IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E.R.C. 10 of 1995

In the matter of all that parcel of land known as [redacted] in the parish of Saint Andrew being land comprised in certificate of title registered at Volume 1138 Folio 45

AND

In the matter of an application for the modification of covenants Nos. 1 and 4 affecting the land

AND

In the matter of the Restrictive Covenants (Discharge and Modification) Act.

Raoul N.A. Henriques, Q.C., Ransford Braham and Glenford Watson instructed by Messrs. Livingston, Alexander and Levy for the applicant.

Gordon Robinson and Mrs. W. Marsh instructed by Miss Judith Haughton of Nunes, Scholefield, DeLeon & Co, for the objector.

Heard: 29.11.95, 30.11.93, 1.2.95
5.12.95, 6.12.95 & 11.3.96

Harrison J.

By an originating summons dated the 16th day of January, 1995, supported by affidavits, C.O. Jacks and Associates Ltd. (the applicant) seeks to modify the restriction placed on land known as 15½ Kensington Crescent in the parish of St. Andrew, registered at Volume 1138 Folio 45 of the Register Book of Titles.

The said restriction, as endorsed on the title is contained in covenants nos. 1 and 4, which read,

> "1. To erect only one suitable dwelling house on each of the said lots having not less than five apartments and all necessary outbuildings. The cost of such dwelling house and outbuildings to be not less than three hundred pounds.
>
> 4. Not to subdivide either of the lots above described but to keep and reserve each of the said lot as one building lot."

The applicant wishes the modification to read,

1. To erect no more than forty eight (48) habitable rooms on the said lot.

2. Not to subdivide the said lot save and except into strata lots under the Registration (Strata Titles) Act as approved by the relevant authority."

The grounds on which the applicant relies, are as contained in Section 3 of the Restrictive Covenants (Discharge and Modification Act,) which reads,

"3-(1).....

a. That by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Judge may think material, the restriction ought to be deemed obsolete; or

b. that the continued existence of such restriction or the continued existence thereof without modification would impeded the reasonable user of the land for public and 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; ....."

c. .....

d. that the proposed discharge.....

The applicant did not advance, in its arguments, the grounds contained in section 3(1) (c) of the said Act.

The premises 15½ Kensington Crescent, Saint Andrew is a lot of land part of a development of lots on the plan of Kensington deposited in the Office of the Registrar of Titles in June 1924. The said development consisted of a subdivision of twenty eight (28) lots. The covenants endorsed on the titles were to ensure the maintenance of, inter alia, a single family private dwelling house on each lot. This was initially observed. Since the mid-1960's to date there have been departures from the strict residential user to include commercial and multi-dwelling user; the affidavit, with plan attached, of Lloyd Davis, a partner in a firm of chartered surveyors, valuators, estate and property managers, dated the 10th day of July 1995, reveals this. The said number of lots are now increased to thirty two (32) by the subdivision of four (4) of the original lots. The applicant, C.O. Jacks and Associates Ltd. is the current owner of 15½ Kensington Crescent.

The objectors, Sherbourne Ltd. is the owner of several apartment units situated at 15 and 15A Kensington Crescent, immediately adjacent to and south east of the applicant's premises.

The applicant bought the said propety in 1993 and was registered as the owner. Building plans were submitted to the Kingston & St. Andrew Corporation - the applicant being fully aware of the covenants on the property - and building approval no. B32.8.92 dated the 27th day of November 1992 and issued. In 1994 the applicant commenced construction in breach of the said covenants. The applicaiton for modification of the covenants was made in 1995 and published in the newspapers on the 2nd and 9th days of February 1995, by order of the Master made on the 27th day of January 1995. Now constructed on the said premises is an apartment complex of forty eight (48) studio units in strata titles including lofts of sixteen (16) of the said units. Building approval was granted to the applicant for the construction of forty eight (48), habitable rooms, and therefore the applicant is in breach of the said approval and have in reality constructed sixty-four (64) habitable rooms; see affidavit of Michael Lake, architect and shareholder in the objector, dated the 20th day of July 1995. Arthur Lowe, the architect who obtained the said building approval for the subject premises in 1992, maintains that the density is in fact 48 habitable rooms, because the lofts, built with handrails, are not enclosed and so not classified as habitable rooms. The objector built is apartment complex, consisting of forty-two (42) strata lots. The objector retained sixteen (16) of the said lots. The applicant also constructed two, four-storey (4) apartment complexes at nos. 9 and 11 Kensington Crescent in 1991 and 1992 respectively; no objection was made to these latter constructions. The original Kensington Crescent development, now consisting of thirty two (32) lots can no longer be described as a single family dwelling house development.

