J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 36/1969

BEFORE: The Hon. Mr. Justice Luckhoo, Presiding.
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Smith, J.A.

STEPHENSON ET UX v. LIVERANT ET AL

R. Alberga, Q.C., and J. Stephenson for the appellants.

V.O. Blake, Q.C., and R.H. Williams for the respondents.

July 12 - 16, 19 - 21, October 25 - 29, 1971;
March 10, 1972

LUCKHOO, J.A.:

This is an appeal by Dr. F.B. Stephenson and his wife Mrs. Elizabeth Stephenson against an order of Parnell, J., dismissing their application made in February, 1969, under s. 3 of the Restrictive Covenants (Discharge and Modification) Law, 1960 to have certain restrictive covenants endorsed on the titles to certain of their property at Fortlands, Discovery Bay in the parish of St. Ann modified. The application was opposed by S. Liverant, J. Upham and G. Tunney, the joint owners of property adjoining the applicants' property.

The applicants' property, the subject of the application, consists of two lots numbered 12 and 13. The respondents' property is lot 14. These lots form part of a sub-division containing 20 lots consecutively numbered. Each lot consists of 30,000 square feet. The sub-division is situate between the parochial road leading to Fort Point, Discovery Bay and the sea. At one end lot 1 is owned by the Kaiser Bauxite Company. Lots 1 and 2 are in bush. The land outside the subdivision adjoining lot 1 is also owned by the Kaiser Bauxite Company. Part of that

/land is ....

land is on loan to fishermen and the remainder is on loan to the University of the West Indies for their marine laboratory. To the seaside of that area is a public beach and recreation area. Immediately behind the length of the sub-division is an area of land part of which has been developed and used as an airfield for the Kaiser Bauxite Company's operations. In close proximity to the sub-division the Kaiser Bauxite Company owns land upon which is situate its industrial complex.

The sub-division was laid out in or about the year 1950 as a private residential area and the covenants imposed on the titles to the lots therein were directed to preserving it as a private residential area. The sub-division forms an enclave or more accurately a peninsula with areas of industrial and commercial activity surrounding it where it is not open to the sea.

The restrictions which the applicants seek to have modified are as follows -

"3. 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 One Thousand Five Hundred Pounds.

4. The main buildin to be erected on the said land shall face the roadway or one of the roadways bounding the said land and no building or structure shall be erected on the said land nearer than twenty-five feet to any road boundary which the same may face nor less than fifteen feet from any other boundary thereof and all gates and doors in or upon any fence or opening upon any road shall open inwards and all out-buildings shall be erected to the rear of the main building.

5. No building erected on the said land shall be used for the purposes of a Shop, School, Chapel, Church or Nursing Home or for racing stables and no trade or business whatsoever shall be carried on upon the said land or any part thereof."

/The applicants ....

The applicants wish to develop lots 12 and 13 by erecting thereon -

(a) one main apartment block 2 storeys high containing 8 separate self contained flats;

(b) three 2 storeyed blocks each containing 2 apartments;

(c) two single storey units consisting of one bedroom, one bathroom, living room, kitchen and verandah.

There would be an office in the rear of the main apartment block to deal with business incidental to the letting of the apartments. There would also be a swimming pool in the centre of the lots and a jetty going into the sea with a white sand beach. It is the intention of the applicants to have the apartments rented out to holiday makers who are expected to be tourists. In order to achieve their object the applicants desire that the abovementioned restrictions be modified to read as follows -

"3. No building of any kind other than private dwelling houses or apartment blocks with appropriate outbuildings appurtenant thereto and to be occupied therewith shall be erected on the said land and the value of each such private dwelling house and apartment block and outbuildings shall in the aggregate be not less than One Thousand Five Hundred Pounds.

4. No building or structure shall be erected on the land less than fifteen feet from any boundary thereof and all gates and doors in or upon any fence or opening upon any road shall open inwards.

5. No building erected on the said land shall be used for the purposes of a Shop, School, Chapel, Church or Nursing Home or for racing stables and no trade or business whatsoever, except such as may be incidental to the letting and maintaining of the buildings on the said land, shall be carried on upon the said land or any part thereof."

Section 3 (1) of the Restrictive Covenants (Discharge and Modification) Law, 1960 (No. 2) provides as follows -

/"3 (1) ....

"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 benefits 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 persons entitled to the benefit of the restriction also suffers loss in consequence of the discharge or modification, nor shall any compensation

/be payable ....

be payable in excess of such loss."

It will be observed that the matters stated in paragraphs (a) and (b) and in paragraphs (c) and (d) of s. 3 (1) are in substance those contained in paragraph (a) and in paragraphs (b) and (c) respectively of s. 84 (1) of the English Law of Property Act, 1925.

The application as filed was made on grounds which fall within each of the paragraphs of sub-s. (1) of s. 3 of the Jamaica enactment. The respondents have resisted the application on the following grounds:

(a) that none of the conditions contemplated and required by s. 3 (1) of the Restrictive Covenants (Discharge and Modification) Law, 1960 (No. 2) which have to be satisfied and fulfilled before the restrictive covenants may be modified, have in fact been fulfilled;

(b) the modification proposed will adversely affect the value of their holding, lot 14; and the enjoyment of the amenities thereof;

(c) the erection of apartment blocks and an office will adversely affect the quality of the neighbourhood and will change the character thereof and will create traffic hazards and endanger life and property.

At the hearing before the judge in chambers and before us on appeal only two of the grounds originally filed in support of the application were pursued, namely -

(a) that by reason of the changes in the character of the neighbourhood and breaches in the covenants that have already taken place the restrictions are obsolete;

(b) that the proposed modifications will not injure persons entitled to the benefit of the restrictive covenants.

The applicants are the registered owners of lots 12, 13 and 15. They acquired lots 12 and 13 by transfer in 1955 and 1965 respectively. The respondents acquired lot 14 (which adjoins lot 13) in or about 1967. They are the only owners of the lots within

/the sub-division ....

the sub-division who have objected to the application being granted. The owners of the remaining lots, save the respondents and the owner of lot 11, have signified that they do not have any objection to the application being granted. The owner of lot 11 (which adjoins lot 12, one of the lots upon which the applicants wish to erect the apartments) has neither assented nor dissented to the application being granted. The judge in chambers upon a consideration of the affidavits filed in the matter and of the arguments addressed to him came to the conclusion that the applicants had failed to satisfy him that any of the factors which they had set out to prove had been proved whereby he would have some ground to exercise the discretion given him under the above-mentioned statutory provision whether or not to modify the restrictions. He specifically held that the restrictions imposed on each of the titles of the applicants could not be deemed obsolete and that they afforded a real protection to each lot owner to see that the other carries out his obligation by maintaining the sub-division as a private residential area. He rejected the argument that the evidence was all one way to the effect that the character of the sub-division had changed.

It is common ground that covenant 3 is designed to ensure that the style, nature and appearance of the one main building to be erected on a lot in the sub-division is that of a private dwelling house. But that is not the only restriction imposed by this covenant. Any other building erected thereon must be in the nature of an outbuilding appurtenant to the main building and appropriate to the main building being a private dwelling house and is to be occupied therewith. Such a restriction contemplates the user of the main building as a private dwelling house and the occupation of the outbuildings is to be such as is appropriate to the user of the main building as a dwelling house. For example outbuildings may be used as servants' quarters, washrooms, garages or stables in connection with the user of the main building as a

/private dwelling ....

private dwelling house and not otherwise. Covenant 5 also affects the user of any building on a lot. Whether the main building or an outbuilding, a building on a lot may not be used for the purposes of a shop, school, chapel, church, nursing home or racing stables. For example a businessman may not use his dwelling house or outbuilding in the carrying on of a shop, an educator in the carrying on of a school, a minister of religion in the carrying on of a chapel or church, a doctor in the carrying on of a nursing home or a racehorse owner or trainer in the carrying on of racing stables. Further covenant 5 forbids the carrying on of any trade or business on the land or any part thereof.

Covenant 4 relates to the arrangement of the buildings on a lot.

The combined effect of covenants 3, 4 and 5 in so far as those covenants relate to the user of a lot in the sub-division is that no lot shall be used otherwise than for private residential purposes. The applicants say that by reason of changes in the character of the neighbourhood and breaches in covenants 3, 4 and 5 those covenants are obsolete. It is not denied that covenant 4 (which relates to the arrangement of buildings on the lots) has been breached by all the owners who have erected dwelling houses in the sub-division. However, breach of covenant 4 is really of little importance in respect of this application. The first question is - has it been shown that there have been changes in the neighbourhood since the covenants were imposed? This raises another question - what is the neighbourhood in this case? It is said on behalf of the applicants that the neighbourhood extends beyond the limits of the sub-division itself and that as the unchallenged evidence in the affidavits filed on the part of the applicants show there has been very considerable growth and expansion of industrial and commercial activity (including the erection of a block of apartments) on lands adjoining the sub-division since the sub-division was created. Now, as it has already been observed the sub-division is an enclave or peninsula. The other physical characteristics

/of the ....

of the lands in the immediate vicinity of the sub-division have already been noticed. I do not think that having regard to those matters it can fairly be said that the neighbourhood extends beyond the limits of the sub-division itself.

