

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. R/C 13 OF 1989

IN THE MATTER OF ALL THAT parcel of land part of RETREAT in the parish of SAINT ANDREW containing by survey two acres one rood and thirty-five perches 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 592 Folio 43 of the Register Book of Titles

A N D

IN THE MATTER of the restriction affecting the user hereof

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

Mr. Michael Hylton of Messrs. Myers, Fletcher & Gordon for the Applicant.

Dr. Lloyd Barnett instructed by Mr. David Wong Ken of Perkins, Grant, Stewart, Phillips and Company for the 1st, 3rd, 4th, 5th, 6th, 8th and 9th Objectors.

Mr. Christopher Honeywell for the 7th Objector.

Mr. Ransford Graham for Jamaica 4-H Club Board of Management.

Heard: 1st and 2nd October, 1990.

THEOBALDS J.

As one travels North from Cross Roads, oft referred to as the local version of Piccadilly Circus, you go along Old Hope Road towards Liguanea, passing through a well mixed development of business places, petrol stations, Doctors' offices, pharmacies, private residencies of a modest size and condition. This continues until you reach the Traffic Light at the intersection of Old Hope Road and Mountain View Avenue where to one's right is a Texaco service station and a few small business places and to one's left there begins a visible change in the size of the lots. One notes for the first time a number of large two storey houses which all "seem" to have the appearance of private residencies. I say "seem" because it is admitted on both sides that these premises, all four of them, are in fact being used for commercial purposes without the covenant restricting such user having been lifted or modified in any way. This is the same covenant which will be set out verbatim later on in this judgment and which is on all the Titles which form a part of the original subdivision. As you reach up to the next intersection on your left, that is, to Retreat Avenue, one's

attention is immediately attracted to a large multi-coloured tent towards the Old Hope Road side of one of these lots - Lot No. 5 by counting from Seaview Avenue - Lot No. 97 on the planimetric map which forms an Exhibit to the Affidavit of Byron George Lewis dated 26th September, 1990 and filed in Support of the Application. To the rear of this tent and at the back of the same lot is a similar type of solid two storey residence which prevails from above Seaview Avenue. If one is a stranger to the area and predisposed to reacting audibly to shock so strikingly large and colourful is the tent that like the Lilliputians in Gullivers Travels when they beheld the giant pinned to the ground the spontaneous question is, "Ho, what have we here?" It is this Lot 97 which is the subject of the application for modification of certain restrictive covenants endorsed on the Certificate of Title registered at Volume 582 Folio 43 in the name of the Applicant, Covenant Community Church Limited.

A brief background history of this application would be helpful. All this information is gleaned from the Affidavits filed and appears not to be in issue. The lots on the western side of Old Hope Road and fronting thereon are a part of a subdivision known as "Seymour Lands". The applicant's lot at 97 Old Hope Road, the objectors' lots at 1 and 2 Retreat Avenue, the residences of the Canadian High Commission, the Australian High Commission and the Chinese Embassy Cum Residence and five other lots are all bounded by the same roadways and constitute the block in which the applicant's lot falls. On the other side of Retreat Avenue you find the British High Commission Residence, the Indian High Commission Residence and further north the Korean Embassy Cum Residence and twenty-five smaller residences all on Halart Drive. All these lands form part of the same subdivision, share the same root of title and are endorsed with the same covenants for the mutual protection of the registered proprietors of lands in the Subdivision. The Embassies and High Commissions listed above are all large prestigious houses and along with several others in the immediate area, some of whom have lodged objections to this application, go to establish beyond any question that they all form part of a very prestigious residential area.

Lot 97 Old Hope Road was purchased by the Covenant Community Church as recently as 1988. They wished to establish a Church and school on the site. Mindful of the covenant endorsed on the Certificate of Title they proceeded to acquire title. But more to the point and this has not been denied, prior to the completion

of the purchase the applicant was advised that their immediate neighbours whose property shared a common boundary would be objecting to Lot 97 being put to use as a School and Church. Another objector at No. 2 Retreat Avenue is across the road from the applicant but it is noted that the Applicant's Lot known as No. 97 Old Hope Road has its longer street boundary on Retreat Avenue. This boundary is approximately 350 feet in length while on the Old Hope Road side that boundary is only approximately 150 feet.

