JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 51/83

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.(AG.)

BETWEEN: LORRAINE MARIE ISSA - APPELLANT

AND JOHN DAVID STANNARD
CYNTHIA ANN STANNARD
DANIEL GLOVEN - RESPONDENTS
HURSTONE ST. CLAIR WHITEHORNE
MICHAEL E. N. COSTA

Dr. Lloyd Barnett and Mr. Jerome Lee for Appellant.

Mr. Michael Hylton and Miss Barbara Alexander for Respondents.

October 10, 11, 12, 13, and 20, 21, 1983;

April 12, and July 6, 1984

KERR, J.A.:

This is an appeal from a decision of Theobalds, J. whereby he refused the appellant's application for modification of certain restrictive covenants with costs to the objectors.

The application was in respect of two lots of land part of a small subdivision of eleven lots. The northern boundary of this subdivision, forming a rough arc, is on the sea, while the southern boundary in more or less a straight line is on the main road from Tower Isle to Ocho Rios. Nine of these lots have their northern boundary on the sea and for distinction and easy reference have been numbered from East to West 1 - 9. Lots 10 and 11 are carved out of the middle by a semi-circular road with both ends on the main road. Lots 2 - 7 on their southern boundary open on to or are wholly or partly bounded by this road. The appellant is the owner and original purchaser under the subdivision of lots 2 and 3. Lots 1 to 8 are subject to the restrictive covenants of which modifications were sought, lot 9 retained by the

vendor, Harold Mitchell, is free from such restraints, while lots 10 and 11 are specifically designated and reserved for commercial use. The owner of lot 1 has consented to the modifications.

The objectors are interested and concerned with the following lots as under:

John and Cynthia Stannard	Lot 4
Daniel Gloven	Lot 5
Hurlstone St. Clair Whitehorn) and) Michael E. Costa, as) administrators Estate Marion) Simmons deceased)	Lot 6

The covenants running with lots 1 - 8 read:

"1. The said land shall not be sub-divided.

2. No building shall be erected on the said land other than a building which with appropriate outbuildings shall cost not less than Two Thousand Pounds to erect.

3. No trade or business shall be carried on and no commercial signs shall be erected on the said land nor shall the said land be used for any commercial purposes Provided However that for the avoidance of doubt it is hereby declared that the conduct on the said land of the profession of a medical practitioner or surgeon and of the erection of any usual sign or name plate in connection with the conduct of such profession shall not be deemed to be in breach of this covenant."

The modifications sought would result in the following amended form:

"1. That the said land shall not be sub-divided SAVE THAT the erection of apartment buildings under the Registration (Strata Titles) Act or otherwise with appropriate outbuildings shall not be deemed a breach of this covenant.

2. No building shall be erected on the said land other than buildings which with appropriate outbuildings shall cost not less than Two Thousand Pounds to erect.

3. No trade or business shall be carried on and no commercial signs shall be erected on the said land nor shall the said land be used for any commercial purposes Provided However that for the avoidance of doubt it is hereby declared that the conduct on the said land of the profession of a medical practitioner or surgeon and of the

"erection of any usual sign or name plate in connection with the conduct of such profession and the use of the said land or any buildings thereon for the purposes necessary and incidental to the management and operation of any apartment building shall not be deemed to be in breach of this covenant."

The modifications sought were to enable the following proposed development as protrayed by the exhibited plan:-

Six (6) blocks of three storey buildings containing -

1 - One Bedroom Apartment

18 - Two Bedroom Apartments

17 - Three Bedroom Apartments

4 - Three Bedroom Apartments

and other amenities including two swimming pools to be located at a distance of no closer than 50 feet to the existing boundaries of the said two parcels of land and the proposed development will be surrounded by a concrete block fence 6 to 8 feet high save and except along the beach front.

The main entrance to the proposed development will be located a short distance from the junction of the main road and the parochial road and traffic to the proposed development will not pass by the adjoining lots in the subdivision.

(The proposed development will be used solely for residential purpose).

In support of her application, the appellant tendered the following amongst other affidavits:

1. Robert Cartade, Managing Director of Selective Homes and Properties Ltd., the proposed developers, exhibiting letter from the Secretary of the St. Mary Parish Council dated the 23rd of March, 1982, advising of the approval of the proposed development by the Planning and Economic Committee.

2. Roy Stephenson, Architect - to the effect

   (i) that the lots are located in an area catering to the Tourist Industry and as illustrated:

      (a) that on the opposite side of the main road a few yards to the west an apartment complex is under construction.

      (b) that half mile to the east is the Couples Hotel.

(ii) that the development will be located a short distance from the junction of the main road and the same circular parochial road and that traffic to and from the development need not pass the adjoining lots.

(iii) that the proposed development was suitable for the general neighbourhood and will not detract from the values of the neighbouring area or affect the privacy of adjoining owners.

The application was made pursuant to the provisions of the Restrictive Covenants (Discharge and Modification) Act - hereinafter referred to as "The act" and on the following grounds under Section 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).....
>
> (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) .....
>
> (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 of 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 grounds of objection may be summarised thus:

(1) That the modifications sought would allow an apartment building of a quantity and size which would conflict with the general nature and character of the neighbourhood.

(2) That the modifications may significantly or adversely affect the enjoyment of certain

"amenities and reduce the value of the objectors' property. Such amenities would include peace, privacy, prospect and the preservation of single family one storey cottage or bungalow.

(3) It would introduce commercialism.

(4) The applicant had not shown that the statutory grounds existed for the grant of the modification.

(5) The modification if granted would be "the thin edge of the wedge" which would eventually destroy the character of the neighbourhood.

The learned trial judge in addition to the affidavits filed visited the locus in quo. He held that the appellant had failed to satisfy the requirements of Section 3 (1) (b) and (d) of the Act.

En route to his decision he categorised as trivial and of no real significance the objections as to loss or depreciation of such amenities as light and view.

Confining himself to lots 1 - 8 he found that the subidivision was and is entirely residential in character being "a quiet seaside single family resort area with seven of the eight lots having one cottage on each lot (lot 8 being empty)" In coming to his decision the learned judge was clearly influenced by the Fortlands case (1969) 15 W. I. R. 312 and in fact made a comparative analysis of the facts in that case with those in the instant case and held that the grounds for refusal in the instant case were stronger.

Dr. Barnett for the appellant submitted -

Firstly, that the learned judge erred in holding that the subdivision was entirely residential in character and that the covenants secured to the beneficiaries a quiet, peaceful seaside rural locality of single family cottages.

Secondly, as regards the restraint against subdivision he adverted to the fact that in 1952 when the subdivision was carried out only vertical subdivision was legal and practical as this was before the effective advent of the Registration (Strata Titles) Act, 1968, in August 22, 1969.

Further, the covenant did not restrain an owner from erecting multi-storied buildings or limit the size of such building, the area of

construction or the occupation to single families. In that regard where as here the modifications sought were to allow residential type development or increase density by multiple occupancy consistent with Town and Country Planning and in keeping with development in the area, the cases illustrate a liberal approach. Where however the modifications sought would result in a change from the exclusively residential to the essentially commercial the approach was more restricted.

Thirdly, he submitted in effect that on a comparison of the covenants in the Fortlands case and the grounds and extent of the modifications sought in that case with those in the instant case, the cases are clearly distinguishable.

In reply Mr. Hylton submitted that the question of neighbourhood and a consequential determination of what constitued the neighbourhood were essential in the Fortlands case as the application was under Section 3 (1) (a) of the Act, i.e. that by reason of changes in the character of the neighbourhood, the restriction was obsolete, but having regard to the grounds upon which modification was being sought such a finding was unnecessary. In any event, he submitted that the judge in the instant case did in fact find that the eight lots formed a separate entity.

Further, that it is not what the applicants intend that is important but what would be permissible if the covenants were modified as prayed. The covenants said Mr. Hylton should be read and construed together and when so done, it is clear that on the lots subject to the covenants only a private dwelling house or a building that is not a commercial building was permissible. Such a building, he contends, cannot be constructed to contain owners of self-contained flats. The applicants had failed to prove:

(i) That the covenant prevent the "reasonable user" of the land and in that regard he adverted to the difference in wording between the Jamaican Act and the current corresponding English Legislation which

speaks of "some reasonable user".

(ii) That no practical benefits are secured by the covenants. He cited in support - Re Constant Spring and Norbrook Estate - 3 W. I. R. p. 274.

He submitted that the learned trial judge had found that there were practical benefits secured and there was ample evidence to support his findings. The modifications, he contends, would introduce the "thin edge of the wedge".

These competing considerations will now be analysed with such assistance as can be drawn from the decided cases cited by counsel and upon a careful assessment of the restraints imposed by the covenants.

As regards the ground under Section 3 (1) (b) of the Act, the nature of the burden which rests upon an applicant seeking modification under this head was considered in Re Henderson's Conveyance (1940) 4 All E. R. 1:- The headnote reads:

> "In 1918, the appellant purchased a property consisting of a house and garden situated in a high-class residential district, together with the benefit of a covenant on the part of the owner of an adjoining property not to erect any buildings on the portion of that land which adjoined the appellant's garden. The restrictive covenant was given in 1965 on the purchase of the land from the then owner of the appellant's land. As a result of the covenant, the appellant enjoyed the benefit of an open space at the bottom of his garden and the benefit of not having the garden overlooked. In 1938, the respondent purchased the adjoining land together with another portion of the land with full notice of the restrictive covenant. He then desired to build upon the land subject to the restriction, although it was not suggested that it would not have been possible to build on the other portion of the land which he had acquired. He therefore applied under the Law of Property Act, 1925, s. 84, to have the restriction on building on this portion of the land removed. It was found as a fact that since 1865 there had been no change in the character of the property or of the neighbourhood."

It was held:

> "The respondent had failed to satisfy the requirements of the section and was not entitled to the discharge or modification of the restrictive covenant. The section is not primarily designed to benefit one private owner at the benefit of another private owner. If relief is to be given to the covenantor, there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose

> "of the purchaser who is enjoying the benefit of it and this fact the respondent had failed to prove."

In the course of his judgment Farwell, J. said at p. 7:

> "Speaking for myself, I do not view this section of the Act as a section designed to enable a person to expropriate the private rights of another. I am not saying that there may not be cases where it would be right to remove or modify a restriction against the will of the person who has the benefit of that restriction, either with or without compensation, in a case where it seems necessary to release the restriction because it does prevent in some way the proper development of the neighbouring property, or for some such reason of that kind. In my judgment, however, this section of the Act was not designed - at any rate, prima facie - to enable one owner to get a benefit by being free of the restrictions imposed upon his property in favour of a neighbouring owner, merely because, in the view of the person who desires the restriction to go, it will make his property more enjoyable or more convenient for his own private purposes. If a case is to be made out under this section, there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the purchaser who is enjoying the benefit of it. There may be some variation of the restriction by reason of a change in the character of the property of the neighbourhood, such as that the existence of that restriction is one which ought to go because the requirements of the neighbourhood make it proper that there should no longer be any such restriction in existence."

