Privy Council Appeal No. 9 of 1998

Vayden McMorris *Appellant*

v.

(1) Claude Brown and
(2) Burlett Brown *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 27th July 1998,
Delivered the 30th July 1998

Present at the hearing:-

Lord Hoffmann
Lord Mustill
Lord Cooke of Thorndon
Lord Hutton
Sir John Balcombe

*[Delivered by **Lord Cooke of Thorndon**]*

On 27th July 1998 their Lordships indicated that they would humbly advise Her Majesty that the appeal should be allowed and the judgment of Chester Orr J. dismissing the application restored; that the respondents must pay the appellant's costs before the Board and in the courts below; and that they would deliver their reasons later, as they now do.

In this appeal from Jamaica the parties own and have their homes on adjoining properties, each of about three-quarters of an acre, in Forest Hills, a residential area of almost 600 acres in the suburbs of the City of Kingston. The properties are two of six lots together making up a block within which the registered titles are subject to and
[34] enjoy the benefit of a number of restrictive covenants.

Two of these covenants are directly relevant to the present case, namely:-

> "1. There shall be no subdivision of the said land.
>
> 2. 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 Pounds."

The present respondents, Mr and Mrs. Brown (the applicants), own lot 12. They wished to subdivide it into two lots of about 15,000 and 16,000 square feet respectively, and to build on the second lot so created a three-storey, five-bedroom, four-bathroom house, with the result that on the land being hitherto lot 12 there would be two substantial houses. In fact the second house has now been built, in the circumstances hereinafter explained, and what is in issue is whether the first covenant should be modified to permit the subdivision. Having obtained the necessary town planning approval, the applicants applied to the Supreme Court for modification of that covenant. The application came to be opposed by the present appellant, Mr. McMorris (the objector), whose land is lot 12A.

In a judgment delivered on 29th July 1994 Chester Orr J. dismissed the application, but in judgments delivered on 20th December 1995 the Court of Appeal (Carey, Forte and Gordon JJ.A.) allowed an appeal by the applicants, ordering that the first covenant be modified to read as follows:-

> "There shall be no subdivision of the said land ... SAVE and EXCEPT into two lots for residential purposes."

By leave of the Court of Appeal, the objector now appeals to Her Majesty in Council, seeking restoration of the Supreme Court decision.

The jurisdiction to modify such covenants is conferred in Jamaica by section 3(1) of the Restrictive Covenants

(Discharge and Modification) Act (No. 2 of 1960) which provides:-

"3.-(1) A Judge in Chambers shall have power, from time to time on the application of the Town and Country Planning Authority or of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied -

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

(b) that the continued existence of such restriction or the continued existence thereof without modification would impede the reasonable user of the land for public or private purposes without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of such restriction, or, as the case may be, the continued existence thereof without modification; or

(c) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or

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

Provided that no compensation shall be payable in respect of the discharge or modification of a

> restriction by reason of any advantage thereby accruing to the owner of the land affected by the restriction, unless the person entitled to the benefit of the restriction also suffers loss in consequence of the discharge or modification, nor shall any compensation be payable in excess of such loss."

This section is modelled on section 84(1) of the Law of Property Act 1925 (U.K.) as that subsection stood until amended and recast in 1969. One of the changes made in England in 1969 was a liberalisation of the ground corresponding to the Jamaican ground (b). For "the reasonable user" there was substituted in England "some reasonable user".

The Jamaican provisions were considered by their Lordships' Board in *Stannard v. Issa* [1987] A.C. 175 in a judgment delivered by Lord Oliver of Aylmerton, where it was accepted that under the Jamaican (b) as it stood then and still stands the applicant has the burden of showing that the user permitted by the covenant is no longer reasonable and that another user which would be reasonable is impeded. In that case there was no evidence of any difficulty in developing the land or disposing of it for development within the framework of the existing restrictions. Thus they did not sterilise the land. It was not enough that the applicant's proposal was one which would lead to a reasonable user of the land, having regard to current pressures of population and current notions of optimum density.