Covenant Community Church Limited, by Summons dated 30th January, 1989 sought a modification of restrictive covenant in respect of a parcel of land part of Retreat in the parish of St. Andrew. This land is comprised in certificate of Title registered at Volume 592 Folio 43 of the Register Book of Titles. The modification sought was in the following terms:-

"2. Any building or buildings on the said land shall not be used for the purposes of a Church, Chapel, School house or racing stable and no business shall be carried on upon the said land or any part thereof other than the erection maintenance and renting and/or sale of residential apartments, flats, flat-lets, condominiums, town houses."

be modified to read as follows:-

"2. No business shall be carried on upon the said land or any part thereof other than the erection, maintenance and renting and/or sale of residential apartments, flats, flat-lets condominiums and townhouses PROVIDED HOWEVER that the use of any building as a Church, Chapel or School House shall not be deemed a breach for the purpose of this covenant."

The Summons was supported by an Affidavit of even date sworn to by one Byron George Lewis a company director and director of the Covenant Community Church Limited in which he set out the grounds on which the application was made:

- 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 modified or discharged;

or

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

It is noted that these grounds are taken directly from Section 3 of the Restriction Covenants (Discharge and Modification) Act; this section it is which empowers a Judge in Chambers to discharge or modify covenants upon the application of any person interested in any freehold land affected by any restriction arising under Covenant or otherwise (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order).

It is to Mr. Hylton's credit that early in his opening remarks and in presenting the case for the Applicant he candidly admitted that reliance was placed mainly on ground (a) now commonly known as the "change in character of the neighbourhood" provision. It may be useful to remind oneself at this stage that the onus probandi rests on the Applicant throughout to satisfy the Court that there have been changes in the character of the property or the neighbourhood or because of other circumstances of the case which the Judge may think material, the restriction(s) ought to be deemed obsolete. A corresponding burden rests on the applicant in relation to all his grounds. There is no burden of proof on the objectors as they are already clothed with rights under their titles and these rights cannot be altered or modified unless the applicant succeeds on all or any of his grounds. However if the applicant succeeds on any one ground he may be entitled to the order as sought. There still remains a final discretion in the trial judge to refuse an application where one ground has been made out if in his view there are proper and sufficient grounds for such refusal.

In support of the Applicant's case several Affidavits filed on their behalf were read and referred to and form part of the record. The principle Affidavit is

that of Mr. Byron Lewis dated 26th September, 1990. A 1957 Edition of a planimetric map purporting to show the area in which the Applicant's lot is situated is exhibited to this Affidavit. Strong criticism of this planimetric map is raised by the objectors through an Affidavit dated 28th of September, 1990 by Mr. Roosevelt Clanhope Thompson a Commissioned Land Surveyor of upwards of 25 years experience. Bluntly put, Mr. Thompson concludes that the map is inaccurate in that having visited the area for the specific purpose of comparing the map with what exist on earth he has discovered that there are significant omissions from the map in that "large amounts of residences are not shown and in the case of Halart Drive a whole residential subdivision including the roadway situated one block from the Applicant's land has been omitted". This is not surprising for after upwards of thirty years since that plan was prepared it is reasonable to expect that there would be changes in the layout of streets and buildings. The question is why was such a plan submitted in the first place without steps being taken to have it updated? A far more helpful plan of the same area prepared by Mr. Roosevelt Thompson and dated 27th September, 1990 is exhibited to his Affidavit of 28th September, 1990. This plan, the accuracy and correctness of which is not in issue, shows that the Applicant's Lot No. 97 falls squarely in the middle of an area, intersected by Old Hope Road, which is almost in its entirety, residential in character. Indeed on the eastern side of Old Hope Road, which includes Glenview Terrace, there appear to be twenty-eight private residences on individual lots. These lots are all smaller in size than the lots on the side on which the Applicant's lot is situated. It was urged on behalf of the Applicant that these lots on the eastern side of Old Hope Road bear no relationship to the lots on the western side of Old Hope Road, the latter being clearly part of a different subdivision. More to the point, Counsel urged that the Applicant's Lot 97 was not a part of the same neighbourhood as some of the objectors' lots even though No. 1 Retreat Avenue and Lot 97 Old Hope Road share a common boundary and Lot 2 Retreat Avenue was across Retreat Avenue from No. 97 Old Hope Road. In support of his submission Mr. Hylton cited the case of In the matter of 48 Norbrook Drive (E. R/C 160 of 1982) where it was held for the reasons set out in the judgment that the residential homes on the southern side of Norbrook drive were part of a distinctly different neighbourhood from houses on the Northern side of the same Norbrook Drive. In that case Morgan J. as she then was, adopted what is known as the estate agent's test as outlined in Preston v. Newson's Restrictive Covenants and Freehold Land 3rd Edition