This passage was quoted with approval in Re Ghey and Galton (1957) 3 All E. R. at p. 168 by Lord Evershed, M. R. who went on to say:

> "It is true to say that in Re Henderson para. (c) of s. 84 (1) of the Law of Property Act, 1925, was not being invoked, so that the language of the learned judge was really related, and related only, to the two alternative grounds which are comprehended in para. (a); but the citation adopted, as it was, by Romer, L. J.., in this court, seems to me a useful prelude to a consideration of the present case, because it indicates that what has to be done if an applicant is to succeed, is something far more than to show that to an impartial planner the applicant's proposal might be called as such a good and reasonable thing. An applicant must affirmatively prove that one or other of the grounds for the jurisdiction has been established; and, unless that is proved, the person who has the proprietary right, as covenantee, of controlling the development of the property as he desires and protecting his own proprietary interest, is entitled to continue to enjoy that proprietary right."

These cases were decided before certain important amendments in 1969 and in particular the amendment of provisions similiar to Section 3 (1) (b) of the Jamaica Act.

The effect of that amendment was to substitute "some reasonable user" for "the ocassionable user" in the corresponding provisions of the English Act. Although there are English cases prior to the amendment and in which modifications have been granted on the grounds that "the reasonable user" was being impeded by the continuedexistence of the covenants, yet it is clearly beyond debate that the replacement of the definite "the" by the indefinite "some" was purposeful and with the obvious intent to ease the burden of an applicant seeking modification under this head.

In the Jamaican case of Re Constant Spring (1960) 3 W. I. R. 271 - Re Ghey and Galton was cited and the statement of Farwell, J. in Re Hurderson Conveyance (supra) was quoted with evident approval.

Notwithstanding that the Jamaican Legislature has not followed the English example by making a similiar amendment, I do not interpret the eminent master of the Rolls in Re Ghey and Galton to be laying down so rigid a formula as to render well nigh impossible for an applicant to obtain modification under this head regardless of how reasonable the user proposed, merely because there is some possibility of using the land in some unduly onerous way without any modifications to the covenants. Regards must be had to the realities and this no doubt was in his mind when he said at p. 171:

> " I think, however, that it must be shown, in order to satisfy this requirement, that the continuance of the unmodified covenants hinders, to a real, sensible degree, the land being reasonably used, having due regard to the situation it occupies, to the surrounding property, and to the purpose of the covenants."

Parnell, J. was not unmindful of these considerations in the Fortlands case when he observed at pp. 321-2:

> "The object of s. 3 (1) of the Restrictive Covenants (Discharge and Modification)Law 1960 is to provide a means, in the public interest, whereby restrictions on the use of land anywhere in Jamaica which may be regarded as useless or obsolete

"may be removed in whole or in part. The court has a duty to weigh the balance between the public interest and the private benefits which flow from the enjoyment of enforceable restrictions." (Emphasis mine.)

In a realistic approach it seems to me the first step is to examine the covenants to ascertain what development is permissible having regard to the restraints, for by so doing one may ascertain what benefits would be secured to the beneficiaries. Then the next step would be to consider the practicalities against the background of the prevailing circumstances of the area, because before determining what is to be preserved one has to ascertain what is in reality possessed and in assessing the practical values of what is so possessed, regard must be had to relevant and contiguous circumstances.

It follows therefore that "the reasonable user " by the applicant and the "practical benefits" to the objectors are co-relative considerations.

The members of the Court like the trial judge have had the benefit of a view of the locus in quo. The lots were each about 1½ acres and there were on the lots 1 - 7 (including those of the applicant) bungalow type cottages. The lots reserved for commercial use were in ruinate. Across the main road was the Harmony Hall restaurant and bar and further east were apartment buildings and the Couples Hotel. The development contemplated was, therefore, not inconsistent with development in the area and the Mayor of the Parish Council not only congratulated the developers for their "worthy and welcome venture" but augured economic benefit to the area in a letter dated March 21, 1983.

Against that background I now turn to consider the covenants. While each covenant has to be interpreted in relation to the particular aspect with which it deals, yet to obtain a composite picture of the development in contemplation or permitted by the covenants, they have to be read and construed together.

Covenants Nos. 1 and 2 when so read and construed prohibited subdivision. It is true that at the time the covenants were created only vertical subdivision could legally be carried out, but in my view this is immaterial. The covenants by their terms clearly prohibited

fragmentation of the lots and a resultant multiplicity of owners. This is implicity conceded by the very modifications sought..

Accordingly, I now turn to consider two of the cases put forward by Dr. Barnett as illustrative of what he considers the liberal trend toward modification where the restraint is on density.

In Re Snowden's Application (1954) 7 P. & C. R. 145:

> "The applicant owned a large house known as Linnington, at Walton-on-Thames. It was subject to a covenant forbidding its user except as a single private dwelling-house. The applicant wished to convert it into two flats and applied for the covenant to be modified accordingly. There was evidence that Linnington was unsaleable as a single dwelling-house, that the area was a high-class residential one, and that one large house in it had been converted into flats without injury to the neighbours."

The application was opposed by the owners in Castle Road on the grounds that the proposed alteration would not be in tone with the character of the road and consequently would depreciate the value of their houses. Sir William Fitzgerald, Q. C. in giving the decision of the Lands Tribunal said:

> "Castle Road is undoubtedly a high-class residential area and consists of very nice detached houses with spacious gardens. I sympathise with the desire of the owners of these houses to preserve as far as possible the character of the neighbourhood, but I do not think that the proposed alteration would have the detrimental effect that they fear. One large house has already been converted into flats, and it is admitted that this conversion did not seriously disturb the tone, but those who opposed the application say that it was a very good conversion. I have no reason to believe that the conversions of "Linnington" will not likewise conform to standards of good taste. In my opinion the type of person who would invest money in the purchase of a house or a flat in Castle Road would be just as anxious to preserve the amenities of this residential area as those who already own houses there.
> I have come to the conclusion that the existence of the covenant does hamper the reasonable development of "Linnington," and the modification of it, to the extent sought, would not injure those other persons entitled to the benefit of the restriction."

In Re S. & K. Darvill, Ltd's Application (1955) 7 P. & C. R. 212:

> " The applicants owned a piece of land at Garston, near Watford, subject to a covenant imposed in

> "1933 forbidding more than twelve houses to be erected thereon.
> The applicants sought to have the covenant modified so as to enable them to erect fourteen houses in accordance with a scheme for which they had obtained planning permission.
> The original covenantee raised no objection and it appeared that no one else was entitled to the benefit of the covenant. Nevertheless, three owners of neighbouring properties objected to the application and claimed substantial sums of compensation in the event of the modification being granted."

In granting the application the Lands Tribunal's decision reads:

> "..... According to the evidence the density provisions of the planning authority would permit not twelve but fourteen houses on the plot, and a condition imposed by the planning authority was that a road should be constructed in such a way that none of the houses fronted directly to the main St. Albans Road. The form of development proposed does not transgress the covenants in any way except in so far as it provides for two extra houses. It may also be that the houses are not "evenly spread," whatever that may mean. I am satisfied that the form of development which is the basis of this application is superior to that envisaged by the original vendor, and I am also satisfied that the plea of the objectors, who each claim $750 in compensation, that their light and air and privacy would be affected, is entirely unjustified, and that if the restrictions are modified in the manner proposed, none of the objectors, nor anybody else, would be injured. Accordingly there will be an order that the restrictive covenants be modified in accordance with the terms of the application."

The following in Preston and Newston on Restrictive Covenants 5th Edition, at p. 231 is indicative and illustrative of the liberal approach of the Lands Tribunal to application for modification to permit an increase in density:

> ".....where the restrictions would have permitted four houses each standing in rather over one acre of ground at Birkenhead, it allowed detached houses and twenty-one flats. And in Re J. & D. Martin's Application it allowed a twelve-storey block of flats on a site at Hove previously occupied by a few ordinary houses and some much lower blocks of flats."

In a densely populated Island as Jamaica is and with the modern trend in building town houses and condimmuims in developed and developing areas, this liberal approach is reasonable, relevant and commendable.

The second question that arose for determination is what structure is permitted or alternatively would be in breach of the restrictions?

The covenant demands one main building with service buildings at a minimum cost of two thousand pounds. At that time (1952) that sum could erect a respectable and attractive bungalow. Today, its equivalent conversion of four thousand dollars, could not meet the costs of construction of a porter's lodge. I mention this in passing to indicate the result of changing times and circumstances and to illustrate that one could in compliance with the covenant erect a building that would certainly lower the character of the neighbourhood.

As regards structure, the covenants are woefully imprecise and, in that regard in marked contrast to those in the Fortlands case - (In Re Lots 12 & 13 Fortlands (1969) 15 W. I. R. 312) in which the restrictions endorsed on the certificates of title included:

> "(3) No building of any kind other than a private dwelling-house with appropriate outbuildings appurtent thereto and to be occupied therewith shall be erected on the said land and the value of such private dwelling-house and outbuildings shall in the aggregate not be less than one thousand, five hundred pounds.
>
> (4) The main building to be erected on the said land shall face the roadway or one of the roadways bounding the said land and no building or structure shall be erected on the said land nearer than twenty-five feet to any road boundary which the same may face nor less than fifteen feet from any other boundary thereof and all gates and doors in or upon any fence or opening upon any road shall open inwards and all outbuildings shall be erected to the rear of the main building.
>
> (5) No building erected on the said land shall be used for the purposes of a shop, school, chapel, church, or nursing home or for racing stables and no trade or business whatsoever shall be carried on upon the said land or any part thereof."

The modifications sought were:

> (1) To enable apartment blocks to be erected.
>
> (2) To place the buildings nearer the boundary - fifteen feet.
>
> (3) To permit business incidental to the letting of the flats to be carried on.

and the grounds upon which the modifications were sought were:

> "(a) that by reason of changes in the character of the property or the neighbourhood and of breaches in the covenants that have already taken place, the restrictions should be regarded as obsolete.

"(b) that the proposed discharge of modification will not injure the persons entitled to the benefit of the restrictions."

