J A M A I C A

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 16/71

Before: The Hon. Mr. Justice Fox (Presiding)
The Hon. Mr. Justice Edun
The Hon. Mr. Justice Robinson

B E T W E E N	UNITED CHRISTIAN MISSIONARY	APPLICANT/ APPELLANT
	SYDNEY O. GUNTLEY and MAE O. GUNTLEY	RESPONDENTS

Mr. David M. Muirhead, Q.C. for the Appellant

Mr. E. C. L. Parkinson, Q.C. for the Respondents.

25th May, 1973

FOX, J.A.,

Prior to 29th October, 1970, an application for discharge of a restrictive covenant in relation to premises at 37, Arnold Road, came on for hearing in Chambers before the Master, His Honour Mr. H. V. T. Chambers. The record does not show when the proceedings actually commenced but it is agreed that this was on a date shortly before the 29th October, 1970. There were several adjournments. On 16th March, 1971, the matter came on for completion. At this stage there remained unfinished the address of Mr. Muirhead, the Attorney who appeared for the applicant, and the decision of the court. The Master pointed out that since the hearing prior to the 16th March, 1971, he had been elevated to the Bench and was now a Judge of the Supreme Court, and he raised the question of his jurisdiction to continue the hearing. By written consent of all parties it was agreed that the hearing should be continued before Mr. Justice Chambers in his capacity as Judge.

On the 23rd April, 1971, Mr. Justice Chambers handed down his written decision refusing discharge of the restriction. The Applicant's notice of appeal was filed on the 31st May, 1971. When the appeal came on for hearing before us, Mr. Parkinson who appeared for the respondents took a preliminary objection based upon the lateness of the notice of appeal.

He submitted that the matter had been decided by Mr. Justice Chambers in his capacity as a Master and that therefore the time within which notice of appeal should be given was as provided by Rule 3 of the Master in Chambers Rules 1966. Rule 3 provides that "Notice of Appeal from a Master shall be lodged with the Registrar within 7 days from the date on which any order or decision is made."

Replying to this objection, Mr. Muirhead contended that having regard to the jurisdiction of a judge to perform all the functions allotted by law to a Master, including discharge of restrictive covenants, the time within which to appeal was governed by Rule 13(b) of the Court of Appeal Rules, 1962, which fixes this period as six weeks from the date when the judgment for order of the court was made. Mr. Muirhead also submitted that in view of the consent which was given to the continuation before Mr. Justice Chambers in his capacity as judge of the Supreme Court, the objection was misconceived.

We agreed with Mr. Muirhead and overruled this objection. Both Mr. Muirhead and Mr. Parkinson agreed that, in the circumstances, the Master was competent to continue the hearing in his capacity as a judge and no point was taken on the ground that the proceedings were a nullity. We consider that this stand by both attorneys was correct and that the only point which arose was whether the notice of appeal was in time. We were also of the view that if the Master's Rules applied to this case, the matter was eminently one in which the discretion of the court would have been exercised to extend the time for giving notice of appeal.

Mr. Parkinson took a second preliminary objection to the hearing of the appeal on the ground that the appellant was not a legal personality and was without locus standi. This point is without merit. The appellant is registered on the title as the owner of the premises at 37, Arnold Road and it was competent for the proceedings to have been initiated in the name of the society and by way of its accredited agent. For these reasons we were of the view that the preliminary objections should be overruled and that the appeal should be heard on its merit.

The discharge of the restrictive covenant was sought on three grounds, namely:

(a) that by reason of changes in the character of the neighbourhood the restriction ought to be deemed obsolete;

(b) that the continued existence of the restriction would impede the reasonable user of land for public and private purposes without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of the restriction, and

(c) that the proposed discharge will not injure the persons entitled to benefit of the restriction.

The restriction on the applicant's title reads as follows:-

> "Not to erect or permit to be erected on the said parcel of land any shop, store, factory or other place of business, or any church, chapel or school-house or any other building except a private dwelling house and the necessary outbuildings thereto."

