IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. ERC 147 of 1991

IN THE MATTER of all that parcel of land part of MONA and PAPINE ESTATES in the Parish of SAINT ANDREW containing by survey Twenty-eight Thousand Eight Hundred and Forty-nine Square Feet and Six-tenths of a Square Foot of the shape and dimensions and butting as appears by the Plan thereof and being the land comprised in Certificate of Title registered at Volume 1225 Folio 979 of the Register Book of Titles.

A N D

IN THE MATTER of the Restrictive Covenants numbered "1" and "2" affecting the erection of buildings thereon.

A N D

IN THE MATTER of the Restrictive Covenant (Discharge and Modification) Act.

Mrs. P. Benka-Coker, Q.C., and Mrs. Lanza Turner for the Applicant
Mr. Alexander Williams for objector.

HEARD: July 22, 23, 24 and 31, 1992
August 4, 1992 and 18th March, 1994.

CHESTER ORR, J.

This is an application by SBH Holdings Limited for modification of Restrictive Covenants Nos. 1 and 2 affecting premises 2C Bamboo Avenue. The application is opposed by Mr. Clive Morin whose premises situate at 2D Bamboo Avenue adjoins that of the applicant.

2C Bamboo Avenue is a part of a sub-division of land part of Mona and Papine Estates. Wellington Drive runs from east to south west. On its eastern end it forms a junction with Mona Road and at its south western end it forms another with Munroe Road. From the western end of Wellington Drive on the left side, the following roads form junctions, Canberra Crescent, Bamboo Avenue and Ottawa Avenue. No roads lead from Wellington Drive on its right side.

The restrictions which the applicant seek to be modified are as follows:-

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

2. 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 Two Thousand Pounds."

The modification sought as amended at the hearing is as follows:

"1. There shall be no sub-division of the said land except into town house lots and or Strata Plan Lots under the Registration of Titles (Strata) Act except under and in accordance with the building and Town Planning Approval dated the 30th November, 1990 and granted in relation to the proposed development at premises 2C Bamboo Avenue.

2. No building of any kind other than private dwelling houses or town houses with appropriate out buildings appurtenant thereto and to be occupied therewith should be erected on the said land and the value of each of any of such private dwellings together with appurtenant out buildings shall be in the aggregate not less than Seven Hundred and Fifty Thousand Dollars."

The restrictions were imposed in 1954. The applicant obtained permission from the Town Planning department for construction of four (4) 3-bedroom town houses and conversion of the existing house into a 3-bedroom flat and a studio.

Affidavits were filed in support of the application and one filed by the objector, Mr. Clive Morin.

Mrs. Benka-Coker grounded the application on section 3(1)(a) and (d) of the Restrictive Covenants (Discharge and Modification) Act which reads as follows:

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

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

(b) .....

(c) .....

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

Under section 3(1)(a) of the Act, she submitted that the neighbourhood should be comprised of the following area - from where Old Hope Road leads into Munroe Road, Wellington Drive to Bamboo Avenue, Ottawa Avenue and back to Old Hope Road.

It was her submission that the original purpose of the Covenants imposed in 1954 was to have a large residence on extensive grounds. Because of changes in the character of the neighbourhood in the ensuing years the Covenants were no longer capable of fulfillment. The character had been altered from single family to multi-family residences and consequently the Covenants ought to be deemed obsolete.

With regard to section 3(1)(d) of the Act, she submitted that the modification will not injure the objector in that (1) it will not depreciate the commercial value of his property and (2) the modification will not in itself reduce the amenities that he may now enjoy. She asserted that it was not clear from his Affidavit what amenities will be reduced by the modification.

Mr. Williams submitted that the Covenants for which modification was being sought were the same as those in the matter of No. 39 Wellington Drive in which the modification was refused on the 9th December, 1991.

The neighbourhood was the same as in that case - the whole of Mona-Papine Estate. The applicant had not shown that the character of the neighbourhood had changed such as to render the restrictions obsolete. The covenants were designed to protect the neighbourhood area for single family dwelling houses. The applicant would need to show that the neighbourhood is almost totally one of town houses.

Under section 3(1)(d) he submitted that if the modifications were allowed the objector would suffer injury.

