. It is from that order that the present proceedings have been instituted.

It appears from the documents filed herein that to get the order of Mr. Justice Chambers on the 8th of May, 1975, the usual notices were sent out to the adjoining owners or persons who it was thought might be affected by the order sought. It is interesting to note that in the affidavit of Mr. Steele who is also a member of the firm of Myers, Fletcher and Gordon and who appeared for Engineering

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Construction Services Limited on that motion; in his affidavit in support of that motion sets out the names of the persons whom he said were in close proximity to these premises, Nos.16 and 18 Cargill Avenue. The names of those persons are set out on page 41 of the bundle in the motion before me. Mr. Herman Farrel of 20 Cargill Avenue was one of the persons so served and it seems that other persons on the other side of Nos.16 and 18 Cargill Avenue, indeed, a number of persons on that other side were served, yet one notes that the Gleaner Company Limited who owned 22 Cargill Avenue were never served at all nor are they mentioned as being one of the persons who had an interest in the removal of these restrictive covenants; despite the fact their injunction was still in full force and effect as far as I am aware.

It is thus unthinkable that Engineering and Construction Services Limited could have been unaware of the existence of this order restraining that company from using the premises as a nursery or school. Whilst one may not go as far as to say that the firm of Myers, Fletcher and Gordon who appeared for Engineering and Construction Services Limited on the previous occasion were reminded of the order made on the 20th of June, 1973,it seems that the internal workings of this office leave much to be desired. It seems remarkable that within a matter of two years the same firm as appearing for the same company in the same sort of issue and yet be forgetful of the fact that an injunction is still in force against the company if even the usual and necessary precautions were taken to ascertain the several adjoining owners, then I cannot see how they could have failed to be aware that the owners of No. 22 were the Gleaner Company Limited who had at that time in full force an order enforcing the covenant. Be that as it may, the fact remains that on the affidavits put before Mr. Justice Chambers on the 8th of May, 1975, as so says the present applicant and it seems to me uncontradicted, no mention is made of the Gleaner Company Limited being a person having an interest in the removal of these restrictions.

The order of May 1975, was apparently discovered by Mr. Cook who represented the Gleaner Company Limited in the prior motion some time in June, 1975, and he asked Messrs. Myers, Fletcher and Gordon to have the

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order of Mr. Justice Chambers rescinded. Apparently nothing was done in the matter and so in February of this year this motion was launched.

Mr. Hill who appears for the Gleaner Company Limited argued that there was a duty on the part of Engineering and Construction Services Limited to disclose in the proceedings before Mr. Justice Chambers this prior judgment and, secondly, that in any event even if that was not so, then the Gleaner Company Limited whom Engineering and Construction Services Limited must have known had this judgment entered against them restraining them from using these premises as a school, should at least have served the Gleaner Company Limited as they were well aware that they were persons interested in the matter. I think that one may say that his argument went so far as to say that it might amount to fraud but, of course, I do not think he pursued that argument any further. He says that by reason of the Gleaner Company Limited not being served with any notice of the proceedings before Mr. Justice Chambers, that is an irregularity. I am a little confused as to whether his submission is that by reason of the Gleaner Company Limited not being served with this notice whether that amounted to an irregularity which would be a nullity, or whether it was what may be termed as a mere irregularity. Whatever it is, and I hope I have done no injustice to Mr. Hill's argument, he seems to be saying that whether it be a mere irregularity or something worse which would be a nullity, he would be entitled ex debito justitiae to have the order of Mr. Justice Chambers set aside in the circumstances. In the course of the arguments I was informed that the reason for the delay from June of 1975 before this motion was launched was that there was dialogue between the various attorneys to see if Messrs. Myers, Fletcher and Gordon would have the matter adjusted but apparently nothing was done and so this motion was eventually launched.

Mr. Henriques, on the other hand, submitted that this motion was misconceived as the judgment sought to be impugned was not irregularly obtained and, alternatively, even if it could be said that it was irregularly obtained, then, this court has no jurisdiction to set that order aside; the applicant's remedy would be by way of appeal to the Court of Appeal and, if necessary, an application could be made to that court for extension of time within which an appeal could be brought. He goes on to say that the

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statute, that is, the Restrictive Covenants (Discharge and Modification) Act, gave wider powers than those the parties would possess at Common Law and I think his submission went so far as to say that the application before Mr. Justice Chambers being under Section 5, there was no necessity to serve notices on anyone at all.

