IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

CLAIM HCV 0961 OF 2003

IN THE MATTER OF ALL THAT parcel of land part of VALE ROYAL in the Parish of Saint Andrew being the lots numbered Ten and Eleven Block "Y" on the Plan of Vale Royal aforesaid deposited in the Office of Titles on the 1st day of November 1927 and Containing by survey One Acre two Perches and Five-Tenths of a Perch of the Shape and Dimensions and butting as appears by the Plan thereof hereunto annexed and being the land comprised in certificate of Title registered at Volume 288 Folio 35 of the Register Book of Titles.

AND

IN THE MATTER of Restrictive Covenants Numbered (2) (5) and (6)

AND

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

HOPEFIELD CORNER LIMITED **APPLICANT**

FABRICS De YOUNIS LIMITED **RESPONDENT**

Mrs. Denise Kitson and Mrs. Suzanne Risden-Foster instructed by Grant, Stewart, Phillips &Co. for the Applicant, Hopefield Corner Limited.

Mr. Maurice Manning and Ms Sherry-Ann McGregor instructed by Nunes Scholefield, DeLeon & Co. for the Objector – Fabrics De Younis Ltd.

Land Law; Restrictive Covenants (Discharge and Modification) Act; Definition of "Neighbourhood"; Whether obsolescence has been shown by changes occurring in neighbourhood; Whether Objector has impliedly or expressly agreed to modifications; Meaning of "reasonable user" in section 3(1)(b) of Act; Application of Stannard and others v Issa; exercise of Court's discretion; Availability of compensation to unsuccessful Objector.

Heard April 12, 13, 14 and 15, and June 9 and 15, 2011.

1) This is an application by Hopefield Corner Limited ("the Applicant"), seeking to modify Restrictive Covenants which presently exist over the user of the land with civic address No. 3 Hopefield Avenue, Kingston 10 in the Parish of St. Andrew (the "Hopefield Corner property"). The matter has a long history dating back to at least 2002, but for the purposes of this hearing, may be summarized in the following.

2) The Applicant is a company incorporated in Tortola, British Virgin Islands. It has a number of shareholders including Mr. Kenneth Benjamin, Mr. Vinay Walia, Mr. Rai Tarun Handa and Mrs. Elizabeth Ann Jones-Kerr. The company, through its representatives, negotiated and ultimately purchased the parcel of land now contained in the Certificate of Title, Volume No. 288 Folio 35 of the Register Book of Titles. It is the land with the civic address referred to above. It is not in dispute that when the property was being purchased, the Applicant was aware of certain restrictive covenants over the land, which would have prevented development in the manner that was contemplated. The Applicant now seeks to effect a modification of Restrictive Covenants Numbers 2, 5 and 6, the terms of which are set out below:

> 2) Not to subdivide the said land except in accordance with aforesaid plan or with a plan approved by the Board under law 222 of 1914 in which latter case none of the lots shall be less than half an acre in area.

5) Only one residence shall be erected on any lot of the said land and such residence together with the buildings appurtenant thereto shall cost not less than eight hundred pounds and shall be fitted with proper sewer installations and no pit closet to be erected for use on the said lot.

6) No building shall be erected within thirty feet of any road boundary nor within fifteen feet of any other boundary.

3) The application seeks to modify the covenants so that they read as follows:

2) Not to subdivide the said land into smaller lots save and except into six (6) dwelling houses.

5) Only one residence shall be erected on any lot of the said land.

6) No building shall be erected within eight (8) metres of any boundary of Hopefield Avenue, save and except for the guard house.

4) The application is opposed by Fabrics De Younis Ltd., (the "Objector") the owner of the adjoining premises with civic address, 1 Hopefield Avenue, Kingston 10 (the "Younis premises") and contained in Certificate of Title registered at Volume 203 Folio 69 of the Register Book of Titles, through its principal, Mr. Sameer Younis.

5) The original application for modification by way of a Fixed Date Claim Form was filed on or around June 11 2003, and an amended Fixed Date Claim Form was filed July 29, 2003. It came on for hearing on various dates between then and the 20th February 2004, on which date the learned Judge, Cole-Smith J. granted an order for the modification in terms of the application. Purportedly, in reliance upon that Order, the Applicant proceeded to construct the development it contemplated at 3 Hopefield Avenue, which development was completed sometime around September to December 2005.

6) While construction of the development was continuing, in or around August 2004, the Objector applied to set aside the grant of the order and was successful in so doing on the basis that it had not received, as it was entitled to, the Notice of the Application to discharge or modify the covenants. After several hearing dates in 2005, Beckford J. reserved her judgment. The learned judge's decision setting aside the Court's earlier order,

was given on the 3rd February 2006. The Applicant then appealed to the Court of Appeal which upheld the judgment of Beckford J. This has, accordingly, necessitated the filing of a new application by the Applicant and it is in relation to this new application, now opposed by the objector, that this hearing is taking place.

7) The application is made pursuant to the Restrictive Covenants (Discharge and Modification) Act, ("the Act"), Section 3 (1) of which is in the following terms.

> "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 consequences 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; 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
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> (d) That the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.
>
> Provided that no compensation shall be payable in respect of the discharge or modification of a restriction by reason of any advantage thereby accruing to the owner of the land affected by the restriction, unless the person entitled to

the benefit of the restriction also suffers loss in consequence of the discharge or modification, nor shall any compensation be payable in excess of such loss".

8) The evidence is contained in the various affidavits of Vinay Walia, Rai Tarun Handa, Kenneth Benjamin, Catherine Craig, Ian Garbutt, Bryan Morris, Peter Mair and Norma Breakenridge filed in support of the application. The affidavit of Norma Breakenridge of Breakenridge and Associates, has attached to it a report in relation to an evaluation of the area in which the properties, the subject of the application and objection, are located. Several affidavits in opposition to the application have also been filed on behalf of the Objector by its principal, Mr. Younis, who actually resides in the premises at No: 1 Hopefield Avenue. The Hopefield Corner property now comprises the land in Certificate of Title Volume 288 Folio 35, (lots 10 and 11 of Block "Y" and part of Lot 9 of Block "Y"); land at 9 Lilford Avenue and registered at Volume 946 Folio 195 of the Register Book, and land previously part of 11 Lilford Avenue (now part of 3 Hopefield Avenue) and registered at Volume 792 Folio 72, all these lands previously part of Vale Royal in the Parish of St. Andrew. There is no dispute that the Younis premises is the beneficiary of the covenants at issue. Both the Younis property and the Hopefield Corner property were originally part of a one hundred and seven (107) acre property registered at Volume 38 Folio 6 of the Register Book of Titles in the name of one Ernest Nuttall.

9) From that title, the registered proprietor transferred to Lillie Maude Bolton a section described as Lot 12, Part of Vale Royal in the Parish of St. Andrew and which became registered at Volume 203 Folio 69. There was a subsequent transfer to Charles Costa. The property at Volume 288 Folio 35 was transferred to Arderne Limited and subsequently transferred to the Applicant by transfer dated June 2003.

10) It is undoubtedly the law that in order to be granted permission to modify or discharge a restrictive covenant, it is necessary for the applicant to fulfill at least one of the conditions imposed by virtue of section 3(1) of the Act. Even if a condition is fulfilled, it is still open to the Court's discretion as to whether to grant the application. It will therefore be necessary

to consider the evidence and the relevant authorities in relation to each of the grounds upon which approval for discharge or modification may be granted.

Obsolescence under section 3(1)(a) of the Act

11) Section 3(1) (a) allows for such modification or discharge where "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". It was the submission of the Applicant that it is able to satisfy the test in each of the bases provided for in the subsection. In particular, in the instant case it was submitted that obsolescence may be shown from the fact of changes "in the nature of the use and occupation of the neighbourhood" of which the properties of the Objector and the Applicant are a part. Counsel for the Applicant points to the Supplemental Affidavit of Vinay Walia and Catherine Craig filed on May 19, 2009 which asserts that the area where the properties are located

> "… can be regarded as an enclave and certainly with regard to that area and with particular reference to other developments in the neighbourhood it can be positively stated that the restriction against subdivision has become obsolete".

12) It must be clear that before considering whether the changes in character are of a sufficient extent so as to fulfill the statutory criteria, it is necessary to consider what is to be properly characterized as "the neighbourhood". The term is not defined in the Act and therefore it is to the cases that we must turn to make such a determination.

13) For the Applicant it was submitted that the "neighbourhood" ought at least to be considered as the area known as the "Golden Triangle". This is not an area with defined boundaries like a constituency or other political division. There is no dispute that both the properties are within the area so generally referred to. In any event, counsel for the Applicant goes further and submits that the neighbourhood must at least include the area from the junction where Hopefield Avenue touches Hope Road, down that avenue to the junction with Lady Musgrave Road and includes the areas of Donhead Avenue and Seymour

Avenue and streets off, as well as those properties on Trafalgar Road and between Trafalgar Road and Lady Musgrave Road, which were carved from the original title at Volume 38 Folio 6.

