

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. 2006 HCV03792

BETWEEN	OSWALD AUGUSTUS SHERRIAH	FIRST CLAIMANT
AND	VERNA MAE SHERRIAH	SECOND CLAIMANT
AND	JADE HOLLIS	DEFENDANT

Wendell Wilkins instructed by Robertson Smith Ledgister & Co. for the claimants.

Patrick Bailey instructed by Patrick Bailey & Co. for the defendant.

Heard: 8th December 2006 and 2nd July 2008

Campbell, J.

**Injunction – Modification of Restrictive Covenant-
S3 and 4 of Restrictive Covenants (Discharge and Modification) Act –
Change in Character of Neighbourhood**

- (1) The claimants, Oswald and Verna Sherriah, are the registered owners and occupiers of a single family dwelling house situated at 21 Caribbean Close, Trafalgar Park. The property was transferred into their joint names on the 17th June 2002.
- (2) The defendant, an Attorney-at-Law, is the registered owner and occupier of 23 Caribbean Close, Trafalgar Park, Kingston, registered in her name on the 9th March 2006. The defendant has admitted that she is in breach of certain restrictive covenants endorse on her Certificate of Title and wants to apply to the Court to effect the modification.
- (3) Trafalgar Park is described by the claimants as being located in an upper scale neighbourhood in St. Andrew “that there are commercial properties near to Trafalgar Park, but the neighbourhood remains exclusively residential.”
- (4) The claimants allege that in April 2006, they observe construction at the defendant’s property that included an office to the front of the dwelling-house and the occupation of the defendant of both facilities. According to the claimants, the defendant started to operate a law

practice at the premises and was visited by delivery trucks, bearers, couriers and staff. In addition, several cars were observed there.

(5) As a consequence of the construction work, the claimants objected to the defendant's structure which was within four feet of their boundary fence. The position of the newly constructed wall resulted in the rain water from the roof of the erected structure flooding the claimant's property and prematurely filling the cess pits thereon. These in turn cause an offensive odour to permeate the area. There were also complaints by the claimants of the exhaust from an air-conditioning unit emitting hot fumes into the claimant's kitchen.

(6) The claimant wrote the cities' municipal managers, Kingston and St. Andrew Corporation (KSAC), and complained about the defendant's breaches. The KSAC served the defendant with a cease work notice.

(7) On the 27th October 2006, the claimants filed a claim form, seeking to enforce, inter alia, restrictive covenant 4 and 5, on the defendant's Certificate of Title, alleging that the defendant had erected structures, commenced a business in breach of the restrictive covenants, thereby denying the adjoining neighbours the benefit of such covenants. It was further alleged that the defendant caused the flow of rainwater onto their property and caused the emission of air-conditioning exhaust.

(8) On the 27th October 2006, the claimants filed an ex-parte Notice of Application for Court Orders, seeking injunctive (1) relief to restrain the defendant and was granted Orders, in terms of the application, as follows:

1. an injunction restraining the Defendant by herself, her servants and or agents or otherwise from continuing or commencing the construction of any structure or erection on premises known as 23 Caribbean Close, Trafalgar Park, Kingston 10 in the Parish of St. Andrew and registered at Volume 1038 Folio 500 of the Register Book of Titles that breaches covenant No. 6 endorsed on the title to the said property.
2. an injunction against the Defendant, her servants and or agents or whomsoever to demolished (sic) and removed (sic) forthwith from the said property, at the expense of the defendant, the structures or erections constructed on premises known as 23 Caribbean Close, Trafalgar Park, Kingston 10 in the Parish of St. Andrew and registered at Volume 1038 Folio 500 of the Register Book of Titles

that are in breach of restrictive Covenant No. 6 endorsed on the title to the said property.

3. an injunction restraining the Defendant by herself, her servants and or agents or otherwise from commencing, continuing or conducting any law practice or any other business or trade at premises known as 23 Caribbean Close, Trafalgar Park, Kingston 10 in the Parish of St. Andrew and registered at Volume 1038 Folio 500 of the Register Book of Titles.
4. an injunction restraining the Defendant by herself, her servants and or agents or otherwise from continuing to cause the exhaust from the air conditioning unit installed on the Defendant's property situated at 23 Caribbean Close, Trafalgar Park, Kingston 10 in the Parish of St. Andrew and registered at Volume 1038 Folio 500 of the Register Book of Titles from travelling over into the Claimants' property.
5. an injunction restraining the Defendant by herself, her servants and or agents or otherwise from causing or permitting rain water from spilling directly from the building or structure erected on the Defendant's property situated at 23 Caribbean Close, Trafalgar Park, Kingston 10 in the Parish of St. Andrew and registered at Volume 1038 Folio 500 of the Register Book of Titles and into the Claimants' property.
6. The claimants give the usual undertaking as to damages.
7. This Order to be served as soon as possible.
8. Cost to be cost in the Claim.

(9) On the 7th November 2006, the matter was heard inter-partes and the injunctions were extended to 30th November 2006.