As one enters Kensington Crescent from Oxford Park Avenue, which runs from Oxford Road, one would now observe, with the aid of the plan annexed to the said Lloyd Davis affidavit:

A. On the left hand side of the Crescent, eleven (11) premises, consisting of,

(a) one (1) vacant lot

(b) eight (8) apartment complexes (including the applicant's and the objectors'),

(c) one (1) residence and

(d) one (1) business premises.

B. On right hand side of the Crescent, one would observe also eleven (11) premises consisting of,

(a) one (1) vacant lot

(b) two (2) apartment buildings.

(c) five (5) residences, and

(d) three (3) business premises.

C. To the southeast where two ends of Kensington Crescent are joined by Old Hope Road, are, ten (10) premises, consisting of,

(a) one (1) vacant lot

(b) one (1) hotel and

(c) eight (8) business premises.

According to Mr. Davis there are therefore, a total of six (6) residences, which except for no. 7, are in poor physical condition. Of these five (5) residences,

(1) is "in ruins"

(2) is unoccupied

(3) has been sold at a commercial price of $10.5 million.

(4) with an office, is for sale for $18 million, presumably also a commercial sale price.

(5) the owner is asking for a price of $12 million, presumably also, a commercial sale price.

Michael Lake, in his said affidavit, agrees with Lloyd Davis' classification of the Kensington Crescent neighbourhood, except for the premises along Old Hope Road, probably five (5) such premises; maintains that those of the premises which are being used as business or professional offices are illegally being done so; and concluded that "..... more than a half of the lots in the Kensington Crescent neighbourhood are therefore residences or capable of being used as residences."

The permitted population density is determined by the local authorities, depending on the public utility services available. In 1983 that density

was fifty (50) habitable rooms per acre; currently it stands at one hundred (100) habitable rooms per acre.

Mr. Henriques for the applicant argued that the provisions of section 3(1) (a) of the said Act had been satisfied - there has been change in the character of the property, in that although the applicant commenced construction prior to applying for modification can be construed as accepted change; referring to Ridley v Taylor [1905] 1 WLR 612 and Restrictive Covenants by Preston & Newsom, 8th Edition, at p. 254 he maintained that one should look at the history of the property; that there has been change in the character of the neighbourhood, definable as the lots on Kensington Crescent- see D.F. & H. Joyce, Ltd's Application [1956] 7 P & C.R. 245, Re: 48 Norbrook Avenue, St. Andrew, E.R.C. 160/82 delivered on the 16th day of November 1984 E.R.C. 80/90 delivered on the 27th day of July 1994; that there were other circumstances of the case and that the covenants were obsolete - In re Truman, Hanbury, Buxton & Co. Ltd. Application [1955] 1 Q.B. 261. He argued further that there were originally twenty eight (28) lots in the development for which the benefit of the restrictive covenants were imposed - to maintain a single family dwelling house status - only six (6) of those are still residential, some being in ruins; that on the narrow interpretation of "neighbourhood" there are now thirty two (31) lots on Kensington Crescent consisting of nine (9) apartment buildings, (the applicant's would be the tenth), one (1) commercial building, eleven (11) businesses, one (1) hotel, three (3) vacant lots and the said six (6) residences; that the original object of the covenants cannot be maintained, the neighbourhood is now predominantly commercial; that the objector, having obtained a modification of the covenants increased the population density, and is deemed to have acquiesced; that the practical benefits of quietude and exclusively of the area provided by the covenants, to the residents had gone, and, no one would suffer injury if the modification was effected. He concluded that the rules of equity should not be applied in the examination of the conduct of the applicant in the matter - Ridley vs Taylor, supra.