In giving his judgment Parnell, J. said at p. 321:

" I am satisfied that the restrictions imposed on each of the titles of the applicants cannot, by any stretch of the imagination, be regarded or deemed as obsolete. These restrictions do afford a real protection to each lot owner to see that the other carried out his obligation in maintaning the sub-division as a private residential area. Expropriating one's rights for the gain of the other cannot be lighly entertained and the covenants may be invoked in one's protection."

In the instant case, the covenants in their impreciseness do not enjoin the owner to build a private dwelling house, to limit the size or height of the structure or place any limitation as to proximity from the dividing fence. It is therefore open to an owner, subject to the limitation on minimum costs, to erect either a magnificant or imposing chateau with a sufficiency of outbuilding to service the mansion or a modest chalet with perhaps a single small building within the curtilage.

It cannot therefore be said that the restrictions enjoined the erection of a single story resort cottage. No reasonable person purchasing the lots would feel constrained to build that type of house.

I now turn to restrictions as to user. The 'sub-divider' (if I may so call him) retained for himself lot 9, free of the restrictive covenants. He would enjoy such benefits as the covenants conferred on the purchasers but none of the burdens. Secondly, he reserved for commercial use two lots 10 and 11 which were across the comparatively narrow parochial road from six of the lots subject to the covenants. Thirdly, the covenant against commercial or business undertaking permitted on each and every lot "the conduct of the profession of a medical practitioner or surgeon". It was therefore open to every purchaser to have on the land the conduct of such a profession and to turn the entire sub-division into a veritable medical centre;could it then be seriously argued that a non-commercial building must of necessity be a private dwelling house?

In none of the cited cases were the restrictions so permissive.

In Re Constant Spring (1961) 3 W. I. R. 270 - the sub-division was carried out in 1958 and subject to a restrictive covenant limiting the size of each lot to one acre. The sub-division was of lands amounting to over two hundred and eighty-five acres. The modification sought was to re sub-divide the lots into ½ acre lots.

In his judgment Waddington, J., identified the reasons ofr the application thus at p. 274:-

> "The answer to this question appears to be that the user contemplated is the subdivision of a portion of the land for the purposes of sale".

And went on to say:

> "In any event, I can find no evidence in the affidavits to show that the applicants have experienced any difficulty or have been impeded in any way in disposing of the land in one acre lots. I cannot say therefore that I am satisfied that the continued existence of the restrictive covenant without modification would impede the user of the land for the purposes contemplated by the applicants."

Here, the development contemplated was residential albeit on an increased density. The modification was to increase the number of owners. In the Fortlands case it was to set up a tenement area with transient occupiers. This was more likely to change the character of the neighbourhood than the conversion into home-owners" flats.

No doubt the objectors are desirous that the lots of the sub-division should be confined to the erection of single storey one family resort cottages and so maintain a quiet rural haven of modest houses. However, the mere fact that they have so built cannot thereby extend the restrictions beyond what could be in reasonable contemplation having regard to the terms and tenor of the covenants. A single family resort bungalow may be desirable but as the covenants read, that is no more than mere desire.

I now turn to consider what practical benefits are secured by these vague covenants. Mr. Hylton makes the point that a determination as to the extent of the neighbourhood is not essential where the applicant does not rely on the ground that there has been a change in the character of the neighbourhood and that such a finding in the instant case is unnecessary.

While such a finding is certainly essential where the allegation is that there is a change in the character of the neighbourhood, it is certainly not irrelevant in applications under Section 3 (1) (b) or (d). In my view it is essential in considering what practical benefits, if any, are secured by the covenants. It would be no more than an idealistic gesture for any one to set up in the midst of a busy and noisy manufacturing neighbourhood a small sub-division with covenants tending to secure peace and quietness.

On the other hand the approval of the Planning Authorities do not relieve the judge of his consideration of the vital questions. The Act wisely and specifically empowers the judge to direct enquiries of the Planning Authority. Indeed it would be embarrassing for the modification to be granted only to find that the Planning Authorities disapprove of the scheme. Planning approcal, however, is evidence of the type of development that is in contemplation or is being carried on in the area and relevant to the determination of the character of the neighbourhood.

In the instant case in the light of the sub-division making reservations for commercial business in close proximity to the restricted lots and in the sub-divider reserving an unfettered lot for himself, the learned judge in determining the extent of the restriction erred in limiting his concern to the eight lots. Such benefits of peace and privacy as may be said to exist are assailable directly by the owners of lots 9, 10 and 11. Further, it is clear from the evidence that this is a tourist resort area and the development contemplated is in harmony with the area and with current developments in close proximity to the lots in this sub-division.

With respect to the submissions that the grant of the modifications would be inserting the "thin edge of the wedge", it seems otiose to so contend when the ammenities which the objectors claim are secured to them under the covenants are, as indicated above, so easily assailable because of the impreciseness in the covenants and the reservations in relation to certain lots.

In my view the applicant has tendered sufficient evidence to show

that the continuance of the unmodified covenants impedes in a real and to a substantial degree the land being reasonably used, having regard to its location and the proposed scheme of developments; nor can it reasonably be said that the proposed development would result in a substantial depreciation of the value of the objectors property. The jurisdiction created by the Act was designed to prevent reasonable and desirable development in tune with the times and the area, being prohibited by restrictive covenants that confer comparatively small benefits on the few while denying substantial economic advantages to a whole area.

For these reasons, I concurred in allowing the appeal and granting the modifications sought by the appellant.

CAREY, J.A.:

By the sea, just off the main road between Tower Isle and Ocho Rios in St. Mary, is a relatively small resort-type sub-division, known as Harmony Hall. It comprises eight lots, approximately one and a half acres in extent, each with its own cottage save for a solitary vacant lot on the west. Six of these lots are subject to the following restrictive covenants endorsed on the respective certificates of title and which are expressed to run with the said land and to bind the registered proprietors thereof for the time being. I set out these covenants:

> "1. The said land shall not be sub-divided."
>
> "2. No building shall be erected on the said land other than a building which with appropriate outbuildings shall cost not less than Two Thousand Pounds to erect."
>
> "3. No trade or business shall be carried on and no commercial signs shall be erected on the said land nor shall the said land be used for any commercial purposes Provided However that for the avoidance of doubt it is hereby declared that the conduct on the said land of the profession of a medical practitioner or surgeon and of the erection of any such sign or name plate in connection with the conduct of such profession shall not be deemed to be in breach of this covenant."

The appellant, Lorraine Marie Issa, the owner of lots numbered 2 and 3, which are included in the sub-division, proposes to erect six blocks of three storey apartment buildings thereon and accordingly applied to have the covenants recited earlier, modified in the following terms:

> "1. That the said land shall not be sub-divided SAVE THAT the erection of apartment buildings under the Registration (Strata Titles) Act or otherwise with appropriate outbuildings shall not be deemed a breach of this covenant."
>
> "2. No building shall be erected on the said land other than buildings which with appropriate outbuildings shall cost not less than Two Thousand Pounds to erect."
>
> "3. No trade or business shall be carried on and no commercial signs shall be erected on the said land nor shall the said land be used for any commercial purposes Provided However that for the avoidance of

> "doubt it is hereby declared that the conduct on the said land of the profession of a medical practitioner or surgeon and of the erection of any usual sign or name plate in connection with the conduct of such profession and the use of the said land or any building thereon for the purposes necessary and incidental to the management and operation of any apartment building shall not be deemed to be in breach of this covenant."

The grounds on which she relied to modify the covenants were these:

> "(a) the continued existence of the said Restrictions without modification would impede the reasonable user of the said land for private purposes without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of the said Restrictions without modification;
>
> (b) the proposed modification will not injure the persons entitled to the benefit of the said Restrictions as it will in no way affect the privacy, view, light or value of any adjacent property or any other property entitled to the benefit of the Restrictions."

Objection was taken to her application by the present respondents, registered proprietors of adjoining lots, on the footing that privacy would be reduced, the planned modification would alter the general nature and character of the neighbourhood by increasing density of building and concomitantly, of persons and traffic, and embolden similar minded developers to make similar applications. According to the affidavit evidence of the objectors and their supporting experts, the objectors' premises are presently very private and residential in tone and character being waterfront single family one storey dwelling. The learned judge who plainly accepted this as a fact, in a note of his judgment, recorded that - "the sub-division was and is entirely "residential in character. Peaceful quiet seaside single family nature." He found -

(1) that it had not been proved that the continued existence of the said restrictions without modification would impede the reasonable user of the land, and that the modification would change or alter practical benefits of adjoining owners, and

(2) that the proposed modification would injure persons entitled to the benefit of present restrictions in affecting their privacy, and consequently dismissed the application with costs to the objectors.

it is from this order that this appeal now comes before this court. I think it is right to say a word in tribute to counsel on both sides, who argued their respective case with great candour, cogency and admirable lucidity. Despite that assistance however, and speaking entirely for myself, I did not find this case an easy one.

It is convenient, I think to begin by asking the question - what was the applicant obliged to prove having regard to the grounds of her application? Those grounds which have earlier been recited are provided for in ss. 3(1) (b) and (d) of the Restrictive Covenants (Discharge and Modification) Act. In England, applications for the discharge or the modification of restrictive covenants are determined by the Lands Tribunal from which an appeal lies to the Court of Appeal. The grounds of application for modification and discharge of restrictive covenants in England are to be found in s. 84 (1) of the Law of Property Act 1925, prior to its amendment in 1969. And it is as well to note that the provisions of our own Act are not the ipsissima verba of the United Kingdom Act. Our legislation does, however, plainly derive its origins from that Act and is in substance similar. The attitude of counsel before us, certainly Dr. Barnett, has been to rely on the approach of the Lands Tribunal from its reported decisions. I can see nothing amiss in looking at these decisions. In this country similar applications are made, not to a quasi-judicial body, but to the Master in chambers in the Supreme Court, and I am inclined to doubt whether there has developed in this country any significant body of reported decisions of the Master to assist in determining whether a peculiarly Jamaican approach exists in matters of this kind. However, there are some few cases reported in the books to which reference will hereafter be made.

Having made those prefatory observations, the matter before us resolves itself into a matter of law or mixed fact and law, seeing that the grounds argued complain that the learned judge misdirected himself on a number of matters in these areas. An applicant for modification or discharge of a restrictive covenant where his ground is that provided for in s. 3 (1) (b) has a burden imposed on him to show that the permitted user is no longer reasonable and that another user which would be reasonable is impeded. As was rightly said by Farwell, J., in Re Henderson's Conveyance [1940] 4 All E.R., at p. 7 -

> "If a case is to be made out under this section, there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the purchaser who is enjoying the benefit of it."

The learned Judge went on to say -

> "If one turns to the Act, it is apparent what he has to show. He has to show that by reason of changes in the character of the property, the restriction ought to be modified."