It was next submitted that even if the sub-division be treated as a neighbourhood of its own, breaches of covenants 3, 4 and 5 have caused a change in the character of the sub-division. It was urged that the original objects of those covenants have disappeared because the houses erected on the lots are in a majority of cases not being used as in a purely private residential area where the owners have their homes and in which they reside permanently but the sub-division is being used as "a tourist commercial area"; therefore it follows that the covenants ceased to have any effect and have become obsolete.

The affidavits disclose that there are -

(i) 5 vacant lots including the two the subject of this application;

(ii) 7 lots each with only one house;

(iii) 5 lots with two buildings but it is not disclosed whether the second building on these lots are out-buildings or not;

(iv) 1 lot - the opposers - on which there is one main building and outbuildings appurtenant thereto;

(v) 2 lots in respect of which there is clearly a breach of covenant 3 in that there are 3 dwelling houses on each of those lots.

As Mr. Blake for the opposers pointed out, on a strict view of the affidavits a contravention of covenant 3 in relation to the restriction of one dwelling house which may be erected on each lot has only been shown in the case of 2 lots and on a view most favourable to the applicants in the case of 8 lots. So, Mr. Blake not unreasonably argues, the covenant in that regard is virtually intact and its objects are still capable of fulfilment. However, regard must be had to the nature of user of the buildings on the

/lots to ....

lots to see if any other breach of covenants 3 or 5 has occurred and if so to what extent. The affidavits filed disclose that in respect of some 10 lots their owners rent the buildings thereon or some of them to tourists as dwelling houses while in the case of the opposers who normally reside in the U.S.A. but come to stay in their house on lot 14 where they maintain a full time domestic staff, when they are not in residence on lot 14 they make their dwelling house available for use by their friends who would be asked to defray the expenditure incurred during the period of their stay. Mr. Alberga urges that in the case of those 10 lot owners as well as in the case of the opposers the houses when occupied by tourists are not being used as <u>private</u> dwellings and therefore are being used in breach of covenant 3 and further it is to be presumed that the lot owners in letting to tourists conducted that business on the lots in question, thereby contravening the restriction against carrying on a business contained in covenant 5. The question arises whether a dwelling house when being occupied as such by a tourist is not being used as a <u>private</u> dwelling house. It is urged by Mr. Alberga that the expression "private dwelling house" in covenant 3 connotes permanency of residence by the occupier in the sense that it must be used as his home and indeed Mr. Alberga's contention went as far as to suggest that covenant 3 requires the owner himself to reside in the dwelling house. I think that a dwelling house may be used as a private dwelling house even where the person who resides in it is a tenant of the owner and I do not see that it ceases to be used as a private dwelling house if the tenant happens to be a tourist who occupies the house as his dwelling place be it for a month, or a week or even a day. The question is not whether the house is the residence of the occupier but rather whether the user of the house being a private dwelling house is as a private dwelling. There remains the further question of the opposers permitting their friends to occupy their house on lot 14, the latter meeting the expenditure for domestic staff incurred during the period of

/their stay ....

their stay. The opposers have not done this by way of a business and I can see no reason why it should be considered as being in breach of covenant 3 or covenant 5. To sum up the position in respect of covenant 3, it has been admitted that there has been a breach of that condition in the case of three lots by reason of more than one dwelling house being erected on each of those lots. In the case of five other lots breach of covenant 3 in that regard has not been proved nor admitted. But assuming that it were, the fact is that otherwise covenants 3 and 5 remain substantially intact. I am satisfied that the learned trial judge was not in error when he held that the restrictions imposed by covenants 3 and 5 could not in the circumstances and ought not to be deemed obsolete.

The other ground urged in support of the application was that the proposed modification will not injure persons entitled to the benefit of the restrictive covenants. The applicants say that the development of lots 12 and 13 proposed is such that it will improve the quality of the neighbourhood and that there will be no injury of any kind, either financial, aesthetic or otherwise to anyone entitled to the benefit of the covenants. The opposers say inter alia that the privacy they now enjoy will be interfered with by the project itself and the modification proposed would amount to an expropriation of a viable extant right and make the covenants vulnerable to the action of the court. Indeed Mr. Blake has submitted that covenants cannot be modified on the ground that no injury will result to anyone in circumstances where there has been no change in the character of the neighbourhood and the covenants are not obsolete because once there is no change in the character of the neighbourhood and the covenants are not obsolete, injury must necessarily result except in certain exceptional cases of which the instant case is not one. This submission may well find support in the observations of Russell L.J. in Ridley v. Taylor (1956) 1 W.L.R.

/at p.622 ....

at p. 622 that this ground is "designed to cover the case of the, proprietorially speaking, frivolous objection" and that "it is, so to speak, a long stop against vexatious objections to extended user." Can it be said that in the instant case there is a vexatious objection to the extended user proposed? The learned trial judge in describing the character of the sub-division said -

> "The layout shows an air of sophistication, fastidiousness and delicacy. One can readily understand the anxiety which a lot owner entertains when he sees that his dream of having this haven for a reasonable time is frustrated by the instrusion of a complex which may bring in complexities likely to disturb the enjoyment which he thought was guaranteed to him by the document under which he calls himself an owner in a building or residential scheme."

The apartment blocks and units proposed to be erected by the applicants on lots 12 and 13 are intended to accommodate 52 guests. In addition there would be staff quarters and a manager's apartment. While the project itself might be aesthetically uninjurious it can hardly be doubted that the privacy now enjoyed by the objectors would be diminished. A fortiori the modification proposed would interfere with the privacy now enjoyed by the objectors and which is sought to be ensured by the restrictions. Despite any efforts which might be taken by the applicants through their designers and architects to keep noise to a minimum there is bound to be an increase in the noise level as a result of the occupation by at least 52 persons over and above that which would normally have obtained upon the occupation of two dwelling houses on the two lots. One of the original purposes of the sub-division sought to be ensured by conditions 3 and 5 would thus be affected adversely.

/There remains ....

There remains the "thin end of the wedge" argument. There can be little doubt that the proposed modification would render the covenants vulnerable to the action of the court and this in itself would be a good reason why the objection cannot fairly be deemed to be frivolous or vexatious.

I would hold that the applicants have failed to show that the proposed modification would not cause injury to the objectors.

I would dismiss the appeal with costs to the respondents.

FOX, J.A.:

Many days were spent discussing this appeal. Numerous authorities were cited. Several interesting considerations were described. The submissions ranged over a wide area. Nevertheless, the broad questions to be answered in the appeal are not difficult to state. They are:

(a) Have there been such changes in the character of the neighbourhood of the Fortlands sub-division that the restrictions imposed by the covenants ought to be deemed obsolete?

(b) Would the modifications of the covenants which have been proposed, injure the objectors?

I have had the advantage of reading the judgments of my brothers and am in entire agreement with their answers to these questions. I am also in substantial accord with much of the reasoning, and with the use made of authority in arriving at these answers. It is therefore with no disrespect for the careful and helpful submissions of counsel that I venture to state in broad outline my own thinking. on the questions.

1. What is the neighbourhood of the Fortlands sub-division and what are the changes which have taken place in the character of that neighbourhood?

From one point of view, the neighbourhood may be said to include the town of Discovery Bay and its environs. Great changes have taken place in this area since 1950 when the sub-division was created. A sleepy hamlet where four roads met has given way to a fast developing town. Tourism and the operations of the Kaiser Bauxite Company provided the twin impetus for expansion. It is no doubt true to say that the town has grown beyond the recognition of those who knew it twenty years ago as a scattering of buildings along a road bordering the sea. From another point of view, it is argued that the neighbourhood of the sub-division is not so wide an area, but is restricted to the sub-

/division ....

division itself. Counsel for the applicants contended that, even when so defined, changes in the character of that neighbourhood were also plainly perceptible and fundamental. These changes had occurred because more than one separate unit capable of being used as a dwelling house had been erected on more than one half of the lots which had been built upon. In addition, in contravention of covenant 4 all the houses faced the sea instead of the roadway. Finally, nearly all lot owners openly advertised for rent, and rented their houses to tourists. The result was that what was once a residential area had become substantially a commercial area.

2. Ought the restrictions to be deemed obsolete by reason of the changes which have taken place in the character of the neighbourhood?

I do not think that the changes which have worked such marked alterations in Discovery Bay itself, justify the conclusion that the restrictions which were intended to secure the residential aspect of the sub-division are no longer able to achieve their object. To my mind, these changes tend to enchance rather than to depress the quality of the sub-division. Against the increasing bustle of the town, the tranquility of an area set apart for residences may be expected to assume added attraction. The restrictions would be all the more necessary to preserve this oasis of peace, if in fact it was such a haven. Consequently, if the question whether or not the restrictions "ought to be deemed obsolete" depended only upon a consideration of the changes which had taken place in Discovery Bay itself, I would unhesitatingly answer in the negative.