On the first ground stated above upon which the discharge was sought, an important matter to be decided was the neighbourhood of 37, Arnold Road. The burden was upon the applicant to show that by reason of the changes in the character of that neighbourhood the restriction ought to be deemed obsolete. In discharge of that burden the appellant relied upon the oral and affidavit evidence of Mr. George Finson, a real estate appraiser and agent with experience in this respect of the Corporate Area going back as far as 1945. In Mr. Finson's opinion the neighbourhood in which the premises is located was an extensive one, encompassed to the south by Connolley Avenue running easterly from Wolmer's Girls School lands to Dames Road and continuing along Dames Road easterly to South Camp Road; to the east by South Camp Road which curves to the north as Camp Road to its intersection with Arnold Road; then southerly from this intersection down Arnold Road to include those premises bordering on Arnold Road; and to the west by Caenwood Teachers' Training School, the Water Commission's land, the Wolmer's Girls School land and so back down to

Connolley Avenue. This is an area of about 150 acres. It contains many streets. Mr. Finson was living at the Grange Guest House on Arnold Road in 1947 and has been traversing the area which he described since that time. He said, in effect, that within this area substantial changes had taken place which in his opinion reduced it from a residential area which it originally was to a commercial area. These changes were summarised by Mr. Finson. Dwelling houses had changed from single family occupancy to several family occupancy; to use as workshops within the dwelling-house with sheds at the back of some yards; to use as churches and as buildings for offices and shops and many other uses which in his opinion could not be considered residential in any form.

Without going into details of the evidence before the learned judge, I am of the view that on that evidence it was overwhelmingly established that changes of a fundamental nature had taken place within the area described by Mr. Finson as the relevant neighbourhood. In Re Truman, Hanbury, Buxton & Company Ltd.'s application (1956) 1 Q.B. at 261, at 272, Romer L.J. said:

> "It seems to me that if, as sometimes happens, the character of an estate as a whole or of a particular part of it gradually changes, a time may come when the purpose to which I have referred can no longer be achieved, for what was intended at first to be a residential area has become, either through express or tacit waiver of the covenants, substantially a commercial area. When that time does come, it may be said that the covenants have become obsolete, because their original purpose can no longer be served and, in my opinion, it is in that sense that the word "obsolete" is used in section 84(1)(a)".

This passage correctly describes the principle to be applied in determining when a covenant has become obsolete. On the evidence, and accepting the neighbourhood as defined by Mr. Finson, I take the view that the original purpose for which the covenant in this case was imposed can no longer be served and it should therefore be deemed obsolete.

Mr. Parkinson submitted that the area described by Mr. Finson was not the relevant area defining the neighbourhood in this case. He said that this area was a much smaller area confined to the upper part of Arnold Road. It is necessary to describe Arnold Road. It runs roughly from south to north, the southern portion up to the intersection with Connolley Avenue and Danes Road is clearly commercial. In Mr. Finson's evidence the upper portion of Arnold Road starts from Connolley Avenue and extends to Camp Road in the north. Some distance north of Connolley Avenue, Arnold Road meets on the west with Caenwood Road leading into Caenwood College. Immediately north of Caenwood Road is a bridge over a gully running behind the premises on the western side of Arnold Road. Arnold Road goes by this bridge to the north and eventually meets Camp Road. From Connolley Avenue up to this bridge the evidence overwhelmingly asserts the commercial character of Arnold Road. On the western side of this portion of Arnold Road there is a large establishment of building contractors. On the eastern side there are shops and other business places. Immediately south of the bridge there is a cabinet shop, the activities of which are plain to be seen by travellers on the road and dwellers within the vicinity. North of the bridge towards Camp Road, there are on the west commencing with the objector's house at No. 35, a range of dwelling houses extending to what was formerly a dwelling house at No. 49 but which admittedly is now a hatchery. North of the hatchery on the western side of Arnold Road there is the Y.W.C.A. building, which is admittedly used as a basic school. On the eastern side of Arnold Road north of the bridge, there are some dwelling houses including the Grange Guest House which is undergoing vast changes and is now a range of apartments North of these apartments there are a series of building; the Women's Federation, the Mary Seacole Hall, and the Red Cross.