(10) Before this Court was the claimant's application for an extension of the injunction and the defendant's application under S 4 of the Restrictive Covenants (Discharge and Modification) Act, which provides;

“Where any proceedings by action or otherwise are taken to enforce a restrictive covenant, any person against whom the proceedings are taken may in such proceedings apply to the court for an order giving leave to apply to a Judge in Chambers under section 3, and staying the proceedings in the meantime.”

(11) It was submitted on behalf of the defendant that an application before a Judge in Chambers should be commenced by a Fixed Date Claim Form, and that the Court should grant a stay of the

original proceedings to allow for an application for modification/discharge to be properly considered.

(12) It was further submitted that such an application has a reasonable prospect of succeeding because the claimant consented to the use of the premises as a professional office of an attorney-at law. 2) That having regard to the particular location of those premises the proposed modification will not injure the persons entitled to the benefit of those restrictive covenants. 3) The continued existence of such a restriction without modification would impede the reasonable user of the defendant's land, without securing to any person practical benefits. (4) Reasonable compensation could be paid to anyone who establishes loss as a result of the proposed modification would be an adequate remedy. 5) The practice of law by the defendant on the premises would be unobtrusive, inconspicuous and comports with the character of the neighbourhood.

(13) The defendant, it was contended, had breached the following covenants;

Restrictive Covenant no. 5

The building on the said land shall not at any time be used for the purpose of a club, school, chapel or church and **no trade or business whatsoever** shall be carried on upon the said land or any part thereof and the said building shall be used for the purpose of a private dwelling house only.

Restrictive Covenant no 6

No dwelling house **or other building or erection** shall be built or erected on their said land or any part thereof nearer than fifteen feet from any road boundary or four feet from any of the other boundaries.

(14) Section 3 and 4 of the **Restrictive Covenants and Modifications Act** (the Act) are in all matters substantially similar with s 84 and s 84 (9), respectively of the **United Kingdoms, Law of Property Act**. Having said that, however there are some fundamental distinctions between the application for modification process in the United Kingdom and in this jurisdiction. Section 84 names the Authority, the forum to which applications should be made for the discharge or modification of covenants by any person affected by any restriction arising under the covenant. Section 84. (9), provides for the application by any person against whom enforcement proceedings are taken to apply to the Courts, for leave to apply to the Authority set up under section 84, and to seek a stay in the interim.

(15) In this jurisdiction, however, S3 of the Act, which is substantially similar to s 84, provides for applications to a Judge in Chambers, and not the Planning Authority (who is empowered, under Section 3) for discharge or modifications. The Planning Authority is empowered like any other interested party to make an application to the Judge.

(16) In **Feilden v Byrne (1926) 1 Ch. 623**, the plaintiffs filed a writ, claiming an injunction to restrain the defendants from using certain premises as a school, in breach of the covenants contained in the deed of conveyance. Eve J, after noting the difficulty in determining the principles on which he ought to exercise his jurisdiction in the matter, said;

“If, for example, they were setting up a defence to the action change of neighbourhood or conduct on the part of those entitled to the benefits of the covenants rendering it inequitable to enforce the restrictions, I think the plaintiffs might properly insist upon such issues being dealt with by the Court; but where, as in this case, the defendants are asking for modified relief such as the court has no jurisdiction to give them, I think circumstances do exist justifying the making of the order.”

(17) Similar views were expressed in **Richardson v Jackson and Another (1954) 1 All ER 437**, where it was held that the modification of covenants were not within its power. Danckwerts J cautioned that there should be no stay granted if “such an application has no real chance of succeeding.”

(18) This court is not so hamstrung and can in fact give such modified relief to the defendants. I start with the clear power of the Judge in Chambers, pursuant to Section 3 of the Act, and the provisions of the Civil Procedure Rules. The Court, under these rules, is mandated to identify the real issues in the case, decide if further investigation and full trial is needed, if not, dispose summarily of the case. The backdrop to the management of the case by the judge is that hopeless cases or matters that have no real prospect of succeeding ought to be disposed of summarily. Rule 25.1 (b) and (c).

(19) The defendant, who is an Attorney-at-Law, has not denied being in breach of the restrictive covenants. In her affidavit filed on the 28th November 2006, at paragraphs 62 - 66 and 77, she demonstrates the change in the neighbourhood.... at paragraph 62.

“Since moving into the neighbourhood and even before then, I was aware that several professionals and artisans live in the neighbourhood and that many of them work from home, or home and office.

(20) The subsequent paragraphs 63 – 66, list the types of commercial activities being done in Trafalgar Park, jewellery designing, piano music instructor, real estate brokers, urban developers, and marketing consultants, and paragraph 77;

77... That my property is at the periphery of Trafalgar Park, nearest the Trafalgar Road end. That boundary falls in a vibrant commercial area next to the National Commercial Bank Jamaica Ltd. main office including the Banks legal department.