In my view, however, the neighbourhood of the sub-division does not embrace such a wide area. The sub-division is contained within a parochial road on the east, the sea on the west and the north, and the Puerto Seco public beach on the south. The sub-division is therefore "sufficiently distinctive to constitute a neighbourhood of its own". It is the changes in the character of this precisely defined neighbourhood which are relevant in deciding the question whether or not the restrictions "ought to be

/deemed.........

deemed obsolete".

In my estimation, these changes are not so far reaching as to warrant an affirmative answer to the question. A private dwelling house does not cease to be such when the owner rents it to another person to be occupied by him as a dwelling. This position is not affected by the duration of the occupation, or the status of the occupants, or the circumstances under which the occupation was brought about, or the consideration given therefor. So long as the dwelling house is occupied as a unit, and is kept at all times in the recognizable manner in which dwelling houses are maintained, all those essential incidents which characterize a private dwelling would remain intact. Different considerations would of course arise if there was any evidence of any uptoward conduct by the tenants of any of the houses at Discovery Bay, or anything to suggest that they were being used as lodgings, or, again, if the frequency in the change of occupation was such as to show that, in substance, they were being used as motels. But there is no such evidence. Everything points to occupation by persons and their families and friends of the same nature and quality as that of the owner. Such occupation cannot by itself alter the residential aspect of the neighbourhood.

The contention that, by renting to tourists, business is being carried on upon the land, requires a closer examination. It is clear that the owners of nearly all the houses derive a steady annual income from such rent. Looked at in this light, it is true to say that the houses are being used for the purpose of business. But it should be noticed that within the houses themselves no business is being carried on. The houses are not being used as a shop, a school, a chapel, or a nursing home or a racing stable. They are being used as private dwellings. Such user does not really jeopardize to any significant extent those incidents which the first part of covenant five was intended to secure.

/Neither would........

Neither would the transactions which may be necessary to conclude a contract of tenancy, impeach the spirit of the latter part of that covenant. If in fact those transactions took place upon the land; and as to this the evidence is vague, - they could have been effected elsewhere - in their nature, the transactions do not go beyond the business which the owner of any dwelling house may be obliged to complete in his home from time to time. In addition, the business is done with delicacy, discretion, and an absence of physical exhibition. There is no evidence that any lot is used for advertising, or contains an office set apart for the discharge of formalities, or is possessed of any means of entertainment beyond those that may be expected in any private dwelling house. Having regard to these considerations, I take the view that even if it is admitted that most houses are being used for the purpose of a business, such user has not caused such a change in the residential character of the neighbourhood as to justify a conclusion that the covenants are obsolete.

(3) Has it been shown that the proposed modification will not injure the objectors? The answer to this question is by way of another question, namely, is the objection frivolous? Obviously it is not. The covenants are substantially intact. They secure to the objectors a distinctly recognizable right whereby the overt conduct of business in the area is excluded, and its residential character preserved. Consequently, even though the proposed project of the applicants is highly estimable, and is compatible with the trend within the sub-division towards tourist commercial activity, the worthiness of the proposed development is not the criterion in derming whether it will be uninjurious. Also, such commercial activity as is discernible is slight, and does not detract from the residential flavour of the sub-division.

/In my ....

In my view, the learned trial judge was right in holding that the foundation for the exercise of his discretion had not been established, and in dismissing the application.

SMITH, J.A.:

In order to found the jurisdiction of the Court to modify the restrictive covenants the applicants had the burden of proving one, at least, of the matters of fact set out in s. 3 (1) of the Restrictive Covenants (Discharge & Modification) Law, 1960. Before the learned judge who heard the application, the applicants relied on the provisions of paras. (a) and (d) of s. 3 (1) and sought to establish: (i) that by reason of changes in the character of the property or the neighbourhood and of breaches in the covenants that have already taken place the restrictions should be regarded as obsolete, and (ii) that the proposed modification will not injure the persons entitled to the benefit of the restrictions. Proof of both or either of these matters would entitle the applicants to ask for the exercise of the Court's discretion in their favour. The learned judge refused the application, holding that the applicants had failed to satisfy him that "any of the factors which they set out to prove has been proved."

The ground on which a covenant may be modified under para. (a) of s. 3 (1) of the Law of 1960 is that the restriction imposed by the covenant ought to be deemed obsolete. The learned judge said that he was satisfied that the restrictions imposed on the applicants' titles "cannot by any stretch of the imagination be regarded or deemed as obsolete." He added: "These restrictions do afford a real protection to each lot owner to see that the other carries out his obligation in maintaining the sub-division as a private residential area." It was submitted for the applicants that the judge was in error in concluding that the covenants were not obsolete. It was said that the affidavit evidence in the case demonstrated clearly and unequivocally that there had been breaches of covenant 3 as far as the number of buildings on the lots were concerned, breaches of covenant 4 in the location of the buildings on the lots and breaches of covenant 5 as far as user of the buildings and premises is concerned.

/It is ....

It is not disputed that there have been breaches of covenant 3 in that on certain of the lots buildings have been erected in addition to or in place of those permitted by the covenant. The extent of these breaches is in dispute. The applicants claim that of fifteen lots which have been built upon eight or nine are in breach of the covenant by each having more than one dwelling house built upon it. There is evidence in the affidavit of Lord Graham to support this but he spoke of the sub-division in a general way. There is clear evidence that houses have been erected on lots 11, 16 and 17 in breach of covenant 3. Five other lots have been described as having two "building units" or two "houses" but there is nothing to show whether or not the second unit or house is a building appurtenant to the main building. The objectors' lot is included in the five and they expressly assert that there is but one dwelling-house on their lot. This leaves four in the realms of uncertainty. Assuming these four are in breach, the position is that seven out of fifteen lots built upon are in breach of the covenant. It was argued for the applicants that the covenant has been honoured more in the breach than the observance, that this is a dead covenant and that the underlying objective or principle which the covenant was designed to achieve can no longer be achieved. Learned counsel for the objectors, on the other hand, pointed to the ratio between the total number of lots in the sub-division, twenty, and those in breach and submitted that the covenant cannot be deemed to be obsolete as its object is still capable of achievement.

It is not disputed that all the main buildings so far erected have been erected in breach of covenant 4 in that they have been made to face the sea and not the roadway as the covenant requires.

/As regards ....

As regards covenant 5, the allegation is that there have been breaches in two respects. Firstly, it is said that the object of covenant 3 coupled with covenant 5 is that the house erected on each lot should be used as a private dwelling-house only and that the evidence that houses in the sub-division have been, and are being, let to tourists shows that these houses are not being used as private dwelling-houses. Secondly, it is alleged that the letting of the houses constitute the carrying on of a trade or business on those premises on which houses are so let.

Learned counsel for the objectors pointed to the fact that there is no covenant to the effect that the private dwelling-house to be erected on each lot is to be used by the owner as a private dwelling-house only. This is so. But it is not necessary that there should be an express provision to this effect. (See Rolls v. Miller (1884) 27 Ch. D. 71 at pp. 84 & 87). Those words are to be implied from the combined effect of covenants 3 and 5. This does not mean that the owner must himself live in the house and use it as a private dwelling-house. It only means that the occupant must use it as such. It was submitted for the applicants that the words "private dwelling-house" are synonymous with the words "private residence" and connote a home - the private home of the owner or occupant - the place at which he and his family live - with some degree of permanence in occupation. It was contended that the user of the houses for the purpose of renting as holiday resort houses to which the public can come and go, where the occupancy is advertised and where it is of a transitory and casual nature, cannot in ordinary and popular parlance be taken to come within the meaning of the words "private dwelling-house." For the objectors it is said that the letting of the houses for use by tourists as dwelling-houses is not a breach of the covenant.

The ordinary meaning of "dwelling-house" or "residence" is "a place where one resides." To "reside" is "to settle, to take

/up one's ....

up one's abode or station, to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place." (see the Oxford English Dictionary). If the word "private" adds anything it is, perhaps, to distinguish a dwelling-house in which a private person lives either alone or with his family from lodging-houses, guest-houses and the like which have permanent residents. In Rolls v. Miller (supra) Lindley, L.J. (at p.88) said that "hotels are dwelling-houses of a certain kind." Consistent with these definitions one may have more than on residence - e.g. one here and one abroad. Or one may have a holiday home, a fixed establishment where one goes on holidays. The objectors' house at Fortlands may properly be described as their holiday home. It is so kept and maintained by them. What about the tourists to whom, according to the evidence of the owners, all the other houses at Fortlands, or the majority of them, are rented? There is no evidence to show the periods for which they are rented. I think their occupation of these houses can properly be described as transitory and casual. I think we can take judicial notice of this. If a tourist and his family live for two weeks in a house rented for that period while on holiday can it be said that they "reside" there? I think it would be doing violence to language to say that they do. And I do not think it matters if the period is three months instead of two weeks. It is not so much the length of time that governs the matter as the state of mind and intention of the occupant. If a family, not for a holiday, leaves one house and lives in another for one month and moves to another for three months and so on, such house is the family's home or residence for the time being. But, in my view, a house rented by a tourist for a month for a holiday can no more be described as his residence, in the ordinary acceptance of the

/term, than ....

term, than can a hotel suite which he occupies for the same period. I agree with counsel for the applicants that those houses which are rented solely to tourists are really being used as holiday resort houses and not as private dwelling-houses.

