[2022] JMSC Civ 163

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. SU 2021 CV 02781

BETWEEN	**WINSTON HUDSON**	**CLAIMANT**
AND	**MICHAEL FAGAN**	**1ST DEFENDANT**
AND	**YVONNE FAGAN**	**2ND DEFENDANT**

IN CHAMBERS

Mr Lemar Neale instructed by Messrs. NEA | LEX for the Applicants/1st and 2nd Defendants

Mr Lorenzo J. Eccleston instructed by Temple Law for the Respondent/Claimant

Heard: June 2 and September 30, 2022

Injunction – Threshold test – Whether serious issue to be tried – Whether the balance of convenience lies in favour of the grant of injunctive relief – Whether damages are an adequate remedy

Restrictive covenant – Breach of restrictive covenant – Whether the restrictive covenant creates an inviolable right – Whether the restrictive covenant creates an absolute right for all time – Defence – Whether delay or acquiescence

Remedies – Whether grant of injunctive relief – Whether award of damages – The Judicature (Supreme Court) Act, section 49(h), The Restrictive Covenants (Discharge and Modification) Act, sections 3 and 4, The Town and Country

Planning Act, section 22(3), Civil Procedure Rules, 2002, rules 17.1(1)(a) and 17.4

A. NEMBHARD J

INTRODUCTION

[1] By way of a Notice of Application for Court Orders, which was filed on 1 September 2001, the Applicants/1st and 2nd Defendants, Michael Fagan and Yvonne Fagan, respectively, seek the following Orders: -

1. An interim injunction restraining the Claimant, whether by himself, his servants and/or agents or otherwise howsoever from operating or continuing to operate a garage on the property in breach of zoning laws and the restrictive covenant numbered 6 endorsed on the Duplicate Certificate of Title registered at Volume 1113 Folio 177 of the Register Book of Titles;

2. An interim order that the Claimant shall forthwith remove all vehicles connected to the business of a garage from the premises;

3. Costs of this Application to be costs in the Claim;

4. Such further and other relief as this Honourable Court deems just.

[2] The Application for the Interim Injunction is supported by the Affidavit of Yvonne Fagan in Support of Notice of Application for Court Orders, which was filed on 1 September 2021.

[3] The Application for the Interim Injunction is made against the background that the Applicants/1st and 2nd Defendants are the registered proprietors of property situate at 37 East Road, Boucher Park, Kingston 10, in the parish of St. Andrew, being the land comprised in Certificate of Title registered at Volume 1113 Folio 177 of the Register Book of Titles ("the subject property").

[4] The Applicants/1st and 2nd Defendants contend that they purchased the subject property, for their own use and benefit and that they permitted the Respondent/Claimant to occupy the said property.

[5] Conversely, the Respondent/Claimant asserts that he has an equitable interest in the subject property by way of the doctrines of proprietary estoppel and constructive trust. He also asserts that he has a life interest in the subject property.

[6] The Applicants/1st and 2nd Defendants deny the Respondent/Claimant's assertion and assert that the latter is a licensee whose licence has been determined by virtue of their having served on him a Notice to Quit.

[7] The parties accept that the subject property is being used by the Respondent/Claimant to operate a garage, contrary to a restrictive covenant which is endorsed on the Certificate of Title to the subject property as well as applicable zoning laws.

[8] The Applicants/1st and 2nd Defendants contend that the Respondent/Claimant's use of the subject property will subject them to criminal prosecution and/or civil liability, as the registered owners of the subject property. They also contend that the Respondent/Claimant's use of the subject property may result in nuisance to the adjoining neighbours.

[9] The Respondent/Claimant's failure to comply with the Notice of Quit, resulted in the Applicants/1st and 2nd Defendants commencing proceedings for recovery of possession in the Parish Court. Prior to the commencement of the trial, the Respondent/Claimant commenced the instant Claim. The Applicants/1st and 2nd Defendants filed a Defence and Counter Claim for Recovery of Possession, Injunctive Relief and mandatory Orders.

[10] It is the Counter Claim that grounds this Application for an Interim Injunction.