In answer to the submission that the judge had not found what was the relevant neighbourhood, Mr. Parkinson contended that by implication from what the judge said in his written judgment he had

found that the neighbourhood comprised the dwelling-houses on the western side of Arnold Road stretching north from the bridge up to and including the hatchery at No. 49, and being bounded on the north by the Y.W.C.A. building. In making these submissions Mr. Parkinson at first excluded the buildings on the eastern side of Arnold Road from the bridge going north. He stressed that, on the evidence, there were no changes in the residential character of the buildings in this limited area on the western side of Arnold Road north of the bridge except the hatchery, and argued that this change was not of such an extent and nature as to enable the restriction to be deemed obsolete. Later on, Mr. Parkinson submitted that, in the alternative, it could be gathered from the judgment of Mr. Justice Chambers, that the area which he had found as the neighbourhood embraced all the buildings on both sides of Arnold Road north of the bridge and bounded on the west by the premises of the Caenwood College, on the south by Caenwood Road and on the north and east by Camp Road.

I agree that it is possible for changes to occur in a particular region which has the result of converting what was a residential area into a commercial area and at the same time leave what could properly be described as a residential enclave. This was the position in Stephenson et ux v. Liverant et al. In that case a particular subdivision in Discovery Bay was held to be sufficiently distinctive to constitute a neighbourhood of its own. The essential element is precision in the definition of the area said to be residential. No such precision exists in relation to either area indicated by Mr. Parkinson. The range of dwelling houses north of the bridge on the western side of Arnold Road is not sufficiently distinctive to be regarded as an enclave. Neither is the larger area north of the bridge on both sides of Arnold Road sufficiently intact to enable it to be labled a residential neighbourhood. Within this extended area north of the bridge there is admittedly on the western side of the road one premises being used as a hatchery, (in the submission before us it was described as a factory), and one premises being used as a school. On the eastern side of the road there are several

premises being used for purposes which are clearly institutional. I hold that the changes in this area on both sides of Arnold Road north of the bridge are so fundamental as to compel a finding that the restriction ought to be deemed obsolete within that limited area.

The second ground upon which great emphasis was placed by the appellant was that the discharge of the restriction will not injure the objector. In this respect it is important to note that number 37, Arnold Road was formerly a vacant piece of land north of the objector's premises at No. 35. It was acquired from the society by Government. In July, 1969, a contract of sale was executed. Thereafter, the Government proceeded to erect a school building at the western section of the premises at No. 37 Arnold Road. This building was completed in December, 1969, but has never been used as a school. In the latter part of 1969, the objectors also carried out construction activity on their land. The out-building and the garage behind the main building were converted into four apartments of one room each. Mr. Parkinson described the action of the government in putting up this school building at the back of No. 37 as outrageous behaviour. He charged that nothing could be more calculated to make the habitation of the objector's house unendurable than the erection of a school, and he emphasised that the breach of the covenant was compounded by the fact that it was committed with full knowledge of its existence.

I agree that even if the building was never used as a school, it was unfortunate that the erection was made without the restriction having first been removed pursuant to an application to the court, or without at least the prior consent of the objectors and such other parties as may be entitled to the benefits of the restriction. On the other hand, it lies ill in the mouth of the objectors to complain of outrageous behaviour in the breach of the covenant, when at the same time they are also guilty of a like default in erecting buildings other than 'a private dwelling house and the necessary out-buildings thereto'. The matter does not stop there. In his submissions to us, Mr. Parkinson said that the erection of

the school had driven the objectors from their house. This statement exaggerates the evidence. The fact of the matter is that whilst the school was being erected, a fact which must have been obvious to the objectors, they made no complaint, took no legal action, and did not even write a letter of protest. When this situation was drawn to Mr. Parkinson's attention he suggested that the objectors did not take action to restrain this alleged outrageous breach of the covenant because they are decent people and did not want to undertake litigation. They were content to be driven from their homes. There is no evidence to support this suggestion. In his evidence Mr. Guntley said that he was removing from the premises in June 1970 because 'we were expecting that a school was coming next door'. This is quite a different thing from removing because of the grossly undesirable consequences attendant upon breach of the covenants which counsel detailed.