In our Act, the analagous provision does not contain the introductory governing phrase, viz.:

> ".... that by reason of changes in the character of the property or neighbourhood or other circumstances of the case ...."

I venture to think, nonetheless, that as a matter of evidence, changes which might have occurred over a period of time with respect to the tone and character of an area, would be a relevant consideration. But our Act does not, as in the United Kingdom, require an applicant to prove these changes.

It will be necessary hereafter to consider what the restrictions imposed in respect of this sub-division were directed to preserving. For the moment, I am concerned to establish the factors which an applicant desirous of modifying restrictive covenants is required to prove. Lord Evershed, M.R., in Re Ghey And Galton's Application [1957] 3 All E.R. at p. 171 expressed the view that in relation to this ground -

> "... it must be shown, in order to satisfy this requirement, that the continuance of the unmodified covenants hinders, to a real, sensible degree, the land being reasonably used, having due regard to the situation it occupies, to the surrounding property, and to the purpose of the covenants."

Put another way, the restrictions must be shown to have sterilised the reasonable use of the land. Can the present restrictions, prevent the land being reasonably used for purposes the covenants are guaranteed to preserve? Accordingly, I would suggest that it would not be adequate to show that the proposed development might enhance the value of the land for that would demonstrate the applicant's proposals are reasonable and the restriction impedes that development. In Re M. Howard (Mitcham) Ltd's Application [1956] 7 P. & C. R. 219 it was said:

> "The applicants certainly proved that the restrictions impede the development which is proposed, and it was contended that, since that development had been approved by the planning authority, it was reasonable development. It is not, however, in my view sufficient to show that one particular form of development is impeded. If development in accordance with the covenants is a reasonable development, then it seems to me impossible to find in accordance with the statute that reasonable development

> "is impeded, particularly if that development shows practical benefits to other persons entitled to the benefit of the covenants which would not be secured if a different form of development took place."

This case is of some authority for that view. Moreover, even where, as in this case, a parish council being the planning authority approves and supports a proposed development, that may amount to no more than evidence that the proposed development is a reasonable user of the land. If it were shown that the unmodified covenants tended to preserve the amenities of a neighbourhood and afforded protection to the parties entitled to enforce them, then I do not think it could fairly be said that the onus had been discharged. And I would come to the like conclusion if it were shown that the modification or discharge would injure persons entitled to the benefits of the covenants. I would make one final comment. If the evidence indicates that the purpose of the covenants is still capable of fulfillment, then in my judgment the onus on the applicant would not have been discharged.

I can now turn to consider whether the applicant endeavoured to discharge this burden. There are three relevant affidavits. In the first, Roy Stephenson, an architect of no little experience made three points:

(I) the two lots in the sub-division are situated in an area catering for the tourist industry;

(II) the proposed development is suitable for the general neighbourhood, which was another way of expressing the view which he had put forward that the "proposed development would not detract in any way from the value or beauty of the neighbourhood;"

(III) the development would not affect the privacy of any adjoining owners of lots.

As to the second by Noel Carby, a real estate consultant and valuator, his opinion was that the development would serve to improve the value of the premises in the immediate area. The final affidavit was that of the Superintendents of Roads and Works for the St. Mary Parish Council, Oswald Serju whose opinion was, that the proposed development accorded with development patterns of the area.

The learned judge found that the sub-division is entirely residential in character and is a peaceful quiet, seaside, single family resort area. This is, of course, a finding of fact, which is entitled to the [illegible]

court, especially as the judge visited the locus. All members of this court with the consent of counsel on both sides, journeyed down to St. Mary and so are in the same position as the learned judge. I have no reason to differ from that view. Dr. Barnett challenged that finding in this way. He said that the learned judge was wrong to regard the neighbourhood as comprising eight plots: it should be 11 plots of land, because there were three others which formed part of the sub-division. Indeed, two of these lots were zoned for commercial development and the restrictive covenants did not attach to the other. It was his submission also that the relevant neighbourhood extended beyond that considered by the judge, and includes areas in which there had been hotels, apartment-type buildings and other commercial development.

I see no reason as I have already intimated, to disagree with the view that the sub-division in question constitutes an enclave of peace and tranquility by the sea in an area in which resort type development has taken place. The lots actually covered by the restrictive covenants do have on them single family sea-side resort cottages. The learned judge was, in my judgment, entirely right to focus his attention on the lots in the sub-division in respect to which, the restrictive covenants attached, for it is that area which will have acquired an identifiable tone and character properly capable to be called a neighbourhood.

Dr. Barnett did not, as I apprehended his arguments, indicate any evidence adduced on behalf of the applicant in support of ground 1 of her application, viz., that the continuance of the restrictions in their present form impeded the reasonable user of the land. His attack was levelled else-where and related to the findings of the learned judge that the covenants secured benefits of privacy and living in a single storey sea-side unit. Having regard to this approach, it will be necessary to consider the nature of the covenants, their purpose and their scope to see what practical benefits they have in fact secured. So it is important not only to construe their terms but to appreciate what has physically occurred. They are:

> "1. The said land shall not be sub-divided."
>
> "2. No building shall be erected on the said land other than a building which with appropriate outbuildings shall cost not less than Two Thousand Pounds to erect."

"3. No trade or business shall be carried on and no commercial signs shall be erected on the said land nor shall the said land be used for any commercial purposes Provided However that for the avoidance of doubt it is hereby declared that the conduct on the said land of the profession of a medical practitioner or surgeon and of the erection of any usual sign or name plate in connection with the conduct of such profession shall not be deemed to be in breach of this covenant."

Taken as a whole, this is not by any manner or means a conspicuous example in drafting of clarity or exactitude. The first restriction is plain, and is designed to prevent fragmentation of the land and so reduce density of persons. The second is intended to guarantee a certain level or standard of building and to hinder low-cost development. It must be borne in mind that these restrictions were imposed over three decades ago, when £2,000 was doubtless a considerable amount of money. The last prevented the carrying on of any trade or business except that a medical practitioner would be exempt. The word "building" in the second restriction is imprecise but when clauses 2 and 3 are fairly read together, the conclusion seems to me inescapable that "building" in this context must mean a dwelling house, seeing that no trade or business is permissible. It restricts construction to one main dwelling and appurtenant out-buildings, e.g., cottage for housekeeper, gardener, driver and the like. As to the nature of the main building, there certainly was no restriction as to its size or extent. As was suggested, there could be no objection to constructing a castle with 365 rooms similar to "Folly" in Port Antonio. But so far, no one has done so and the castle would remain a single family residence. What was in fact constructed on these lots, except, of course, the vacant lot, were resort type cottages or villas suitable for single family occupancy. On the true construction of these restrictions, the intention was the construction of a single family dwelling with relevant out buildings. In a resort area by the sea, it is impossible, I suggest, to conceive of any other kind of structure but what were in fact built, namely a resort villa. Having said this, it is right to emphasize that the fact of similarity in type of building constructed is not decisive. I am mindful that that factor may have come about because owners all choose to follow a design trend, and so the result may not be the effect of the covenants. The effect of the covenants in this case since their imposition in 1952, is that the present proprietors have peace and quiet and beauty around them. In my view, this has been secured therein by the nature of the restrictions imposed.

The respondents, or some of them, were very much concerned that the

770

proposed development would deprive them of a view, or the beneficial effect of the prevailing wind but these the learned judge, having categorised as trivial, summarily dismissed. What, as I understood the judge regarded as important, was the privacy which each proprietor had secured. The peaceful seaside locality which had been achieved was, beyond doubt, a valuable practical benefit.

The applicant's expert, Roy Stephenson, deposed that the proposed development would not affect the privacy of any adjoining owners of lots. I am not at all certain in what sense the word "privacy" was being used. Mr. Stephenson pointed out that the proposed development would be surrounded by a concrete block fence six to eight feet high, presumably to insulate it from the rest of the neighbourhood. What is unarguable is that six blocks of three storey apartment buildings on two lots of land would materially alter or affect the quality of life created in the enclave, viz., the peace and quiet of a single family sea-side villa. It is in this context that I venture to suggest that privacy must be understood. No one has suggested that because the lots are situated in an area which conforms to patterns of development devised by the relevant planning authority and that the proposed development will not detract from the value or beauty of the neighbourhood, that such evidence shows that the permitted user is no longer reasonable. Indeed, on the view of the law which I have expressed earlier, that if the purpose of the covenants is still capable of fulfillment, the onus on an applicant would not have been discharged, then in my judgment, the applicant in this case has not discharged that onus. What has been shown is that the proposed user of the land is reasonable because it would not detract from the beauty or value of the locality and would be within patterns of development permitted by the local planning authority. Under this ground, the applicant must also show that no practical benefits are secured to other persons. The learned judge did not accept that the restrictions secured any view from any house. In that, he was eminently right and no one has endeavoured to challenge it. The practical benefit which, the judge found, had been secured was privacy. The Land Tribunal has in Re Stevens' Application [1962] 14 P. & C. R. 59 shown that the test of injury is not necessarily financial for it dismissed an application where it held that a modification would deprive objectors of some privacy. No one has suggested that the objectors' personal predelections for privacy were other than "sincere and well-founded" and "not tinged by ulterior motives." In Re Chandler's Application [1958] 9 P. & C. R. 512, the Land Tribunal held that in such circum-

In this jurisdiction, Waddington, J. (as he then was) considered an application to modify a restriction against sub-division in Re Constant Spring & Norbrook Estate [1960] 3 W.I.R. 270. The grounds for that application were the same as those in the matter before us. The learned judge in refusing the application said:

> "...if the applicants were allowed to do so (i.e. to sub-divide) that would not only destroy the exclusive character of the neighbourhood but would almost certainly result in depreciating of the value of the lots purchased by the objectors."

In that case, there was a clear finding that the increase in density would result in injury to persons entitled to the benefit of restrictions. Thus, I incline to think that privacy, i.e., the exclusive character of a neighbourhood is a valuable practical benefit which, if it would be damaged by an increase in density of dwellings, will operate against an applicant who seeks modification.