To see the present case in perspective it is important to remember that (b) remains unamended in Jamaica. One consequence of this statutory position is that some of the statements in the applicants' affidavits have little relevance to the exercise of the jurisdiction - such as averments that there is a severe shortage of prime land for residential purposes in the area; that approximately half an acre at the rear of their land is under-utilised; and that to subdivide the land will make it more useful and assist their family in overcoming the hardships occasioned by the housing shortage and high land and housing costs. The Jamaican legislature has not seen fit to make considerations of that kind a ground for discharge or modification of covenants under the statute,

although no doubt they will rightly encourage the exercise of the discretion once a ground is made out. Their relevance to the prescribed grounds is at best limited. As to any suggestion that they might be relevant under (a), a restriction tending to preserve the quality of a particular environment is clearly not to be deemed obsolete because it frustrates proposals which, were it not for the covenant, would seem entirely reasonable.

So it is not surprising that, faced with an omnibus application invoking all four grounds, the four judges in Jamaica who have sat in the case were unanimous in rejecting (b) and three of them rejected (a) also. The exception was Gordon J.A., who considered that "the neighbourhood" for the purposes of the Act extended to the nearby development known as Shaker Heights. He said that, since the deposit of the subdivision plan of Forest Hills in 1949, the neighbourhood as defined by him, while consisting predominantly of single dwelling houses, had changed in character because many of those in Shaker Heights were on much smaller plots than originally provided: instead of a house to an acre, there were in parts four to an acre.

Their Lordships find it unnecessary to determine the precise boundaries of "the neighbourhood". Whether or not it extends to the whole of Shaker Heights, or at least to certain properties there (as the judge at first instance thought), the salient fact remains that within the block where the parties have their properties the integrity of the covenants has been intact. Their Lordships do not doubt that, as held by the majority of the Jamaican judges, changes in the character of the neighbourhood have not rendered the restrictions in the block obsolete. Indeed Mr. Morrison Q.C. for the respondents did not argue otherwise on the present appeal. The argument on the appeal turned on grounds (c) and (d).

In order to deal with these grounds it is necessary to recount some history. In 1990 Mr. Brown told Mr. McMorris that he intended to subdivide his land. As to the reaction of Mr. McMorris the affidavits are in conflict. According to him, he expressed total disagreement. According to Mr. Brown, Mr. McMorris indicated that he had no objection as long as Mr. Brown

constructed a bungalow on the land, and even gave Mr. Brown the names of an architect and of a building society as a suggested source of finance. While this conflict cannot now be resolved, it is to be noted that the house later constructed is much more than a bungalow.

In February 1990 Mr. Brown applied to the Government Town Planner for permission to subdivide in accordance with plans submitted. Permission was granted on 6th June 1990. It is not suggested that at the time Mr. McMorris was given notice of that application or the permission. On or about 17th November 1990 a surveyor's notice was hand-delivered to the residence of Mr. McMorris indicating that a survey of Mr. Brown's land was to be carried out. Mr. McMorris says that he instructed a firm of land surveyors to be present to protect his interest, and that he awaited notice of the subdivision. Again, however, he was not served, either personally or otherwise, with any application for modifying the covenant against subdivision.

But in November 1990 the applicants also applied to the Supreme Court for modification of the first covenant. On 7th December 1990 an Acting Master ordered that notice be served on four registered proprietors identified by the applicants as entitled to the benefit of the restriction, including Mr. McMorris. Unfortunately the notice for Mr. McMorris was sent by registered mail addressed to him at an incorrectly numbered Kingston post office. During the argument of the present appeal it was said, too, that he should have been served personally, no order having been made for substituted service. Be that as it may, it is not in dispute that Mr. McMorris did not in fact receive notice of the proceeding. On 8th March 1991 the Acting Master, having heard only counsel for the applicants, ordered that the covenant be modified to allow subdivision into two lots for residential purposes.