p. 162 and asked herself the question "what does the purchaser on a lot in that road or that part of the road expect to get?" The learned judge accepted a submission that the tone and character of the houses on the north side of Norbrook Drive was so different from those on the south side as to constitute a different "neighbourhood". She went on:

"To satisfy the estate agents test I would say that a purchaser of a house on the south side of Norbrook Drive expects to get privacy, seclusion, a view on either side of his house of beautiful gardens, and to enjoy peace and quiet occasioned by low occupancy in a place where private single-family dwelling houses exist. If that is right, then I am constrained to find that there are special peculiarities in features and amenities which redound to the benefit of the south side, amenities which are not available to and could not have so been intended for the north side. These lots are on a higher level than the north side which would tend to give them a special view; there are facilities for walking on the golf course with its beautiful green grass and lush vegetables. The spaciousness of these lands and that of the golf course in front of them attracting privacy, seclusion and quietude creating an enormous aura of calm and peace, all these are undoubtedly amenities not available to the north side. This area must have been intended by the covenants to create and possess a tone and character of its own far different from the area on the other side to which many of these amenities are limited if at all.

I therefore conclude that "neighbourhood" in the context of this case consists of those houses only in the sub-division on the south side of Norbrook Drive numbers 20 to 76 being even numbers only and fronting the Constant Spring Golf Links as appears on the planimetric map. I further conclude that the houses on the north side do not form part of this "neighbourhood" but belong to a distinctly different one of their own, and therefore need no consideration for the determination of this matter."

The Norbrook Drive case cannot be considered an entirely relevant authority for the reason that the learned judge in that case had to decide whether two admittedly residential areas in the same locality could be regarded as different "neighbourhoods". In this case the Applicant is submitting that his Lot and those immediately contiguous to him and fronting on Old Hope Road are now commercial having undergone a change in character. The applicant seeks to distinguish between these lots and those on the far West of Old Hope Road which he describes as being a "fully residential neighbourhood". Having read the Affidavit(s) of Mervyn Down and Roosevelt Thompson earlier referred to I am constrained to reject this submission. Indeed these Affidavits, the

Planimetric Map of Mr. Thompson and the Affidavit of Carole Cartade dated 28th September, 1990 together bring the Crystal Tower residential apartment complex, the Beverley Hills Hotel and Beverley Glades Apartments with their high occupancy potential literally into the picture. These units are conspicuous by their absence from Mr. Byron Lewis' Planimetric Map of 1957 Vintage. Indeed far from there being changes in the character of the neighbourhood the entire area has become more residential than ever and this certainly would be a circumstance to be considered material in holding that the restriction ought not to be deemed obsolete, and I so hold.

There is a pattern running through these affidavits that taken separately might not be considered of any significance, but collectively cannot fail but to leave an aura of skepticism in the mind of any judge of fact. Why for instance refer to the modification of covenant at 99 Old Hope Road as allowing National Commercial Bank to use the property as a school when the Order of the Master in Chambers, an Attested Copy of which is exhibited speaks of a Training School. Is it because the modification sought before this Court includes the use of a building as a school house.