THE ISSUES

[11] The Application for the Interlocutory injunctive relief raises the following issues for the Court's determination: -

(i) Whether there is a serious issue to be tried (a real prospect of succeeding on the claim);

(ii) Whether the restrictive covenant creates an inviolable right or an absolute right for all time;

(iii) Whether the balance of convenience lies in granting or refusing the interlocutory relief sought; and

(iv) Whether damages are an adequate remedy.

THE LAW

The court's power to grant an interim injunction

[12] Section 49(h) of the Judicature (Supreme Court) Act empowers the court to grant an injunction. The section reads as follows: -

> "*(h) A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court, in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court thinks just, and if an injunction is asked either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Court thinks fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable."*

[13] Rules 17.1(1)(a) and 17.4 of the Civil Procedure Rules, 2002 ("the CPR"), also empower the court to grant interim injunctive relief. These rules, in so far as they are relevant, provide as follows: -

> *"17.1*
>
> *(1) The court may grant interim remedies including –*

(a) an interim injunction;

(b) …

17.4

(4) The court may grant an interim order for a period of not more than 28 days (Unless any of these Rules permit a longer period) –."

The purpose of the grant of an interim injunction

[14] The purpose of an interlocutory injunction is to preserve the status quo but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else but such restrictions on the defendant's freedom will have consequences, for him as well as for others, which a court has to take into consideration.

[15] The grant of such an injunction serves the added purpose of improving the chances of the court's being able to do justice after a determination of the merits at trial. At the interlocutory stage, the court is required to assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in **American Cyanamid Co v Ethicon Ltd**,[1] that means that if damages will be an adequate remedy for the claimant, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction.

[16] Likewise, if there is a serious issue to be tried and the claimant could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

The threshold test for the grant of an Injunction

[17] Before granting any application for an interim injunction the court must first determine: -

[1] [1975] AC 396

(i) Whether there is a serious issue to be tried (a real prospect of succeeding on the claim);

(i) Whether the balance of convenience lies in granting or refusing the interlocutory relief sought; and

(ii) Whether damages are an adequate remedy.

Whether there is a serious issue to be tried

[18] The law set out by Slade J in **Re Lord Cable (deceased) Garratt and others v Walters and others**[2], at page 431, is respectfully accepted as being correct:

> *"…Nevertheless, in my judgment it is still necessary for any plaintiff who is seeking interlocutory relief to adduce sufficiently precise factual evidence to satisfy the court that he has a real prospect of succeeding in his claim for a permanent injunction at trial. If the facts adduced by him in support of his motion do not by themselves suffice to satisfy the court as to this, he cannot in my judgment expect it to assist him by inventing hypotheses of fact on which he might have a real prospect of success…"*

[19] That reasoning was accepted by the Court of Appeal in **Reliance Group of Companies Limited v Ken's Sales and Marketing and another; Christopher Graham v Ken's Sales and Marketing and another**[3], and is consistent with that of Lord Diplock in his seminal judgment in **American Cyanamid Co v Ethicon Ltd**[4], where he stated, in part at page 408, that a prerequisite for considering the grant of an interlocutory injunction is that the applicant for the injunction should show that he has a real prospect of succeeding in obtaining a permanent injunction at trial: -

> *"…So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a*

[2] [1976] 3 All ER 417

[3] [2011] JMCA Civ 12

[4] [1975] AC 396

permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief sought…"

[20] In **Brian Morgan (Executor of the Estate of Rose I Barrett) v Kirk Holgate**[5], the Court of Appeal held that, based on the evidence produced before the learned judge at first instance, the learned judge erred in principle in granting the injunction. The failure to establish that there is a real question to be tried means that Mr Holgate should be denied an injunction. The failure to establish a real question to be tried also obviates the need to discuss the issues of whether damages would be an adequate remedy and the balance of convenience.

[21] In **American Cyanamid Co v Ethicon Ltd** (supra), the court developed a set of guidelines to establish whether an applicant's case merited the granting of an interlocutory injunction. The main guidelines are: -

(i) Whether there is a serious question to be tried;

(ii) What would be balance of convenience of each party should the order be granted, in other words, where does that balance lie?