14) In support of this proposition the Applicant's counsel cited the Further Supplemental Affidavit of Vinay Walia and Rai Tarun Handa sworn June 30, 2010 which sought to further define "the neighbourhood". Definition is done by referring to all the certificates of title mentioned in the affidavit, which titles were all originally contained in the one Deposited Plan and also contained in that original certificate of title registered at Volume 38 Folio 6 of the Register Book. It was averred that in respect of all the properties referred to in the affidavit, modifications or discharges of the same restrictive covenants, 1, 2, 5 and/or 6 had been effected. Those modifications have generally been to allow the construction of apartments and townhouses thereby increasing the housing stock. Several properties had had restrictive covenants modified so as to allow commercial user of the properties. The area referred to includes the following properties:

A) Certificates of Title Volume 316 Folio 79, Vol 1225 Folio 448 and Vol 1409 Folio 749 with civic addresses at 1 Braemar Avenue, (covenants modified # 1, 2 and 4);

B) Certificates of Title at Vol 224 Folio 38, Volume 1334 Folio 451 with civic address at 1 Argyle Road; (covenants modified # 2 and # 5;

C) Certificates of Title at Vol 281 Folio 26, Vol 1168 Folio 323 and Vol 1294 Folio 897 with civic address at 12 Trafalgar Road (covenants modified # 2);

D) Certificates of Title at Vol 199 Folio 45, Vol 1216 Folio 960; civic address 14 Trafalgar Road; (covenant now modified to allow use as commercial premises);

E) Certificates of Title Vol 280 Folio 67, Vol 1273 Folio 893, civic address at 5 Comlin Bank Road (covenants 1, 2, and 6 modified; covenant #5 wholly discharged and property developed as a strata complex);

F) Certificates of Title Vol 289 Folio 71, Vol 1263 Folios 177 to 191, with civic address 7 Braemar Avenue (covenants #2 and 5 modified);

G) Certificates of Title Vol 305 Folio 42; Vol 1110 Folio 93 and Vol 1206 Folios 742 to 772 (civic address 8 Upper Musgrave Avenue (now a strata complex);

H) Certificates of Title Vol 323 Folio 24 and Vol 1144 Folio 427 civic address 8 Upper Braemar Avenue (covenants # 1 and 6 modified. Later covenant # 2 modified and covenant #4 wholly discharged. Property developed as a strata complex;

I) Certificates of Title Vol 1046 Folio 684 and Vol 1410 Folio 136 and Vol 1425 Folio 658 and 692 civic address 11 Musgrave Road, St. Andrew (covenant #2 modified and thirty-five (35) strata lots issued in respect of land with area of a mere one rood and eight perches);

J) Certificates of Title Vol 1249 Folio 811 and Vol 1402 Folio 471 to 482 civic address 17 Braemar Avenue (covenants # 1, 2, 4 and 6 duly modified.

15) The affidavit under reference averred that the subdivision relating to land at Volume 38 Folio 6 and Volume 283 Folio 92 was intended to be a residential neighbourhood with individual lots of at least half an acre per dwelling house. There had been no intention that the area covered by these titles would have been used for commercial purposes. However, an examination of the Lady Musgrave Road and Trafalgar Road properties formerly part of the Vale Royal and Retreat Pen properties clearly demonstrates that most of these were now commercial establishments and multi-family dwellings. It is the common origin of all these titles that may be considered to form the basis of the submission that "the neighbourhood" should embrace the wider area argued for by the Applicant.

16) The Objector agrees that the Younis and Hopefield Corner properties are within the area commonly described as the Golden Triangle. Mr. Younis delineates that area as being within the area from a point where Seaview Avenue meets Old Hope Road, then Northerly to Matilda's Corner, then Southerly along Hope Road to Lady Musgrave Road and then along Lady Musgrave Road to Seaview Avenue. This delineation would undoubtedly include the two properties. On the other hand, counsel for the Objector submits that "the neighbourhood" for the purposes of the Act ought not to be the area covered by the original title which has been the subject of subdivision, nor even the area described as the Golden Triangle. Rather it ought to be determined by answering the question: "Who is my neighbour?" The answer, it was submitted, is "those persons who are most likely to be affected by what I do with my property". In those circumstances, "neighbourhood" in the instant case ought to be confined to the area on Hopefield Avenue between the

intersection of that Avenue and Seymour Avenue where it becomes Donhead Avenue, and Hopefield Avenue at its junction with Lady Musgrave Road.

17) I note, *en passant*, that the submissions of counsel for the Objector seem to suggest that there are intersections (NOT junctions) of Hopefield Avenue at both Donhead and Lady Musgrave Roads. That however, is not my view as Hopefield ends where it enters Lady Musgrave Road while it crosses (intersects) the Donhead/Seymour Avenue roadway.

18) The evidence to which counsel for the Objector pointed was that between those points which they posit are appropriate, there remained a majority of five (5) single family dwellings compared to four (4) multi-family units. In particular, the properties at No.1 and No. 5 as well as No. 4 Hopefield Avenue remained single family dwellings. Counsel also points to the fact that there does not appear to be a multi family development on the triangle formed by South Hopefield Avenue, Upper Montrose Road and Hopefield Avenue, which area is very close to Numbers 1 and 3 Hopefield Avenue. It seems that the Objector is prepared to accept this area as part of the neighbourhood. There is some uncertainty in this last assertion as the witness Norma Breakenridge in cross examination suggested that she saw some indication that the triangle had more than one single family dwelling.

What then is the neighbourhood for the purposes of this application?

19) In Western Australia (where the Torrens System of land registration is used as used here in this jurisdiction) the Western Australia Law Reform Commission Final Report on Restrictive Covenants (1997) noted the following:

> Various approaches have been adopted to defining the meaning of "neighbourhood". In **Smith v Australian Real Estate & Investment Co Ltd** [1964] WAR 163, 166 Negus J stated that the term means the immediate vicinity of the subject site including lots whose owners might reasonably expect to gain benefits from a restrictive covenant. In **Wall v Australian Real Estate Investment Co Ltd** [1978] WAR 187 at 191 Lavan SPJ held that " . . . the meaning of the word 'neighbourhood' will vary according to the facts and circumstances of the case in which the definition is called for. Having regard to the nature of the locality in the vicinity of the subject site, I consider that, in relation to this application, the term extends to cover not merely the lots in the immediate

> vicinity which are entitled to the benefit of the restriction, but also to the lots within a reasonable radius of such subject site whether subject to the covenant or not."

20) In "**Restrictive Covenants and Freehold Land, A Practitioner's Guide**" by Andrew Francis, the learned author observes:

> "Neighbourhood" has a wide definition and may mean a larger area than the immediate neighbourhood of the property within the application. The question of what is the neighbourhood is a question of fact. It is usually the applicant who will point to a wide definition of the neighbourhood, thereby trying to get in as many changes since the covenant was imposed as possible. The objector on the other hand will try to limit the area of the neighbourhood so as to show that there are fewer changes which are not material.

21) It may be useful to start at the outset by acknowledging, as Wright J. A. did in the **Central Mining and Excavation Limited v Peter Crosswell, Carl Crosswell and Others**, (1993) 30 J.L.R. 503, that the provisions in the Act under consideration are similar to those in what had been section 84(1) of the Law of Property Act 1925 (U.K.) "and accordingly, decisions of the Lands Tribunal under the latter are relevant to the consideration of applications under the former".

22) The authorities refer to the "estate agent's test" as being the test to determine "neighbourhood". It was so accepted by the Court of Appeal in the **Central Mining** case where Downer J.A. said:

> 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 agent's test". It is generally put thus: "What does a purchaser of a house on that road or that 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 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 is 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 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".

23) I pause here to note that Downer J.A. in his judgment also had this to say:

> "……. 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":

Having set out the relevant part of the section, the Downer J.A. continued:

> "Were there sound reasons for Courtenay Orr J. to be satisfied *that the restriction in the covenant sought, ought to be discharged*?"

24) It is not immediately clear to me how this question arises out of the proposition stated before. In my view, it is the *secondary question* after determination of the neighbourhood, and does not speak to what his lordship characterized as "the thrust of (Dr. Barnett's) contention." Moreover, it is also clear from what is said in the following paragraph, that Downer J.A. never engages the issue of the definition of the neighbourhood which he had identified as "the thrust" of the applicant/appellant's submission. And further, in the event that his following words were thought to provide an answer, his concluding thoughts are instructive:

> "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 proprietary rights, did not extend to those areas". (My emphasis)

25) But notwithstanding how interesting the foregoing is, I do believe I digress.

Wolfe J.A. (Ag, as he then was), dealt frontally with Dr. Barnett's concern. He said:

> "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… Act."

26) While, as noted elsewhere in this judgment, there was some confusion which emerged in arguments in the Court of Appeal as to what the parties had agreed and had been accepted by Orr J. at first instance, it is clear that Dr. Barnett's submission now sought to extend the area of the "neighbourhood", by including Wellington Glades and Wellington Court. Wolfe J.A. (Ag) had this to say:

> Dr. Barnett, however, has submitted that the neighbourhood ought to include Wellington Court, Wellington Glades and all of 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 part of the Mona and Papine Estates, the area subject to the covenant 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 the Certificate of Title registered at Volume 924 Folio 44, undoubtedly shows that Wellington Court and Wellington Glades were ***never part of the same subdivision*** which is governed by the covenants. In light of the foregoing, I would hold that Wellington Court and Wellington Glades do not form part of the neighbourhood which is protected by the covenants".(My emphasis)

27) It seems clear that Wolfe J.A., for his part, was prepared to accept that the fact that the properties in issue were originally part of the same subdivision, and derived from a common title, provided some basis for defining the neighbourhood. With respect, I adopt the learned judge's view of the definition of neighbourhood. However, because I am of the view that the definition of "neighbourhood" is critical to the determination of the consideration of the factors set out in section 3(1) of the Act, I shall pursue the matter further.