Covenant 5 is in two parts. The first part provides that no building erected on a lot shall be used "for the purposes of a shop, school, chapel, church or nursing home or for racing stables." The second part provides that "no trade or business whatsoever shall be carried on upon the said land or any part thereof." As has been stated, it is alleged that there has been a breach of this covenant in that by the letting of houses to tourists a trade or business is being carried on upon the respective lots of land where houses are so let. The owners of lots 16 and 17, by their own admission, live in one house on their respective lots and rent the other house thereon to tourists. This appears also to be the case with the owners of lot 11. The authorities make it clear that this amounts to the carrying on of a business upon their premises and is in breach of the second part of covenant 5. This is more or less conceded by counsel for the objectors. There is no evidence that any of the other owners live on the lots which they let. Unless the letting transactions take place systematically upon their premises there is no breach of the second part of covenant 5 in their case. There is no evidence to this effect. If I am right that the houses are not being used as private dwelling-houses but for letting as holiday resort houses then it would seem to follow that the owners are using these houses for purposes of this type of business. This is not, however, in breach of covenant 5 as the words "trade or business" are not specified in the first part of covenant 5. As I have opined, this user is in breach of the implied covenant to use the house for the purpose of a private dwelling-house only.

/The next ....

The next question for consideration is whether in the light of the admitted or proved breaches or otherwise there can be said to be a change in the character of the neighbourhood. I agree with my brethren that the Fortlands sub-division is a "neighbourhood" in itself and that it is this neighbourhood that must be considered on the question of whether or not a change has been proved. This eliminates the contention that the commercial and industrial influence of Discovery Bay has affected the character of the sub-division and leaves for consideration the effect, if any, which the breaches have had. A finding that a restriction ought to be deemed obsolete cannot be made under para. (a) of s. 3 (1) merely on the ground that there have been breaches of covenants. It has to be proved that these breaches have caused changes in the character of the property or the neighbourhood before such a finding can be made.

It is common ground that the character of a neighbourhood derives from the style, arrangement and appearance of its houses and from the social customs of the inhabitants. The learned judge said that he did not accept the argument on behalf of the applicants that the evidence is all one way that the character of the sub-division has changed. It was submitted before us that the breaches which have taken place have brought about a change in the character of the sub-division in the sense that even if it is treated as a neighbourhood of its own the original objects of the covenant have disappeared because it is no longer being used as a purely private residential area but as a tourist commercial development. It was said that there have been changes in the style and arrangement of the houses (in breach of covenant 4), in their appearance in the sense that there is now more than one house on many of the lots (in breach of covenant 3) and in the social customs and

/habits of ....

habits of the neighbourhood which have developed along lines not envisaged or contemplated. It was said that the judge disregarded all this evidence, which was unchallenged and uncontradicted, in reaching his conclusion that there had been no change. Counsel contended that the judge's findings on this aspect of the case are not reasonable and are based on a consideration of irrelevant matters and on an application of wrong and erroneous principles. Without deciding whether or not this criticism is justified, the evidence must now be examined to see whether the judge's finding that the character of the neighbourhood has not changed can be supported.

The object of the restrictions imposed by the covenants was, clearly, to ensure that the sub-division should be developed and maintained as a private residential area. The question for determination is whether the sub-division's character as a private residential area has been changed by the breaches of the covenants. On the three lots (11, 16 and 17) on which it is clear that buildings have been erected in breach of covenant 3, there is nothing to indicate that the style and/or appearance of the additional buildings do not each conform to that of a private dwelling-house. On the four lots where it is uncertain whether or not the second building is a building appurtenant to the main dwelling-house, there is also nothing to show that the second building on each is not either an appropriately styled outbuilding or a second dwelling-house. I cannot, therefore, see how it can be said that the additional buildings have caused any alteration in the appearance and, therefore, the character of the sub-division. The same applies to the breaches of covenant 4. The fact that the dwelling-houses are erected to face the see rather than the road do not, in my opinion, make them any less dwelling-houses in style and appearance. I do not think it is accurate to say, in these days, as was stated by counsel for the applicants, that ordinary houses of a permanent nature usually face the road while resort

/cottages of ....

cottages of a holiday nature usually face the sea.

It was argued that the breaches of covenant 5 have brought about a change in the social customs within the sub-division in that the user which has developed is no longer one where the area is a community in which the owners or occupiers of the houses live and have their homes in the ordinary sense of that word; that the sub-division is now more of a commercial development in the sense of having become a tourist resort area. It was argued for the objectors that covenants 3 and 4 are the ones which are relevant to the definition of the character of the Fortlands sub-division; that covenant 5, which relates to user, is not in itself a covenant dealing with character, and that, therefore, breaches of user have nothing to do with the changes in the character of the neighbourhood. But in the same breath it was said that the purpose of covenant 5 is to maintain the character of the neighbourhood and to restrict the activities of the persons living in a neighbourhood of the character prescribed by covenants 3 and 4. I am afraid I do not agree with the contention that breaches of covenant 5 are irrelevant in determining whether or not the character of the neighbourhood has changed. Suppose, in breach of covenant 5, the majority of the houses in the Fortlands sub-division were used, without any physical alteration of structure, as shops and this user persisted for years without protest from those having the benefit of the covenant? Could it be said that this would have no effect on the character of the area? The whole purpose of the covenant is to preserve the character of the neighbourhood thereby preventing a change in its character.

Has the private residential character of the sub-division been affected by the fact that the majority of houses are used as holiday resort houses and that business is being carried on upon three of the lots? In my opinion, there is no proof that it has, and this cannot be presumed. The owners

/of the .....

of the three lots are only technically carrying on a business. They themselves live in dwelling-houses on their lots. There is no evidence of what services, if any, they provide. Nor is there any evidence that they do more than collect the rent from their tenants. In any event, it cannot reasonably be said that this limited form of business on three of twenty lots has changed the character of the entire sub-division. There is also no evidence that the nature of the occupancy or the conduct of the persons who rent the houses for a holiday are any different to those of private residents so that outwardly the houses cease to be private residences. It seems clear that the area is still essentially residential and no real change in character has been proved. In my judgment, on the evidence that was before him, the learned judge was justified in concluding that there was no change in the character of the neighbourhood. It follows that there was no ground upon which it could properly be held that the covenants ought to be deemed obsolete.

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 (1956) 1 Q.B. 261 and Driscoll v. Church Commissioners for England (1957) 1 Q.B. 330 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 (supra) for resolving this question is whether the original purpose for which the covenants were imposed can or

/cannot still......

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, there is no valid basis, in my view, on which to justify a finding that the original object of the covenants cannot still be achieved. All the physical characteristics necessary for a private residential neighbourhood seem to be still substantially intact. In my opinion, there is no reason to disturb the finding of the learned judge that the covenants cannot be deemed obsolete.

There remains for consideration the second main ground on which the applicants relied in support of their application, namely, on the provisions of para. (d) of s. 3 (1), that the proposed modification will not injure the persons entitled to the benefit of the restrictions. The applicants complained on appeal that the learned judge failed to deal with the evidence which was before him on this important aspect of the application and failed to make any findings thereon. Alternatively, that if the finding, to which reference has already been made, that "the applicants have failed to satisfy me that any of the factors, which they set out to prove, has been proved whereby I would have some ground for the exercise of my discretion", can possibly be construed in its context as a finding that the modification sought will cause injury then such a finding is totally unreasonable and unjustifiable having regard to the unchallenged and uncontradicted evidence in the case. It was submitted that such a finding was not open to the judge on the evidence and that the only finding open to him on a proper analysis of the evidence was that no injury would result from the proposed modification.

It is true that the judge did not deal expressly with this question and did not analyse and make specific findings on the evidence relating thereto. But it is plain from the

/terms.......

terms of his judgment that this aspect of the case was present to his mind and was considered by him. Early in the judgment he stated the question of lack of injury as one of the grounds on which the applicants relied; later he detailed the evidence on which they relied in support of it and midway in the judgment he stated as one of three main questions for consideration: "would the proposed discharge or modification injure the objectors?" Clearly implicit, therefore, in the finding quoted above, the learned judge was rejecting the applicants' case that no injury will be caused. This is so because he expressly said that they failed to satisfy him that "any of the factors" which they set out to prove has been proved.

