

John David Stannard and Others

Appellants

v.

Lorraine Marie Issa

Respondent

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 2ND DECEMBER 1986

Present at the Hearing:

LORD KEITH OF KINKEL
LORD MACKAY OF CLASHFERN
LORD ACKNER
LORD OLIVER OF AYLERTON
SIR IVOR RICHARDSON

[Delivered by Lord Oliver of Aylmerton]

This is an appeal from an order of the Court of Appeal of Jamaica (Kerr, Carey and Campbell JJ.A.) made on 12th April 1984 allowing the respondent's appeal from an order of Theobalds J. in the Supreme Court of Jamaica dated 22nd June 1983 and ordering that certain restrictive covenants affecting the respondent's land at Harmony Hall in the Parish of St. Mary be modified.

The land concerned lies on the coast between Ocho Rios and Tower Isle in Jamaica and forms part of a larger plot which, in the year 1952, was sub-divided by the then owner into 11 lots. The site forms, broadly, a semi-circle the base of which is constituted by the main road to Tower Isle and the outer perimeter of which is the sea coast which forms the northern boundary of the site. Within the site a smaller semi-circle formed by a service road communicating with the main road at each end comprises lots 10 and 11, both of which had been reserved for commercial development. The outer semi-circle consists of lots 1 to 9 inclusive. Apart from lot 9, which was retained by the original vendor and is not subject to any restrictions, each of these lots was sold subject to common restrictive covenants

and it is not in contest that the appellants, who are respectively the owners of lots 4, 5 and 7, are persons entitled to the benefit of the restrictions as estate owners of their respective lots. The respondent is the owner of lots 2 and 3 and is an original covenantor. The restrictions are as follows:-

- "1. That the said land shall not be sub-divided.
2. No building shall be erected on the said land other than a building which with appropriate outbuildings shall cost not less than Two Thousand Pounds to erect.
3. No trade or business shall be carried on and no commercial signs shall be erected on the said land nor shall the said land be used for any commercial purposes Provided However that for the avoidance of doubt it is hereby declared that the conduct on the said land of the profession of a medical practitioner or surgeon and of the erection of any usual sign or name plate in connection with the conduct of such profession shall not be deemed to be in breach of this covenant."

There is no specific restriction requiring that buildings on the various lots shall be used only as private dwelling houses, but in fact such development as had taken place on the site up to the end of 1982 was entirely residential, consisting of 7 villa-type houses each standing in its own grounds and described by the trial judge as development of a "peaceful quiet seaside single family nature". The respondent having become desirous of redeveloping the two lots of which she was the owner, obtained in 1983, a planning permission for a scheme of development consisting of the erection of six blocks of three-storey buildings comprising 40 residential apartments together with amenities including two swimming pools. It was proposed that the development would be subdivided horizontally into strata lots pursuant to the Registration (Strata Titles) Act (No. 42 of 1968). No doubt in anticipation of such permission she applied on 31st December 1982 by originating summons for an order modifying the restrictions pursuant to the provisions of the Restrictive Covenants (Discharge and Modification) Act (No. 2 of 1960). She had already obtained the consent of the owners of lot 1 to the modification which she proposed.

The Restrictive Covenants (Discharge and Modification) Act is modelled upon section 84 of the Law of Property Act 1925 of the United Kingdom in its original form and it is accepted by both sides that the English authorities governing the construction and operation of that section are equally applicable

to the construction and operation of the Act notwithstanding the slight verbal differences. Section 3(1) provides so far as material:-

" 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) ...
- (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 person entitled to the benefit of the restriction also suffers loss in consequence of the discharge or modification, nor shall any compensation be payable in excess of such loss."

The modification sought by the respondent consisted of the substitution for the original restrictions of the following:-

- "1. That the said land shall not be sub-divided SAVE THAT the erection of apartment buildings under the Registration (Strata Titles) Act or

otherwise with appropriate outbuildings shall not be deemed a breach of this covenant.