28) In the **Central Mining** case, counsel for the applicant/Appellant submitted that:

> "……the proper definition of the neighbourhood, as illustrated by the 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)".

29) Wright J.A. who delivered a strong dissenting judgment, and who referred to this submission did not question its correctness but suggested that the particular area being suggested did not fulfill the criteria set out in the submission. His lordship also agreed with the criticism made of the learned first instance judge who had sought to define a "neighbourhood" by reference to where curves on Wellington Drive occurred. From the terms of the Court of Appeal judgment in **Central Mining**, it is apparent that there had been some agreement before the judge at first instance as to what constituted "the neighbourhood", although when the matter came before the Appeal Court, there was uncertainty as to exactly what had been agreed. On any reading however, there it was agreed to include not only Wellington Drive, but also Bamboo Avenue, Canberra Crescent and Ottawa Avenue which are all streets off Wellington Drive.

30) In **Re Davis Application** (1950) 7 P & C R 1, a case also cited by Wolfe JA (Ag) in the **Central Mining** case, the Court had stated:

> Provided a neighbourhood is sufficiently clearly defined as to attract to itself and maintain a reputation for quality and amenity, the size of the neighbourhood and, within reasonable limits, the progress and nature of the development outside its boundaries is of little consequence.

31) In **Davis** the applicant prayed in aid changes in the character of an area half a mile square surrounding the premises at Hove in respect of which he was applying for relief. The application failed but the Tribunal delivered itself of the words cited by Wolfe J.A. set out above. It is not open to doubt that the test as to what constitutes a neighbourhood is the "estate agent's test": "What does the purchaser of a house in that road or that part of the road expect to get?" The Objector's counsel in submissions emphasized "that part of the road". Interestingly, in the **Central Mining** case, in considering the answer to the question implicit in that test, quite insightfully, Wright J.A. said:

> 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."

32) I believe that there is great value in the words of the learned Judge of Appeal. I also adopt the following from **Preston and Newsome**, **Restrictive Covenants Affecting Freehold Land, 7th Edition**, (paragraph 7-49) as a correct statement of the law in this area:

> The neighbourhood need not be large: it may be a mere enclave. Nor need it, so far as this definition goes, be coterminous with the area subject to the very restriction that is to be modified, or other restrictions forming part of a series with that restriction. Thus in **Re Knott's Application** (1953) 7 P & CR 100, the Tribunal found expressly that Berkeley Square was a neighbourhood for the present purpose, although the covenants imposed on the houses in the square appear to have been part of a series of covenants extending over a larger area. Conversely, in **Re Escritt's Application** (1954) 7 P & CR 134 the covenants were imposed in pursuance of a scheme affecting a certain area; but in that case the Tribunal was prepared to consider whether the establishment of a housing estate somewhat outside the area affected by the scheme had so changed the character of the neighbourhood as to justify action under sub-paragraph (a). the Tribunal stated that "there are circumstances in which such an event (such as the establishment of a housing estate) could spread a blight over a wide area but inspection….convinces me that the character of the neighbourhood has been affected so slightly, if at all, that the covenants on the common vendor's estate have not been stultified," And in **Re Firmin's Application** (1957) 8 P & CR 275, the Tribunal held that no case under paragraph (a) had been made out "from the evidence and from my own inspection of the surrounding area." *The test is a pragmatic one: if events in the vicinity have stultified the covenant, those events may be considered even if they are on land never affected by the restriction in question or any related restriction*. (Emphasis mine)

33) In the instant case, I am of the view that "pragmatism" must be the watchword. The authorities seem to suggest that a "neighbourhood" is a relatively homogenous area in so far as its physical appearance and socio economic definition are concerned. Indeed, in **Stephenson et ux v Liverant et al**, (1972) 12 JLR 719 Smith J.A. in the Jamaican Court of Appeal stated that:

> "It is common ground that the character of a neighbourhood derives from the style, arrangement and appearance of its houses and from the social customs of the inhabitants" (at page 730, letter h)

34) The submission in support of treating the entire area previously contained in the title of Vale Royal Pen at Volume 38 Folio 6 as "the neighbourhood" has some attraction. Indeed, that approach seems to be supported, (at least by implication) by that of Wolfe J.A. in the

Central Mining case. Nevertheless, I believe that it would be flouting authority to limit the definition by the historical accident of a Volume and Folio number. At the same time, there seems to be no rational or logical basis or any authority cited for limiting the neighbourhood to the very small area suggested by the Objector's counsel, being just the part of Hopefield Avenue from Donhead Avenue to Lady Musgrave Road. I believe, and so hold, that the area now popularly known as the "Golden Triangle" is more appropriate to define the neighbourhood. Indeed, the court having had a chance to "traverse the area" (as suggested by Wright JA, in **Central Mining)** considers that the neighbourhood must comprise at most, the area referred to as Seymour Lands. For the avoidance of doubt, I accept the evidence of the witness Breakenridge that the Seymour Lands area may properly be defined as bounded by and including the streets, Hope Road, Old Hope Road, Downer Avenue, Lady Musgrave Road and Trafalgar Road.

35) I also accept the evidence of the said witness that the Golden Triangle which falls within the Seymour Lands area is bounded by Old Hope Road, Hope Road, Lady Musgrave Road to Seaview Avenue and along that road to Old Hope Road. Based upon the visit to the locus, and bolstered by the delineation suggested in the Breakenridge Report, I am satisfied that the area as delineated above which is essentially co-terminous with the area loosely described as the Golden Triangle, is the neighbourhood for the purposes of this application. I so hold and find this as fact.

36) I am further encouraged in this view by the recent decision of Lawrence-Beswick J. in **In the Matter of # 30 Dillsbury Avenue in the Parish of St. Andrew**". There, her ladyship adopted the opinion of the learned authors of **Preston and Newsome** (op. cit.) which I have already cited above. She held that the entire length of Dillsbury Avenue was a "neighbourhood", an avenue on which there were thirty two (32) lots and which linked two clearly distinct communities.

Has the neighbourhood changed?

37) It was submitted that there was clear evidence in the report of Breakenridge Associates which indicated that there had been considerable changes in the neighbourhood, sufficient

for the restrictive covenants to be considered obsolete. The affidavit evidence shows that the original subdivision (done in or around 1933) contemplated single family homes on a third to a half acre of land. In this regard, it is to be noted that the affidavit evidence of Norma Breakenridge to which her report was attached as an exhibit, is very instructive in the information it provides. According to that evidence, "The area boasted a very high residential prestige and was always considered to be exclusive with its low density of thirty habitable rooms per acre and the permitted development being single-family houses. The development pattern of the area created an upper class environment of manorial dwellings on large plots". From as early as the 1960s and 1970s, a perceptible change began to occur. At least part of the impetus for change came from a recognition that there was a need to rethink policies governing development in the Kingston area. Thus, the 1966 Kingston Development Order indicated changes designed to increase the housing stock in the city. According to the Breakenridge report, Seymour Lands was included in the plan which listed areas "ripe for development" and which could accommodate density rates of 50, 100 and 150 habitable rooms per acre.

38) It is instructive to note from the report that in 2007 to 2008 the National Water Commission put in sewerage facilities described as a lateral which facilitated considerably enhancing the carrying capacity of the properties in the neighbourhood. This is because a major inhibiting factor in increasing density is the ability to dispose of domestic water and effluent. The report provides compelling evidence that the neighbourhood has changed completely. There are relatively few single family homes which remain. Even in the immediate vicinity of the Objector's premises, the submission for the Objector was that the evidence suggested that there was a majority five to four for single family houses, among nine (9) properties. It seems clear from a visit to the locus that by far the predominant feature of the neighbourhood is the development of multi-family units on plots where restrictive covenants had previously had to be modified in order to allow for their construction. The report also points to specific covenants which have been the subject of modification of discharge and the covenants which are in issue in this case, numbers 2, 5 and 6 have all been the subject of successful applications to modify or discharge in many of these cases.

39) The Breakenridge report listed twelve (12) addresses on Hopefield Avenue and Seymour Avenue where there had been townhouse developments. Among these addresses were two (2), The Lilford and The Oak Club at 6 and 7 Hopefield Avenue respectively, which are in the "immediate vicinity" of the Objector's property. Both the developments at the Lilford and the Oak Club involved the modifications of the same covenants at issue, numbers 2, 5 and 6. The report notes that as the demand for more housing to accommodate increased populations, as well the desire for increased personal security intensifies among home buyers, the demand for gated townhouse residences has increased apace. This has been reflected in the demand for homes in the Golden Triangle neighbourhood which has continued to be an extremely desirable address.

40) At the Court's request, counsels were invited to make additional submissions on a suggestion which had been made to the witness Norma Breakenridge. In response to that suggestion from Mr. Manning, Ms. Breakenridge had agreed that several (as many as eight) of the twelve titles on Hopefield Avenue where there had been townhouse developments had been derived, not from the original Vale Royal subdivision, but from the Retreat Pen subdivision originally owned by Sir George Seymour Seymour. This was, as I understand it, to counter the submission that the changes which are apparent reflect changes in a "neighbourhood", the neighbourhood being the lands contained in the registered title, the subdivision in respect of which the restrictive covenants had been imposed. Moreover, it was advanced, the Objector, not being a beneficiary of the covenants in that subdivision would not have been entitled to object to their modifications.