It is true that looking at the rules made under the Restrictive Covenants (Discharge and Modification) Act, which were published, I think, on the 13th of June, 1960, they seem to have been made with the provisions of Section 3 of the Act in mind. Then, one has to remember that no rules seem to have been made in so far as applications under Section 5 of the Act are concerned. Section 3 subsection 3 of the Restrictive Covenants (Discharge and Modification) Act, 1960 reads:

> " Any order made under this section shall be binding on all persons, whether ascertained or of full age or capacity or not, then entitled or thereafter capable of becoming entitled to the benefit of any restriction, which is thereby discharged, modified, or dealt with, and whether such persons are parties to the proceedings or have been served with notice or not. "

It seems to me that the clear effect of any modification under section 3 would be a judgment in rem because whether a person has notice or not he would be bound by such an order. Although there is no such similar provision under section 5, it is my view that the effect is practically the same because what is being asked for under section 5 is, a declaration whether or not in any particular case any freehold land is affected by restrictions imposed by the particular instrument or what is the true construction of the instrument purporting to impose the restrictions made, the nature and extent of the restrictions thereby imposed and whether the same is enforceable, and if so, by whom?

So although, there are no provisions in the rules of 13th June, 1960, or in the Act itself as to the actual procedure that should be followed, in so far as a section 5 application is concerned, I think that having regard to the consequences that ensue from such an order, that is, it being a judgment in rem , that all persons who claim to be affected by such modification ought to be given notice in the normal way as under a section 3 application.

Again, one bears in mind that proceedings under the Restrictive Covenants (Discharge and Modification) Act are cognizable only in the Supreme Court and the rules under the Restrictive Covenants (Discharge and Modification)

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Act being silent as to the procedure under section 5 then the procedure under the Judicature Civil Procedure Act apply.

In so far as the argument of Mr. Henriques is concerned, that the proper forum to hear an application of this sort is the Court of Appeal, I am afraid I cannot accept that submission. In Craig v. Kanseen (1943) 1 A.E.R. p. 108, the Master of the Rolls, Lord Greene, had this to say say after he had reviewed a number of authorities as to whether there is a mere irregularity or whether proceedings are void at p. 113:

> " Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled ex debito justititiae to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary. I say nothing on the question whether an appeal from the order, assuming that the appeal is made in proper time, would not be competent.
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> The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity, or whether it was something worse, which would give the defendant the right to have the order set aside, In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England. "

If I may add, the same thing applies in Jamaica. Then he continued:

> " To say that an order of that kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained. "

There seems to be no doubt that where there is an irregularity, or if that irregularity amounts to a nullity, this court can set aside its own order, so the question on this application before me, is this a nullity or a mere irregularity? I think the argument has proceeded on the basis, although perhaps a little misconceived when Mr. Hill argued to have the order ex debito, because in that case what he seeks to set aside must be a nullity whereas if it is a mere irregularity, then the court has a descretion as to whether it will or will not grant the order, but looking on the facts here it seems to me, and there is no doubt in my mind that Engineering and Construction Services Limited were well aware at the time when they made the application before Mr. Justice Chambers that the Gleaner

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Company at that time had an order against them restraining them from using the premises for any purpose of business or, in particular, a school; and I think also that the attorneys although I will not impute full knowledge to them, ought to have known that that order existed and not to disclose that order in the application before Mr. Justice Chambers seems, to my mind, to amount to a gross irregularity which would be a nullity. That being so, it seems that the argument of Mr. Hill must succeed and he must have his order ex debito justitiae. If I am wrong in that and what happened was a mere irregularity in the circumstances and having regard to the practice that exists in this country, one can hardly say that this is too long a time, so that laches would affect the application. One has to remember that things seem to move very slowly in this country and although the period might look a little long I will not say that in the circumstances that existed here, particularly having due regard to the reason that has been put forward, that they were waiting on Messrs. Myers, Fletcher and Gordon to do something about setting the order aside, I would also exercise my discretion in granting the order prayed.

In all the circumstances, then, it seems to me that the order prayed should be granted. In other words, the order is that the judgment entered on the 8th of May, 1975, by Mr. Justice Chambers be set aside.