The first issue for decision is the area of the neighbourhood. The generally accepted test is the "estate agent's test". The learned authors of Preston and Newsom's Restrictive Covenants, 7th edition state at page 230.

> "The test is thus essentially an estate agent's test: what does the purchaser of a house in that road, or that part of the road expect to get?"

I visited the area and take into consideration the plan and photographs submitted. I do not agree with Mr. Williams that the area is the whole of Mona and Papine Estates. There was no plan indicating the extent of this Estate.

I agree that the area described by Mrs. Benka-Coker is the neighbourhood.

Has there been changes in the character of the neighbourhood?

The predominant characteristic of the area is that there are large lots with single family dwellings. On Canberra Crescent there are single family dwellings save for an apartment complex. On Bamboo Avenue Nos. 1 and 2 are multi-family residences - there is a town house complex of 14 town houses for which permission was granted. There are residences at 1C, 2D, 4 and 6 which are occupied by the Embassy of United States of America and used as a Sports Complex. There is a large open lot of land which adjoins premises No. 1C. On Ottawa Avenue, there are four (4) single family residences, an apartment development, a block of flats and a town house development. On Wellington Drive there are two town house developments,

Wellington Glades and Wellington Manor. Munroe Road is commercial save for one residence.

The original purpose of the Covenants was to prevent the fragmentation of that land into small lots and to preserve privacy by restricting the number of houses on a lot to a single family dwelling. The erection of town houses in my opinion has not changed the character of the neighbourhood as to render the covenants obsolete.

Smith, J.A. as he then was said in Stephenson et ux v. Liverant et al (1972) 18 W.I.R. 323 at 336.

> "Even if I am wrong and the user to which the houses have been put can be said to amount to a change in the character of the neighbourhood in that it has lost its private residential character, this would not necessarily entitle the applicants to succeed under para. (a) of s. 3(1) of the Law of 1960. The cases of Re Truman, Hanbury, Buxton & Co. Ltd.'s Application (3), and Driscoll v. Church Commissioners for England (4), show that a change in the character of the neighbourhood does not necessarily result in the covenant being deemed obsolete. The court is obliged to consider the further question whether the changes are such that the covenants ought to be deemed obsolete. The test laid down by Romer, L.J. in the Truman, Hanbury case (3) for resolving this question is whether the original purposes for which the covenants were imposed can or cannot still be achieved. In other words, the question is whether the object to attain which the covenants were entered into can or cannot be attained. If it can, the covenants are not obsolete, while if it cannot, they are."

Applying this test to this case, in my view it is clear that the original objects of the covenants can still be achieved. I hold that the covenants cannot be deemed to be obsolete.

Will the proposed modification injure the perons entitled to the benefit of the restriciton?

Mr. Williams submitted that if the modification was granted, there would be an increase in the density, traffic and noise in the area which would strain the amenities and remove the privacy and tranquility from the area which the restrictive covenants were designed to preserve, by making the area a private residential one of single family dwellings. Further "injury" as defined under the Restrictive Covenants Act is not restricted to injury of a purely pecuniary nature.

With these submissions, I agree. The premises of the applicant adjoins that of the objector and the resultant increase in traffic and noise would affect the amenities he now enjoys.

The learned authors of Preston and Newsom's Restriction Covenants supra state at page 221.

> "It is not the applicants project that must be uninjurious but the proposed discharge or modification, that is, the order which the Tribunal is invited to make. Cases arise in which it is very difficult for objectors to say that the particular thing which the applicant wishes to do will of itself cause anyone any harm: but in such a case harm may still come to the persons entitled to the benefit of the restrictions if it were to become generally allowable to do similar things, or such arm 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 tribunal."

I accept this as a correct statement of the law.

In Stephenson v. Liverant supra, Smith J.A. as he then was, referring to the above quotation said at 337.

> "It seems clear from this passage and as a matter of interpretation that it may be shown that an order for discharge or modification of a covenant will be injurious either by the mere existence of the order or because of the implementation of the project which the order authorises. There is, therefore, a burden on an applicant to show that the discharge or modification will not injure in either respect."

I hold that the applicant in this case has failed to discharge this burden.

The application fails on both grounds. The application is dismissed with costs to the objector to be agreed or taxed.

Finally let me express my profound apologies for the delay in delivering this judgment. This delay was due to a combination of factors, some beyond my control.