One other matter must be noticed. On behalf of the objectors a letter was written on the 7th of January, 1970, to the Permanent Secretary of the Ministry of Education which reads:

"Dear Sir,

In a short time our family is expecting to leave our home in Arnold Road. The house is in very good condition and is at the corner of Arnold Road and Caenwood Road, bounded on the North and West by Caenwood lands.

We are wondering whether your Ministry would be interested in renting the property for offices as it is so near to the Caenwood Junior College.

We shall be glad to hear from you at an early date whether you are interested. If you are, perhaps, you would like to suggest a date when we should come in and see you.

Hoping to hear favourably from you,

Yours truly,

(Sgd.) Venice Guntley (Deaconess)

for the Guntleys"

This letter makes no mention of the complaint of noise which figured so prominently in the submission of Mr. Parkinson. The letter is an offer to the Ministry to make use of premises other than as a private dwelling house, namely, as offices. It is plain that the objectors

perceived that the building of the school could be beneficial to them financially, and in January, 1970, exhibited no concern in protesting the breach, and expressed no apprehension of injury to them as a consequence of the breach. When the Society in due course made this application, the objectors then objected. By that time the reluctance to litigate had apparently been overcome. It is said that the objectors were vindicating their rights. I am not impressed. In my view they were taking advantage of the situation to articulate what was said to be the only way out of the existing situation, namely a claim for the payment of compensation; a claim which I consider is without merit.

In Ridley v. Taylor 1956, 1 W.L.R., 611, Russell, L.J., said that in his view the provision for discharge of a restriction on the ground that it will not injure the persons entitled to its benefit was "designed to cover the case of the proprietorially speaking, frivolous objection" and that "it is, so to speak, a long stop against vexatious objection to extended user". I take the view that the objection in the case before us is frivolous and vexatious and that a removal of the restriction will in no way injure the objector.

In the light of what I have already said, there is no real need to discuss the remaining ground upon which the application was made, namely, that the continued existence of the restriction would impede the reasonable user of the premises without securing practical benefits to other persons. It is sufficient for me to say that on the evidence this ground too was established.

I would allow the appeal. The objectors were allowed costs in the court below. I would set aside the judgment of Chambers J., and the order for costs which he made. I would make no order as to costs in the court below and I would make no order as to costs in this appeal.

EDUN, J.A.,

I agree that the appeal be allowed and that the restrictive covenant be discharged. I wish to add that there was abundant evidence led on behalf of the applicant that the character of the neighbourhood

has so changed that the restrictive covenant ought to be deemed obsolete. The learned trial judge in arriving at his conclusion not to discharge the restrictive covenant based his decision upon a mere criticism of the evidence for the applicant.

In my view, he did not properly, or at all, assess the evidence for the applicant which clearly established that the restriction was no longer necessary for the purposes of the persons who were enjoying the benefits of them. He also failed to consider evidence of the objectors which undoubtedly acknowledged the change in the neighbourhood from one of residential to a commercial area.

I also agree with the 'No Order' as to costs as proposed.

ROBINSON, J.A.,

I agree with my brothers in this judgment. Of all cases of this sort with which I have had to deal, this stands out as the clearest one in which the evidence supports the conclusion that the neighbourhood has changed character rendering the restrictive covenant obsolete; the physical characteristic necessary for private residence has disappeared.

The evidence is that several houses and buildings are in the area, with which this case is concerned and there has been one objector, i.e. The Guntleys and the Guntleys by their conduct have without doubt forfeited any right to complain. I agree that the appeal be allowed and with the proposed order as to costs.

I might add here that Chambers J. appears to have made no findings of fact in this matter.

FOX, J.A.,

The appeal is allowed. The judgment of Chambers J. is set aside. The order as to costs in favour of the objectors in the court below is set aside and substituted therefor, there shall be no order as to costs for either party in the court below. The restrictive covenant is discharged. There is no order as to costs on the appeal to either party.

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