One of the main arguments by Dr. Barnett was that the learned judge erred when he held that the covenants prescribed single family type cottages or hindered the height of the structures which could be built on the lots and further erred in construing the covenants as being designed to and capable of protecting privacy or restricting occupational density. There was nothing in the judgment of the learned judge which indicated that he was of the view that the covenants restricted the height of structures which could be built on the lots. Nothing in the covenants precluded any of the owners from building a castle as has already been pointed out. But there is no gainsaying the fact that the neighbourhood was proven to be of a single family, villa type, residential character. That differentiated it from other development which had taken place in the surrounding areas. The covenants which it was sought to modify plainly called for residential type dwellings on the lots. Only one main dwelling house could be built. The effect of this would, in my view, naturally restrict privacy. Of no less importance, it prevented the operation of any trade or business. No hotel, guest-house or boarding-house could be carried on. All these buildings are, of course, designed for residence however transient but they are not dwelling houses. A dwelling house built for a family and any friends who might be guests of the owners, does not cease to be a single family residential dwelling. I come to the conclusion therefore that on the true construction of the covenants, they ensure that only single family type dwelling houses could be erected on the lots. The tone and character of the neighbourhood are derived from this factor. It created this peaceful, quiet sea-side single family characteristics; in

was a benefit of the restriction which as a proprietary right vested in the owners of the lots, could be enforced to preserve the private residential character of the sub-division.

The modification sought by the appellant affected not only density but in my view, involved a change of user. The appellant's condominium type development involved a change in the residential characteristic quite different from what the appellant at purchase had covenanted to maintain. I entirely agree with the learned judge that Re Lots 12 and 13 Fortlands [1969] 15 W.I.R. 312 is directly in point. It is a matter of common knowledge that condominium type buildings in resort areas operate in the same way as hotels. This being so, a commercial type activity would be placed in this peaceful sub-division and would assuredly alter the privacy which the covenants were intended to preserve.

It becomes necessary to examine Re Lots 12 and 13 Fortlands (supra). In that case, the applicants who were the owners of two lots in a sub-division of some 20 lots, desired to construct apartment blocks with a view to rental of the apartments to persons on holiday. The restrictions endorsed on the title were in the following form. I set out below only those necessary for the purposes of this case:

> "(3) No building of any kind other than a private dwelling-house with appropriate outbuildings appurtenant thereto and to be occupied therewith shall be erected on the said land and the value of such private dwelling-house and outbuildings shall in the aggregate not be less than one thousand, five hundred pounds."
>
> "(5) No building erected on the said land shall be used for the purposes of a shop, school, chapel, church, or nursing home or for racing stables and no trade or business whatsoever shall be carried on upon the said land or any part thereof."

The manifest intention was that the estate should be a private residential one. The applicants sought to have these restrictions modified thus:

> "(3) No building of any kind other than a private dwelling-house or apartment blocks with appropriate outbuildings appurtenant thereto and to be occupied therewith shall be erected on the said land and the value of each such private dwelling-house and apartment block and outbuildings shall in the aggregate be not less than one thousand, five hundred pounds."
>
> "(5) No building erected on the said land shall be used for the purposes of a shop, school, chapel Church, or nursing home or for racing stables and no trade or business whatsoever, except such as may be incidential to the letting and maintaining of the buildings on the said land, shall

"be carried on upon the said land or any part thereof."

The grounds of the application were twofold, one of which is not material but the other was that the proposed modifications would not injure the persons entitled to the benefit of the restrictions. The affidavits in support showed that the development plan would enhance the value of the sub-division and that it would be in keeping with the development pattern of the area (i.e. Discovery Bay), that the development plan will enhance the value of all lots of Fortlands. The learned judge in that case found that the sub-division shewed "an air of sophistication, fastidiousness and delicacy" and then expressed himself thus at p. 322:

> "The idea that a man is free to enter into a sub-division knowing that it is intended to be for residential purposes and then he can anxiously bide his time when he may attempt to change its character into a residence quite different from what he had agreed to support or maintain should not be encouraged."

The importance of this case is to demonstrate that where a sub-division or a neighbourhood in a resort area has acquired a character sui generis which is therefore plainly identifiable, the courts will be loath to modify covenants which have brought this about even where the modification might enhance the value of the lots in the sub-division or is in keeping with similar development patterns in the general area. In those circumstances, the court will hold that it is not satisfied that the proposed modifications would not injure the persons entitled to the benefit of the restrictions.

An argument put forward by Mr. Hylton greatly impressed me, viz., that the grant of the modification was the "thin end of the wedge." There was evidence that one of the lot owners is minded, in the event that the covenants are modified, to pursue a development similar to the present applicant's. In this regard, Luckoo, J.A., in Stephenson v. Liverant [1972] 18 W.I.R. 323 at p. 330 said this:

> "There remains the 'thin end of the wedge' argument. There can be little doubt that the proposed modification would render the covenants vulnerable to the action of the court and this in itself would be a good reason why the objection cannot fairly be deemed to be frivolous or vexatious."

The "thin end of the wedge" is a ground of injury which could be caused to the respondents by the modification of the covenants. The respondents in this have the power to guarantee the continued the

sub-division, if it be the fact that the present restrictions ensure this. If follows from what I have earlier indicated of the neighbourhood.

It is right to point out that where the ground of application is that the proposed modification would not injure persons entitled to the benefit of these covenants (see s. 3 (1) (d)), the law is clear that the applicants have undertaken the burden of showing that the objections put forward are frivolous or vexatious. In Ridley v. Taylor 1965, 2 All E.R. 51 at p. 58, Russell, L.J., with whom Diplock, L.J., concurred observed -

> "that paragraph (c) (i.e. s. 3 (1) (d) of our Act) may be designed to cover the case of the proprietorially speaking frivolous objection."

The judge below dismissed as trivial, and so amounting to a frivolous objection the right to a view and the beneficial effect of the prevailing wind. But the privacy which was a characteristic of the neighbourhood did not fall into that category. I have not been persuaded by Dr. Barnett that the objection, found as valid by the judge, was either trivial or vexatious. I derive support for the view I have formed from the helpful words of Smith, J.A. (as he then was) in Stephenson v. Liverant [1972] 18 W.I.R. 312 at p. 339:

> "Since the restrictions are substantially intack and their objects can still be achieved, they do indeed, as the judge held, afford a real protection to the objectors in that they give them the power to ensure that the private residential character of the area shall be maintained. To deprive them of this power, or weaken it, by modification of the covenants will surely be injurious. A modification in these circumstances could, justifiably, be said to be the 'thin end of the wedge' and is another ground of injury. On both these grounds, a finding that injury will be caused to the objectors by the modification could justifiably be made."

This case was an appeal from Parnell, J., in Re Lots 12 & 13 Fortlands [1969] 15 W.I.R. 312. The facts have previously been stated and it is enough to say that the significant facts of that case bear a striking resemblance of those in the present case. This court affirmed the order of Parnell, J., and I would do likewise in this appeal.

Finally, there was some argument during the hearing of this appeal with respect to the question of compensation. I do not propose to deal with it, having regard to the views I have expressed above.

I would accordingly dismiss this appeal with costs.

CAMPBELL, J.A. (AG.)

Lorraine Marie Issa is the registered proprietor of two adjacent lots of land namely lots 2 and 3 in a subdivision described as Harmony Hall which formerly was part of a larger area known as Tower Hill in the parish of St. Mary. The registered titles which she acquired in 1952 are subject to certain restrictive covenants stated to be for the benefit of and enforceable by the registered proprietors of lots 1, 4, 5, 6, 7 and 8 on the deposited plan of Harmony Hall. The relevant restrictive covenants are that:

> "1. The said land shall not be subdivided."
>
> "2. No building shall be erected on the said land other than a building which with appropriate outbuildings shall cost not less than Two Thousand Pounds to erect."
>
> "3. No trade or business shall be carried on and no commercial signs shall be erected on the said land nor shall the said land be used for any commercial purposes. Provided however that for the avoidance of doubt it is hereby declared that the conduct on the said land of the profession of a medical practitioner or surgeon and of the erection of any usual sign or name plate in connection with the conduct of such profession shall not be deemed to be in breach of this covenant."

She applied by Originating Summons dated 31st December, 1982 to have the abovementioned restrictive covenants modified to accommodate the erection of six blocks of three storey apartment dwellings for which the Planning and Economic Development Committee of the St. Mary Parish Council had given approval. The apartment complex is to consist of forty apartments made up of 18 twp bedroomed, 17 three bedroomed, 4 four bedroomed Pent House, and 1 one bedroomed dwellings. The complex is to be enclosed except along the beach front, by a 6 to 8 foot high wall and the apartments are intended for use solely as residences

The registered proprietors of lot 1 adjacent and to the east of the applicant have formally consented to the proposed modification and the unchallenged evidence is that they are, so to speak, waiting in the wings, on the outcome of the present

application as they themselves have an application for modification of similar restrictive covenants to enable user of their lot for the reerection of a hotel.

The registered proprietors of Lot 4 adjacent and to the west of the applicant and the registered proprietor of Lot 5 further to the west have objected to the proposed modification.

The modification sought is primarily of the first restrictive covenant which is against subdivision. It seeks to have inserted in the aforesaid covenant immediately after the word "sub-divided" the words "save that the erection of apartment buildings under the Registration (Strata Titles) Act or otherwise with appropriate out buildings shall not be deemed a breach of this covenant." The modifications of the other two covenants are consequential to the modification of the first.

The grounds upon which the modifications are sought are that:

> "(a) the continued existence of the said restrictions without modification would impede the reasonable user of the land for private purposes without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of the said restrictions without modifications;
>
> (b) the proposed modification will not injure the persons entitled to the benefit of the said restrictions as it will in no way affect the privacy, view, light or value of any adjacent property or any other property entitled to the benefit of the restrictions."

The objections to the application in summary are as hereunder:

> (1) The modification would permit the erection of an apartment complex of a quantity and size which will or may conflict with the nature and general character of the neighbourhood;
>
> (2) the modification by permitting the erection of an apartment complex will or may significantly and adversely affect the enjoyment of the social and public

"amenities in the area and reduce the value of the objectors' properties. Such amenities are privacy, unimpeded view to the east enjoyed by the proprietors of Lot 4, the preservation of the attractiveness of the subdivision as constituting private single family cottages, freedom from noise and congestion along the roadway serving the subdivision and along the sea frontage.

(3) The modification sought if granted will constitute the thin edge of the wedge providing the prelude to the destruction of the neighbourhood as a quiet exclusively residential area of cottage dwellers by opening the sluice to further applications for user of lots for purposes which are even more inconsistent with the continuance of the area as a quiet exclusively, residential area,

(4) None of the statutory grounds enumerated in Section 3 of the Restrictive Covenants (Discharge and Modification) Act (hereinafter called the Act) exists on the basis of which the relevant covenants can be modified."

The learned trial judge visited the locus in quo and in the light of what he observed he categorised and dismissed as trivial, rightly in my view, the objections based on the allegedly significant and adverse effects which the applicant's project would have on the flow of the air, the view from the east and the blockage of light.