2. No building shall be erected on the said land other than buildings which with appropriate outbuildings shall cost not less than Two Thousand Pounds to erect.
3. No trade or business shall be carried on and no commercial signs shall be erected on the said land nor shall the said land be used for any commercial purposes Provided However that for the avoidance of doubt it is hereby declared that the conduct of the said land of the profession of a medical practitioner or surgeon and of the erection of any usual sign or name plate in connection with the conduct of such profession and the use of the said land or any buildings thereon for the purposes necessary and incidental to the management and operation of any apartment building shall not be deemed to be in breach of this covenant."

The appellants objected to the modifications proposed on a number of grounds, the principal one of which - and the only one with which, in the event, this appeal is concerned - was that the judge could not, on the evidence, be satisfied that any of the conditions for the making of an order under section 3(1) of the Act existed. It was not contended that the covenants had become obsolete, so that the Court had to be satisfied that one or other of the alternative requirements set out in paragraphs (b) and (d) had been fulfilled. As to (b) the submission was that a perfectly reasonable user of the land (that of a single private residence) was permitted by the covenant and that in any event there were various practical benefits enjoyed by the appellants by reason of the covenant which justified the maintenance of the restrictions in their original form. As to (d) it was argued that effectively that paragraph applied only where the objections raised were so insubstantial that they could properly be categorised as frivolous. In the Supreme Court Theobalds J., after visiting the site, determined that the continued existence of the covenants in their present form did not impede the reasonable user of the respondent's land and that in any event the proposed modification would adversely affect the practical benefits secured to the appellants by the continuation of the restrictions. Moreover he expressed himself as unsatisfied that the proposed modification would not injure the appellants. He accordingly refused an order and dismissed the summons with costs.

The respondent appealed to the Court of Appeal which, on 12th April 1984, reversed by a majority the decision of Theobalds J. and ordered that the restrictions be modified as proposed in the originating summons.

Their Lordships have had some difficulty in following the reasoning by which the majority in the Court of Appeal arrived at the conclusion that the requirements of section 3(1)(b) and (d) were satisfied. It appears to have been this, that the question of whether the reasonable user of the land was impeded by the restrictions was inextricably bound up with the question of whether the Court could discern sufficient practical benefit in those entitled to enforce the restrictions to justify their continuation. They seem to have entertained the opinion that unless they could be satisfied that there was some substantial and precisely ascertainable benefit to be derived from the restrictions by those entitled to enforce them it necessarily followed that the restrictions impeded the reasonable user of the land. Campbell J.A. was indeed prepared to go further and to say that the burden on an applicant relying on section 3(1)(b) was merely to show that the user of the neighbouring lands "had changed sufficiently in quality ... such that ... the existing user of the sub-division lots ... is no longer consonant with the current view on the optimum user of lands in the neighbourhood". Kerr J.A. considered that inasmuch as (a) there was no specific requirement that buildings erected on the land should be used as private dwelling houses and no limit on size or architectural design of such buildings (b) it was open to the owners of lots 9, 10 and 11 to develop their lots for commercial purposes (though they had not done so) and (c) it was open to each plot-owner to turn his sub-division into a medical centre without being in breach of covenant (although none had done so) it followed that the covenants secured no practical benefit whatever worth preserving. As to the question whether the covenant impeded the reasonable user of the land, which he described as a correlative consideration with the existence of a practical benefit to those entitled to the benefit of the covenant, he favoured a liberal approach which, in a densely populated island such as Jamaica and with the modern trend in building town houses and condominiums, he described as "reasonable relevant and commendable". The area was, he observed, a tourist resort area and "the development contemplated is in harmony with the area and with current development in close proximity to the lots in this sub-division". Much the same approach was adopted by Campbell J.A. He adverted to the possibility, within the framework of the restrictions as they stood, of carrying on activities which would impinge on the privacy of owners of adjoining lots.

They thus, in his view, secured no benefits, their real purpose being to preserve the quality of the locality by restricting the density of development. He analysed the issue on the appeal in these terms:-

"Since the restrictive covenants did not secure privacy and the other practical benefits found by the learned trial judge but only the benefit of having the quality of the locality preserved the learned trial judge should have considered the application as one to secure intensification of the user of the lots for residential purpose in a situation where the only issues were whether the modification sought would injure the objectors by causing a diminution in value of their lots or deprive them of the benefit of continuing to reside in a good quality residential area albeit not exclusively residential and whether the user sought would be in conflict with the general character of the neighbourhood."