41) Counsel for the Applicant, Mrs. Kitson, in response pointed out that while that was correct, the two subdivisions were contiguous and had in fact contained similar covenants aimed at preserving the area as one of large "single-family manorial dwellings". Moreover, it was clear from the evidence that both properties fell within the Seymour Lands area which were now subject to the Seymour Lands Re-Development Plan adverted to by the witness. It was also submitted that: "In the circumstances of the proximity of the lands and the fact that the proposed roads would cross through each area as indicated from the subdivision plan, it

is therefore understandable why similar covenants were imposed on both titles". As will be apparent from my analysis of what constitutes a neighbourhood, I do not think it is sufficient that the subdivision had to be in respect of one registered title, nor is it incapable of being considered a neighbourhood because it involves more than one registered title. Neighbourhood is not necessarily coterminous with subdivision.

42) While the report does focus on developments along the length of Hopefield Avenue, and this was not denied by Ms. Breakenridge in cross examination, it was clear from a visit to the locus undertaken by the Court that other streets within the neighbourhood, notably Seymour and Donhead Avenues, Clieveden Avenue, Hillcrest Avenue are all now dominated by multi-family developments. In order to clarify the evidence with respect to the kind of buildings in the triangular area formed by South Hopefield Avenue, Upper Montrose Road and Hopefield Avenue, about which there had been some uncertainty in the evidence, a further visit was made to the locus on June 9, 2011. It appears that on that land space, there is both a single family home and what appears to be a multi-family development. It is also apparent that most of the properties on Upper Montrose Avenue off Hopefield Avenue remain single family dwellings. However given the analysis in the earlier part of this judgment on what comprises a neighbourhood, I do not believe that the existence of those single family dwellings affects the validity of the conclusion at which I have arrived and which are set out fulsomely at paragraphs 35 and 36, above.

43) There was one bit of evidence given orally by Ms. Breakenridge which I found extremely compelling. In answer to the Court, she confirmed that she was very familiar with the area of the Golden Triangle, and had practiced there extensively as a real estate professional. She stated that she *could not remember any case* where a single- family dwelling had changed hands and thereafter remained as a single-family dwelling. I am of the view that the court can draw the inference that all such properties which have been sold have been converted into multi-family developments. Moreover, if one considers the adjoining areas as the citation from **Preston and Newsome** above suggests is relevant, it will be clear that in

those adjoining areas of Braemar Avenue, Upper Musgrave Avenue, properties are almost exclusively in commercial use. There the learned authors had stated:

> The test is a pragmatic one: if events in the vicinity have stultified the covenant, those events may be considered *even if they are on land never affected by the restriction in question or any related restriction*. (My emphasis)

44) There is no doubt in my mind from the evidence adduced by and on behalf of the Applicant that the developments in the neighbourhood and in the "vicinity" have "stultified" the covenants, although in some cases the stultification has come from events "on land never affected by the restriction in question". Indeed, I am satisfied that there is compelling evidence to support the view that the neighbourhood has changed from an area of single manorial residences to a mixed neighbourhood incorporating many houses with a modest level of upkeep on the exterior as well as properties that reflect an interwoven matrix of social and economic forces. The Breakenridge Report expressed an opinion that the changed nature of the neighbourhood is shown, for example, in the following features on Hopefield Avenue.

- Ten (10) townhouse complexes (including one currently under construction) on Hopefield Avenue;
- The High Commission of India – Offices;
- A childcare/nursery facility at 34 Hopefield Avenue;
- The Guardsman Plant Nursery 30 Hopefield Avenue;
- Derelict house at its corner with Lady Musgrave Road and another at No. 35 Hopefield Avenue;
- A hotel/guesthouse at its corner with Hope Road
- An educational institution – Campion College – at its corner with Hope Road.

> "The forces for change have led to changes in the physical make-up of the road adapting to meeting changing circumstances. Hopefield Avenue carries two-way traffic to/from Hope Road from/to Lady Musgrave Road and as such is used as a through road so there is increased traffic on that road as well. These changes are brought about partly due to the high costs in maintaining large residences whilst there is growing demand for increased security, tilting the preference scale in favour of the gated townhouse concept. They have become the housing solution of popular choice for people who have the means".

45) Before going further, I believe that I need to deal with the issue of the validity of the evidence of Norma Breakenridge as same is contained in "The Breakenridge Report" and which is a part of the Record. Counsel for the Objector in his submissions drew the Court's attention to the fact that the Report

a) had been prepared at the request of the then attorneys for the Applicant, and

b) contained opinions of the author although she had not been declared to be an expert by the court.

46) It is not contended that the provisions of the Civil Procedure Rules 2002, (CPR) apply to Restrictive Covenant applications. There is therefore no need to have witness certified as an "Expert Witness" in order to give opinion evidence. Rather, the Common Law principles as they apply to the admissibility of the evidence of persons who give opinion evidence apply, and the Court must, if it is to countenance such opinion evidence, be satisfied that by virtue of training and experience of the witness, any opinion expressed may be relied upon. In any event, the Court must still determine what weight, if any, it should attach to any such admitted evidence.

47) In the instant case, the witness Norma Breakenridge who produced the Report and was carefully cross examined thereon gave evidence as to her qualifications and her experience. She is the holder of a Bachelor's Degree in Land Administration, and a post-graduate Masters Degree in Rural and Farm Management. She is also a Chartered Valuation Surveyor and Licensed Real Estate Dealer and has practiced in that industry for well over thirty years within organizations as well as in her own practice. She testified that she was particularly knowledgeable about the area of St. Andrew which is described as the Golden Triangle having had considerable experience in working on deals done in that area for many years.

48) For the record it should be noted that in the following cases, the opinion evidence of professionals in the real estate industry was accepted as providing assistance to the court in making its determination. For example, In **Re Gainsborough Development Company Limited's Application** (1990) 27 J.L.R. 491, the evidence of a Chartered Surveyor and

Planner was accepted by Bingham J as good evidence although it expressed opinions. Parnell J. in **Lots 12 and 13 Fortlands** (1969) 11 J.L.R. 387, accepted the opinion evidence of an architect and quantity surveyor called to give evidence on behalf of one party. Similarly, in **Regardless Ltd v Haddeed and Others** (1996) 33 J.L.R. 417, Downer J.A in the Court of Appeal, quoted widely from the opinion evidence from a witness for the objectors which had been led before Harris J at first instance.

49) I am satisfied that the witness established her credentials to give opinion evidence which is relevant to the issues which the Court must decide although I accept that the Court must carefully consider what weight, if any, should be given to her evidence.

Summary of the Evidence in the Report

50) It bears repeating that the evidence of Ms. Breakenridge is that whereas the original subdivision provided large lots of a third to a half an acre with single-family Manorial dwellings, there now exists within that space, several multi-family dwellings as well as a school, a child care facility, a gymnasium, a High Commission, a hotel/guest house and a plant nursery. As a real estate agent herself for many years, she was of the view that the purchaser of a property on Hopefield Avenue would now expect to find primarily multi-family dwellings and this is so, even in the immediate area which the Objector submits should be considered the neighbourhood.

51) The Report details the development pattern of the lands in the Seymour Lands area forming part of the Golden Triangle. It noted as a demonstrable fact that there has been a gradual shift in the land use and development pattern starting from as early as the late 1960's. This had occurred in circumstances where there has been an increase in housing demand, rapid rates of urbanization, change in lifestyle and a change in the planning rational underpinning the development of Kingston and St. Andrew. Ms. Breakenridge noted in her oral evidence that this had given rise to the Seymour Lands Re-Development Plan of 1975 which indicated that the Planning Department approved the Seymour Lands area as being part of the category of lands ripe for redevelopment. In that regard it was noted that the plan

envisaged facilities having up to fifty (50) habitable rooms per acre on land of between a third and half an acre in size.

52) It is against that background that restrictive covenants in the Seymour Lands area had been gradually relaxed giving way to a host of townhouse and apartment complexes as the need for the large manorial residences no longer existed on a large scale. It is instructive to quote directly from the said Plan:

> "Throughout Jamaica, Urbanization is occurring at a very rapid rate due both to rural-urban migration and natural population increase. The most rapid increase is taking place in the Kingston Metropolitan Area where the annual growth rate is calculated at 3.0% and the population being approximately 30 percent of the Island's total. The rapid increase in Kingston's urban growth is creating a demand for a minimum of 4,500 new dwelling units per annum – a situation which is imposing severe pressures on the limited land resources of the Corporate Area.
>
> As a result efforts must be made to utilize this scare resource in the most effective manner by increasing densities through re-development in areas where this possibility exists.
>
> The advantages of this approach are as follows:
>
> 1. It increases the housing stock in the city.
> 2. It increases the tax base of the urban area.
> 3. It provides a basis for a proper planning framework which may be used in other areas.
>
> The Seymour Lands Area, bounded by Hope Road, Old Hope Road, Downer Avenue, Lady Musgrave Road and Trafalgar Road is considered one of the areas with the potential for re-development at this time to satisfy the advantages mentioned above."

Are the Restrictive Covenants in issue, obsolete?

Section 3(1)(a) of the Act, already set out above, defines the first of the four alternative tests, at least one of which the Applicant must satisfy if it is to be successful.