He however dismissed the application based on the undermentioned finding of fact namely:

"That the land is a small subdivision comprising 8 lots and is entirely residential in character. It is a peaceful, quiet seaside resort area consisting of a single family cottage on each lot except for lot 8 on which there is no cottage."

Based on the above finding he concluded that:

(1) The modification if granted would change or alter the practical benefits of the adjoining owners, it would injure the persons entitled to the benefit of the present restrictions by affecting their privacy. It would disturb the rights and expectations of the objectors namely that of living in a quiet seaside rural locality.

(2) The applicant had failed to satisfy the requirement of section 3 (1) of the Act in that she had not proved that the continued existence of the restrictive covenants would impede in the sense of preventing reasonable user of lots 2 and 3 for private purpose.

(3) Further, that in consequence of the binding force of 'stare decisis,' were he to find otherwise than that the applicant had failed to satisfy section 3 (1) of the Act he would be flying in the face of the decision in Re Lots 12 and 13 Fortlands subnom Stephenson et ux v. Liverant et al (1972) 18 W.I.R. p. 323 (hereinafter referred to as 'Fortlands case') the reasoning and conclusion wherein he adopted."

He further concluded that the present case provided a stronger ground than in "Fortlands case" for the continued existence of the restrictive covenants because (among other factors which he contrasted) he noted that firstly, in the "Fortlands case" the subdivision was fairly large comprising 20 lots, in this case however, it was only 8 lots and in these small subdivisions the greater would be the susceptibility of modification having adverse effects on the rights of lot owners in the subdivision. Secondly, this case involved 40 apartments as against 16 in "Fortlands case." Thirdly, the height of the apartment complex namely three storey as contrasted with the one and two storey in "Fortlands case" would more likely affect the privacy of adjoining owners.

The complaint before us by the unsuccessful applicant is that:

"(1) the learned Judge erred and misdirected himself in law in holding that:

(a) the Case of Re Lots 12 and 13 Fortlands (1969) 15 W.I.R. 312, was binding on him or that its ratio decidendi was applicable to the instant case,

" (b) in failing to appreciate that there are significant difference between the terms of the restrictions in the Fortlands Case and in the terms of the restrictions in the instant case; and;

(c) that there were significant differences in the facts of the Fortlands Case and the facts of the instant case, in that the neighbourhood in the instant case is predominantly tourist resort oriented.

(2) The learned judge erred and misdirected himself in law in holding that the restrictive covenant in question prescribed single family type cottages or hindered the height of the structures which could be built on the lots.

(3) The learned judge erred and misdirected himself in law in construing the covenants in question as being designed to and capable of protecting privacy, or restricting occupational density, the height of buildings or prohibiting multiple occupancy of the structures on the lot.

(4) The learned judge failed to take into account or to attach sufficient significance to the fact that:

(a) at the time the covenants were created the Registration Strata Title Act was not in existence and the covenantee did not contemplate horizontal subdivision of buildings;

(b) the area and neighbourhood is predominantly tourist resort oriented;

(c) the existing buildings and houses on the lots in the subdivision were being used for rental in the tourist industry and could continue to be so used;

(d) .....

(e) the subdivided area forms part of an originally larger subdivision and neighbourhood in which there has been extensive tourist resort activity and development.

"(5) The learned judge misdirected himself and erred on the facts in failing to find that the apartment type development contemplated by the modification was in keeping with the character of the neighbourhood and would have no injurious effect on any amenities or privileges secured by the covenants in question;

(6) the learned judge failed to consider the appropriateness of granting the application on condition that compensation be paid to the objectors."

Dr. Barnett in his submissions covered grounds 2, 3, 4 and 5 together. Basic to his submissions is the complaint that the learned trial judge by failing to construe the relevant restrictive covenants to determine what benefits or rights were secured thereby and by failing also to consider critically the documents in evidence, erroneously concluded that:

(a) The restrictive covenants were designed to and capable of securing privacy;

(b) the restrictive covenants secured to the objectors the right and benefit of residence in a peaceful quiet seaside rural locality of single cottage families;

(c) the subdivision comprised 8 lots and was entirely residential in character,

(d) that the appellant did not satisfy the requirement of section 3 (1) of the Act.

Dealing with the complaint that the learned trial judge failed to construe the relevant restrictive covenants Dr. Barnett submitted that a proper construction of the three covenants discloses that their real purpose was not to secure privacy or the other practical benefits found by the learned trial judge but rather to preserve the quality of the subdivision by restricting subdivision, providing for substantiality of buildings erected on the lots and by the exclusion of trading and business operations thereon. Viewed in the light of the knowledge and experience of

1952 when the restrictive covenants were imposed, it was, no doubt reasonably felt that degeneration in the quality of the neighbourhood through an increase in the number of lot owners would be most effectively foreclosed by providing for a minimum vertical area on which a building could be erected. This restriction against subdivision could also be said to have been designed to preserve the quality of the neighbourhood by restricting density. This purpose of preserving the quality of the neighbourhood becomes more apparent when considered with the restriction on the minimum construction cost of any building to be erected on a lot which construction cost in the era of the 1950s was a substantial sum. This was designed to ensure substantiality of the building. The further restriction on the use of any such building for trade or business was equally designed to preserve the quality of the neighbourhood.

Mr. Hylton in reply submitted that the covenants when construed together secured to the respective lot owners the practical benefits found by the learned trial judge namely privacy and the benefit of peace and quiet through living in an exclusively residential neighbourhood consisting of single family dwelling units. Mr. Hylton conceded that while the word used in the covenants namely "building" would not prima facie be limited to a "dwelling house", yet when the three covenants are construed together the irresistible inference flowing therefrom is that the covenants prescribed the use of the lots in the subdivision for any purpose other than for the construction on each lot of a main dwelling house exclusively for use as a private residence. Through this circumscribed use of the lots, the practical benefits found by the learned trial judge were secured. Mr. Hylton relied on Roger v. Hosegood (1900) Ch. 388 and Fortlands case as support for the interpretation embraced by him.

In my view the fact that trade or business is excluded does not necessarily or logically mean that only user as a private dwelling is authorised and the case of Roger v. Hosegood (1900) Ch. 388 relied on by Mr. Hylton is of no assistance as an aid in the interpretation of the present covenants because in that case one of the covenants expressly provided for a single dwelling house only to be adapted for and used for private residence only. The covenant was as hereunder:

> "No more than one messuage or dwelling house should at any time be erected or be standing on the plot, and that such messuage should be adapted for and used as and for a private residence only."

Similarly the Fortlands case on which both Mr. Hylton and the learned trial judge relied is clearly distinguishable from the present case in that in the former the relevant restrictive covenants sought to be modified expressly provided for private dwelling house only. The covenants stated thus:

> "3. No building of any kind other than a private dwelling house with appropriate out-buildings appurtenant thereto and to be occupied therewith shall be erected on the said land and the value of such private dwelling house and out-buildings shall in the aggregate not be less than One Thousand Five Hundred Pounds.
>
> 5. No building erected on the said land shall be used for the purpose of a Shop, School, Chapel, Church or Nursing Home or for racing stables, and no trade or business whatsoever shall be carried on upon the said land or any part thereof."

There can in the light of the above covenants be no doubt as to the correctness of the finding of Parnell J., in that case which was confirmed by Luckhoo J.A., in the Court of Appeal in these words namely:

> "The subdivision was laid out in or about the year 1950 as a private residential area and the covenants imposed on the titles to the lots therein were directed to preserving it as a private residential area."

In the present case there is no covenant that even attempts to limit the building to be erected to a dwelling house much less to a private single family cottage type dwelling house. The covenants expressly authorised the use of buildings erected as clinics and surgery by medical practitioners and surgeons. Thus in my view, the covenants as they exists plainly accommodated without any breach thereof not only the user of the lots for the construction thereon of buildings appropriate to the exercise of the profession of medical practitioner but also inter alia for use as a club house, chapel, community centre, or swimming pool to which innumerable persons resident in the neighbourhood may have access so negating privacy quietness and exclusivity to other lot owners, provided the provision of the club house, chapel, community centre or swimming pool to the aforesaid persons did not constitute the carrying on of a trade or business. Further there is no restriction on the siting of the main building, and or the out building on a lot either in relation to its proximity to the boundaries of adjacent property owners or to frontage thereon which restrictions if they existed could be construed as designed to secure privacy and quietness in the enjoyment by adjacent property owners of their property. There is no restriction on the size, height or elevation of the building so to safeguard against one lot holder's building towering over and so overlooking and overseeing his neighbour's premises. The right to construct buildings in which medical practitioners and surgeons may lawfully conduct their practice to which a concourse of people would be drawn by itself negative any practical benefits of privacy, peace quiet or exclusivity having been secured by the covenants.

I am persuaded by the force of Dr. Barnett's submission that the real purpose of the restrictive covenants was to preserve the quality of the locality. This was sought to be achieved, albeit ineffectively by endeavouring to limit the density of occupation. In this context as Dr. Barnett has rightly submitted, the advent of condominium style living as revoluntionised thinking on how best to preserve the quality of a neighbourhood while at the same time intensifying its user for residential purposes to meet the problems posed by population explosion and high construction costs of dwelling houses.

The "authority" and the "local planning authorities" statutorily constituted under the Town and Country Planning Act, in the exercise of the powers vested in them provide a guarantee both against irrational density of a condominium and against incompatibility of a condominium development with the character of the neighbourhood. The Registration (Strata Title) Act provides for the management of condominiums designed to preserve their standard and quality consonant with contemporary tolerance of the neighbourhood. Such corporate management ensures that the nonchalance of individual Strata Title owners, or individual impecuniosity do not result in a condominium unit being left in a state of disrepair with resultant depreciation and degeneration of the entire condominium building and the locality wherein it is situated. Thus an increase in density resulting from horizontal subdivision does not necessarily result in degeneration in the quality of the neighbourhood. Rather such a subdivision conduces more to the preservation or enhancement of the quality of the neighbourhood. Therefore this type of subdivision per se affords no ground for sustaining an argument that it will injure other subdivision owners by destroying the practical benefit of living in an area, the quality of which was sought to be preserved by a covenant against subdivision.

The learned trial judge by failing to construe the covenants to determine whether the practical benefits in particular those of privacy, mentioned by him were thereby secured, erred in dismissing the application on the ground of injury which he said the objectors would suffer by the loss of the aforesaid practical benefits enjoyed by them. There can be no injury derived from the loss of practical benefits if no such practical benefits are secured by the covenants.