Can the rejection of the applicants' case that no injury will be caused be supported? It was submitted for the applicants that any implied adverse finding on the question of injury was arrived at after the judge had demonstrated that a host of irrelevant considerations were present to his mind and it is not possible to say that this conclusion would have been arrived at if his mind had been attuned to the application of correct principles and relevant considerations. Counsel for the objectors submitted that there was ample evidence to support the judge's finding. The evidence and submissions on this aspect of the case must now be considered to see if the rejection of the applicants' case under para. (d) of s. 3 (1) was justified.

Learned counsel for the applicants contended that the test whether injury will be caused by the modification is whether it will be caused by the project. For the objectors, it was submitted that in strict law it must be proved not that the project will not occasion injury but that the modification itself will be uninjurious. This submission accords with the terms of the statutory provision and is supported by a passage in the 4th edn. of Preston & Newson on Restrictive Covenants

/on which ....

on which reliance was placed. At p. 185 the learned authors said:

> "It is not the applicant's project that must be uninjurious .... 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 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 Tribunal."

It seems clear from this passage and as a matter of interpretation that it may be shown that an order for the 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.

The objectors in their formal objection to the application objected to the grant of the application on the grounds: (a) that none of the conditions required by s. 3(1) of the Law of 1960 to be satisfied before the covenants could be modified had in fact occurred, (b) that the modification proposed will adversely affect the value of their holding and the enjoyment of the amenities thereof and (c) that the erection of apartment blocks and an office will adversely affect the quality of the neighbourhood and will change the character thereof and will create traffic hazards and endanger life and property. In view of the allegations contained in the objection the applicants filed a number of affidavits in rebuttal. There was evidence in these affidavits which, in my

/view, ...

view, effectively refuted the allegations that the applicants' project will adversely affect the value of the objectors' land or the amenities of quiet and privacy or that any traffic hazards will be created or life and property endangered. No evidence was brought by the objectors to contradict this positive evidence. The Judge did not make any findings on these matters and there was, in my opinion, no evidence on which he could decide these issues in favour of the objectors and find that injury will be caused.

It was contended on behalf of the objectors that modification may cause injury to the objectors in two ways: (A) the project itself may cause injury by virtue of the extent to which it will bring about a change in the character of the neighbourhood and (B) the modification itself may injure in the sense that the restrictions preserving character will _in futuro_ become vulnerable to the actions of the Court - the "thin end of the wedge" argument.

As regards (A): this allegation, as stated above, was made in the formal objection. In the affidavits filed in reply by the applicants there is evidence from the applicants' architect that: "the character and siting of the buildings (of the project) will harmonize very satisfactorily with the general residential atmosphere. The landscaping is intended to soften and beautify the spaces in between and around the buildings so that the whole project will be integrated in scale and character with the existing buildings." Two of the residents, in separate affidavits, said that they had perused the proposed plans of the applicants' project "and do feel that it is in keeping with the general aesthetic tone of the sub-division." In his judgment the learned judge said (at p.63 of the record):

> "But to erect 16 apartments ostensibly for business on two lots of land which were intended for private residence .... seems to me to be an attempt to change the whole character of

/Fortlands ....

Fortlands sub-division."

Later he said (at p. 64):

> "One can readily understand the anxiety such a lot owner entertains when he sees that his dream of having this haven for a reasonable time is frustrated by the intrusion of a complex which may bring in complexities likely to disturb the enjoyment which he thought was guaranteed to him by the document under which he calls himself an owner in a building or residential scheme."

I agree with the submission of counsel for the objectors that these passages amount to a finding that implementation of the project will cause a change in the character of the neighbourhood.

As regards (B): it was submitted that the judge has held that the restrictions are intact and not obsolete and that they afford protection to each lot owner to maintain the sub-division as a private residential area. In addition, it was said, he has clearly implied that to modify in such circumstances would be to expropriate extant proprietary rights for private gains and that this is a clear finding that the modification itself would be injurious. At p. 15 of his judgment (p.64 of the record) the judge said:

> "I am satisfied that the restrictions imposed on each of the titles of the applicants cannot, by any stretch of the imagination, be regarded or deemed as obsolete. These restrictions do afford a real protection to each lot owner to see that the other carries out his obligation in maintaining the sub-division as a private residential area. Expropriating one's right for the gain of others cannot be lightly entertained and the covenants may be invoked in one's protection."

/The answer ....

The answer made on behalf of the applicants to the contention of injury under (A) and (B) above is that the arguments, and the extracts from the judgments, in support of the contention are founded on the basis that the restrictions are intact, that the area is entirely residential and that there has been no erosion of the original underlying scheme. It was said that no attempt is being made by the applicants to change the whole of the Fortlands sub-division; that the sub-division has already been changed and there now exists a commercial user of the houses; and all that the applicants seek is an intensification of this kind of use. The arguments and the judge's findings and remarks were, indeed, made on the basis stated by counsel. The findings, now being upheld, that it has not been established that the character of the neighbourhood has changed and that the restrictions ought to be deemed obsolete amount to a finding that the restrictions are at least substantially intact and that the area is residential in character. The basis for the arguments of counsel for the objectors and the findings and remarks of the judge has, therefore, been established and, at the same time, the basis for the argument of counsel for the applicants has been destroyed.

The benefit of the restrictions is a proprietary right vested in the owner of each lot of land in the sub-division which can be enforced in order to preserve the private residential character of the sub-division. In my judgment, there can be no doubt that a project which, if implemented, will destroy or cause a change in this character is bound to cause injury to any owner who objects to the change. The objectors brought no evidence to prove their allegation that the project will change the character of the neighbourhood. The burden was, however, on the applicants to negative injury to the objectors. The evidence produced by the applicants on this aspect of the case, and referred to above, was given in

/the context

the context of the understanding by the owners of two lots that "the area (of Discovery Bay) was to become that of a tourist resort." Though one can sympathize with the contention that all the applicants seek is an intensification of the user to which the majority of houses in the sub-division have been put, it cannot be doubted, in spite of the architect's evidence, that the apartment buildings and a business office intended to be used for persons on holiday are out of character in a private residential neighbourhood. There is not much practical difference between this complex and an hotel. In my opinion, there was evidence on which the learned judge could find that the applicants' project will cause a change in the character of the sub-division and consequent injury to the objectors.

Since the restrictions are substantially intact and their objects can still be achieved, they do indeed, as the judge held, afford a real protection to the objectors in that they give them the power to ensure that the private residential character of the area shall be maintained. To deprive them of this power, or weaken it, by modification of the covenants will surely be injurious. A modification in these circumstances could, justifiably, be said to be the "thin end of the wedge" and is another ground of injury. On both these grounds, a finding that injury will be caused to the objectors by the modification could justifiably be made.

During the argument counsel for the applicants sought to rely on para. (c) of s. 3 (1) though this ground was not relied on at the hearing of the application. It was submitted that if the breaches of the restrictions cannot be used as a ground for regarding the covenants as obsolete, the general disregard of them which has taken place over a long period of time and the fact that no one has taken any step to prevent these breaches enable the applicants to come within para. (c) of s. 3 (1) on the ground of consent by implication or

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acquiescence. It seems to me that this submission cannot prevail in the light of the adverse findings in respect of paras. (a) and (d).

In all the circumstances, I cannot say that the finding of the learned judge that the applicants have failed to satisfy him that any of the factors has been proved which they set out to prove is either unreasonable or was not open to him on the evidence as contended. I would dismiss the appeal with costs.

JAMAICA

IN THE COURT OF APPEAL

R.M. CIVIL APPEAL No. 82 of 1970

BEFORE: The Hon. Mr. Justice Luckhoo, Ag. P.
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

****

BETWEEN - HUGO BERRY and VERNON MORRIS - DEFENDANTS/APPELLANTS APPLICANTS

AND - THE KINGSTON AND ST. ANDREW CORPORATION - PLAINTIFF/RESPONDENT

H. Edwards, Q.C., and N. Wright for the applicants.

Miss B. Walters for the respondent.

January 27, 28, March 24, 1972

LUCKHOO, AG. P.:

This is an application to relist a civil appeal from the Resident Magistrate's Court which was dismissed for want of prosecution when it was called on for hearing on December 17, 1970.

The application is supported by an affidavit sworn by counsel for the applicants on February 25, 1971 setting out the circumstances under which the applicants and their counsel came to be absent when the applicants' appeal was called on for hearing on December 17, 1970.