On 25th April 1992 Mr. McMorris, whose land is on a higher level than that of the applicants, saw that construction of a building on their land had started. There is no evidence of any direct communication between the parties after that, nor any explanation of the apparent and perhaps surprising lack of direct communication. But on

28th April 1992 Mr. McMorris wrote to the Government Town Planner enquiring whether Mr. Brown had permission to subdivide and, if so, whether notice of the town planning application should not have been given to Mr. McMorris. He emphasised that the matter was serious and urgent. Receiving nevertheless no reply, he wrote again on 19th May 1992. The letter indicates that he had in the meantime learnt from the Town Planning office in a telephone conversation that planning approval had been granted on the understanding that Mr. Brown would take the necessary steps to have the covenant removed. Again in his second letter Mr. McMorris stressed the need for an early reply, as Mr. Brown was "proceeding vigorously with his construction programme".

About this time Mr. McMorris also consulted his attorneys, who reported to him on 1st June 1992 that the title of the applicants had been modified in 1991 to allow for the subdivision, and that a new certificate of title had been issued for the second lot. On his instructions the attorneys then searched the court file, discovering the order for service and an affidavit of service by registered mail; but, as already mentioned, the address had been wrong. On 19th August 1992 Mr. McMorris by his attorneys filed an application in the Supreme Court for orders that he be joined as a defendant in the earlier proceeding and that the order of 8th March 1991 be set aside on the ground that it was irregularly and/or fraudulently obtained. In justice to the applicants it should be recorded that no suggestion of fraud has been pursued. There is every reason to accept that they proceeded in good faith on the assumption that Mr. McMorris had been properly served.

There is no need to detail much of the subsequent prolonged history of the case, since it has not been suggested that there was any want of due diligence on the part of Mr. McMorris after the filing of his setting aside application. Suffice it that on 2nd October 1992 after a contested hearing the Master did order that the order of 8th March 1991 be set aside. Subsequently further affidavits were filed on both sides, including on the applicants' side affidavits from three other neighbouring registered proprietors confirming that they consented to

the application. Eventually Chester Orr J. dismissed the application, finding none of the statutory grounds established. On 2nd September 1992 and 26th April 1993 Mr. McMorris had obtained interim injunctions restraining the continued construction of the building. Whether any construction was carried out in breach of either injunction was not explored before their Lordships, and it is to be noted that already by October 1992 the building had reached roof height and a substantial part of the roof had been completed. What is clear is that after they were served with the application of 19th August 1992 the applicants completed the construction at their own risk, in the knowledge that Mr. McMorris was pursuing an objection to the subdivision.

The appeal of the applicants to the Court of Appeal was heard on 6th, 7th and 8th March 1995 and continued on 2nd, 3rd, 4th and 5th October and 20th December 1995. On the resumption of the hearing on 2nd October there was before the court affidavit evidence from the applicants that in the meantime Mr. McMorris had caused a certain building to be added to his own property. In part evidently a conversion of an existing outbuilding, it is a comparatively modest two-storey structure, consisting of a bedroom, bathroom, living room and powder room. Mr. McMorris deposed in reply that it is merely an extension of his dwelling house, to which it is connected by a tiled patio. It is occupied by his son and possibly the latter's partner. Mr. McMorris said that he was advised by his attorneys that it was not a breach of the restrictive covenants; and that he did not intend to apply for a subdivision of his title.

Photographs of this building are in evidence. In size it is certainly in no way comparable with the large second house on the applicants' land. Carey J.A. likened it to a lodge appurtenant to the main dwelling house. The analogy of a "granny flat" might also be suggested. Whether it could lead to an approved subdivision of the objector's land appears highly doubtful. Conduct by an objector can show that his objection is frivolous or vexatious - that is to say, the kind of objection which in *Ridley v. Taylor* [1965] 1 W.L.R. 611, 622, Russell L.J. regarded the provision which is ground (d) in Jamaica as intended to cover. Or, no doubt, it could otherwise

disqualify an objector from maintaining that a statutory ground of application is not made out. But their Lordships do not see the conduct of this objector in that light. They are far from satisfied that this structure is more than a permissible outbuilding. Its effect on the character of the neighbourhood would seem negligible. For these reasons it cannot be a significant factor in the determination of the present appeal.