Mr. Robinson for the objector argued, inter alia, that the applicant had failed to show that any of the grounds on which it relies have been

satisfied in order that the court may grant the application, and if they have, the court has reason in its discretion to refuse the said application. The applicant has failed to show that the continued existence of the restriction has prevented all reasonable use of the land within the framework of the existing restrictions - Stannard vs Issa [1987] A.C. 175; the applicant can still use the land for the purpose set out in the covenants - the fact that the applicant's project or the existing apartments would enhance the neighbourhood is immaterial; the issue is whether the permitted user is no longer reasonable and that another user which would be reasonable is impeded. The state of affairs which the covenants were imposed to ensure, namely, to protect the neighbourhood as a private residential area for the single family dwelling houses, remain substantially intact, the objectives can still be achieved to some degree. Despite the fact that there have been other modifications and developments, for example, apartment buildings, the character of the neighbourhood has not changed to an extreme degree, and even if the said character has changed, but the objectives can still be achieved, the convenants cannot be deemed obsolete. He relied, inter alia, on, In the matter of 14 Gainsborough Avenue, St. Andrew, supra, in the matter of 48 Norbrook Drive, supra, suit no E. R/C 13/89, In the matter of land part of Retreat, St. Andrew, delivered on the 2nd day of October 1990, Supreme Court Civil Appeal No. 16/92 Central Mining & Excavating Ltd. vs. Peter Croswell et al delivered on the 22nd day of November 1993 (majority decision) and Re Knott's Application (1953) 7 P & CR 100. He continued, that the neighbourhood is, comprised of lots nos. 1 to 20 Kensington Crscent; that a purchaser could not now expect a community of single dwelling houses; that the modification sought would increase the density of population, by at least 48 persons, increase the traffic and noise level, reduce the privacy and tranquility existing, thereby causing injury to persons, entitled to the benefit of the covenant and therefore, it cannot be deemed obsolete. He concluded that because the applicant proceeded to construct in breach of the restriction, prior to seeking the approval of the Court, the principles of equity precluded the Court for granting assistance to the applicant.

The jurisdiction of the court to grant the application for the modification sought is conferred by section 3 of the Restrictive Covenants (Discharge and Modification) Act.

> "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 the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied -
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> a. that by reason of changes in the character of property or the neighbourhood or other circumstances of the case which the Judge may think material, the restriction ought to be deemed obsolete, or
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> 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 practival benefits sufficient in nature or extent to justify the continued existence of such restriction, or, as the case may be, the continuance existence thereof without modification; or
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> c. that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or
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> d. that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction;....."

In order to succeed the applicant needs to show that one of the circumstances related in the said section, exists, in respect of the property concerned. The sub-sections are considered disjunctively; paragraph (1)-(a) is itself read disjunctively.

Changes in the character of the property relate primarily to physical characteristics. In Re Findlay & Co. Ltd's Application [1963] 15 P & C 94, the Land Tribunal modified as obsolete a restriction on property forbidding user as shops, under section 84(1) (a) & (b) of the Law of Property Act 1925 (England), which is similar in terms to section 3(1) above. This was a case of long continuous user in breach of the restriction.