53) Having found that there have been substantial and substantive "changes in the character of the neighbourhood", the question in respect of which the court must be satisfied is whether by virtue of the extent of the changes "or other circumstances of the case which the judge may think material", the restriction ought to be "deemed obsolete". Merely satisfying the

"change in character" test, does not, of course, amount to obsoleteness. When may a covenant be deemed obsolete?

54) It may be noted at the outset that it was the submission of the Objector's counsel in this case, seeking it seems to assimilate the provision in paragraph (a) with that of paragraph (d) that:

> "……..*proof of obsolescence is necessary* if the Applicant is to show that there will be no injury as a result of the modification, because it was held that if serious injury could be caused to the objector by the modification, then the covenant could not be said to be obsolete". (My emphasis)

Given what I hold below, that the provisions are to be considered disjunctively, I do not accept this as a correct proposition of law.

55) In **Stephenson et ux v. Liverant et. al.** (1972) 12 JLR 719 Smith J.A. (as he then was) had cited with approval the decisions of the English Court in **Re Truman, Hanbury, Buxton & Co. Ltd.'s Application** [1956] 1 Q.B. 261 and **Driscoll v. Church Commissioners for England** [1956] 3 All ER 802). The dicta of Romer L.J. In **Truman** was also cited with approval by Downer J.A. in the **Central Mining** case referred to above. There, Romer L.J. had stated

> 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 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).

56) In the unreported decision, **In Re Norbrook Heights Lot 15,** HCV 1767 of 2005, delivered July 30, 2009, my learned brother Brooks J. in discussing the concept of obsoleteness, referred to the earlier decision of Harris J (as she then was) in another case involving property in Norbrook, which decision was upheld in **Regardless Ltd. v Haddeed and Others**.

> Although 15 years have passed since the unreported decision of Harris, J. (as she then was) in the case of **Re 48 Norbrook Drive** (E.R.C. 80/90 delivered 27/7/1994), the findings, the reasoning and the decision in that case are still applicable today. That decision considered restrictive covenants imposed on a

title which had been splintered by Eastwood Park Development from C/T 794/84. It was an earlier subdivision to the one which is the subject of this claim. Harris, J then found that because the single family residence was still the prevailing feature of development in the area, despite the general tendency toward multi-unit complexes, the covenant restricting subdivision of the land, had not been rendered obsolete. Her Ladyship relied on the cases of ***Re Truman, Hanbury, Buxton & Co. Application*** [1956] 1 Q.B. 261 and ***Driscoll v Church Commissioners for England*** [1957] 1 Q.B. 330 in arriving at her decision on that point. The decision of Harris, J. was upheld by our Court of Appeal in the case of ***Regardless Ltd. v Haddeed and others*** (1996) 33 J.L.R. 417. There, Patterson, J.A. accepted the position that, "covenants have become obsolete, because their original purpose can no longer be served and…it is in that sense that the word 'obsolete' is used in [the legislation]". (See page 428 A)

57) However, as Wolfe, J.A. (Ag) said in **Central Mining** in relation to the question "…….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*". I entirely agree.

58) I believe it is extremely instructive to also note the following approaches or dicta in various cases in Australian jurisdictions which have legislation which are in pari materia with our own Act. **Section 89 of the Conveyancing Act 1919** of New South Wales which deals with easements, is in similar terms to section 3 of the Act and provides as follows:

> "(1) Where land is subject to an easement ... the Court may from time to time, on the application of any person interested in the land, by order modify or wholly or partially extinguish the easement ... upon being satisfied –
>
> (a) that by reason of change in the user of any land having the benefit of the easement ... or in the character of the neighbourhood or other circumstances of the case which the Court may deem material, the easement ... ought to be deemed obsolete……,

59) In the New South Wales Supreme Court case of **Cavacourt Pty. Ltd v Durian (Holdings) Pty Ltd.** Matter 1998 NSWSC 787, at first instance the learned Judge, Young J. reviewed some authorities from England, Australia and New Zealand relating to the meaning of the word "obsolete". He said:

The word "obsolete" as used in this section or corresponding sections in the legislation of other places has been defined sufficiently often not to require me to do more than refer to the principal cases.

In **Re Truman, Hanbury Buxton & Co Ltd's Application** [1956] 1 QB 261, 272, C Romer LJ said in respect of a restrictive covenant, that "obsolete" was used in the section in the sense that the original purpose of the covenant can no longer be served. This approach has been adopted in subsequent cases; see e.g. **Re Miscamble's Application** [1966] VicRp 81; [1966] VR 596, 601 and **Re Robinson** [1972] VicRp 28; [1972] VR 278, 281.

In **C Hunton Ltd v Swire** [1969] NZLR 232, 234, Wilson J said that "obsolete" means "*no longer relevant to the circumstances presently obtaining*". (Emphasis mine)

In **Re Mason** (1960) 78 WN (NSW) 925, 927; [1962] NSWR 762, 764, Jacobs J said in this court, "I consider that the word `obsolete' can be taken to mean that the object of the covenant is now incapable of fulfillment or perhaps that *it serves no present useful purpose*." (Emphasis mine)

As Jacobs, J said in **Re Mason** immediately after the passage I have quoted, that means that one must look to see the object of the easement. However, when doing this, one takes into account not only the use contemplated at the time of grant, *but also permitted uses which were not necessarily so contemplated*; see **Armishaw v Denby Horton (NZ) Ltd** [1984] 1 NZLR 44, 47, where Eichelbaum J considered that this proposition was correct in principle, but did not have to decide it. However, it follows from what Jacobs J said in **Re Mason** that the easement or covenant is not to be narrowly construed which, in turn, flows from the principle that the grant is construed most strongly against the grantor: **Williams v James** (1867) LR 2 CP 577, 581.

60) In a more recent decision in the New South Wales Supreme Court case of **Long v Michie** 2003 NSWSC 122, Austin J. citing a number of cases including the **Cavacourt** case which had subsequently gone to the Court of Appeal, observed:

Some earlier cases took the view that the word "obsolete" was to be construed narrowly. In **Chatsworth Estates v Fewell** [1931] 1 Ch 224, for example, "obsolescence" was said to relate to whether the restrictive covenant before the court was *absolutely valueless* (see esp at 271-2 per Romer LJ). In other cases,

> the question of obsolescence was seen to depend upon whether the original purpose of the easement or restrictive covenant could no longer be achieved (for example, **Knight v Simmons** [1896] 2 Ch 294, 297 per Lindley MR; **Guth v Robinson**, at 9215 per Powell J). However, in **Durian (Holdings) Pty Ltd v Cavacourt Pty Ltd** (2000) 10 BPR [97830], 18,100, Mason P adopted an even broader construction, holding that the word "obsolete" meant *either* that the object of the easement had become incapable of fulfilment, *or* that it served no present useful purpose.

61) The judge in that case did however continue by saying:

> Even so, this ground is to be applied cautiously. While the section confers a power to abrogate existing rights, the power "is not available for the purpose of expropriating private rights for profit": **Durian (Holdings)** at 18,100, per Mason P, citing **Re Henderson's Conveyance** [1940] Ch 835, 846 per Farwell J (where a tendency to erect smaller houses in place of the larger houses used in "more spacious times" was held, on the facts, not to change the residential character of the neighbourhood).

62) It is especially instructive that although the first instance decision in **Cavacourt** was overturned later in the **Durian Holdings** appeal, the learned President of the appellate court, Mason P., specifically adopted Young J's definition of "obsolete" as being "*either* that the object of the easement had become incapable of fulfilment, *or* that it served no present useful purpose".

63) In the Jamaican Court of Appeal, in **Regardless Ltd**. (supra) Patterson, J.A. had accepted the position that, "covenants have become obsolete, because their original purpose can no longer be served and…it is in that sense that the word 'obsolete' is used in the legislation". It is clear from the evidence which has been accepted here, that the purpose of the covenants in question was to retain the "single-family character" of the neighbourhood. The Objector submits that it is still possible for the Applicant to build on the property without breaching the terms of the covenant, and in that sense "the original purpose can still be served ". I do not believe that the weight of the authorities supports such a narrow construction. Rather, I agree with and adopt the reasoning of Austin J. in **Long v Michie** (supra) that obsolete means *either* that the "objective of the covenant cannot be fulfilled" *or* that it "served no present useful purpose".