Their Lordships were given to understand by counsel, however, that on the resumption of the appeal hearing on 2nd October 1995 the judges of the Court of Appeal indicated that they were unfavourably impressed with the conduct of the objector in adding this building. Such was the prevailing curial atmosphere in which counsel for the objector, Mr. Hylton Q.C., made a concession which came to play no small part in the Court of Appeal's decision. The tenor of the concession was that Mr. McMorris was objecting, not to the applicants' new house, but to the subdivision. It seems that the precise words of the concession were not recorded in any note that could be made available by counsel to their Lordships. Counsel's recollections differ. Mr. Hylton himself says that he meant to convey only that, because the new house was now a *fait accompli*, the objector realistically recognised that he would have no prospect of obtaining an order for its demolition. Mr. Wright, who led for the applicants before the Court of Appeal, says that he understood Mr. Hylton to have intimated that the objector never had any objection to the second house, only to the subdivision. It is agreed, though, that the reference in one of the Court of Appeal judgments to Mr. McMorris being "not troubled" by the second house does not reproduce Mr. Hylton's actual language. Possibly the objector's position is best summarised in the paraphrase of Gordon J.A. - "I can accept and live with 2 houses on an undivided lot, I object to modification of the covenant [not] to subdivide the lot".

At all events the concession had much influence in the Court of Appeal. Carey J.A. said that but for it he would have had little hesitation in dismissing the appeal. He thought that it destroyed all arguments that modification of the first covenant as sought would injure the objector. He rejected all the other grounds relied on

by the applicants, holding that the application should succeed under (d) only. The judgments of Forte J.A. and Gordon J.A. were more widely reasoned. Both upheld (d), treating the concession and the building by the objector himself as relevant. In addition Forte J.A., although ultimately basing his conclusion on (d), held that the objector, whom he described as having "remained dormant for over 12 months", had impliedly consented to the modification, at least until he applied to have it annulled. Gordon J.A., as well as holding the restrictions obsolete, expressly found that the objector by his laches had impliedly consented to the modification, on which view ground (c) was also established. The question becomes whether these somewhat various ways of establishing jurisdiction to grant the application are correct.

With great respect to the Court of Appeal's sense of the merits of the case, their Lordships are unable to agree with their conclusion. The subject of acquiescence by delay appears to have played no part in the oral argument before Chester Orr J., as distinct from being possibly covered by the formal and general terms of the application and a supporting affidavit. On such evidence as is before the courts, the objector had no reason to suspect anything amiss until the building work on the applicants' land began in late April 1992. He did not learn of the application to modify the covenant against subdivision and its success until early June 1992. He applied to the Supreme Court on 19th August 1992. At the worst his delay was of the order of four months, and he was by no means inactive during that period. An objector who sees building going on apace next door in apparent breach of covenant is of course well advised to move with expedition. Otherwise, in terms of (c), his omission exposes him to a risk of a finding of implied consent. But everything turns on the particular facts.

Here it is perhaps arguable that, as far as the building itself was concerned, four months was unreasonable in the circumstances. Yet, even if that were so, it would be relevant primarily to whether the objector could still seek to uphold the covenant against building more than one dwelling house. The applicants have never sought to have that covenant modified, presumably being content

that it should apply in future to each of their proposed new lots. As was made clear by the concession, the objector is not complaining of the new house as such, merely of the subdivision. In the light of the history their Lordships consider that it would be over-strict to impute to him implied consent to the subdivision. Ground (c) is therefore not established.