Since the restrictive covenants did not secure privacy and the other practical benefits found by the learned trial judge but only the benefit of having the quality of the locality preserved the learned trial judge should have considered the application as one to secure intensification of the user of the lots for residential purpose in a situation where the only issues were whether the modification sought would injure the objectors by causing a diminution in value of their lots or deprive them of the benefit of continuing to reside in a good quality residential area albeit not exclusively residential and whether the user sought would be in conflict with the general character of the neighbourhood.

In this regard as pointed out by Dr. Barnett an analysis of cases in the United Kingdom involving applications for the discharge or modification of restrictive covenants discloses a liberal approach to modification sought to secure intensification of the user of the land or building for residential purposes as distinct from modification which would result in a fundamental change in the nature of the user, as for example from residential to commercial or from private residential to institutional residential purposes. Modifications have thus been granted for a building in a high residential area to be converted into flats where the restriction expressly forbade the building being used as more than one dwelling house, for two dwelling houses to be erected on land where the restriction forbade more than one dwelling house being

erected thereon, and for blocks of flats to be erected where the restriction forbade more than one building being erected on the land. See the cases of Re: Snowdon's Application (1954) 7 P & C.R. 145 (successful application to modify restrictive covenant to facilitate the conversion into flats of a single dwelling house in a high class residential area), Re: Wreford's Application (1956) 7 P & C.R. 257 (restrictive covenant modified to permit two houses instead of one being erected on land) and Re: St. Albans Investment Ltd's Application (1956) 7 P. & C.R. 260 (restrictive covenant providing for user of plot as and for a single private dwelling house modified to enable a number of small blocks of flat to be erected).

Mr. Hylton however invited us to exercise judicial caution in accepting the above cases as persuasive authority because they, like the exposition on density in Preston and Newsom's treatise on "Restrictive Covenants affecting Freehold Land" 7th Edition are based on an amendment of the law in the United Kingdom whereby the words "some reasonable use" has been substituted for the "reasonable use" in the section of the United Kingdom legislation corresponding to Section 3 (1) (b) of our Act. Mr. Hylton is not however correct in his submission that the decisions were based on the amendment of the law in the United Kingdom because the cases cited were all decided prior to the amendments referred to. The approach of the courts in the United Kingdom is discernible from at least 1940. In Re: Henderson's Conveyance (1940) 4 All E.R. p. 1 at page 6 we have this dicta of Farwell J., indicative of the approach to modification to facilitate the proper development of adjoining property. He said this:

> "Most of the case under this section are cases in which there are in existence restrictive covenants which are likely to, or actually do, impede or prevent the proper development of adjoining property. In most cases, they are covenants which, having regard to the present time and the changes which are required from time to time in the use of property, have become absolete, or are of such a hampering nature that they really prevent any proper development of the adjoining property. In cases of that sort, the court has to consider whether the restrictions are such as can be properly and justly modified or released, or whether there is a real necessity in order to enable the neighbouring property to be developed in a proper way, that there should be some modification or removal of the restriction in question. However this is not a case of that sort. This is purely a question between two private owners, one of whom desires to erect a house on a particular portion of his property while the other desires to keep that which he has long enjoyed and that for which, presumably, he paid when he acquired his house and grounds, an open space at the bottom of his garden so that his garden cannot be overlooked. It is not really a case where the applicant before the Official Arbitrator is seeking to develop his neighbouring land for some purpose such as erecting small Houses or shops thereon. It is a question of whether the personal benefit which may result to him from being able to put his house on a particular part of his property will be sufficient to justify him in asking that the benefits under the covenant which the appellant has long enjoyed should be taken away from him."

Speaking for myself I do not view this section of the Act as a section designed to enable a person to expropriate the private rights of another. I am not saying that there may not be cases where it would be right to remove or modify a restriction against the will of the person who has the benefit of that restriction ..... in a case where it seems necessary to release the restriction because it does prevent in some way the proper development of the neighbouring property or for some such reason of that kind. In my judgment, however, this section of the act was not designed at any rate prima facie to enable one owner to get a

benefit of being free of the restrictions imposed upon his property in favouring a neighbouring owner, merely because in the view of the person who desires the restriction to go, it will make his property more enjoyable or more convenient for his own private purpose. If a case is to be made out under this section there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the purchaser who is enjoying the benefit of it. There may be some variation of the restriction by reason of a change in the character of the property or the neighbourhood such as that the existence of that restriction is one which ought to go because the requirements of the neighbourhood make it proper that there should no longer be any such restriction in existence.

Nevertheless caution has to be exercised in praying in aid in the interpretation of our Act, the persuasive authority of the more recent text book expositions of, and decisions on the construction of the amended section 84 (1) of the Law of Property Act (1925) (U.K.) which statutorily provides for the Discharge or Modification of Restrictive covenants. The amendment to the latter Act in 1969 undoubtedly makes it easier for applicants to secure modifications of restrictive covenants on the ground of impediment to the reasonable user of the land in that such applicants ordinarily only have to establish that the project contemplated is reasonable and that the unmodified restrictions impede the implementation of the project. This will not be the case under our Act which remains unamended. However, notwithstanding this caveat, it remains true that the test to be applied in applications for modification under section 3 (1) (b) of the Act is the reasonableness of the user for which modification of the covenant is sought and in applying this test it is necessary to consider not only the particular lot in question but the neighbourhood in

which it is situated as also the purpose which the covenants were devised to achieve and whether the modifications sought would stultify or destroy the aforesaid purpose.

This brings me to Dr. Barnett's next complaint against the learned trial judge namely the latter's conclusion that the subdivision comprised 8 lots and was entirely residential in character. On the basis of this finding the learned trial judge founded his decision. Dr. Barnett submits that this conclusion is erroneous and the error stemmed from the failure of the learned trial judge to evaluate the documents admitted in evidence to enable him not only to ascertain the extent of the subdivision but also the extent of the neighbourhood as a condition precedent to determining the character of the subdivision. He erred, says Dr. Barnett, in relying on the Fortlands case without discerning that the said case in which the subdivision coincided with the neighbourhood was clearly distinguishable, on the facts, from the one he was deciding.

To the contrary, Mr. Hylton submitted that even if the learned trial judge did not in this case as was done in the Fortlands case, make a specific finding on the extent of the neighbourhood, he committed no error because a finding on the extent of the neighbourhood is relevant only where the ground of the application is that the restrictive covenants have become obsolete and ought therefore to be discharged. This was the ground of application in the Fortland's case. He submitted that in applications based on impediment in the reasonable user of the land, all that the learned trial judge had to do was to determine whether the applicant had adduced evidence satisfying him that in the absence of modification of the restrictive covenants all reasonable user of the land would be sterilised. He further submitted that in any case the learned trial judge having viewed the area did show that he was treating the 8 lots as a separate enclave or neighbourhood.

The relevant part of the learned trial judge's judgment reads as hereunder:

> "The particular area and subdivision is divided into 8 lots. It is a small subdivision, the purchasers of which are all aware of the covenants re no subdivision. The subdivision was and is entirely residential in character (I am restricting my comments to 8 lots only). It is a peaceful, quiet seaside single family, resort area and seven lots at present have one cottage on each lot. Lot 8 is empty."

I do not agree with Mr. Hylton that the learned trial judge intended by the words in parenthesis, to define the neighbourhood as limited to the 8 lots in the subdivision. Had he done so he would have been clearly wrong. To the contrary it is clear from the above excerpt that he did not make any findings on the extent of the neighbourhood within which the subdivision is situated. Thus the question is whether his non-finding of the extent of the neighbourhood is in this case irrelevant as submitted by Mr. Hylton or whether it is equally necessary and pertinent for a trial judge to make a finding on the extent of the neighbourhood when the basis of the application is impediment to the reasonable user of the land.

It is my view that a finding on the extent of the neighbourhood is always necessary and pertinent whether the application is based on obsolescence of the restrictive covenants or impediment in the reasonable user of the land due to the existence of the restrictive covenants.

Reasoning a priori, both grounds of application derive their vitality and significance from a comparison of the proposed user of the particular lot of land with the actual user of lands sufficiently proximate to and similar in topography to the lot whose user is called in question. The reasoning is that since by characterization the lot in question and the lands lying proximate thereto constitute a single neighbourhood, there is no rhyme or

reason in retaining restrictive covenants encumbering the lot only, in a neighbourhood otherwise free from restrictions, where the contrary user of the neighbourhood lots exert such an overriding influence on the character of the neighbourhood that the efficacy of the restrictive covenants affecting the lot is completely eroded.

The burden of the applicant in an application based on obsolescence is to show that the user of the lands surrounding a subdivision, has over a period of time changed so fundamentally and radically from the user originally designed for the lots in the subdivision that the continued enforcement of the originally designed user of the lots in the said subdivision is totally ineffective in retaining the original tone and character of the subdivision surrounded as it now is, by lands the user of which is diametrically different from such original user. The submission in such a case is that the restrictive covenants are to be deemed obsolete.

The burden of the applicant in an application based on impediment in the reasonable user of land is equally to show that though the restrictive covenant is not obsolete due to any fundamentally and radically different user of adjoining and proximately lying lands, yet the user of these latter lands while continuing for example to be primarily residential have changed sufficiently in quality as for example by changes in density of occupation and in the type of residence built, such that the existing user of the subdivision lots no longer represents the reasonable user thereof in the sense that such user is no longer consonant with the current view on the optimum user of lands in the neighbourhood.

In my view the distinction between an application based on obsolescence of the restrictive covenants and one based on impediment in the reasonable user due to the existence of the restrictive covenants is not based on the need in the former and absence of need in the latter to determine the extent of the

neighbourhood as submitted by Mr. Hylton. The extent of the neighbourhood has always to be determined on the evidence. The difference between the two grounds of application turns on the fact that in one case what has to be proved is that the radical changes in user as for example from residential to industrial user in the neighbourhood have made the restrictive covenants meaningless. In the other case what has to be proved is that within the neighbourhood such current changes have taken place in the concept of the optimum use to which a lot can be put without changing the intrinsic character of the user that to insist on its original user would not reflect the current thought on the reasonable user of the lot e.g. insisting on the continuing use of a Victorian Mansion as a single dwelling house in an era dominated by new ideas and within a neighbourhood characterized by townhouse and condominum dwellings.

I am fortified in my view on the necessity of determining the neighbourhood in either application by the irresistible inference to be drawn from what Lord Evershed M.R., said in Re: Ghey and Galton's Application (1957) 3 A.E.R. p. 164. At p. 171 Lord Evershed while disclaiming any intention of giving an exposition on the second limb of section 84 (1) paragraph (a) of the Law of Property Act (1925) (U.K.) which is in pari materia with section 3 (1) (b) of our Act said:

> "I think, however, that it must be shown in order to satisfy this requirement, that the continuance of the unmodified covenants hinder to a real sensible degree the land being reasonably used, having due regard to the situation it occupies, to the surrounding property and to the purpose of the covenants." (underlining mine)

While I am not unmindful of the caveat that a Court of Appeal should be slow to interfere with a trial judge's finding of fact and decision based thereon, there is a duty to do so if the court is satisfied inter alia that the trial court has not given a

proper consideration to certain material facts, or has misread the evidence.