Counsel's affidavit discloses that the appeal was originally listed for hearing during the week commencing November 17, 1970. It was not heard during that week and was subsequently relisted for hearing on Wednesday, December 16, 1970. On that day the Court was engaged in hearing another

/appeal ....

appeal - Kent Smith et al v. R. - the arguments in which had commenced on Monday, December 14, 1970. Counsel attended Court on December 16 and was informed that the hearing of the appeal of Kent Smith et al v. R. was likely to continue for the remainder of that week. On the following day counsel enquired of counsel for the appellant in the Kent Smith appeal whether that appeal was likely to last all that day and was assured that it would. In fact on that day the hearing of the Kent Smith appeal came to an abrupt and unexpected end the Court deciding to refer the matter for hearing by a panel of five judges. The Court thereupon proceeded to call on for hearing the appeals which stood next in the list up to that date and dismissed those in respect of which appellants (or counsel) were not present to prosecute their respective appeals. It was in those circumstances that counsel for the applicants was absent when the applicants' appeal was called on for hearing. Counsel for the respondent was, however, present. Without a hearing on the merits the applicants' appeal was dismissed for non-appearance of the applicants (the appellants). Upon being informed of what had occurred counsel for the applicants approached two of the judges who had sat in disposing of the applicants' appeal in this way and the judges suggested that counsel might in the circumstances apply to the Court for the appeal to be relisted. The present application was accordingly made, though not earlier than February 26, 1971 because of the supervening illness of counsel.

The hearing of this application began in July, 1971 when the Court reserved judgment at the end of the arguments. In the course of its researches into the matter prior to arriving at a decision the Court discovered two reported cases - Palmer v. Vernon (1943) 4 J.L.R. 103 and Brooksbank v. J.L. Rawsthorne & Co. (1951) 2 All E.R. 413; (1951) W.N. 393 - which it desired to bring to the attention of

/counsel ....

counsel. This was accordingly done and the application was relisted for further hearing.

Upon the matter coming on for hearing before us attorney for the applicants Mr. Horace Edwards submitted that this Court has an inherent jurisdiction to relist an appeal which has been struck out or dismissed for non-appearance of the appellant where there is no hearing on the merits of the appeal and that such an appeal will be relisted in a proper case when the justice of the circumstances requires it. Good and sufficient reason for non-attendance on the part of an applicant would have to be shown. Mr. Edwards urged that in the circumstances of the present case good and sufficient reason for the applicants' non-attendance when the appeal was called on for hearing has been shown to exist and that this Court should accordingly direct that the appeal be relisted for hearing.

Mr. Edwards' submission raises the question whether this Court has an inherent jurisdiction to do what the applicants now ask us to do. To answer that question we must seek to discover what are the jurisdiction and powers of the Court.

This Court was constituted in 1962 under the Judicature (Appellate Jurisdiction) Law, 1962 (No. 15 of 1962) intituled a Law to make provision for the jurisdiction and powers of the Court of Appeal for Jamaica, and for matters incidental thereto or connected therewith. Section 8 of that Law provides as follows -

> " 8. There shall be vested in the Court of Appeal -
>
> (a) subject to the provisions of this Law the jurisdiction and powers of the former Court of Appeal immediately prior to the appointed day;

/(b) such ....

(b) such other jurisdiction and powers as may be conferred upon them by this or any other law."

By s. 2 of the Law (No. 15 of 1962) the "former Court of Appeal" means the Court of Appeal established by the Judicature (Court of Appeal) Law, Cap. 178 prior to the appointed day, that is prior to August 5, 1962. The Judicature (Court of Appeal) Law was enacted in 1932 and amended from time to time. That Law was repealed by s. 36 of Law No. 15 of 1962. Section 11 of Cap. 178 conferred a right of appeal from Resident Magistrates' Courts in civil proceedings in the following terms -

" 11. Subject to the provisions of this Law, to the provisions of the Judicature (Resident Magistrates) Law, regulating appeals from Resident Magistrates' Court in civil proceedings, and to rules made or deemed to be made under that Law, an appeal shall lie to the Court of Appeal from any judgment, decree or order of a Resident Magistrate's Court in all civil proceedings."

Section 7 of that Law provided for the making of rules of Court _inter alia_ regulating generally the practice and procedure under the Law (Cap. 178) or any matter relating to the Court of Appeal. Section 251 of the Judicature (Resident Magistrates) Law, Cap. 179 the provisions of which were in force when the Judicature (Court of Appeal) Law was enacted, regulates appeals from Resident Magistrates' Courts in civil proceedings in the following terms -

" S. 251 Subject to the provisions of the following sections, an appeal shall lie from the judgment, decree or order of a Court in all civil proceedings, upon any points of law, or upon the admission or rejection of evidence, or upon the question of the judgment, decree, or order being founded upon legal evidence or legal presumption, or upon the question of the

/insufficiency ....

insufficiency of the facts found to support the judgment, decree, or order; and also upon any ground upon which an appeal may now be had to the Court of Appeal from the verdict of a jury, or from the judgment of a Judge of the Supreme Court sitting without a jury.

And the Court of Appeal may either affirm, reverse, or amend the judgment, decree, or order of the Court; or order a nonsuit to be entered; or order the judgment, decree or order to be entered for either party as the case may require; may assess damages and enter judgment for the amount which a party is entitled to, or increase or reduce the amount directed to be paid by the judgment, decree or order; or remit the cause to the Court with instructions, or for rehearing generally; and may also make such order as to costs in the Court, and as to costs of the appeal, as the Court of Appeal shall think proper, and such order shall be final:

Provided always, that no judgment, decree, or order of a Court shall be altered, reversed, or remitted, where the effect of the judgment shall be to do substantial justice between the parties to the cause:

Provided also, that an appeal shall not be granted on the ground of the improper admission or rejection of evidence; or on the ground that a document is not stamped or is insufficiently stamped; or in case the action has been tried with a jury, on the ground of misdirection, or because the verdict of the jury was not taken on a question which which the Magistrate was not at the trial asked to leave to them, unless in the opinion of the Court of Appeal, some substantial wrong or miscarriage has been thereby occasioned in the trial, and if it appears to the Court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, The Court may give final judgment as to part

/thereof ....

> thereof, or some or one only of the parties, and allow the appeal as to the other part only, or as to the other party or parties."

Simultaneously with the repeal of Cap. 178 there was enacted as s. 11 (1) of Law 15 of 1962 a provision in terms identical with the provisions of s. 11 of Cap. 178. Subsection (2) of s. 11 of Law 15 of 1962 relates to the time for giving of notice of appeal, security for costs and filing of grounds of appeal and is not relevant to the matter under consideration. In fact there is no other provision of Law 15 of 1962 which bears on the question of the jurisdiction or powers of the Court in relation to appeals from Resident Magistrates' Courts in civil proceedings. In so far as provision is made by Rules of Court regulating the practice and procedure of the Court in appeals from Resident Magistrates' Courts in civil proceedings, rules 72 to 75 (inclusive) of the Court of Appeal Rules, 1962 (which revoked the Court of Appeal Rules 1935 and all amendments thereto made for regulating the practice and procedure of the former Court of Appeal) are the only rules which relate to appeals in such proceedings. These rules deal with the making of preliminary objections by a respondent, evidence relating to such objection, amendment of grounds of appeal and copies and notice of grounds of appeal respectively. In the light of these various statutory provisions, there being no other jurisdiction or powers conferred on this Court by any other enactment in relation to appeals from Resident Magistrates' Courts in civil proceedings. brought under s. 251,of Cap. 179, it would follow that by virtue of s. 8 of Law 15 of 1962 the powers of the Court in relation to appeals from Resident Magistrates' Courts in civil proceedings are the same as those possessed by the former Court of Appeal in like proceedings.

It might be useful therefore to have regard to decisions of the former Court of Appeal on applications for rehearing of appeals from Resident Magistrates' Court in

/civil

civil proceedings to that Court where such appeals have been struck out or dismissed not on the merits **but** because of the non-attendance of the appellants to prosecute their appeals when called on for hearing. One such reported authority is Palmer v. Vernon (1943) 4 J.L.R. 103. Counsel for the applicant in that case cited in support of his application to relist the English cases of Hession v. Jones (1914) 2 K.B. 421, Walker v. Budden (1879) 5 Q.B.D. 267 and Rackham v. Tabrum (1923) 39 T.L.R. 380. The application was opposed. The former Court of Appeal whose judgment was delivered by Sherlock, J.A. said -

> " Having considered the above authorities and especially the observations of L.C.J. Lord Hewart in Rachman (sic) v. Tabrum we are of the opinion that this Court has the power in a proper case to re-list an appeal that has been dismissed for non-appearance of appellant, there being no hearing on the merits. It appears that this has previously been done in Resident Magistrates' civil appeals where the application was not opposed. We think that the power to re-list should only be exercised in a proper case and for good and sufficient reasons."

The Court went on to hold that the case was not one where the power should be exercised in favour of the applicant. The case of Palmer v. Vernon was cited with approval by this Court in Brown v. Nembhard and anor (1966) 4 Gl.L.R. 128, where a similar application came up for determination. In Rackham v. Tabrum relied on by the former Court of Appeal a judge in chambers dismissed a summons for non-attendance of the plaintiff. The order of dismissal was drawn up. Upon application of the plaintiff the judge in chambers restored the summons and made the order sought therein. Upon appeal to the Divisional Court it was held that the judge in chambers had jurisdiction to entertain the summons after it had been dismissed.