64) It is clear from the evidence provided in the Breakenridge Report that planning authorities have determined that the area in which the neighbourhood falls is to be allowed to provide housing solutions at a much greater density than was contemplated at the time of the subdivision of the property. Indeed, the implementation of the plans to install major sewage facilities to accommodate the greater densities is an indication of the thinking in relation to this neighbourhood which remains an upscale and very desirable address. I adopt Austin J's approach as I believe it to be the correct one. I find additional support for it in the dissenting judgment in the **Central Mining** case above. There the learned Judge of Appeal, Wright J.A., had stated the following view:

> "The evidence of the changes which have taken place in the neighbourhood is undisputed and it cannot be assumed that the neighbourhood which has been transformed from being a quiet single-family neighbourhood to one which is now interspersed with high-density dwellings would retain the character unchanged. In some instances several families now occupy one 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 planometric map. And it is unlikely that the customs of multiple family dwellings would be the same as those of the single family envisaged by the covenants. 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 neighbourhood*, the restriction ought to be deemed obsolete in the circumstances". (Emphasis Mine)

65) The reference to "style, arrangement and appearance of the houses", is of course taken from **In Re Davis Application** (supra). Even dicta in the judgment of Downer J.A., one of the majority in the Court of Appeal, I believe, provide some support for the approach to the characterization of the covenants at issue as being now obsolete. The learned judge, having cited the judgment of Smith J.A. in **Stephenson v Liverant** in his closing comments, stated:

> "Applying this test to this case there is no(t) valid basis, in my view, on which to justify a finding that the original objects of the covenants cannot still be achieved. *All the physical characteristics necessary for a private residential neighbourhood seem to be still in substantially intact"*. (Emphasis mine)

66) The clear evidence in this case is that "all the physical characteristics for a private residential neighbourhood" do not remain "substantially intact". In fact the opposite is true as the

court takes note of the increase of commercial establishments within the geographic area originally included in the title then subdivided. It should also be noted, as Wright J.A. did in his dissenting judgment, that the sub-section of the Act under consideration requires the trial judge to consider not only the extent and quality of the changes in the character if the neighbourhood, but also "other circumstances of the case which the judge may think material". In my respectful view, there is evidence which I accept that:

(a) the entire Hopefield Avenue is now a through road along which a considerable amount of traffic flows;

(b) the authorities have installed major sewage mains to facilitate much higher densities for the purposes of the disposal of waste;

(c) the Seymour Lands Development Plan 1975 has identified the whole area as one for development with higher densities, and

(d) no other person in the immediate vicinity of the properties at 1 and 3 Hopefield Avenue has objected to the development.

67) Unarguably, I believe that these are "material factors which the judge may consider" (section 3(1)(a)) and they point to the view that "all the physical characteristics" for a neighbourhood of "single-family manorial-type dwellings" no longer exist in the neighbourhood as defined by the Court. I place great store by the evidence of Ms. Breakenridge referred to above that in her years of practice as a real estate agent, she is not aware of any single-family home in the Golden Triangle, which when sold, remained a single family home.

68) Given the evidence which I have accepted, I have formed the view and so hold, that the covenants in issue are obsolete. It is equally clear that even if the court finds that the condition in the relevant section of the Act is satisfied, it still has a discretion as to whether the proposed modification or discharge ought to be allowed. I am satisfied that because of what has been set out above and additionally the issues to which I will refer below, this is an appropriate case for the court to exercise its discretion and allow the modification in the manner sought by the Applicant and I so order.

69) Given the undoubtedly correct dictum expressed by Wright J.A. in **Central Mining** that "the provisions of section 3(1) are disjunctive. It is sufficient, therefore, if the application succeeds on any one of the grounds provided", a ruling such as that articulated here would be sufficient to dispose of the matter. Nevertheless, since counsel for the Applicant has made submissions in support of the proposition that each limb of section 3(1) is satisfied by the evidence, and these have been responded to by the Objector's counsel, I believe that I ought at least to consider them briefly.

70) Paragraph (b) of section 3(1) of the Act which has already been set out above provides authority for the court to exercise its discretion to modify or discharge the covenants where

> "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".

71) It is clear that to satisfy this provision, an Applicant must show on the evidence that:

(a) continued existence of the restriction without modification would impede the "reasonable user" of the land for private or public purposes;

(b) the impeding of such reasonable user does not secure to any person any practical benefits;

(c) those benefits are sufficient in nature and extent to justify the continued existence of such restriction, or as the case may be, the continued existence without modification.

72) In **Stannard and Others v Issa**, (1986) 23 J.L.R. 489, the Privy Council rejected the view of the majority in the Jamaican Court of Appeal that all that was necessary to succeed on this limb, was to show that "some" reasonable user of the burdened land was impeded. In fact, it was pointed out that the equivalent provision in the Law of Property Act 1925, had been amended by replacing the word "the", with the word "some". A similar amendment had

not been effected in Jamaica. I set out below, in extensu, that part of the judgment of Lord Oliver of Aylmerton.

> Their Lordships have no hesitation in preferring the dissenting judgment of Carey, JA. Indeed the reasoning of the majority judgment in the Court of Appeal appears to their Lordships not only to be based upon a misconstruction of the plain words of the section but to be contrary to the whole tenor of both the English and West Indian authorities. The corresponding provision of section 84 of the Law of Property Act 1925 was amended by section 28 of the Law of Property Act 1969 by substituting the word "some" for the word "the" in the expression "impedes the reasonable user" and if that had been done in the Jamaica statute it would, no doubt, be impossible to quarrel with the approach of the majority on any ground save that they had paid too little attention to the actual benefit conferred by the restrictions. But it has not been done and the result at which they arrived can be achieved only by treating the section as if it had been amended and by disregarding the construction universally applied to it in its un-amended form. Lord Evershed MR, in **Re Ghey and Galton's Application** [1957] 2 QB 650 at page 659, pointed out that in order to succeed in an application under the section an applicant has to go a great deal further than merely to show that, to an impartial planner, his proposal appeared a good and reasonable proposal. He must affirmatively prove that one or other of the grounds of jurisdiction has been established. At page 663 of the report Lord Evershed MR propounded the often-quoted test for a successful application under the English equivalent of section 3(1)(b) of the Jamaican statute in the terms already referred to in the dissenting judgment of Carey JA. Curiously enough this was relied upon by Kerr, JA., in his judgment as justifying his approach to the problem. But it is, in their Lordships' judgment, entirely clear that in propounding his test, Lord Evershed MR was very far from suggesting, as Kerr, JA., seems to imply, that all that had to be shown was that there was some use of the land which was (a) reasonable, and (b) impeded to a sensible degree by the restrictions sought to be modified. That submission, under legislation in all material respects similar to that with which this appeal is concerned, had been decisively rejected (and in their Lordships' view, rightly rejected) in a number of decision of the Lands Tribunal in England (*see* **Re Walkfield City Corporation's Application** (1953) 7 P & CR 90 and **Re Howard (Mitcham) Ltd's Application** (1956) 7 P & CR 219), by the Supreme Court of Victoria *(***Re Miscamble's Application** [1966] VR 596 and by the High Court of Jamaica (**Re Constant Spring and Norbrook Estate** (1960) 3 WIR 270). In the instant case there was no evidence whatever of any difficulty in developing the respondent's land or in disposing of it for development within the framework of the existing restrictions and certainly there was no suggestion that they had the effect of sterilising the land. All that was said was that the respondent's proposal was one which made a reasonable user of the land having regard to current pressures of

> population and current notions of optimum density. In their Lordships' judgment both Theobalds, J., and Carey, JA., were right in saying that the respondent failed to surmount the first hurdle placed in her way by section 3(1)(b).

73) It may very well be considered whether this approach to construction of the provision is now too restrictive and whether, in light of the physical, geographic and socio-economic realities of the Jamaican housing situation, the provision ought to be amended in a similar vein to the English amendment, as I believe it should. But that is a separate issue for discussion at another time. This same question has been raised in Australia in the New South Wales decision **Lolakis and Another v Konitas** [2002] NSWSC 889, a decision of Campbell J. (as he then was) in October 2002. (En passant, it should be borne in mind that in the New South Wales statute, what is section 3(1)(b) of our Act is also included in paragraph (a) as part of that paragraph). The learned judge said:

> 50. The English section corresponding to section 89 has been interpreted so that *"the continued existence thereof would impede the reasonable user of the land subject to the ... restriction"* only if no reasonable user of the land is possible, while the covenant remains in existence, or in its present form. It is recognised that, for the parcel of land burdened by a covenant, various different uses might be possible, each of which is a reasonable use. That the covenant prevents some of those uses of the land is not a reason for extinguishing or modifying it, if some other reasonable use of the land, consistent with the covenant, is also possible. If some other use of the land, consistent with the covenant, is possible, it does not matter that the prohibited uses might be significantly more profitable to the owner of the land burdened than the permitted one, or that the prohibited uses might be seen by a town planner to be ones which are a preferable use for the land in question:

74) He then proceeded to cite a number of Australian decisions which have consistently interpreted the provision restrictively, and continues:

> 51 This same approach to construction has been taken in Victoria; **In Re Miscamble's Application** [1966] VicRp 81; [1966] VR 596, and in the Privy Council on appeal from Jamaica: **Stannard v Issa** [1987] 1 AC 175.

He concludes:

> 52 There may be some reason to doubt whether as restrictive an approach as this to the circumstances in which the second limb of section 89(1)(a) {Read our

> section 3(1)(b)}could be used was intended by the original draftsman of the legislation – see **Morpath Pty Ltd v ACT Youth Accommodation Group Inc** (1987) 16 FCR 325 at 338-340 per Beaumont J. In **Guth v Robinson** *(*1977) 1 BPR at 9216 Powell J approached with some caution whether the restrictive construction was the appropriate one. In **T Z Developments Pty Ltd v Rickman Pty Ltd** (1993) 7 BPR [97582] the Court of Appeal left open the question of whether the correct construction was the restrictive construction which I have outlined, or whether it was sufficient for the appellant to show that there was *a* reasonable user of the land prohibited by the restriction.
>
> 53 While the Court of Appeal has not since resolved that question, the appropriate course for a single judge to follow is to adopt the restrictive approach, which has been applied so many times at first instance in this State.