(iii) Whether there are any special factors; and what Lord Diplock referred to as the governing principle;

(iv) Whether an award of damages would be an adequate remedy.

[22] The basis for which was explained by Lord Diplock as follows: -

"…the governing principle is that the court should first consider whether, if the plaintiff were to succeed at trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. ***If***

[5] [2022] JMCA Civ 5

> ***damages in the measure recoverable would be an adequate remedy*** *and the defendant would be in a financial position to pay them,* ***no interim injunction should normally be granted****, however strong the plaintiff's case appeared to be at that stage."* ***[Emphasis added]***

Whether damages are an adequate remedy

The term 'adequate remedy' considered

[23] The term "adequate remedy" has recently been considered by the High Court in **AB v CD (Rev 2)**.[6] In this case, the claimant applied under section 44 of the Arbitration Act 1996 for an injunction to restrain the defendant from terminating a Licensing Agreement ("LA") between the parties pending the resolution of an arbitration. Among other submissions, counsel for the claimant referred to an exclusion clause in the LA which provided, in so far as is material: -

> *"…in no event will either Party be liable to the other Party or to any third party for…lost profits…or any…indirect, special, consequential or incidental damages, under any cause of action and whether or not such Party or its agents have been advised of the possibility of such damage. …either Party's total disability in contract, tort, negligence or otherwise arising out of or in connection with the performance of the observance of its obligations, or otherwise, in respect of this Agreement shall be limited to a sum equal to the total amount RevShare entitlement of that Party during the previous six (6) calendar months prior to the calendar month in which such damages accrued. This limitation will apply notwithstanding any failure of essential purpose of any limited remedy provided herein."*

[24] Against that background, Stuart-Smith J considered, when considering the "adequacy" of the damages available to the claimant in the event that an injunction is not granted, what regard should be had to the contractual limitations imposed on the damages a party would likely recover under the relevant underlying agreement.

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[6] [2014] EWHC 1 (QB)

[25] The learned judge helpfully referred to the previous authorities which seemingly adopted different approaches before drawing a distinction among them, namely by reference to establishing the commercial intentions of the parties when they entered into the underlying contractual arrangement.

> *"…In each case there was a package of contractual rights and obligations freely negotiated between substantial commercial concerns. The distinction between the two cases is that in Bath the contractual agreement and intention was that the Council's losses should be fully compensated, while in Ericcson the contractual agreement and intention was that the relevant heads of damages should not be compensable…"*

[26] Accordingly, the Judge found that the commercial expectations of the parties were set by the package of rights and obligations in the LA. These included a clause that restricted the damages recoverable. The potential effects of the clause did not lead to a conclusion that damages were not an adequate remedy and accordingly, the application was refused.

The defence of delay and acquiescence

[27] The Halsbury's Laws of England, Volume 24 (2004), at paragraph 843, states the following: -

> "*An injunction may be refused on the ground of the plaintiff's acquiescence in the defendant's infringement of his right. The principles on which the court will refuse interlocutory or final relief on this ground are the same, but a stronger case is required to support a refusal to grant final relief at the hearing. The fact that a person did not interfere to prevent a small and limited breach does not preclude him for all time in respect of a wider and more important breach. If a person stands by and knowingly, but passively, encourages another to expend money under an erroneous belief as to his rights, and then comes to the court for relief by way of a perpetual injunction, it will be refused and he will be left to his remedy, if any, in damages.*

[28] It is further stated that: -

> "*Acquiescence will be taken into account in considering whether an injunction or damages should be granted, and an amount of acquiescence, not sufficient to bar the action, may be sufficient to induce the court to give damages instead of an injunction. A plaintiff may preclude himself by his acquiescence from recovering more than nominal damages.*
>
> *A person may so encourage that which he afterwards complains of as a nuisance as not only to preclude himself from complaining of it, but to give the adverse party a right to protection in the event of complaint."*