Changes in the character of the neighbourhood is of wider consideration, as if affects the instant case. "Neighbourhood" is the relevant area to be considered in relation to the applicant's property in the determination of the effect and influence of the covenants thereon. This area may not necessarily be restricted to that immediately bound by similar covenants. By its geography, as seen on the plan to the Lloyd Davis affidavit, Kensington Crescent permits access to itself only from Old Hope Road, (two entrances) and Oxford Road. There is no access from the northern nor western directions. It enjoys its "set aside" positioning free from, "assault from all sides". It is not directly accessible from the exaggerated commercial activity of tkhe New Kingston area. I maintain that the area consisting of premises on Kensington Crescent itself, originally developed into twenty eight lots (28), now thirty two (32), is the relevant neighbourhood.

The author, in Restrictive Covenants, by Preston & Newson 8th Edition at page 225,

> "The neighbourhood need not be large: it may be a mere enclave. Nor need it, so far as this definition goes, be coterminous with the area subject to the very restriction that is to be modified, or other restrictions forming part of a series with that restriction.....".

The character of the neighbourhood has been consistenly determined by the "estate agent's test", namely, what does a purchaser on that road expect to get? In Re Davis' Application (1950) 7 P & C 1, the Lands Tribunal held that,

> "Character .... derives from style, arrangement and appearance of the houses on the estate and from the social customs of the inhabitants."

A purchaser of property on Kensington Crescent would expect to get a single dwelling house on a lot of land of approximately had an acre in size, in an area with houses of a similar nature. In addition, it would portray a secluded laid back setting, a quiet leisurely, sub-urban residential living with a vegetation -filled existence, devoid of the bustle of commercial activity and without the attendant daytime stream of motorized and pedestrian flow. On the contrary, such a purchaser would find, that on proceeding

from Oxford Park Avenue from the south west on to Kensington Crescent, he would be greeted to his left by a vacant lot, a continuing procession of seven (7) apartment buildings, (exclusive of the applicant's), interrupted by one residence, but further supplemented by a business premises. To his left he would again be welcomed by a vacant lot, five (5) residences, interspered with two (2) apartment buildings and two (2) business premises. In the remaining "semi-circle" of Kensington Crescent, bordered by Old Hope Road - he would seek in vain for a residence, but would be confronted by eight (8) business premises, one vacant lot and a hotel. He would experience, by day, an evident stream of activity of personnel, machines and traffic, motorized and pedestrian, occasioned by the offices, businesses and apartments, with the said bona fide residences interspered; by night, there would be stark emptiness, an unnatural stillness caused by the daily departed inhabitants of that changed community. This is hardly the original object of the said covenants, conferred on a residential area. The appearance of some of the houses has changed and the social customs of the inhabitants have changed. There have been changes in the character of the neighbourhood.

This is not a determinant of the burden cast on the applicant. The court needs to be further satisfied that it should exercise its discretion to, as a consequence, declare that the covenants are deemed obsolete. Because, in spite of the changes, if the original objects and benefits of the covenants can still be achieved, they cannot be seen as obsolete.

Rower, L.J., in Truman, Hanbury Buxton & Co. Ltd.'s Application, supra, said of obsolescene, at page 272,

> "It seems to me that if, as sometimes happens, the character of an estate as a whole or of a particular part of it gradually changes, a time may come when the purpose to which I have referred can no longer be achieved for what was intended at first to be a residential area has become, either through express or tacit waiver of the covenants, substantially a commercial area. When that time does come, it may be said that the covenants have become obsolete, because their original purpose can no longer be served and, in my opinion, it is in that sense that the word 'obsolete' is used.....",

he continued,

> "... if the original object of the covenant can no longer be achieved, it is difficult to see how the covenant can be of value to anyone."

It was held however that, though there were changes in the character of the neighbourhood, the covenant was not rendered obsolete, because the objectors, entitled to the benefit of the covenant would be seriously injured if it was discharged or modified.

In Central Mining & Excavating Ltd. v. Croswell et al, supra, the Court of Appeal, by a majority, confirmed the decision of Courtenay Orr, J, that the covenant was the obsolete, the original object of the covenant could still be achieved, although, in the opinion of one of the said judges, there had been changes in the neighbourhood.