(21) Counsel for defendant in his written submission, after referring to further adjoining commercial property, stated inter alia, “That having regard to the particular location of those premises the proposed modification will not injure the persons entitled to the benefit of those restrictive covenants.” In other words, the covenants are obsolete, a matter which the Judge may take into his deliberations pursuant to S3.1. (a)

(22) The defendant speaks at some length to the illness of both of her children with accompanying medical reports. And states that her proximity to her children would be enhanced as they quite frequently require her attention at short notice. See paras 19 – 28, affidavit of Jade Hollis.

(23) It was submitted on behalf of the defendant that the continued existence of such a restriction would impede the defendant’s use of the premises as a professional office without securing any practical benefits to any person, because the defendant’s practice was small and could be carried on inconspicuously and comports with the character of the neighbourhood.

Analysis

(24) It is not in issue that the defendant took the premises with notice of the restrictive covenants. It appears that access to her children was the primary consideration of the defendant, a single mother, in choosing to work from home. Although the Court appreciates that

it is convenient to work from home for the defendant, it was open to the defendant to secure an office closer to the children's school.

(25) The Court had the benefit of seeing affidavits of David Johnson and Carmen D. Leighton, registered owners of property on 9 Caribbean Close respectively. They both state that prior to the arrival of the defendant, the community was wholly residential. I have seen a letter dated 6th September 2006 in which then Counsel for the defendant, Myers, Fletcher and Gordon, wrote to the lawyers who represented themselves as appearing, "for certain owners of property situated along Caribbean Close" that in relation to breach no.6, she is rectifying same. However in relation to Covenant number 5, she has no intention of breaching same. This amounts to an admission that the defendant was using the premises as a professional office and which use was out of character to the area. Johnson has deponed he purchased the property "because it was situated in a **solely residential area**, which would foster an environment in which our children could play safely without the dangers occasioned by the increased traffic associated with business premises."

(26) The claimants at paragraph 19 deponed, inter alia, "We specifically bought our property because it offered us an exclusive upscale neighbourhood to reside in free from the operation of private businesses and commercialization of any type and its negative consequences"

These were the goals of the homeowners in purchasing their property. Should the office be allowed to remain, can one reasonably expect that as the young attorney becomes more experienced, is her clientele likely to increase? Will this lead to greater pedestrian and motor traffic to her doors? Will this seriously impact the benefits that the claimants attach to their property?

(27) Is Trafalgar Park still properly considered residential?

Farwell J, dealt with the matter in this way. In **Chatsworth Estate Fewell (1931) 1Ch. 224.**

"I think that when one talks about a residential area one means an area in which persons reside more or less permanently, and it is quite a different thing to talk about an area of hotels or boarding-houses, schools and things of that sort. So that one starts with this, that although the area is no longer confined to

single dwelling-houses, and there has been some relaxation of the covenants in the sense that some boarding-houses or guest houses have been permitted, and some other use have been made of some of the other houses in the area which is not strictly within the covenant, nevertheless taking it as a whole, and looking at it broadly, the area retains its character of being a residential area.”

(28) Did these homeowners have a benefit which would be injured should the application by the defendant succeed? I think so, even if we accept,(and I don't) all of what the defendant contends in respect of the pockets of commercialization she has cited as taking place in the community, if the modification sought will cause injury to the claimants, then it ought to be refused. **In Re Truman 7 Co. Ltd. 3 All ER 562.** On a case stated to the Court of Appeal from the Lands Tribunal which had found that there had been a change in the neighbourhood, but was satisfied that the discharge or modification of the covenant would seriously injure persons entitled to the benefit, and rejected the application. The Court of Appeal held in upholding the Lands tribunal decision and quoted with approval the dictum of Farwell J. In **Chatsworth Estates Co v Fewell (1931) 1 Ch. 224 at pg 229.**

“A man who has covenants for the protection of his property cannot be deprived of his rights there under merely by the acts and omissions of other persons unless those acts or omissions bring about a state of affairs as to render the covenants valueless, so that an action to enforce them would be unmeritorious, not bona fide at all, and merely brought for some ulterior purposes. It is quite impossible here to say that there has been so complete a change in the character of this neighbourhood as to render the covenants valueless to the plaintiffs.”

and at pg 563

“If a case is to be made out under this section, there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the purchaser who is enjoying the benefit of it.”

(29) Section 3 of the Act spells out what is required to be shown by an applicant for modification. That because of the changes in the character of the property, the restriction ought to be removed. The defendant has failed to so demonstrate. There is not one scintilla of evidence that the claimant's property has changed in such a way that the restriction is now considered obsolete. The defendant herself speaks of the changes she has made to enhance the value of her house and states that it is not conspicuous and comports to the area. It speaks of the

character of the area that this \$16,000,000 dollar home fits in inconspicuously. In fact the main area of complaint by the claimants is not to the appearance of the structure, it is the increased pedestrian and vehicular traffic to the house.

(30) The essential residential character of the area has not changed. Neither is there an impediment to the defendant's use of the land.

The defendant's application for permission to apply to a Judge in Chambers and to stay the proceedings is refused. The defendant's case has no prospect of succeeding. I am minded therefore to grant the injunctions sought. Costs to the claimants to be agreed or taxed.