CONV.

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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. R.C. 70 OF 1988

RE LOTS 10 McAULEY HEIGHTS, SAINT ANDREW.

Mrs. P. Benka-Coker for Applicant.

Mr. B. St. Michael Hylton for the Respondent.

HEARD: 28th, 29th, November, 1988 and 13th, 14th and 20th July, 1989.

EDWARDS J.

The plaintiff has by originating summons requested a modification of the restrictive covenants affecting land which he bought and on which he is erecting a building with a common internal dividing wall capable of housing two families.

The plaintiff states that when he acquired the land he was not aware that there was any restrictive covenant affecting it as this was not readily apparent from the title for the land.

An examination of the title shows that the original owners transferred it to the first purchaser "subject to the incumbrances and restrictive covenants set out in the transfer". The restrictive covenants were not actually endorsed on the title. There were encumbrances such as a mortgage which was subsequently paid off. The first purchaser then transferred the land to the plaintiff without any further reference to the restrictive covenants either on the title or on the transfer.

The plaintiff sought and obtained the necessary statutory approvals for the sub-division of the land and the erection thereon of two private dwelling houses with a common dividing internal wall and commenced construction. The house was placed in roughly the middle of the land and was designed to give the appearance of a single large house no different in appearance from other houses in the area.

When the construction was well advanced the plaintiff discovered that there were restrictive covenants on the land which forbid the sub-division of the land or the erection of more than one private dwelling house on it. He then took steps to have the restrictive covenants modified to permit completion to the building as planned. This involved inserting advertisements in the press and the service of notices on interested parties to apprise them of the proposed modification. This elicited the response from the objectors which is now under considera-

tion.

The land is lot numbered ten on the plan of Widcome now known as McAuley Heights and the lot has a total area of 15,808 square feet.

The restrictive covenants for which modification is sought are:

1. There shall be no sub-division of the said land.
2. Not to erect more than one private dwelling house on the said land and the area of such private dwelling house shall not be less than two thousand one hundred square feet (2,100 sq. ft.).

The modification which is sought would provide that:

1. That the land shall be sub-divided into two (2) lots of not less than 7,000 square feet respectively.
2. Not to erect more than one private dwelling house on each lot sharing a common wall with the dwelling house on the adjoining lot and the area of each such dwelling house shall not be less than two thousand one hundred square feet (2,100 square feet).

The sub-division of the land of which lot 10 forms a part was done in 1975 and the land was sub-divided into 35 lots. Only 10 lots have been built upon in the nearly 15 years which have intervened and none of the lots adjoining lot 10 has been built upon.

On the 29th November 1988 in the company of the parties I visited the sub-division. I found that lot No. 10 is situated in a partly developed hilly area which appeared quite isolated and lonely. Because of the rough, uneven nature of the terrain, lots which appeared close to each other on the plan of the area, could not be seen from other lots when the actual location was visited.

Lot 10 appeared to be completely isolated from other houses, with a winding estate road in front of it and a gully to the back. No neighbours on either side. The adjoining lots were vacant. It was out of ear-shot of other houses in the area, and was not visible to most.

The house itself because of its design gave the appearance of a single substantial dwelling sitting in the middle of the lot, and had it not been pointed out to me that this was the house which was the subject matter of the objection I would not have known that it was two dwelling houses and not one, on the lot.

The sub-division of which lot 10 forms a part, appeared to be a far cry from the "peaceful seaside enclose of a family nature" which was the subject matter of the objection in Stannard v Issa (1986) 34 W.I.R. This was a private dwelling house isolated and standing on its own in a relatively remote residential area of the parish of St. Andrew.

The court takes Judicial Notice of the fact that in 1974 - about a year before this sub-division came into existence Parliament saw fit because of the high incidence of gun crimes to enact the Gun Court Act which established a court to deal specifically with gun crimes. That court is still in existence. As a companion measure the Parliament also enacted the Suppression of Crime Act which enabled the relevant Minister of Government to make regulations giving the police extraordinary powers of arrest in crime prone areas of the Island. The regulations were kept in force for several years by periodic renewals by Parliament but they are no longer applicable to certain parishes. They still apply to the parish of St. Andrew in which lot 10 is situated. Utterances from the Minister (as reported by the press) indicate that when the situation warrants it they will be removed from the other parishes. The insistence that Lot 10 should remain isolated without next-door neighbours in this potentially dangerous period of the country's history (which would be the effect of refusing the application) appears to me to be unreasonable and anachronistic.

The grounds on which the application for modification are sought are those set out in Section 3 (1) (b) and 3 (1) (d) of the Restrictive Covenants (Discharge and Modification) Act. Section 3 (1) (c) was included in the plaintiff' first affidavit but that was not pursued.