[29] In respect of delay, it is stated at paragraph 844 that: -

> "*Although delay in applying to the court excites the court's diligence to ascertain whether the plaintiff has stood by and voluntarily allowed his right to be infringed, it is not sufficient to deprive the plaintiff of his right if it can be satisfactorily explained and the right is not statute barred. The court will not lightly act so as to deprive a plaintiff of an established right. There must be fraud or such acquiescence as, in the court's view, would make it a fraud afterwards to insist on the right, but long abstention from the assertion of his right, coupled with an alteration of the condition of other parties, may render it unconscientious on the plaintiff's part to enforce it."*

[30] Specifically, in relation to restrictive covenants, paragraph 910 of Halsbury's Volume 24 (2004) states: -

> "*The burden and benefit of covenants which are entered into between lessor and a lessee and which touch or concern the land run with the reversion and the term at law. In the case of a covenant relating to land entered into between persons other than a lessor and lessee, such as a vendor and a purchaser, the benefit, but not the burden, may run with the land at law, but if the covenant is negative in substance the burden as well as the benefit will pass in equity, provided certain conditions are fulfilled, so as to render the covenant enforceable by persons other than the original covenantee against the*

> *covenantor's successors in title. Apart from statute, conditions cannot generally be imposed in a contract for the sale of goods so as to bind persons who may purchase the goods from the original buyer and be enforceable against them by the original seller.*

[31] In **Gafford v Graham and another**,[7] by a conveyance dated 22 December 1976 Mr and Mrs C sold some twelve (12) acres of their property to M. M covenanted not to use the property other than as a livery yard, stabling and one bungalow and not build on the land until plans had been submitted and approved in writing by the vendor. In 1978 Mr and Mrs C conveyed some two (2) acres of the land they retained to the plaintiff. The conveyance included an express assignment of the benefit of the restrictive covenant with M. In 1980 Mr and Mrs C conveyed the remainder of the retained land to the first defendant. By 1983, the defendant had also acquired the twelve (12) acres of land burdened by restrictive covenants by reason, inter alia, of (1) in 1986 the bungalow had been converted into a two-storey building and a barn had been enlarged without the submission and approval of plans; (2) in 1989 an indoor riding school had been constructed without the submission and approval of plans; and (3) the business of a riding school was being carried on. The defendants maintained that if there had been any breaches, there had been delay and acquiescence by the plaintiff. The judge found that there had been breaches of the restrictive covenant and granted an injunction requiring the first defendant to cease operating the riding school business; awarded £250 as damages for the first defendant's breach in failing to submit plans for the riding school for approval; awarded £750 damages in respect of the barn and £20,000 for the conversion of the bungalow. The defendant appealed contending that no injunctions should have been granted and only minimal damages should have been awarded. The plaintiff cross-appealed maintaining that an injunction should be granted requiring the riding school to be demolished.

[32] The appeal was allowed and the cross-appeal was dismissed. The Court of Appeal held that although the express assignment of the restrictive covenant

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[7] [1999] 3 EGLR 75

gave the plaintiff the legal right as against M, the plaintiff had only an equitable right to enforce the covenant against M's successors in title. In any event, it was now doubtful whether a distinction ought any longer to be made between a legal and equitable right when considering a defence of acquiescence. In considering whether injunctive relief should be granted for breaches of a restrictive covenant, the proper enquiry was whether, in all the circumstances, it would be unconscionable for the plaintiff to continue to seek to enforce the rights. Between 1986 and 1989, the plaintiff knew he had rights but failed to pursue them in respect of the works to the bungalow and the barn; there was acquiescence and this barred all relief; including damages. There was no breach of user restriction up to 1989. In respect of the construction of the riding school and the current riding school use, there was no question of acquiescence being an entire bar to relief, However, the plaintiff's failure to apply for interlocutory relief was an important factor. A person who, with the knowledge that he has clearly enforceable rights and the ability to enforce them, stands by while a permanent and substantial structure is unlawfully erected, ought not to be granted an injunction to have it pulled down.

[33] It may be stated as a good working rule that –

(1) If the injury to the plaintiff's legal right is small;

(2) And is one which is capable of being estimated in money;

(3) And is one which can be adequately compensated by a small money payment;

(4) And the case is one in which it would be oppressive to the defendant to grant an injunction: -

then damages in substitution for an injunction may be given.