The test to be applied in applications for modification under section 3(1)(b) of the Act is, he observed:-

"... the reasonableness of the user for which modification of the covenant is sought and in applying this test it is necessary to consider not only the particular lot in question but the neighbourhood in which it is situated as also the purpose which the covenants were devised to achieve and whether the modification sought would stultify or destroy the aforesaid purpose."

He appears also to have considered that because it was possible to conceive of developments within the framework of the restrictions which might have the effect of defeating the manifest intention of preserving the quality of the locality by restricting the density of occupation it followed that a modification which enabled development to a greater density to take place would not result in any injury to the appellants since the market value of their properties would not, in the light of contemporary views of acceptable housing densities, be depreciated.

Carey J.A. in a powerful dissenting judgment observed that:-

"An applicant for modification or discharge of a restrictive covenant where his ground is that provided for in section 3(1)(b) has a burden imposed on him to show that the permitted user is no longer reasonable and that another user which would be reasonable is impeded. ... Lord Evershed M.R. in *Re Ghey and Galton's Application* [1957] 3 All E.R. at p. 171 expressed the view that in relation to this ground -

'... it must be shown, in order to satisfy this requirement, that the continuance of the unmodified covenants hinders, to a real, sensible degree, the land being reasonably used, having due regard to the situation it occupies, to the surrounding property, and to the purpose of the covenants.'

Put another way, the restrictions must be shown to have sterilised the reasonable use of the land. Can the present restrictions, prevent the land being reasonably used for purposes the covenants are guaranteed to preserve? Accordingly, I would suggest that it would not be adequate to show that the proposed development might enhance the value of the land for that would demonstrate the applicant's proposals are reasonable and the restriction impedes that development. ..."

He concluded:-

"I would make one final comment. If the evidence indicates that the purpose of the covenants is still capable of fulfilment, then in my judgment the onus on the applicant would not have been discharged."

After an analysis of the evidence, he agreed with the trial judge that the restrictions had the practical effect of preserving privacy and that they did not impede the reasonable user of the land.

Their Lordships have no hesitation in preferring the dissenting judgment of Carey J.A. Indeed the reasoning of the majority judgments in the Court of Appeal appears to their Lordships not only to be based upon a misconstruction of the plain words of the section but to be contrary to the whole tenor of both the English and West Indian authorities. The corresponding provision of section 84 of the Law of Property Act 1925 was amended by section 28 of the Law of Property Act 1969 by substituting the word "some" for the word "the" in the expression "impedes the reasonable user" and if that had been done in the Jamaican Statute it would, no doubt, be impossible to quarrel with the approach of the majority on any ground save that they had paid too little attention to the actual benefit conferred by the restrictions. But it has not been done and the result at which they arrived can be achieved only by treating the section as if it had been amended and by disregarding the construction universally applied to it in its unamended form. Lord Evershed M.R. in *Ghey and Galton's Application* (*supra*) pointed out (at page 659) that in order to succeed in an application under the section an applicant has to go a great deal further than merely to show that, to an impartial

planner, his proposal appeared a good and reasonable proposal. He must affirmatively prove that one or other of the grounds of jurisdiction has been established. At page 663 of the report Lord Evershed propounded the often quoted test for a successful application under the English equivalent of section 3(1)(b) of the Jamaican Statute in the terms already referred to in the dissenting judgment of Carey J.A. Curiously enough this was relied upon by Kerr J.A. in his judgment as justifying his approach to the problem. But it is, in their Lordships' judgment, entirely clear that in propounding his test, Lord Evershed was very far from suggesting, as Kerr J.A. seems to imply, that all that had to be shown was that there was some use of the land which was (a) reasonable and (b) impeded to a sensible degree by the restrictions sought to be modified. That submission, under legislation in all material respects similar to that with which this appeal is concerned, has been decisively rejected - and in their Lordships' view rightly rejected - in a number of decisions of the Lands Tribunal in England (see *Wakefield City Corporation's Application* [1953] 7 P & C.R. 90 and *Re Howard (Mitcham) Limited's Application* [1956] 7 P & C.R. 219), by the Supreme Court of Victoria (*Re Miscamble's Application* (1966) V.R. 596) and by the High Court of Jamaica (*Re Constant Spring and Norbrook Estate* (1960) 3 W.I.R. 270). In the instant case there was no evidence whatever of any difficulty in developing the respondent's land or in disposing of it for development within the framework of the existing restrictions and certainly there was no suggestion that they had the effect of sterilising the land. All that was said was that the respondent's proposal was one which made a reasonable user of the land having regard to current pressures of population and current notions of optimum density. In their Lordships' judgment both Theobalds J. and Carey J.A. were right in saying that the respondent failed to surmount the first hurdle placed in her way by section 3(1)(b).