As to ground (d), the question is whether it has been shown that the proposed modification will not injure the persons entitled to the benefit of the restriction. The consents of other owners do not affect the objector's right to contest this ground. A familiar and at times legitimate argument in this branch of the law is known as the thin end of the wedge argument. Other expressions are sometimes coupled with it, such as "the first is the worst". It is an argument which has prevailed in Jamaica in earlier cases, notably *Stephenson v. Liverant* (1972) 18 W.I.R. 323, 337, per Smith J.A. and *Earl v. Spence* (unreported, 22nd June 1992; Court of Appeal of Jamaica (Supreme Court Civil Appeal No. 69/1989)), pages 6 to 8, per Rowe P. These decisions have accepted that cases may arise in which it is very difficult to say that the particular thing which the applicant wishes to do will of itself cause anyone any harm; but that harm may still come to the persons entitled to the benefit of the restriction if it were to become generally allowable to do similar things. Or such harm may flow from the very existence of the order making the modification through the implication that the restriction is vulnerable to the action of the Lands Tribunal in England or the Supreme Court in Jamaica. The Jamaican judges have cited to that effect a passage in Preston and Newsom on *Restrictive Covenants Affecting Freehold Land*, fourth edition (1967) page 185. That passage has not been carried through to the latest edition of that work - the eighth edition (1991) - but there is a passage to the like effect at page 282 of this edition, based on *Re Teagle's and Sparkes' Application* (1962) 14 P. & C.R. 68, 73.

Their Lordships find more recent decisions of the Lands Tribunal in England in the same line of cases collected in Maudsley and Burn's *Land Law: Cases and Materials,* seventh edition (1998) page 926. It appears that, while occasionally the Tribunal has been content to

leave future issues until they actually arise, the prevailing approach is as indicated in *Re Snaith and Dolding's Application* (1995) 71 P. & C.R. 104, 118. That case has some similarity to the present on the facts, although there the applicants were seeking modification of a covenant against the erection of more than one house on a lot. It was described in the decision at page 117 as being in "a well-laid out and opulently spacious residential estate". The applicants wished to build a second house on their two-acre plot. Houses nearby had already been built to a similar density, but Judge Bernard Marder Q.C., President, observed at page 118 that this rendered it more rather than less important to preserve the character of the stretch of land in which the properties of the applicants and the objectors were situated. He continued:-

> "The position of the Tribunal is clear. Any application under section 84(1) must be determined upon the facts and merits of the particular case, and the Tribunal is unable to bind itself to a particular course of action in the future in a case which is not before it: see *Re Ghey & Galton* [1957] 2 Q.B. 650; 9 P. & C.R. 1 and *Re Farmiloe* (1983) 48 P. & C.R. 317. It is however legitimate in considering a particular application to have regard to the scheme of covenants as a whole and to assess the importance to the beneficiaries of maintaining the integrity of the scheme. The Tribunal has frequently adopted this approach. See for example *Re Henman* (1972) 23 P. & C.R. 102; *Re Saviker (No. 2)* (1973) 26 P. & C.R. 441; and *Re Sheehy* (1992) 63 P. & C.R. 95.
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> Insofar as this application would have the effect if granted of opening a breach in a carefully maintained and outstandingly successful scheme of development, to grant the application would in my view deprive the objectors of a substantial practical benefit, namely the assurance of the integrity of the building scheme. Furthermore I see the force of the argument that erection of this house could materially alter the context in which possible future applications would be considered."

Their Lordships adopt that approach as correct in principle under the English and the Jamaican statutes alike.

On that approach, notwithstanding that the present objector is content to put up with the second house on the applicants' land, he is entitled to preserve the integrity of the covenant against a subdivision which would create separately saleable registered titles. The onus is on the applicants to show that a first relaxation of that covenant would not constitute a real risk as a precedent, so disturbing the pattern of a block of family homes in exceptionally extensive grounds. Bearing in mind the subdivisional tendencies and pressures for housing sites in Forest Hills generally, their Lordships cannot treat the onus as discharged. Indeed the judgment of Gordon J.A., with its emphasis on changes in a wider neighbourhood (including modifications of covenants applying to 17 lots), underlines the risk. As a matter of private property law, the objector cannot be said to be unjustified in the stand that he has chosen to take to protect this comparatively small and unusually spacious enclave from any fragmentation of titles. Ground (d) is therefore not established either. The covenant will stand unmodified.