[34] In **Jaggard v Sawyer and Another**,[8] in 1980, the plaintiff and her husband bought a house built as part of a residential development of ten houses served by a private road which was a cul de sac. Each plot, together with the

[8] [1995] 1 W.L.R. 269

area of roadway immediately in front of the plot up to the centre of the roadway, had been conveyed subject to covenants binding on successive owners not to use any part of the unbuilt land other than as a private garden and to keep the relevant portion of roadway in good repair. In 1987, the defendants bought a house at the opposite end of the cul de sac from the plaintiff's property. In 1988 they obtained planning permission to build a dwelling house on the plot and, in the belief that the cul de sac was a public road, they proposed that access should be provided by means of a driveway to be constructed over part of the garden of their existing property and by use of the cul de sac. The plaintiff threatened to bring proceedings for an injunction to restrain such user as constituting a breach of covenant and a trespass over her potion of the roadway. No such application was made and on 14 June 1989, the defendants began building work on the plot. On 10 August 1989, when the building was at an advanced stage, the plaintiff began proceedings for an injunction. Thereafter, the house was completed and occupied by the defendants for a short time before being let. At trial it was common ground that the cul de sac was a private roadway and, together with the driveway, the only means of access to the plot. The judge found that the defendants' proposed user of the land would involve a continuing trespass and breach of covenant; that they had not acted in blatant and calculated disregard of the plaintiff's rights; that they had known of but failed to appreciate the effect of the covenant and that the plaintiff had failed to seek interlocutory injunctive relief. He concluded that in all the circumstances it would be oppressive to the defendants to grant the injunction sought and that the plaintiff should be awarded damages in lieu under section 50 of the Supreme Court Act 1981 in the sum of £694.44, such sum being her one ninth share of the total sum of £6,250 which he valued as the price the defendants might reasonably have been required to pay the residents of the cul de sac for release from the covenant and for a right of way.

[35] On the plaintiff's appeal, it was held, dismissing the appeal, (1) that, since the proposed use of the cul de sac would cause only a minimal increase in the traffic and the costs of roadway maintenance and since the driveway neither impaired the visual amenity of the plaintiff's house nor affected its value, the

judge had rightly regarded the injury to the plaintiff as small, its value as capable of being estimated in money and of being adequately compensated by a small money payment; that, having regard to the defendants' conduct and to the plaintiff's failure to seek interlocutory injunctive relief at an early stage and since restrictive covenants were not to be regarded as absolute or perpetually inviolable, the judge had been entitled to conclude on the material before him at trial that the grant of an injunction would be oppressive and to award the plaintiff damages in lieu.

The discharge and modification of restrictive covenants

[36] Section 3 of The Restrictive Covenants (Discharge and Modification) Act outlines the power of the court to discharge or modify restrictive covenants that bind land. The section reads as follows: -

"3. – (1) 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 consequence 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 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 impeded 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 entitle to the benefit of the restriction whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by

implication, by their acts or omissions, to the same being discharged or modified; or

(d) That the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction:

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."

The affidavit evidence

The factual matrix

[37] The affidavit evidence discloses that the Applicants/1st and 2nd Defendants purchased the subject property for their own use and benefit. They hold interest in the subject property as joint tenants.[9] The Applicants/1st and 2nd Defendants accept that they put the Respondent/Claimant in possession of the subject property, as a licensee, for the reason that they currently live overseas.[10]

[38] Subsequent to the Respondent/Claimant's occupation of the subject property, a dispute developed between Messrs. Fagan and Hudson, over the latter's use of the subject property as an automobile repair garage.

The Restrictive Covenant

[39] The subject property is encumbered by a total of nine (9) restrictive covenants endorsed on the Duplicate Certificate of Title. For present purposes, it is the restrictive covenant numbered six (6) that is relevant.