That decision renders it strictly unnecessary to consider the further question whether the existence of the restrictions conferred a practical benefit on the objectors sufficient to justify their continuation without modification. However, in their Lordships' judgment, the majority in the Court of Appeal erred also in their approach to this problem. Given any set of restrictions it is not usually difficult to conjure up colourful hypothetical examples of things which could be done within the framework of the covenants as they stand and which, if done, would substantially impair or defeat the purpose for which the covenants were imposed, but that is not an exercise which the Court is enjoined by the section to undertake. What the Court exercising this jurisdiction is enjoined to do is to

consider and evaluate the practical benefits served by the restrictions. The purpose of these restrictions is obvious on their face. It was to preserve the privacy of each purchaser's plot and the quality of the totality of the sub-divisions by restricting housing density, by regulating commercial activity and by providing a lower cost limit intended to ensure good quality development. Whether or not the covenants as drawn are sufficiently specific to achieve all these purposes in the face of a really determined attack by somebody intent on disturbing the peace of the neighbourhood is really immaterial. The undisputed evidence was that in fact all those plots which had been built on had in fact been developed by the erection of single storey private dwellings. It was the trial judge's opinion, after a view, that the land formed a peaceful seaside enclave of a family nature. That was the actuality and, with respect to them, the majority of the Court of Appeal, in positing the nightmare of a complex of medical centres or six-storey castles covering the entirety of the sub-divided lots, were ignoring altogether the practical effects of the restrictions and engaging in unnecessary flights of imagination in order to test whether the original intention of the restrictions was capable of achievement in all circumstances. In doing so they were, in their Lordships' judgment asking themselves the wrong question. The question is not "what was the original intention of the restriction and is it still being achieved?" but "does the restriction achieve some practical benefit and if so is it a benefit of sufficient weight to justify the continuance of the restrictions without modification?"

It hardly needs stating that, for anyone desirous of preserving the peaceful character of a neighbourhood, the ability to restrict the number of dwellings permitted to be built is a clear benefit, just as, for instance, was the ability in *Gilbert v. Spoor* [1983] Ch. 27 to preserve a view by restricting building. It scarcely requires evidence to demonstrate that the privacy and quietude of an enclave of single dwellings in large gardens is going to be adversely affected by the introduction on adjoining lands of no less than 40 additional families. If, therefore, it were necessary to decide the point, it is in their Lordships' view quite clear that the trial judge was correct in finding that the continued existence of the covenants did secure substantial practical benefits to the appellants and in finding himself unpersuaded that the requirement in paragraph (d) of the sub-section that the modifications proposed would not injure the appellants had been satisfied. As regards this latter consideration, it was observed by Russell L.J. (as he then was) in *Ridley v. Taylor* [1965] 1 W.L.R. 611 that the equivalent of this paragraph in the Law

of Property Act 1925 appeared to have been "designed to cover the case of the, proprietorially speaking, frivolous objection". Whilst the trial judge found that some of the objections raised on behalf of the appellants were of an insubstantial nature, on no analysis could it be said that the principal objection to a modification which would permit an unrestricted sub-division of (and thus an unrestricted density on) the subject land was frivolous or vexatious.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be allowed and the order of Theobalds J. in the Supreme Court restored. The respondent must pay the costs of the appellants before the Board and in the Court of Appeal.