75) Despite how attractive the interpretation of Kerr JA in the Jamaican Court of Appeal in **Stannard and Others v Issa** would appear to be, it would be impossible to defy the line of authorities referred to above and hold otherwise in relation to the Applicant's ability to satisfy section 3(1)(b). I do not think that it would be out of place, however, to observe that it is not absolutely clear that with respect to the beneficiary of the covenants "the practical benefits are sufficient in nature and extent to justify the continued existence of such restriction, or as the case may be, the continued existence without modification".

76) Section 3(1)(c) of the Act, already set out above, deals with the issue of whether there has been express or implied agreement with the modification or discharge of the covenants in question, on the part of the objector, being a person of full age and capacity, and who is entitled to the benefit of the covenants.

Legal Basis

77) It is not in dispute that the Objector is a beneficiary of the covenants sought to be modified. For there to be success under this provision, the Applicant must show that the Objector has impliedly or expressly agreed to the modification. Counsel for the Applicant submitted that the Objector, a beneficiary of the restrictive covenants in issue, has agreed by implication through his acts, to those covenants being "discharged or modified". Support for this submission was found in the decision of Brooks J. in **Re Norbrook Heights Lot 15**. There the objector was held by his lordship to have "agreed" to the modification by his silence and

inactivity in the period of fifteen (15) months during which construction continued on the burdened land, in respect of which the modification of the covenants was sought. With respect to this provision, it is necessary to consider the evidence which the Applicant is submitting supports this conclusion.

Evidence in relation to this Ground

78) It is not disputed that the order granting the original application for modification was made by Cole-Smith J. on February 20, 2004. Some time after the order of February 2004 work commenced on the development. It is not clear exactly when the site preparation and development commenced thereafter. Kenneth Benjamin's recollection was that it was "soon after" receipt of the order, while Mr. Younis' recollection is that it was much later. Indeed, Mr. Benjamin's first affidavit of 8th October 2004 does say that "In May 2004, Mr. Younis contacted me soon after construction had started" seeking certain clarifications as to what was planned.

79) Counsel for the Applicant submitted that there was evidence which indicated that construction of the development on the Hopefield Corner property started "shortly thereafter", and that was indeed, the oral evidence of Mr. Kenneth Benjamin. On the other hand counsel for the Objector places the start of development as being sometime in May 2004. In this regard, counsel points to its letter of May 31, 2004, to the Applicant, (exhibit SY 3 to the affidavit of Sameer Younis dated August 26th 2004) as evidence that the Applicant would have been aware from at least the time of the receipt of that letter that the Objector was raising questions as to "whether the intended construction will comply with the applicable restrictive covenants". It will be very apparent from other evidence to which reference is made below, including that of the Objector, that well before May 2004, Mr. Younis was aware of the nature of the development contemplated and was under no illusions as of May 31, 2004, as to whether the intended construction would have complied "with the applicable restrictive covenants".

I believe that it would be useful to set out the terms of this letter:

> We act on behalf of Mr. Sameer Younis, the registered proprietor of No.1 Hopefield Avenue, which premises adjoins No. 3 Hopefield Avenue, which we are instructed is owned by your company.
>
> Our client has observed that significant development activity has recently been taking place at the premises, including the construction of a perimeter wall and internal works which suggest that it is intended to construct separate buildings on the premises in the form of multi family dwellings.
>
> Our client has previously objected to similar multi family dwellings and is unaware that the applicable restrictive covenants have been modified.
>
> We write to request that we be advised whether the intended construction will comply with the applicable restrictive covenants which prevent further subdivision of the land. Indeed, we request that we be provided with an outline of the proposed development.
>
> For the avoidance of doubt we enclose a copy of Legal Notice in the application to subdivide in ERC No. 211 of 1994 and a copy of the objection to the application for modification to Restrictive Covenant filed by this firm. There were also other objections.
>
> If we do not hear from you within the next three (3) days we will take such action as is necessary to prevent any breach of the Restrictive Covenant.

80) There was a response to this letter from the Applicant's then attorneys at law on the same date May 31, 2004, in which the fact of the earlier grant of the order of Cole-Smith J was brought to the attention of the Objector's attorneys-at-law. There was, nonetheless, an offer to meet in order to "clarify any concerns" and to "view the plans and the relevant approvals".

81) According to the affidavit of Jeremy Brown, Managing Director of Implementation Limited, the project manager for the development then taking place at 3 Hopefield Avenue, on June 4, 2004, he sent to Mr. Younis a letter "providing him with details of the development and seeking his approval to remove a chain link fence that existed between the property herein and that of Fabrics de Younis Limited to facilitate the construction of an eight (8) foot high concrete wall". Further, according to that affidavit, "on or about the 4th June 2004, subsequent to the delivery of the letter, I had a very amicable conversation with Mr.

Sameer Younis about the removal of a tree and we discussed the details of the development in a very positive manner and I advised him that we were ready to assist with any problems that he may have had".

82) It was the evidence of Mr. Brown that the eight (8) foot concrete wall was in fact constructed at the sole expense of the Applicant and that it replaced the chain link fence which had previously separated the two premises. Mr. Brown's affidavit states that "on or about June 30, 2004, at the request of Mr. Younis, Implementation Limited sent among other things copies of the site plans approved and elevations of the buildings proposed to enable Mr. Younis to get an informed appreciation of the upscale quality of the development". Mr. Brown's letter of June 4, 2004 which is exhibit JB2 to his affidavit, said that "construction work on six detached two-storey residential units has just commenced and completion is programmed by January 31, 2005".

83) The averments of Mr. Jeremy Brown are supported by those of Kenneth Benjamin who deponed that between June and August the Applicant and the Objector communicated regularly. He said that the Objector "cooperated fully and very amicably" in the construction of the new concrete boundary wall between the properties as well as the felling of a tree to facilitate the laying of a new drain which was required by the Kingston and St. Andrew Corporation and the National Water Commission to be constructed on a drainage easement as a condition of the approval of the project. These matters were undertaken at the sole cost of the Applicant. It seems to be accepted that the new drain has had the effect of completely alleviating the flooding which had hitherto been a feature of the section of the road in front of the Objector's north gate, although it was Mr. Younis' evidence in cross-examination, that the flooding which had hitherto occurred, had been caused by blockage of the drainage by careless disposal of plastic bags.

84) In his evidence Mr. Younis said that the concrete fence was built alongside the chain link fence but I reject that evidence. His evidence in court was that the chain link fence was not removed but this is at variance with his own affidavit evidence, in which he said that he did not see any need to object to the removal of the chain-linked fence and I do not accept its

truth. I certainly did not see a chain link fence on the occasion that the court visited the property at 1 Hopefield Avenue. I accept the evidence of Mr. Brown, supported as it is by that of Mr. Benjamin, and make a finding of fact that Mr. Younis "co-operated fully and very amicably" in the construction of the new boundary wall.

85) One question which may be mentioned here is whether, assuming the fact of co-operation by the Objector in the construction of the wall and the drain, developed to facilitate the breaches of the covenants, the benefits of which are shared by the Objector while the costs were solely those of the Applicant, some kind of estoppel (maybe of a proprietary nature) may have arisen against the Objector to now object to the modification. I mention this, en passant, purely as an academic exercise since there is no pleading which supports such a consideration. But I digress.

86) There is also other relevant evidence which bears upon the question as to whether the Objector had "agreed, impliedly or expressly" to the modification being sought. According to the affidavit evidence of Kenneth Benjamin, some time after his group (the Applicant) had initially secured an option, (in or around December 2002), to purchase 3 Hopefield Avenue, he had been approached by Mr. Younis who had indicated that he "owned" the covenants over the subject land and suggested that the Applicant should deal with him rather than Dennis Joslin Jamaica Inc., who by then exercised powers as mortgagee over the subject land. It was the evidence of Benjamin that Mr. Younis indicated that he wished to have one of the units proposed to be constructed assigned to his son and was advised that this proposal was unacceptable. The affidavit stated that again in March 2003, just before the exercise of the option, Mr. Younis again broached the subject and enquired whether the Applicant had thought about his proposal. According to the Benjamin affidavit, Mr. Younis was advised that the purchase was in train and that the Applicant "intended to follow due process" in having the covenants amended.

87) The affidavit further stated that in July 2003 Mr. Younis was a guest at Mr. Benjamin's 50th birthday party and while the two had considerable conversations, the subject of the property and/or the proposal never came up. Mr. Younis in one of his affidavits confirms

that he was at the birthday party but said he did not think it "appropriate" to raise the issue in such a forum. What is important about this bit of evidence from the Objector is that there had been previous discussions of the topic of the planned development including the question of the Objector getting one of the houses, as averred by Benjamin. I have no doubt, and find as a fact that, well before May 2004, the objector had been aware of what was planned and had sought to be assigned one of the houses.

