Judgment Book

Reasons for Judgment

Suit No. E-97 of 1995

In the Supreme Court of Judicature of Jamaica
In Equity

Between	**Delroy Greenwood & Revolene Greenwood**	**Plaintiffs**
A n d	**Archibald McIntyre**	**Defendant**

Dr. Lloyd Barnett instructed by Ms. Leila Parker, Attorney-at-Law for the Plaintiffs and Norman E. Wright Q.C. instructed by Messrs. Gaynair & Fraser, Attorneys-at-Law for the Defendant.

Heard: 28.9.98, 30.9.98, 2.10.98, 10.12.98
17.12.98, 18.12.98, 14.4.2000

Before Theobalds, J.

Let me begin by tendering my profound regrets for the seeming delay in delivering this written judgment, a follow up to the oral judgment delivered in Court on the 14th April, 2000. My retirement from the Bench was by no means sudden. After over 21 years service a request to be given time to clean up one's desk and complete outstanding matters met with no favourable response. Indeed up to the very last day in office I was listed for both Civil Court and Chamber matters. To further complicate matters, the particular notebook in which these Notes of Evidence were recorded along with other notebooks were "put away" in order to make the Chambers available for the new incumbent. It took months before it was even located in spite of numerous personal trips and searches. A note of the oral judgment referred to above was not forthcoming in spite of requests until the 23rd day of January, 2002, when it was sent to my residence by police bearer.

In spite of the checkered history as outlined above, and the many days of hearing, it is an overstatement to claim that this is a very involved case. I do not propose to further prolong the matter by delivering a long judgment. The trial lasted 6 days and was followed by lengthy submissions by the Attorneys on both sides. The 1st day of trial (24th day of September, 1998), involved the taking of evidence from the Plaintiffs and a visit to the locus in

quo accompanied by both parties and their relevant Attorneys. This visit was most helpful in making the issues crystal clear.

The Plaintiffs and the Defendant are owners of adjoining Properties situate at Lots 210 and 211 respectively on Keswick Track, part of Cumberland Gardens, Gregory Park, in the Parish of Saint Catherine. Cumberland Gardens is a housing development which was established by the National Housing Trust from as far back as 1989. The houses are built on the Puerto Rican model style with a common dividing wall between each residence. The Plaintiffs and the Defendant are both the original owners of their respective lots. The parent title for both lots was in the name of the National Housing Trust, registered at Volume 1213 Folio 100 and 101 respectively, and is dated the 26th day of July, 1988. Both lots derive from a larger plot of land, part of Cumberland in the parish of Saint Catherine. Both Certificates of Title make clear reference to being of the shape and dimensions and butting as appears by the plan deposited in the Office of Titles on the 10th October, 1986. Indeed both Certificates of Title have the words D.P. 7676 at the top left hand corners and it must be on the basis of that Deposited Plan 7676 that the parties to this suit agreed to the restrictive covenants set out on their Titles. No other Plan, for whatever purpose it was drawn, can alter or supersede the boundaries and covenants contained in the original Plan 7676. The parties have contracted that all buildings to be erected shall not be less than 5 ft. from the adjoining premises and no construction of any kind be of a height of more than 4 ft. 6". Without the advantage of visiting the locus, it can be clearly seen by any tribunal of fact from the photographs Exhibit 8, 8A, 9 and 10, that the structure being erected by the Defendant is in breach of the Covenant as to height and must result in a loss of light and air to the Plaintiffs' building. The approval of the Parish Council is no answer to this complaint, for a Parish Council cannot authorize the breach of any covenant between contracting parties or approve the establishment of a nuisance affecting the enjoyment of one's neighbour's property. These are the issues of fact made abundantly clear by a visit to the locus and an examination of the photographic exhibits.

Perhaps not so clear is the expert evidence given by the 2 commissioned land surveyors. Same is true of the witness Mr. Norman Lewis, even allowing for his 25 years of experience at the Office of Titles. What Mr.

Lewis has done is to produce from the Titles Office Records a plan of Lots 210 and 211 Cumberland, which are the 2 lots involved here. A submission by learned Counsel for the defence that Mr. Lewis testified to the effect that deposited Plan 10111 had been deposited in the Office of Titles on the 17th March, 1998 and had superseded Deposited Plan "7676" does not conform with my note of evidence on that particular point. It was after Mr. Lewis had completed his evidence in chief the adjournment was then taken. The following day an application by learned Counsel for the defence to recall Surveyor Duel Thames to give further evidence was refused. This ruling was based on the ground that the matter sought to be introduced did not arise ex improviso and the Plaintiff had already closed his case.

On similar grounds an earlier application by learned Counsel for the Plaintiffs to file a Reply and Defence to a Counterclaim was refused. Again, the reason was that Counsel had already closed his case and there was indeed strenuous objection by the Defence.

Indeed had these 2 applications been granted, this case in all probability would have been partheard and lasted for another 2 days - a further embarrassment to the litigants who had already obtained an Order for Speedy Trial from as far back as the 16th June, 1997.

Returning now to the earlier paragraph in which I had discussed the importance of observing the covenant relative to the height of the adjoining buildings, it would be useful to add that in the absence of an expressed covenant as to light and air to deprive a neighbour of these 2 essentials to decent living is already a nuisance. There can be no defence to assert that Parish Council Approval has been obtained. That approval in any event is subject to Proviso No. 13 of Parish Council's letter dated 27th November, 1993, "that there be no breach of any existing or restrictive covenants or supportable objections from adjoining owners." I accept Mr. Greenwood's evidence that he spoke to the Defendant McIntyre and complained to both the National Housing Trust and the St. Catherine Parish Council about the Defendant's extension but nothing was done about it. I accept the Defendant's evidence that the verandah built at the front of premises Lot 210 did in fact encroach upon the Defendant's premises all be it to a relatively minor extent.

This encroachment was acquiesced in by the Defendant for years and only became an issue after the Plaintiff filed suit against the Defendant. It was a

modest construction built in good taste, and entirely in keeping with the locality. It caused no damage to the Defendant, but the law must still recognize it as a breach hence the relatively slight sum awarded on the Counterclaim.

On the other hand, the proposed extension to the Defendant's house can properly be described as an overwhelming monstrosity. It is important, in my view, that the 4 photographs, Exhibit 8, 8A, 9 and 10 be preserved so that a reviewing tribunal, if any, can have a fair idea of the true extent of the breach of the covenant. Indeed had the Plaintiffs quantified in monetary terms the extent of the damage to carpet, walls and children's health the award would have been substantially higher. This callous lack of consideration for the next man when improving one's own surroundings or economic prospects has become endemic in our society and should never ever be condoned or overlooked, for it is truly the hallmark of an indisciplined society. Common-wall boundaries and the restrictive covenants and considerations attendant thereon have become and will continue to be more and more the style as population grows and land space becomes less. These are the reasons for the oral judgment recorded in Minute of Order dated 14th April, 2000 on file.

DATED THE 12th DAY OF March , 2002

.....

Judge (Retired)