Section 3 (1) (b) and (d) state as follows:-

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

In paragraph 2 of his further affidavit dated 21st November 1988 the plaintiff states that:

> "The continued existence of the restrictions without modification would impede the reasonable user of the land for private purposes without securing to any person any practical benefits sufficient in nature or extent to justify the continued existence of the said covenants without modification."

The plaintiff is here relying on section 3(1) (b). Mr. Easton Douglas - the Government Town Planner from 1974 to 1978 and Chairman of the Town and Country Planning Authority from 1979 to 1980 shows in his affidavit dated 17th November 1988 in support of the application for modification that security of the residence is a factor that must be taken into account today and I quote paragraph 19 and 20 of his affidavit.

> " Further, the general trends of development in the urban and suburban areas indicate that well planned discreet, multiple family dwellings in the particular socio-economic strata, have contributed to the tone and value of the properties and have helped with the security of the residences. It is no longer socially or economically feasible for these lots to be developed for single family residences. It is certainly more beneficial to all concerned for thelots to be tastefully utilised by high quality multiple-family residences instead of being taken over by squatters.
>
> It is my respectful opinion that the development contemplated, and actually commenced by the applicant, will not injure the persons entitled to the benefit of the restriction and the continued existence thereof 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 covenants without modification."

The several affidavits of the plaintiff indicate that no injury would be caused to the objectors by the grant of the modification which is sought.

As regards Section 3 (1) (b) Carey J.A. was quoted with approval by Lord Oliver of Aylemerton when he delivered the Judgment of the Privy Council in <u>Stannard and Issa</u> (1986) 34 W.I.R. at p. 195 when he said that to succeed under 3 (1) (b) "the restrictions must be shown to have sterilised the reasonable use of the land". The plaintiff has not discharged that burden and so we are left to consider Section 3 (1) (d).

Lord Oliver in Stannard v Issa noted that Russel L.J. in Ridley v Taylor [1965] 1 W.L.R. 611 observed that Section 3 (1) (c) of the United Kingdom Act which is the English equivalent of Section 3 (1) (d) "appeared to have been designed to cover the case of the proprietorially speaking, frivolous objection".

Lord Russel said:

> "My own view of paragraph (c) is that it is, so to speak, a long stop against vexatious objections to extended user."

He then referred to the views of the late Mr. W. A. Jolly in his work on Restrictive Covenants affecting land (2nd Edition, p. 120) and stated that:

> "Paragraph (c) was intended by its inference to injury to modify the extent to which, in its ordinary jurisdiction, the court would grant injunctions. In that jurisdiction injunctions would be granted even if the plaintiff could not be personally interested in enforcement save out of a sense of duty or moral obligation to others; under paragraph (c) the objection must be related to his own proprietory interest. Both this passage in Jolly and the corresponding passage in Preston and Newson suggest that paragraph (c) may be designed to cover the case of the proprietorially speaking, frivolous objection. For my part I would subscribe to that view."

The objections though coming from different persons, and submitted separately on individual letter heads are virtually in identifical form, word for word with each claiming the same sum as compensation without regard to where his lot is situated in relation to that of the plaintiff. This suggests that no serious individual consideration was given to the objection and that it may have been done "out of a sense of duty or moral obligation to others". An analysis of Lord Russel's statement which was mentioned in passing, by Lord Oliver shows that the objection must be related to the objectors "own proprietory interest." I do not consider that these objections have met that test. I consider them to be of an insubstantial nature and a mere formality.

What is clear from the cases is that the practical realities of the situation must be considered. This is not a case as in Stannard v Issa where the owners of a small enclave of seven single dwellings would awake one morning to find as their next door neighbours if the modification had been granted, six blocks of three-storey buildings comprising forty residential apartments together with amities including two swimming pools.

Neither is it a case as in Stephenson v Liverant (1972) 18 W.I.R. where the sole objector in a private residential sub-division would if the modification had been granted awake to find adjoining his lot:

(a) One main apartment block two storeys high containing eight separate self-contained flats;

(b) Three two-storeyed blocks each containing two apartments

(c) Two single storey units

These would result in the addition of at least fifty-two persons over and above the number of persons who would normally be expected to occupy two dwelling houses on the two adjoining lots.

In the instant case what do we find? A dwelling house designed to give the appearance of a single unit, the architecture of which is consistent with the design and external appearance of the houses already built in the sub-division, but capable of accommodating two families because of its internal dividing wall. Each unit would provide security for the other in an isolated area of a crime prone parish, and by their very presence, would provide additional security for the neighbourhood including the homes of the objectors.

I am satisfied that the proposed modification will not injure in any way the persons entitled to the benefit of the restriction.

It has been suggested that approval of the proposed modification may be the "thin edge of the wedge". This argument assumes that the Judiciary is incapable of exercising the discretion which parliament saw fit to entrust to it.

Each case must be dealt with on its merits and the peculiar combination of factors which may be present at the time when the modification is sought may not be present in another case at a later date. In the circumstances of this case the modification applied for is granted.

No order as to costs.