[40] Restrictive covenant number 6 reads as follows: -

[9] See – Affidavit of Yvonne Fagan in Support of Notice of Application for Court Orders, which was sworn to on August 2021 and filed on 1 September 2021, at paragraph 3 and exhibit **"YF-1"** which contains the Duplicate Certificate of Title registered at Volume 1113 Folio 177 of the Register Book of Titles

[10] See – Affidavit of Yvonne Fagan in Support of Notice of Application for Court Orders, which was sworn to on August 2021 and filed on 1 September 2021, at paragraph 4

> *"6. No shop, church, meeting house, school, trade or business shall be carried on on the said land or any part thereof but the said land shall be used for private residential purposes only."*

The varying contentions of the parties

The Applicants/1st and 2nd Defendants' position

[41] The Applicants/1st and 2nd Defendants contend that the area where the subject property is located is zoned as a residential area. They contend further that Mr Hudson's usage of the subject property as a garage constitutes a breach of the restrictive covenant numbered 6, as endorsed on the Duplicate Certificate of Title and the applicable zoning laws. The Applicants/1st and 2nd Defendants maintain that the land is encumbered by the restrictive covenant and ought to be adhered to, as breaches of the restrictive covenants that run with the land, leave them exposed to criminal prosecution and/or civil liability and could amount to a nuisance to the adjoining land owners.

[42] The Applicants/1st and 2nd Defendants contend that damages would not be an adequate remedy. They argue that damages would be an adequate remedy for Mr Hudson, as, any loss which he would suffer would be loss of income, which is quantifiable or measurable in damages.

The Respondent/Claimant's position

[43] The Respondent/Claimant asserts that he has been living at the subject property with his common law wife, adult son and infant daughter, since in or around the year 2002.[11] At that time, he began operating a small automobile repair shop where he carried out work on motor vehicles. He contends that in or around 2008, he entered into an agreement to purchase the subject property from the previous owner. Due to lack of funds at that time, he was unable to complete the sale.

[11] See – Paragraph 13 of the Affidavit of Winston Hudson in Opposition to Notice of Application for Court Orders, which was filed on 21 January 2022

[44] The Respondent/Claimant avers that, in or around 2011 or 2012, he approached the Applicant/1st Defendant, Mr Michael Fagan, for financial assistance, in order to purchase the subject property. In answer to this request, Mr Fagan indicated that he could not loan the Respondent/Claimant the money with which to purchase the subject property but would purchase the subject property himself. This, the Respondent/Claimant avers, was done to enable him to have somewhere to live and work.

[45] Additionally, the subject property would serve as the residence of the Applicants/1st and 2nd Defendants, on their visits to Jamaica.

[46] The Applicants/1st and 2nd Defendants purchased the subject property, which they hold as joint tenants and put the Respondent/Claimant in possession of same.

[47] The Respondent/Claimant asserts that, in reliance on the promises made to him by the Applicant/1st Defendant, Mr Michael Fagan, he carried out significant renovations, alterations and repairs to and did considerable maintenance work at, the subject property. This, at a total value of in excess of Three Million Dollars ($3,000,000.00), inclusive of material supplies and manual labour. These extensive renovations, refurbishment and repairs were done with the encouragement and agreement of the Applicants/1st and 2nd Defendants.[12] [13] The Respondent/Claimant maintains that the value of the subject property has significantly increased, to the benefit of the Applicants/1st and 2nd Defendants.

[48] The Respondent/Claimant's main contention is that the character of the neighbourhood has changed significantly over the years. He asserts that the neighbourhood was solely residential but now has become a mixture of

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[12] See – Paragraphs 5 and 6 of the Affidavit of Winston Hudson in Opposition to Notice of Application for Court Orders filed on September 1, 2021, which was filed on 21 January 2022

[13] In paragraph 8 of his Affidavit in Opposition to the Notice of Application for Court Orders filed on September 1, 2021, which was filed on 21 January 2022, Mr Hudson contends that up to or in about 2018, Mr Fagan and Mrs Fagan visited Jamaica and stayed at the subject property at least once per year. Neither Mr Fagan nor Mrs Fagan once objected to the works that he carried out. He further contends that Mr Fagan was so happy with what he was doing that he gave him money to purchase paint to paint the house and to purchase plumbing fixtures.

residential and commercial properties. In an effort to reflect the changed character of the neighbourhood and to ground his Claim, the Respondent/Claimant has identified fourteen (14) commercial entities, which are currently being operated in the neighbourhood.[14] It is for this reason that the Respondent/Claimant contends that there is an overwhelming existence of commercial activity in the area.