I would accept the sworn statement of one of the objectors that there is a great deal of difference between a "Training School" ... and a school for the education of children of varying ages. One cannot help but wonder how so many residents of the area who support this application go on record as deponing that it is their belief that the property facing Old Hope Road can no longer be considered residential, yet they themselves own homes in which they reside in the immediate neighbourhood. How in answer to objections which speak of loud singing, hand clapping, hundreds of students in attendance, loud music, dozens of cars parked on sidewalks ..., heavy vehicular traffic on weekends and at nights, rallies and fairs with the applicants use of the property as a Church and School they could simply depone "the operation of the Church have not disturbed the peace and tranquility of the neighbourhood". The neighbourhood in this context includes Halart Drive, Glenview Terrace, which from the map is seen to be almost opposite to the applicant's land on the Eastern side of Old Hope Road. These same affidavits filed in support of the application speak of the residential neighbourhood which exists to the West of Old Hope Road. This would of course include Lots 1 and 2 on Retreat Avenue (the private residences of some of the objectors) and also lands on Seymour Avenue and Seaview

Avenue admittedly occupied by diplomatic representatives and embassy officials. The statements by all the deponents that they "support the said application of the Church" without giving any reason and confining their remarks to the operation of the Church and the presence of the Church and noise emanating from the Church when the modification is for a Church, Chapel or School house demonstrates a lack of good faith. Are the deponents to these Affidavits denying the factual allegations as to loud singing, hand clapping, hundreds of students, loud music, heavy vehicular traffic, rallies and fairs or are they saying "this is so but we are not in the least bit disturbed by such". The situation has to be viewed from a common-sense practical approach. One may be indifferent to the presence of a Church in the event that the obvious increase in pedestrian and vehicular traffic is of no import to some residents but to support something without so much as saying, why? Schools involve the presence of young children, and noise both in and out of the class rooms are a part of the normal routine of every school. These fears of the objectors that the peace and tranquility of the neighbourhood would be permanently lost to them were this application to be granted have not been addressed or countered by the Affidavits filed in support of the Applicant. It is beyond argument that any increase in the volume of foot or pedestrian traffic and vehicular traffic will of necessity involve a corresponding increase in the noise values and although specific incidents of increased noise have been given there has been no attempt made to counter or explain. To give an example, the affidavit dated 19th September, 1989 of Mervyn Down, a Senior Valuator and a Director of D.C. Tavares & Finson Company Limited, property valuers of Belmont Road, New Kingston, states that he visited the area on several occasions at different times of the day and on different days of the week and observed the activities of the Church being carried on at times in the open air with the assistance of a public address system. At times services are conducted under a tent thereby causing a considerable amount of noise in an otherwise quiet residential area. Additionally, there are allegations of loud singing, hand clapping, chanting, loud music, rallies and fairs at all hours of the day and night arising out of the applicant's use of the property as a Church and School in breach of the Covenants. The Affidavits of Messrs. Clive Saunders, Abram Young and Mesdames Cuffley and Alberga do not say whether or not this is so.

It is clear that the covenant was designed to establish and/or maintain the



character of the subdivision as residential. The covenant as framed makes it clear that it was intended that the whole subdivision should be residential, and that the covenant should be for the mutual benefit of all those who build houses on the subdivision or subsequently buy them. It is axiomatic that the character of a residential subdivision as a whole or of a particular part of it may change with the passage of time. It is learned counsel's submission for the applicant that this time has come. In support of this submission he claims that the four lots along Old Hope Road immediately below the applicant are all being put to commercial use. He concedes that this is so without the covenant being lifted or modified in any way but he urges that admitted breaches of the covenant are irrelevant. What the Court is to look for is "change" and whether rightly or wrongly if change there be the applicant's case will have been made out. With great respect to Mr. Hylton's views I cannot but disagree with him most emphatically. He has produced no authority for this novel submission and not surprisingly so. At no time will a Court give its blessing to lawlessness or illegality. The covenantees may at some future date seek to enforce their rights in these very Courts. The submissions go on. The applicant now seeks to, as it were, make out that these four lots along with his Lot 97 comprise a different neighbourhood from the lots to the extreme West of Old Hope Road and ought to be considered as a separate entity. He submits that these lots are fully single family residential in character while those facing Old Hope Road are commercial and constitute a different neighbourhood. Counsel for the objectors quite properly in my view, points out that this is inconsistent for by virtue of the Affidavits the Applicant has filed an attempt is made to place "in the vicinity of the Church" lots numbered 117A through 63. Some of these lots including the Matilda's Corner Police Station and Campion College to the north and a Shell Service Station to the south are so far away that they do not appear on the planimetric map at all. The applicant seeks to widen his neighbourhood on paper and narrow it in terms of his verbal submission to the Court. There is evidence before me from an objector and from a Mr. Mervyn Down to which reference has already been made that this area (including the Applicant's lot) "has developed over the years as a strictly residential area occupied by the upper income groups. Today many of the properties are occupied by foreign embassies or are official Government residences. In recent years there has been a concerted effort by the Government to maintain