/Lord Hewart ....

Lord Hewart, C.J. with whose judgment Salter and Branson, JJ. agreed said (1923) 39 T.L.R. at p. 381) -

> " The principle is that where a summons or case has not been heard, but merely struck out, the Court may, if it thinks fit, hear or entertain the summons or case, but if there has been a hearing on the merits, though in the absence of one party, it cannot do so after the order is perfected."

After referring to Walker v. Budden and distinguishing Hession v. Jones the Lord Chief Justice concluded (ibid) -

> " There is, in the present case, a narrower ground. Mr. Kennedy admitted that there was jurisdiction before the order was drawn up. An application was made to Mr. Justice Bray" (the judge in chambers) "on February 2, before the order was drawn up, and was still under consideration when it was drawn up. One of the reasons given by Mr. Justice Bankes for his decision in Hession v. Jones was that the order had been drawn up. It appears from Walker v. Budden and In re Grove, in both of which the orders must have been drawn up, that in cases falling within the branch of the principle applicable to this case the Court has jurisdiction, even though the order has been drawn up."

The Divisional Court in that case invoked the inherent jurisdiction of the Court in applying the principle stated by the Lord Chief Justice. The judgment of Bankes, J. in Hession v. Jones (1914) 2 K.B. 421 shows how the inherent jurisdiction of the Divisional Court in this regard is derived. There the Divisional Court was dealing with a motion by the plaintiff praying that an appeal by the defendant from the judgment of a county court in a claim to recover the price of 20 cases of eggs sold to the defendant be re-instated and reheard. The Divisional Court in the absence of the plaintiff had heard the appeal, reversed the judgment of the county court and ordered

/judgment ....

judgment to be entered for the defendant. When the plaintiff heard the result of the appeal he applied to the court to re-instate and rehear the appeal. By that time the order of the Divisional Court had been passed and entered. In support of the plaintiff's application it was urged that the Divisional Court had jurisdiction to reinstate and rehear the appeal under O. XXXVI, r. 33 and O. LIX r. 16 (1) of the Rules of the Supreme Court, 1883. Reference was also made to Walker v. Budden and In re Morris (1881) 19 Ch. D. 216 among other cases, where the inherent jurisdiction of the Court was invoked.
The application was resisted by the defendant who contended that the Court had no jurisdiction to reinstate and rehear an appeal where the appellant had appeared and had been heard and the Court had determined the appeal, and the order of the Court has been passed and entered. A distinction was to be drawn between such a case and the cases where there had been no hearing but the appeal had merely been struck out. Further the rules of court relied on by the plaintiff were inapplicable.
Bankes, J., with whose judgment Avory, J. stated he agreed, said [(1914) 2 K.B. at p. 425] -

> " Now the Divisional Court is a statutory Court of Appeal created for hearing appeals from county courts. It is constituted under s. 45 of the Judicature Act, 1873 (36 & 37 Vict. c. 66) and it is provided by s. 17 of the Judicature Act, 1875 (38 & 39 Vict. c. 77), and s. 23 of the Judicature Act, 1884 (47 & 48 Vict. c. 61), that the Rule Committee shall have power to make rules regulating the procedure on appeals from inferior courts to the High Court. Under these enactments certain rules have been made, among them those incorporated in Order LIX of the Rules of the Supreme Court 1883. In my view our jurisdiction is not absolutely limited by those rules because we have reserved to us as judges of the High Court by s. 16 of the Act of 1873 all the powers and jurisdiction of all the judges whose jurisdiction was transferred, and also by s. 73 of the Act of 1873 and s. 21 of the Act

/of 1875, ...

> of 1875, the right to exercise all the forms and methods of procedure which were in force before the Judicature Acts and are not inconsistent with those Acts and the rules made under them. Our jurisdiction therefore is in part a statutory jurisdiction regulated by the Rules of the Supreme Court, 1883, and partly an inherent jurisdiction which we possess as judges of the High Court. The question is whether by the rules or by reason of our inherent jurisdiction we have the power to reinstate this appeal."

Bankes, J. then went on to consider the rules urged in support of the plaintiff's application and found that they did not confer on the Court the jurisdiction it was asked to exercise. As to the inherent jurisdiction of the Court, Bankes, J. said (ibid at pp. 426 - 427) -

> " Before the Judicature Acts the Courts of common law had no jurisdiction whatever to set aside an order which had been made. The Court of Chancery did exercise a certain limited power in this direction. All Courts would have power to make a necessary correction if the order of the Court as drawn up did not express the intention of the Court; the Court of Chancery, however, went somewhat further than that, and would in a proper case recall any decree or order before it was passed and entered: but after it had been drawn up and perfected no Court or judge had any power to interfere with it. That is clear from the judgment of Thesiger L.J. in the case of In re St. Nazaire Co. (1879) 12 Ch. D. 88. Therefore apart from some authority to the contrary it would seem that neither under the rules, nor under the statutes, nor by the practice before the Judicature Acts has the Court this jurisdiction. But Mr. Mc-Cardie has referred to several authorities from which he says we ought to infer that judges of the Court of Appeal have taken the view that the Divisional Court has this jurisdiction. Of those authorities my view is that some are not applicable and none contains a decision upon

/the point ....

> the point. At most they contain <u>dicta</u> upon a question which was not in issue and upon which there had been no argument. First there is <u>Walker</u> v. <u>Budden</u>. It was there held that where an appellant from the judge in chambers to the Queen's Bench Division had not appeared, and his appeal had been struck out, he could not appeal to the Court of Appeal from the order of the Queen's Bench Division striking out his appeal. The Court of Appeal did say "the defendant must apply to the Queen's Bench Division, which possibly, in the exercise of its discretion, may allow the appeal from chambers to be argued." But that was a case of the first class I have mentioned, where the appellant had not appeared, the appeal had been struck out, and the Queen's Bench Division was only asked to reinstate a case which had never been heard."

Bankes, J. observed that that was not the position in the matter then before the Court. He referred to the distinction pointed out by the Court in the case of <u>In re Grove</u> (1884) 4 T.L.R. 272 between a case where a proceeding is struck out for non-appearance of the appellant and the case where, as in the one under consideration, although the respondent was absent the appellant had argued the case and satisfied the Court that he was right. In the latter case the Court had no jurisdiction to make the order asked for. In the result the application was refused.

In <u>Hession</u> v. <u>Jones</u> the Divisional Court (which forms part of the Supreme Court of Judicature) did not doubt that the Court could, in its exercise of its inherent jurisdiction, relist a proceeding which has been struck out for non-appearance of an appellant provided that the decree or order pronounced had not been passed and entered. The Court did not, however, decide that where the decree or order pronounced in such circumstances had been passed and entered the matter could not be relisted. Indeed the Court sought to distinguish the position between a matter struck out for

/non-appearance ..

non-appearance of the appellant and a matter in which the appellant was present and had argued his case in the absence of the respondent.

It is to be observed that the views of Thesiger, L.J. in the case of In re Nazaire Co. referred to by the Divisional Court in Hession v. Jones were given in relation to an application for rehearing where both parties had been present at the original hearing. This was pointed out by Lord Hewart, C.J. in Rackham v. Tabrum. Indeed the matter at the original hearing had been fully argued. I do not understand the remarks of Thesiger, L.J. or indeed of any of the ~~other~~ judges of the Court of Appeal who sat in Hession v. Jones as having any reference to a situation, such as the one here, where the appellant has failed to appear and the appeal is dismissed without a hearing on the merits. In the later case of Rackham v. Tabrum, as has already been observed, the Court held that the inherent jurisdiction could be exercised to relist a case struck out for non-appearance of the appellant even where the decree or order pronounced had been passed and entered.

In Brooksbank v. Rawsthorne & Co. (1951) W.N. 393 an appeal was brought in civil proceedings by the plaintiff from a decision of Lynskey, J. sitting at Liverpool Assizes. When the matter was called on for hearing the plaintiff did not appear. He was not represented by solicitors and no counsel had been briefed. On the application of counsel for the defendant company the Court of Appeal dismissed the appeal but directed that the order be not drawn up before 2 p.m. on the following day. The order was duly drawn up on the following day. Upon a motion for the re-instatement of the appeal it was explained that the failure of the plaintiff and his legal representatives to appear when the appeal came on for hearing was due to a mistake on the part of a clerk in the office of the London agents of the plaintiff's solicitors. It was urged that although dismissed the Court had jurisdiction to reinstate it. For the defendant

/company ....

company it was urged that the appeal not having been merely struck out but dismissed, had been determined and the Court had no jurisdiction to undo that which it had done, citing Flower v. Lloyd (1877) 6 Ch. D. 297 and Hession v. Jones (1914) 2 K.B. 421. Counsel for the plaintiff cited Rackham v. Tabrum (1923) 39 T.L.R. 380. Singleton, L.J. with whose judgment, Morris L.J. and Harman, J. concurred said that it appeared to him that the appeal had never been heard and determined by that Court and in the circumstances the Court ought to have, and in his opinion had, jurisdiction to hear the application and to make such order as it though proper.