[49] Additionally, the Respondent/Claimant maintains that the Applicants/1st and 2nd Defendants would have become aware of the fact of the operation of the automobile repair garage from the subject property premises, since in or about 2007, on an occasion when they visited the subject property.

[50] In the result, the Respondent/Claimant maintains that the Applicants/1st and 2nd Defendants knew of the fact of his operation of a garage from the subject property and that they encouraged him in the continuation of that activity, or, at the very least, acquiesced to same.

[51] The Respondent/Claimant asserts that the Application for Interlocutory Injunctive relief is oppressive, unconscionable, unreasonable and unjust.

[52] The Respondent/Claimant further asserts that a grant of the injunctive relief, as sought, would cause him substantial harm, severe hardship and would prejudice himself and his immediate family, for the reason that the garage is his livelihood.

[53] Finally, the Respondent/Claimant contends that the Applicants/1st and 2nd Defendants have not come to this court with clean hands.[15]

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[14] See – Paragraph 14 of the Affidavit of Winston Hudson in Opposition to Notice of Application for Court Orders filed on September 1, 2021, which was filed on 21 January 2022

[15] See – Paragraphs 34 and 35 of the Affidavit of Winston Hudson in Opposition to Notice of Application for Court Orders filed on September 1, 2021, which was filed on 21 January 2022. Mr Hudson alleges that in or around June and July 2021, Mr and Mrs Fagan had changed the lock to the front gate of the subject property, forcing him to have to use a side entrance. Further, he alleges that a representative of the Jamaica Public Service Company informed him that Mr and Mrs Fagan caused electricity at the subject property to be disconnected for a period of about two (2) weeks.

RESOLUTION

[54] There is no dispute in the present instance, that the parties are related to each other. The two men share a fraternal relationship and the Applicant/2nd Defendant is the sister-in-law of the Respondent/Claimant.

[55] It is clear on the evidence that the Respondent/Claimant's occupation and usage of the subject property commenced with the knowledge and later the permission of the Applicants/1st and 2nd Defendants.

[56] It is equally clear on the evidence that the Respondent/Claimant's usage of the subject property, for the purpose of the operation of an automobile repair garage, is the sole means by which he earns his livelihood.

[57] Nor is there any dispute among the parties that the Respondent/Claimant's operation of the said garage on the subject property is in breach of the restrictive covenant numbered 6, as endorsed on the Duplicate Certificate of Title.

[58] The parties do not deny that there has been no application(s) for the restrictive covenant numbered 6, to be modified or discharged, in accordance with section 3(1) of The Restrictive Covenants (Discharge and Modification) Act.

[59] The Court recognizes that any breach of a restrictive covenant is a serious matter. Restrictive covenants operate to bind and confer benefits on registered owners of land and their successors in title. The nature and extent of the restriction imposed by the restrictive covenant is to preserve the character of the property or of the neighbourhood.

[60] That notwithstanding, a restrictive covenant is not an inviolable right and should not be regarded as an absolute right for all time. The Court is strengthened in this position by the legislative framework, created by The Restrictive Covenants (Discharge and Modification) Act and The Town and Country Planning Act. Further, the Court finds that the pronouncements made

in the authorities of **Jaggard**[16] and **Gafford**[17] are equally applicable in the present instance.

[61] Section 3 of The Restrictive Covenants (Discharge and Modification) Act empowers a Judge in Chamber, by order wholly or partially to discharge or modify any restrictive covenant on being satisfied: -

(a) that the restriction ought to be deemed obsolete by reason of changes in the character of the property or the neighbourhood or any other circumstance which the Judge may think material;

(b) that the continued existence of such restriction or the continued existence of such restriction without modification, would impede the reasonable user of the land for public or private purposes;

(c) that the persons of full age and capacity who are entitled to the benefit of the restriction, have agreed, either expressly or by implication, by their acts or omissions, to the restriction being discharged or modified;

(d) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.[18]

[62] The legislation directs that, before making any order, the Judge shall make enquiries of the Town and Country Planning Authority and any local authority and that notices, whether by advertisement or otherwise, are to be given to the Town and Country Planning Authority as well as any person(s) who appear entitled to the benefit of the restriction which is sought to be discharged, modified or dealt with.[19]

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[16] supra

[17] supra

[18] See – Section 3(1)(a),(b),(c) and (d) of The Restrictive Covenants (Discharge and Modification) Act

[19] See – Section 3(2) of The Restrictive Covenants (Discharge and Modification) Act

[63] The legislation also makes it clear that any order which is made pursuant to section 3(1), is binding on all persons.