In the instant case one cannot say, as was found in Re 46 Norbrook Drive, supra, and Re land part of Retreat supra, that the area had remained purely residential and there were no changes in the neighbourhood. The objector contends that the residences can still be used as the original covenant stipulated and therefore it should not be deemed obsolete. This argument was not elevated to a probability. The current reality - apparent to the disinterested observer - is, an area of multi-storied apartments, houses used as offices and businesses places, with residences in betweeen. This will no longer provide quiet, peaceful residential atmosphere as envisaged by the original concept of the single family dwelling house.

In the event that I am in correct in this respect, an examination of the ground contained in section 3(1) (b) is necessary. The applicant has the burden to show that the continued existence of the restriction without modification would impede the reasonable user of the land. In the case of Stannard v Issa (1968) 34 W.I.R. 189, it was held that in order to succeed on this ground the applicant had a burden to show,

> "that the continuance of the unmodified covenants hinders, to a real sensible degree the land being reasonably used."

Lord Evershed, M.R., in Grey and Gulton's Application [1957] 2 Q.B. 650.

This dictum was adopted by Carey, J.A., in the Stannard case in the Jamaican Court of Appeal. Carey J.A., in the latter court maintained that if the evidence indicates that the purposes of the covenants are still capable of fulfilment the onus on the applicant would not have been discharged.

Can the purpose of the covenants still be fulfilled? Restricting the user to a single family dwelling house and forbidding subdivision of the said lot it sought to ensure, principally, the peace and quiet of suburban life, purely residential living, a low noise level, both of traffic and personnel, and a low population density.

Mervyn Down, a director of a firm of real estate, appraisers, auctioneers and real estate agents, in his affidavit dated the 4th day of July 1995, concluded that the certain benefits formerly enjoyed in the said neighbourhood were no longer attainable. He said, inter alia,

> "New Kingston has developen in close proximity to the neighbourhood ... the improvement in roads and road transportation has caused pressure to be placed on the neighbourhood with the effect that the neighbourhood is no longer the quiet suburban area it once was."

He also referred to the "redefined .... zoning regulation" which increased the density to one hundred habitable rooms per acre. He observed that the neighbourhood, "has changed almost completely from a low density residential neighbourhood to a mixed, high density residential and commercial office neighbourhood."

In all the circumstances, I am of the view that the purpose of the covenants can no longer be fulfilled. The benefits they were intended to confer cannot any longer be enjoyed.

As a further consequence, the said benefit of the covenant having been already lost to the owners of the said residences, the "proposed discharge or modification" by the Court, will not thereby be a loss to them. No resulting injury would be suffered by them; section 3 (1) (d) is therefore also satisfied by the applicant.

Michael Lake, in his affidavit dated the 4th day of April 1995, speculates that, "... there may be facts of which the objector is not aware which could affect the amount by which there could be some diminution in the value of the objectors property in the future." This is not evidence of loss, to show injury caused by the "....proposed discharge or modification".

On the contrary, the unchallenged evidence of the said Mervyn Down, is, that, taking into consideration the existing changes, construction of apartment complexes, and the proposed modification , the properties in the said neighbourhood would increase in value and not depreciate.

Undoubtedly, several of the premises of the Kensington Crescent neighbourhood are being used in breach of the covenants, not having been modified by the court. In some cases, the acquiescence of the other owners for an owner, build in breach of the covenant, with knowledge of its existence as the applicant did, in order to achieve, what the attorney for the objector describes as a fiat accompli, and then apply to the court for the requisite modification. The objector contends that this court, taking into consideration its equitable jurisdiction, should not aid the applicant, in the circumstances, and should refuse this application.