this area and strict regulations have been applied to any new construction in the area". An indication of the correctness of this last statement is found in a letter dated 3rd November, 1989 from the Government Town Planner in which it is stated that a proposal by the owners of Lot 99 Old Hope Road to construct an office building to house a computer centre for their use had not been approved. This was in spite of the fact that modification of the covenants on that land had already been secured to permit the operation of a "training School" by the owners, National Commercial Bank. The circumstances under which this modification were obtained are apposite. The owners of the adjoining lands who would have been the principal objectors to the modification had no knowledge when the application was made. Additionally they claim non service of notice of the application and more to the point while at No. 2 Retreat Avenue they share a common fence line with the former owners of Lot 99 on whose behalf the application for modification was made they (the objectors) are not even listed as being the owners/occupants of the land immediately adjoining Lot 99. This is indeed an extraordinary and unfortunate omission. It is important to these proceedings because of a submission on behalf of the applicant that because a change of user already being in effect in relation to Lot 99 their case for a similar change in respect of their Lot 97 is strengthened. The objectors in reply have urged that the modification in favour of a training school for National Commercial Bank was irregular and no disadvantage should be suffered by the adjoining owners. Based on my acceptance of the evidence that no notice was given to these adjoining owners and that they do not even appear on a list of adjoining owners filed in support of the application I would accept the submission made on behalf of the objectors. I am of the view that the modification granted in respect of Lot 99 does not assist the applicants case at all. It certainly could not be said that the owners of Lot 2 Retreat Avenue agreed either expressly or by implication by their acts or omission to the covenant on Lot 99 Old Hope Road being modified or discharged. It cannot be said that the proposed modification in respect of Lot 97 Old Hope Road would not injure the person entitled to the benefit of the restriction. A large number of objections have been filed. More particularly the owners of the land immediately adjoining gave notice before purchase that they would be objecting. The applicant knew before the date of his purchase of the existence of the covenant, he knew that the implementation of his plan to use the premises for a Church and School house not only involved breaking

the Covenant but that objection would be taken. In the words of farwell J. In re Henderson's Conveyance [1940] Ch. 835

"... the Act was not designed ... to enable one owner to get a benefit by being freed from the restrictions imposed upon his property in favour of a neighbouring owner, merely because, in view of the person who desires the restriction to go, it would make his property more enjoyable or more convenient for his own private purposes. I do not think the section was designed with a veiw to benefiting one private individual at the expense of another private individual."

These words are most applicable to the instant case. In any society where lawlessness and lack of consideration are endemic, institutionalized lawlessness and institutionalized lack of consideration cannot be allowed to go. The man on the Papine minibus, like his counterpart on the Clapham omnibus in relation to reasonableness, must look to Church or state as role models in relation to respect for law and order and consideration for its citizenzy. The accepted practice if one wishes to acquire land for a specific purpose and that purpose is restricted by covenant on the title then the vendor should apply for such covenant to be discharged or modified and meanwhile the Sale Agreements should be drawn subject to the release of such Covenant by the Court.

While the establishment of a Church and school is prima facie a most laudable enterprise the Objectors here contend that such a project on this particular site would prejudice them in the enjoyment of their own premises, and it would depreciate the value of the residences. This view is confirmed by Mr. Mervyn Downs in his Affidavit to which reference has already been made. In accepting this evidence, I conclude that a modification of the Covenant as sought would depreciate the residential value of properties in the area and would injure persons entitled to the benefit of the restriction. For these reasons the application is refused.