The position in England seems to be that where an appeal to the Court of Appeal or to the Divisional Court has been struck out or dismissed for non-appearance of the appellant without a hearing on the merits the appellate court may in the exercise of its inherent jurisdiction reinstate the appeal in a proper case whether or not the decree or order pronounced is passed or entered but that where the appellant has appeared and the respondent has not and there has been a determination after a hearing it has no jurisdiction to do so.

The question arises - does the Court of Appeal in Jamaica have an inherent jurisdiction to do likewise? Now as has already been seen such a jurisdiction was exercised in England prior to the enactment of the Judicature Acts by the Court of Chancery. That jurisdiction was reserved to all the judges of the Supreme Court of Judicature by s. 16 of the Act 1873. Further s. 73 of that Act and s. 21 of the Act of 1875 preserves to all the judges of the Supreme Court of Judicature the right to exercise all the forms and methods of procedure which were in force before the Judicature Acts and are not inconsistent with those Acts and the rules made under them. The jurisdiction and powers of the Court of Appeal in Chancery were reserved to the Court of Appeal to which also was transferred the jurisdiction exercised by the Lord Chancellor in the Court of Chancery. ....

/In

In Jamaica according to the First Report of the Commissioners of Enquiry into the Administration of Civil and Criminal Justice in the West Indies (ordered by the House of Commons to be printed in 1827) the Governor, by virtue of the letters patent appointing him Governor, exercised the office of Chancellor. He was in fact the High Court of Chancery in Jamaica. The equity jurisdiction of that Court was similar to and co-extensive with that of the Court of Chancery in England and the rules and orders of the Jamaica Court appeared to have been founded on those of the Court of Chancery in England with variations with respect to time to appear and answer, etc., as local circumstances required. It was stated that the course of pleading in the local Court of Chancery was the same as it was in England. Indeed the Registrar in Chancery is quoted in the Report as having stated that the proceedings in the local court were almost in every particular analogous to those of the Court of Chancery in England. On appeal from orders or decrees of the local court security had to be given for the prosecution of the appeal and once given the appeal could not be dismissed at the instance of the respondent otherwise than with consent. The Rules and Orders to be observed in the High Court of Chancery in Jamaica were modelled on those in force in the Court of Chancery in England and it was provided therein that the course of proceedings used in the High Court of Chancery in England was to be followed in all other things not provided for by these Rules and Orders "as near as the circumstances of the place and things will reasonably allow."

By the statute 3 Vict. c. 65 the office of the Vice-Chancellor was set up. The Vice-Chancellor had to be a barrister-at-law and was empowered to try matters in the High

/Court .....

Court of Chancery which the Governor as Chancellor would normally have tried.

The Judicature Law, 1879 consolidated the Supreme Court of Judicature, the High Court of Chancery and certain other courts in much the same way as the Judicature Act, 1873 did in England in respect of corresponding English Courts. Henceforth there was constituted one Supreme Court of Judicature in Jamaica called the "Supreme Court". Sections 20, 21 and 28 of the 1879 Law provided as follows -

> " 20. The Supreme Court shall be a Superior Court of Record and shall have and exercise in this Colony all the jurisdiction, power and authority, which at the time of the commencement of this Law was vested in any of the following Courts and Judges in this Island, that is to say:-
>
> The Supreme Court of Judicature,
> The High Court of Chancery,
> ....
> .... "
>
> 21. Such jurisdiction shall be exercised, so far as regards procedure and practice, in manner provided by this Law, and the Civil Procedure Code, and the Laws regulating Criminal Procedure, and by such rules and Orders of Court as may be made under this Law; and where no special provision is contained in this Law, or in such Code or Laws, or in such Rules or Orders of Court with reference thereto, it shall be exercised as nearly as may be in the same manner as it might have been exercised by the respective Courts from which it is transferred, or by any of such Courts or Judges, or by the Governor as Chancellor or Ordinary."

/28. A single ......

" 28. A single Judge of the Supreme Court may exercise, in Court or in Chambers, any part of the jurisdiction of the Court which before the passing of this Law might have been exercised in the like manner, or which may be directed or authorized to be so exercised by Rules of Court to be made under this Law.

In such cases a Judge sitting in Court shall be deemed to constitute a Court."

These provisions are the local counterparts of ss. 16 and 23 of the English Supreme Court of Judicature Act, 1873, and are now ss. 24, 25 and 36 of the Judicature (Supreme Court) Law, Cap. 180. Under s. 32 of the local 1879 Law appeals in civil matters from District Courts were to be heard by the Full Court of the Supreme Court. Later on when Resident Magistrates' Courts replaced the old District Courts, appeals in civil proceedings from Resident Magistrates' Courts lay to the Full Court of the Supreme Court. In 1932, a Court of Appeal declared by s. 3 of the Court of Appeal Law, 1932 (No. 9) to form part of the Supreme Court of Judicature established under the Judicature Law, 1879 was constituted and was empowered to hear, _inter alia_, appeals in civil proceedings from Resident Magistrates' Courts, subject to the provisions of that law and to Rules of Court made under that Law. Section 11 of the 1932 Law provided as follows -

"11 - (1). Subject to the provisions of this Law, to the provisions of the Resident Magistrates Law, 1927, regulating appeals from Resident Magistrates' Courts in civil proceedings, and to rules made or deemed to be made under that Law, an appeal shall lie to the Court of Appeal from any judgment, decree or order of a Resident Magistrate's Court in all civil proceedings.

/11 - (2) ....

"11 - (2) On appeals from a Resident Magistrate's Court under this section the Court of Appeal shall have and may exercise the powers and authorities conferred on the Court of Appeal by the Resident Magistrates Law, 1927, and references, wherever they occur, in sections two hundred and fifty-five to two hundred and sixty-eight inclusive of that Law to "Court of Appeal," "Appellate Court," "Supreme Court" and "Clerk of the Appellate Court," shall where the context admits, be deemed to be referenced to the Court of Appeal established by this Law and the Registrar thereof respectively, and the said sections shall be read and construed accordingly."

This provision later appeared as s. 11 of Cap. 178 (now repealed) and is substantially the same as that contained in s. 11 of the Judicature (Court of Appeal) Law, 1962. No provision has been made under any law or in any rule in relation to the re-hearing of appeals which have been struck out or dismissed for non-appearance of the appellant. It has already been noted that under s. 8 of the Judicature (Appellate Jurisdiction) Law, 1962 there has been transferred to the Court of Appeal the jurisdiction and powers of the former Court of Appeal constituted by Law 9 of 1932 which formed part of the Supreme Court of Judicature.

Now appeals in civil proceedings before the Divisional Court and the Court of Appeal in England and before the former Court of Appeal of Jamaica and now before this Court are in the nature of re-hearings. The terms of s. 251 of the Judicature (Resident Magistrates) Law, Cap. 179 leave no room for doubt that this is so in the case of appeals in civil proceedings from Resident Magistrates Courts though it is otherwise in the case of appeals in criminal proceedings

/from ....

from Resident Magistrates' Courts as was pointed out by this Court in R. v. Thompson (1964) 6 W.I.R. 381.

If the Court of Appeal has acquired the jurisdiction and powers of the former Court of Appeal which itself formed part of the Supreme Court of Judicature established under the Judicature Law, 1879 and the Supreme Court by the combined effect of ss. 20, 21 and 28 of the local 1879 Law (now ss. 24, 25 and 36 of Cap. 180) was vested with the jurisdiction and powers exercised by the old High Court of Chancery in Jamaica which in such matters as it tried adopted the practice and procedure of the High Court of Chancery in England then it follows that, there being no enactment or rule regulating the practice or procedure in respect of the matter here in issue, this Court has jurisdiction in a proper case to rehear an appeal which has been struck out or dismissed for non-appearance of an appellant there being no hearing on the merits. By way of contrast rule 36 of the Judicature (Court of Appeal) Rules, 1962 regulates the procedure for making application for rehearing of an appeal from the Supreme Court in its civil jurisdiction where that appeal has been struck out or dismissed for non-appearance of the appellant. There is no similar regulatory provision in respect of Resident Magistrates Courts' appeals in civil proceedings.

The final question is whether or not the affidavit filed in support of this application discloses a good and sufficient reason for this Court to relist the appeal. In the circumstances set out in the supporting affidavit we are of the view that it does.

/The appeal ....

The appeal is accordingly relisted for hearing at a date to be notified.

The costs of this application shall be respondent's in any event.

SMITH, J.A.:

I agree.

GRAHAM-PERKINS, J.A.:

I agree with the conclusion arrived at by my brother LUCKHOO. I wish, however, to reserve for further consideration the question whether an appeal in civil proceedings from a Resident Magistrate's Court is in the nature of a re-hearing.