The author in Restrictive Covenants, by Preston & Newcom, with reference to the equitable jurisdiction of the Court, said at page 225,

> "Apart from disasters caused by natural forces or external agencies, the condition or affairs relied upon will almost necessarily be due in some degree to the actions or inactions of the applicant or his predecessor. If so, the Tribunal, in exercising its discretion, should bear in mind the warning of Russell, L.J. that neither the personality of the applicant nor his past behaviour is relevant to the discretion which must be related to the property and its history as such. That conduct which might tell against the applicant in a Court of Equity is not directly relevant."

The author was here referring to the said dictum of Russell, L.J. in Ridley Taylor, supra. This statement of the author was made in the context of the grounds in section 84(1) (a), similar in terms with our section 84 3 (1) (a) and specifically, change in the character of the property;

he had said earlier, at page 254,

> "There can be comparatively few sets of circumstances in which an applicant will seek to obtain relief under section 84(1) on the ground that by reason of changes in the character of 'the property', i.e., the property the subject - matter of the application, the restriction ought to be made obsolete.....
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> Again, there may be no doubt also be cases in which, owing for instance to some natural or other disaster, the physical character of the property has been radically changed so that the restriction ought to be deemed obsolete."

The emphasis here was on the physical character of the property Ridley vs. Taylor did concern section 84(1) (a), that is, change in the physical character of the property, in which the lessee converted a single family dwelling house into five (5) flats.

The Lands Tribunal in England, which administers the jurisdiction under section 84, and which decided the case of Ridley v Taylor supra, consists of,

> "a President who has either held high judicial office under the Crown or is a barrister-at-law of at least seven years' standing and of such other members as the Lord Chancellor may determine, who are to be partly barristers-at-law or solicitors of the like standing....."

Tribunals such as these are regulated by its own procedure and rules, made by the Lord Chancellor - Halsbury's Laws of England, 4th Edition, Volume 8, paragraph 226, are not governed by the strict rules of evidence as courts of law are, see the Law and Practice of Disciplinary & Regulatory Proceedings by Brian Harris, Q.C., and enjoy a jurisdiction of high judicial status. The exclusion of the rules of equity from its consideration should be viewed as peculiar to the context of that tribunal and in dealing with the change in the character of the property in the circumstances of that case. I am not convinced of its general application.

Section 48 of the Judicature (Supreme Court) Act, reads,

> "48 With respect to the concurrent administration of law and equity in civil causes and matters in the Supreme Court the following provisions shall apply -
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> .....
>
> d

> d. The Court and every Judge thereof shall take notice of all equitable estates, titles and rights, and all equitable duties and liabilities appearing incidentally in the course of any proceeding, in the same way as the Court of Chancery would have done in any proceeding instituted therein before the passing of this Act."

Equitable principles apply in the instant case.

A court will not grant equitable relief to a party who has committed a breach in respect of the very subject matter of his application.

In August of 1992 the applicant, through its architect Arthur Lowe submitted building plans to the K.S.A.C for approval, which was granted in November 1992. The applicant was aware that the covenant then on the said premises precluded the type of development planned; the applicant had removed similar covenants when it did construction on premises nos. 9 and 11. The applicant gave its lawyers instructions to have the covenants removed in respect of 15½ Kensington Crescent; this was done "After the company registered the premises in 1993." Bernard Le Clainche, a director of the applicant stated in cross examination,

> "Lawyers engaged by us to see to it that anything legal to be done from beginning of the development to the end."

When construction commenced in 1994, no enquiries were made of the the attorneys, no affidavtis were signed by Le Clainche, nor was the company aware whether or not the covenants had been modified. The applicant had clearly committed a breach.

In Dyster v Randall & Sons [1926] Chan. D. 932, the plaintiff failed to submit plans for approval prior to commencement of construction of a house. Specific performance was granted because the court was of the view that the non-submission, although it was a breach, was minimal and immaterial in the circumstances, because the plans were unexceptionable and would have been approved.

In the circumstances of the instant case, the failure to apply to modify the covenant prior to construction is neither minimal nor immaterial. However, though the onus is on the applicant to see to the removal of the covenant, it had taken the usual steps to engage its attorneys to effect