88) It was the further evidence of Mr. Benjamin that in or around January 2004, he received a call from Mr. Younis who advised him that he intended to sell his property to the American International School, that in order for the sale to go through, the covenants on his property at No.1 Hopefield would have to be modified and he sought an agreement to an arrangement whereby the Applicant would not object to the modifications over his property at No. 1 (so the sale could go through) and he would not object to modifications of the covenants over the Applicant's property. It was his evidence that he advised Mr. Younis that assuming this would not affect the value of Applicant's property, and there was nothing illegal, he would seek the concurrence of his partners in the Applicant. He said that Mr. Younis "indicated that he would telephone me in a few days for confirmation but that call never came". *Mr. Younis, for his part, recalls the conversation but places it in or around October 2003 and states that it was Mr. Benjamin who was to call but never did.*

89) What is clear from the above evidence is that certainly by January 2004 (according to Mr. Benjamin) or as early as October 2003 (according to Mr. Younis), it was known to Mr. Younis that the Applicant intended to do something on the property at 3 Hopefield Avenue which would have necessitated the modification of the covenants. In my view it is also inconceivable that Mr. Younis, a man of considerable business acumen and experience, could have agreed to the parties mutually agreeing to support the modifications of the respective covenants without knowing, at least in outline terms, what was being planned by the Applicant. The fact of this proposal by the Objector is beyond dispute. It is the evidence of Mr. Benjamin that he was subsequently advised by Mr. Younis that the sale to

the American International School had "fallen through" as the school had decided to purchase other premises.

90) In his affidavit, Mr. Younis complains that there was not "full disclosure" by Mr. Benjamin on behalf of the Applicant at the time he discussed the arrangement with Mr. Benjamin for each not to oppose the other's application for modification so as to allow him to sell his property to the American International School. *The "non-disclosure" was that he had not been made aware at the time of their discussions that an application already had been made to have the covenants on No. 3 Hopefield Avenue modified*, though why it is thought there is any such obligation, is unclear. In his affidavit at paragraph 10 Mr. Younis states:

> "That these discussions with Kenneth Benjamin were premised on the understanding that the Applicant (that is the applicant in the setting aside proceedings, i.e. Fabrics de Younis) would be prepared to modify the covenants to facilitate the sale, not that it would do so while remaining in occupation of No.1 Hopefield Avenue. The proposed modification would facilitate Hopefield Corner Limited and the prospective purchaser and not the Applicant".

91) It is to be observed that this seems to suggest a misunderstanding of the proprietary and not personal nature of restrictive covenants. Somehow, it seems that the fact that the then occupant would have vacated the residence, would have made the enforcement of the proprietary interest in land less important to those other persons who may have an interest in it. In any event, it is clear that the sale of No.1 fell through and this rendered nugatory the proposal for the mutual support by the parties for the modifications of the relevant covenants.

92) Submissions from counsel for the Objector seem to suggest that the proposals by him were no more than a recognition that there was an economic value attached to the benefit of the restrictive covenants of which the Objector was the beneficiary. I do not accept that this was the case. Rather, I would hold that there was an implicit agreement by the Objector that the covenants could and should be modified. The outstanding question for the Objector is what he should get for this agreement.

I find that the Applicant also succeeds on this ground and so hold.

Modification will not cause injury to beneficiaries of Restrictive Covenants

93) The final ground provided for in section 3(1)(d) allows the Court to exercise its discretion to allow for the discharge or modification of the relevant covenants where the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction. I accept the Objector's submissions that in assessing this ground, it is important for the Court to consider and evaluate the practical benefits secured by the restrictions. The Court ought not to engage in "flights of imagination" in order to test whether the original intention of the restrictions are capable of achievement in all the circumstances. The Court is not to look just at the particular development contemplated by the proposed modification but must also consider whether the thin edge of the wedge will then allow for other developments which will degrade the values of the covenants which now deter multiple subdivisions, preserve privacy and quietude and minimize the density of developments within the area.

94) In **Lolakis** (cited supra) the New South Wales Supreme Court considered what "injury" was contemplated by the equivalent section in that state's statute. (I should note that the New South Wales provision, unlike our Act, speaks of "substantial" injury). Nevertheless, I find it helpful. In that case, Campbell J said:

> The kind of injury contemplated in the section is injury to the relevant person in relation to his ownership of (or interest in) the land benefited. The injury may be of an economic kind, eg reduction in the value of the land benefit, or of a physical kind, eg subjection to noise or traffic, or of an intangible kind, eg impairment of views, intrusion upon privacy, unsightliness, or alteration to the character or ambience of the neighbourhood. These arbitrary categories, while serving to illustrate the ambit of the concept of injury for the purpose of the section, are neither mutually exclusive nor necessarily exhaustive, and what I have described as injuries of a physical or intangible kind could well also affect the value of the land in question. However it is clear that a person may be "substantially injured" within the meaning of sec 89(1)(c) notwithstanding that the value of his land would be unaffected or even increased by the proposed modification (see **Re Parimax SA Pty Ltd** (1956) SR (NSW) 130 at p 133, **Heaton v Loblay** (1960) SR (NSW) 332 at pp 335-336, **Re Cook** [1964] VicRp 106; (1964) VR

808 at p 810 and **Re Robinson** [1972] VicRp 28; (1972) VR 278 at pp 283-284).

> It is also clear, particularly in the case of injuries of what I have called an intangible kind, that the subjective tastes, preferences or beliefs of particular individuals may, within limits of reasonableness, give rise to injury in the relevant sense to those individuals (see **Re Parimax SA Pty Ltd** (1956) SR (NSW) 130 at p 133, **Heaton v Loblay** (1960) SR (NSW) 332 at p 336, **Re Chamberlain** 90 WN (Pt 1) (NSW) 585 at pp 593-594, ***Re Callanan*** (1970) 2 NSWR 127 at p 133 and **Re Robinson** [1972] VicRp 28; (1972) VR 278 at pp 283,285).

95) In the instant case before me, there has been no evidence led that the Objector is likely to suffer injury from any of the physical or intangible features listed by Campbell J. above, save the possibility of some increase in traffic. Certainly, as well, the evidence from the Breakenridge Report of changes in value of properties in the area, suggests that a modification of the covenants over the Hopefield Corner property is likely to give rise to an enhancement rather than a diminution of the values of other properties in the neighbourhood including that of the Objector.

96) I wish to make one further observation in respect of a submission by the Objector that at least one of the units (owned by Handa) had been rented out to tenants for some period and that Mr. Benjamin had not lived in his own unit. It will be recalled that in **Stannard** Smith J.A. had pointed out that merely because houses were built which would be rented to itinerant visitors, did not in and of itself, change the character of a neighbourhood from being a "residential" neighbourhood".

97) I do accept the submission by the Objector where **Preston and Newsome Restrictive Covenants** is cited to the following effect:

> It is not the Applicant's project that must be injurious but the proposed discharge or modification; i.e. the order which the Tribunal is invited to make. Cases arise in which it is very difficult for objectors to say that the particular thing which the Applicant wishes to do will of itself cause anyone any harm but in such a case harm may still come to the persons entitled to the benefit of the restrictions if it were to become generally allowable to similar things. For the harm may flow from the very existence of the order making the modification through the implication that the restriction is vulnerable to the action of the Tribunal.

98) In this regard it is to be noted that much was made in evidence of the Breakenridge Report of the high quality nature of the development at issue. Even if one accepts this and it is not difficult to do so, the question remains: "What is likely to be the effect of granting such a modification on the Objector as a beneficiary of the covenants"? The answer is that as I have found above, the "neighbourhood" consists not only of that little section of Hopefield Avenue where the Objector's home is. It consists of the entire Golden Triangle including the whole of Hopefield Avenue and streets off. The avenue is already a through road along which a high volume of traffic flows. The grant of an order for modification is not likely to cause any injury in terms of the further loss of privacy and quietude nor is it likely to cause a significant increase in density of developments in the neighbourhood. In any event, there already exists on one of the Objector's boundaries, a substantial multi family development in Musgrave Mews if one needs to point to a precedent. The modification of covenants covering No 3 Hopefield Avenue is not likely, in my view, to produce any injury to the Objector or be in any way deleterious to the quality of its enjoyment of the property. I therefore also find that the Applicant succeeds under section 3(1)(d).

99) The relevant section of the Act sets out a series of situations which, if found to exist, confer on the Court jurisdiction to discharge or modify a restrictive covenant. If jurisdiction is found, there is then a separate question about whether the Court will, in the exercise of its discretion, actually order the discharge or modification of the covenants. In circumstances where the jurisdiction to extinguish or modify the covenant has not been established, it is not necessary to consider further any question of discretion. In the instant case, no discretionary considerations were put before the Court as being a reason for not making an order and I accordingly make the order sought that the Restrictive Covenants, the subject of this application be modified in the manner sought.

100) Finally, there were brief submissions on the question of compensation. The Objector sought compensation, if the Court were minded to grant the application, of twenty four million dollars ($24,000,000.00). Objector's submissions noted that there was not a lot of authority on this area of compensation but that given the sums quoted for the Applicant for

the sale of other properties, this was not an unreasonable figure. My understanding of the provision is that where the Objector could not show that there had been a loss, there was no entitlement to compensation. I have formed the view, in light of the evidence which has been led before me, that the Objector has not suffered, nor is it likely to suffer, any damage for which compensation should be paid. In that regard in particular, I accept the evidence that in fact the value of the Objector's property is likely to be enhanced by the total development at 3 Hopefield Avenue which has given rise to a new boundary wall between number 1 and number 3 Hopefield and substantially improved drainage on the avenue in the vicinity of the Objector's back gate, both of which I accept as proven by the evidence.

101) In light of the foregoing, I award judgment for the Applicant on the application with costs to be taxed if not agreed. I invite the Applicant's counsel to submit an appropriate draft Order for my signature.

102) I wish to compliment both sets of counsel for the industry and scholarship which have evidently been put into their research and submissions. I trust that the judgment does justice to that scholarship and industry.

ROY K. ANDERSON

PUISNE JUDGE

JUNE 15, 2011