[64] Section 4 of The Restrictive Covenants (Discharge and Modification) Act provides as follows: -

> *"Where any proceedings by action or otherwise are taken to enforce a restrictive covenant, any person against whom the proceedings are taken may in such proceedings apply to the court for an order giving leave to apply to a Judge in Chambers under section 3, and staying the proceedings in the meantime."*

[65] Additionally, part V of The Town and Country Planning Act allows for the discharge or revocation of permission to develop land where that permission relates to a change of the use of any land, at any time before the change has taken place.[20]

[66] The unchallenged evidence before the Court is that the Respondent/Claimant began to operate the garage at the subject property from in or around 2002, which pre-dated the Applicants/1st and 2nd Defendants' acquisition of the subject property.

[67] There is equally no dispute among the parties that the Applicants/1st and 2nd Defendants would have become aware of the existence of the garage at the subject property, since in or around 2007, on a visit to the subject property while they were in Jamaica. This pre-dated the completion of the sale and transfer of the subject property to them, as registered owners.

[68] It is not readily apparent from the evidence of the Applicants/1st and 2nd Defendants, when it is that they communicated a concern about the Respondent/Claimant's usage of the subject property to operate a garage. There is no evidence before the Court to indicate that the Applicants/1st and 2nd Defendants spoke to the Respondent/Claimant in relation to his usage of the subject property as a garage, whether before the completion of the sale of the subject property, or, on any of their visits to Jamaica.

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[20] See – Section 22(3) of The Town and Country Planning Act

[69] In the circumstances, the Court accepts that the Applicants/1st and 2nd Defendants knew of the Respondent/Claimant's usage of the subject property for the purposes of the operation of an automobile repair garage; that the Applicants/1st and 2nd Defendants permitted the Respondent/Claimant to use the subject property for that purpose and that they have done so for approximately twenty (20) years; and that the Applicants/1st and 2nd Defendants acquiesced in the Respondent/Claimant's decision to operate a garage on the subject property.

[70] The Court finds on a preponderance of the evidence, that, even if the Applicants/1st and 2nd Defendants had expressly communicated to the Respondent/Claimant that he no longer had their permission to utilize the subject property as a garage, there is a significant delay from the time of the commencement of the breach of the restrictive covenant numbered 6 and the time of the service of the Notice to Quit and the initiation of the Claim.

[71] Additionally, the Court also has regard to the unchallenged evidence that the character of the neighbourhood has changed from that of being predominately residential in nature, to now reflecting a mixture of both residential and commercial properties, so as to render the restrictive covenant numbered 6 obsolete.

[72] Finally, the Court has regard to the Respondent/Claimant's evidence that the operation of the garage is presently his sole source of income. In these circumstances, the Court finds that the grant of the Interlocutory injunctive relief, as sought, would be oppressive, unjust and unfair.

[73] Accordingly, the Court declines to grant the injunctive relief sought.

[74] The Court also declines to make an award of damages in lieu of the interim injunctive relief sought.

DISPOSITION

[75] It is hereby ordered as follows: -

(1) The Court declines to grant the relief sought by way of the Notice of Application for Court Orders, which was filed on 1 September 2021;

(2) The Court also declines to grant damages in lieu of the interim injunctive relief sought;

(3) The Costs of the Notice of Application for Court Orders, which was filed on 1 September 2021, are awarded to the Respondent/Claimant against the Applicants/1st and 2nd Defendants and are to be taxed if not sooner agreed;

(4) Messrs. NEA | LEX are to prepare, file and serve these Orders.