In this case, it is my view that the learned trial judge did not give a proper and critical consideration to the documents tendered and admitted in evidence so to detemmine the nature, extent and character of the subdivision and of the neighbourhood wherein it is situated because had he done so he would have found certain basic undisputed facts. He would have found that the subdivision in question comprised 12 lots, 8 only of which were subject to any restrictive covenants. Nine of the lots had a frontage to the sea which provided minimal beach facilities since the frontage comprising limestone, dipped sharply and perpendicularly into the sea. One of these nine lots lying to the extreme west of the subdivision is totally unencumbered.

There is a lot comprising a roadway within the subdivision which connects at both its ends with the public highway. This roadway which is used by members of the public commences on part of the southern boundary of Lot 7 to the west. It skirts the entirety of the southern boundaries of lots 6, 5, 4 and 3 moving eastwards. There are two lots lying between this roadway, abutting thereon, and extending throughout its length from west to east. These lots also extend southerly to the public highway and are zoned for commercial development free of any restrictive covenants whatsoever. In the immediate vicinity of this subdivision is Old Harmony Hall Great House which has been remodelled and refurbished. It now houses an art gallery, bar and restaurant and as deponed in the affidavit of Mr. Roy Stephenson an architect, it caters for local residents and tourists and is additionally used for wedding receptions, parties and other like functions. To the east of the subdivision and approximately half mile from the site of the proposed development, albeit on the opposite side of the Ocho Rios Tower Isl

main road, is an apartment complex which is under construction designed as twenty middle income apartments.

In the light of these indisputably salient features the learned trial judge erred in not discerning that the neighbourhood extended beyond the subdivision. He equally erred in not discerning that the subdivision itself even when considered separately, could not be characterised as an exclusively private residential area. Much less could it be characterised as a peaceful quiet, seaside resort area of single family cottages. True enough, some of the eight lots had only one cottage thereon so suggesting a general pattern or trend in user by the lot owners, but on the other hand on at least one of these eight lots there was more than one main building. Further, the existence of lot 9 which could be used for any purpose whatsoever, also the lot zoned as a roadway which is open to and is actually being used by members of the public and the two lots within the subdivision zoned for commercial purposes, precluded the subdivision itself from being characterized as exclusively residential even if it were considered as by itself constituting a distinct neighbourhood. There is the further consideration as I have earlier said that under the covenants any or all the lots could lawfully be used for the construction thereon of buildings appropriate to the practice of medical practitioners and surgeons with the concomitant concourse of sick and ailing persons into the subdivision.

The Fortlands case on which the learned trial judge relied was clearly distinguishable on the facts in addition to being distinguishable in regard to the contents of the restrictive covenants. The facts in the Fortlands case which Parnell J., found were/that the subdivision comprised a neighbourhood in itself. The twenty lots in the subdivision which were all for residential purposes, comprised a peninsula which branched off from the town of Discovery Bay. It was bounded on its North and West by the

sea with Discovery Bay to the Southwest. Each lot had its own private beach affording the owner quiet and privacy. In a sketch map showing the Saint Ann Coast development plan, the Fortlands subdivision area was shaded as "resort and subdivision" in contrast to an area shaded as "commercial area" which comprised the beach and Town of Discovery Bay. Parnell J., in that case expressly found that an airstrip on the entire land side of the subdivision and a public beach and marine laboratory to the south and southeast thereof did not change the character of the subdivision from residential to commercial.

Those facts contrasted markedly with the facts in the present case. The learned trial judge contrary to his view, would not be flying in the face of the decision in the Fortlands case had he granted the application in the present case. The Fortlands case in so far as the learned trial judge in the instant case adopted the reasoning therein should in my view have assisted him in arriving at the conslusion that neither did the covenants in this case, properly interpreted secure to the objectors the benefits which they claimed since they are worded substantially different from these in the Fortlands case nor did the nature of the subdivision provide evidence that as laid out it was designed as an exclusively private residential area as was the position in the Fortlands case.

The learned trial judge concluded that the applicant had not proved that the continued existence of the restrictive covenants would impede, in the sense of preventing reasonable user of lots 2 and 3 for private purposes. Dr. Barnett complains that he erred in so concluding and that he made no express finding of fact on what was the reasonable user thereof. Implicit in the learned trial judge's conclusion was the finding that the subdivision was to be used exclusively for the erection thereon of private cottages.

Reasoning therefrom he considered the practical benefits which would be enjoyed by such user of the subdivision and concluded that as injury must inevitably result from the loss of the benefits flowing from such user if the user was intensified as sought in the application, the application had to be dismissed.

But once it is established, as it has been in this appeal that the practical benefits found by the learned trial judge were neither from a proper interpretation of the restrictive covenants secured to the objectors nor by reference to the physical character of the subdivision and that in consequence no injury in this regard could be suffered by the objectors by the modification of the covenants, all that the learned trial judge had to do was, as stated earlier, to determine whether the proposed development was reasonably consistent with the contemporary circumstances of the neighbourhood and would preserve the quality of the subdivision, whether it would cause injury to the objectors by depreciating the value of their properties, and whether they would suffer injury resulting from any degeneration in the quality of the subdivision as residential albeit not exclusively so. In this regard I reject totally Mr. Hylton's submission that before an application for modification may be granted on the ground of impediment in the user it must be proved that without the modification the user of the land would otherwise be sterlised. Were this the true principle there would in my view be no case in which a modification of restrictive covenant on the ground of impediment in the user could be granted because once the user prescribed by the covenant can still be enjoyed there could not be said to exist a situation where there is or would be a "sterilization of user unless modification is granted." In my view the opinion expressed by Lord Evershed M.R. in Re Ghey & Galton Application supra at p. 171 represents the correct approach namely that what is required to be proved is that the unmodified covenants "hinder to a real, sensible degree the

land being reasonably used having due regard to the situation it occupies, to the surrounding property and to the purpose of the covenants."

Apply the above dicta to the present case, the burden of the affidavit evidence adduced before the learned trial judge was to show that the restrictive covenants in particular that against subdivision was hindering to a real sensible degree the land being reasonably used for more intensive residential purposes which user was appropriate to the neighbourhood and would not be inconsistent with the covenants whose purpose was to preserve the quality of the neighbourhood. The expert evidence given by Mr. Roy Stephenson an architect and Town Planner is that the subdivision lies in an area catering for the tourist industry. The planned development will not detract from the value or the beauty of the neighbourhood. It is well suited to the general neighbourhood and will blend with the landscape. In similar vein is the evidence of Mr. Oswald Serju the superintendent of Roads and Works for Saint Mary Parish Council namely that the proposed development accords and complies with the development pattern of the area. The proposed development has been approved by the Town and Country Planning Authority. This fact is relevant in proof of what is conceived as the reasonable user consistent with the trend in the development of the neighbourhood. The said authority went beyond the mere approval of the plans and specification. It confirmed the evidence of Mr. Roy Stephenson that the proposed project accords with the development of the area and that the proposed method of building was suited to the locality.

The evidence of Mr. Samuel McCalla a Real Estate Agent and valuator in support of the objectors is in this regard of no value since it is premised on an erroneous foundation namely that there are eight lots in the subdivision, his conclusion on the private and residential tone of the subdivision, the effect the modification of the restrictive covenants would have on privacy, congestion along the main road and amenity of view are all vitiated

by his aforesaid erroneous premise. In any case all his conclusions save that on "privacy" were dismissed by the learned judge as trivial.

The evidence of Mr. Joshua Lehrer the Managing Director of a construction company is equally devoid of value because of its concentration on privacy and the change which would take place in the character of the single family dwellings which he said comprises what he described as the "waterfront villas neighbourhood.

Thus the weight of the evidence before the learned trial judge was that the proposed development was designed to intensify the user of lots 2 and 3 for residential purposes without altering the varied character of the subdivision. The proposed user was compatible with user of land in the neighbourhood and would not depreciate the value of other lots in the subdivision. It accorded with the approved development of the area in the interest of the tourist industry. In the absence of any practical benefits of privacy and quiet secured to the objectors by the restrictive covenant against subdivision, the said restriction hinders to a real and sensible degree without any corresponding benefit to the objectors the reasonable user of the lots having regard to contemporary circumstances.

The grounds of appeal are fully substantiated, I would accordingly allow the appeal and substitute for the order of dismissal an order granting the application in the terms sought in the originating summons of the applicant.

stances, these views should be respected and a restriction securing them practical benefits enabled them to scrutinize and if necessary veto any proposals tending to alter the character of the neighbourhood. In the result, I do not accept Dr. Barnett's arguments that the covenants did not secure this privacy contended for by the respondents. I think the judge was right.

This thus leads me to the second ground on which the applicant relied before the learned judge. This was that the proposed modification "will not injure the persons entitled to the benefit of the said restrictions." The evidence to which I have already alluded in reference to the first ground must be regarded as applicable to the second. Mr. Stephenson, the expert, on behalf of the applicant, pointed out in his affidavit that the proposed development was suitable for the general neighbourhood and would not affect the privacy or value of the adjoining lots.

It would be useful to see how this ground is treated in applications before the Lands Tribunal and our courts. The first case to which I would call attention is that of Re Ling's Application 7 P. & C. R. In that case, the covenant in question restricted the user of the premises for the erection of more than two houses. The applicant sought to have the restriction modified by substituting "three" for "two" as the maximum number of houses which might be built. There was evidence that the neighbourhood had undergone a change in character since the covenants were imposed. The Lands Tribunal held that the additional building proposed by the applicant would not depreciate the neighbourhood nor the objector's property and in those circumstances the application succeeded. This decision is plainly with respect right. The effect of the modification would inevitably increase density of dwelling but there was no evidence that any person entitled to the benefit of that covenant, would be injured. In Re Wreford's Application 7 P. & C. R., the land which the applicant owned was subject to a covenant forbidding the erection on it of more than one house. He desired authority to erect two houses instead of one. It was held that the proposal would not affect the value of the objector's property and that the application must be granted.

I venture to think that these cases show that the Land Tribunal grants applications the consequence of which is to increase density of dwelling provided there is no evidence that it will result in injury to the objector. I do not understand the cases to be saying that density of dwelling can never result in injury to those entitled to the benefit of the covenants.