[2017] JMCA Civ 35

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 115/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE McINTOSH JA

IN THE MATTER of **ALL THAT** parcel of land part of **RETREAT** in the parish of **SAINT ANDREW** containing by survey Sixty-eight Thousand Seven Hundred and Fifty Square Feet of the shape and dimensions and butting as appears by the said plan and being the land comprised in Certificate of Title registered at Volume 1408 Folio 562 of the Register Book of Titles.

AND

IN THE MATTER of the restriction affecting the subdivision of lands and the distance of buildings from boundaries.

AND

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

IN THE MATTER of **ALL THAT** parcel of land part of **VALE ROYAL** in the parish of **SAINT ANDREW** being the Lot numbered **FIVE** of **BLOCK P** on the plan of Vale Royal aforesaid deposited in the Office of Titles on the 1st day of November, 1927 of the shape and dimensions and butting as appears by the said

plan and being the land comprised in Certificate of Title registered at Volume 1408 Folio 563 of the Register Book of Titles.

AND

IN THE MATTER of the restriction affecting the subdivision of lands and the distance of buildings from boundaries.

AND

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

IN THE MATTER of **ALL THAT** parcel of land part of **RETREAT** in the parish of **SAINT ANDREW** being the Lot numbered **TWENTY-THREE** on the plan of Retreat aforesaid deposited in the Office of Titles on the 18th day of August, 1925 containing by survey Two Acres of the shape and dimensions and butting as appears by the said plan and being the land comprised in Certificate of Title registered at Volume 1292 Folio 183 of the Register Book of Titles.

AND

IN THE MATTER of the restriction affecting the subdivision of lands and the distance of buildings from boundaries.

AND

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

BETWEEN	**SAGICOR POOLED INVESTMENT FUNDS LIMITED**	**APPELLANT**
AND	**ROBERTHA ANN MATTHIES**	**1ST RESPONDENT**
AND	**JOHN OTWAY**	**2nd RESPONDENT**
AND	**JENNIFER OTWAY**	**3rd RESPONDENT**
AND	**PAUL ISSA**	**4th RESPONDENT**
AND	**JACQUELINE ISSA**	**5th RESPONDENT**
AND	**SUZANNE ISSA**	**6th RESPONDENT**

Vincent Nelson QC and Krishna Desai instructed by Myers, Fletcher & Gordon for the appellant

Emile Leiba, Miss Gillian Pottinger and Miss Candice Stewart instructed by DunnCox for the respondents

23 October, 26 November 2012 and 10 November 2017

PANTON P

[1] This appeal is against a judgment delivered by Brooks J (as he then was) on 7 September 2011. At the outset, the court sincerely apologizes to the parties for the delay in disposing of this matter. The reasons for this delay are many but no useful purpose would be served by narrating them. In this respect, the court continues to aim at non-repetition.

[2] The appellant ("Sagicor") filed three separate claims which were heard at the same time. The claims were aimed at securing modification of certain restrictive covenants endorsed on certificates of title registered at Volume 1408 Folios 562 and

563, and certificate of title registered at Volume 1292 Folio 183 of the Register Book of Titles.

[3] As regards Volume 1408 Folio 562 (**23 Seymour Avenue**), the restrictions are that:

(a) the land shall not be so subdivided that any portion of it form part of a holding of less than an acre;

(b) no building other than a private dwelling house valued no less than £800.00 shall be erected on the land; and

(c) the dwelling house to be erected shall be not less than 30 feet from, and shall face, Seymour Avenue, and be not less than 15 feet from the boundaries of neighbouring lots. All outbuildings and other buildings shall be built at the rear and must also not be nearer than 15 feet from the boundaries.

In its further amended fixed date claim form, Sagicor sought to have the restrictions modified to read that:

(a) the land may not be subdivided except with the permission of the relevant authorities;

(b) no building other than private residential townhouses and apartments shall be erected;

(c) any building to be erected shall be not less than 40 feet from the centre line of Seymour Avenue, and not less than 15 feet

from the boundaries, except for Townhouse Type B2 which shall be 10 feet from the southern boundary, provided that this restriction does not apply where the land adjoins the land at Volume 1048 Folio 563 and Volume 1292 Folio 182; and

(d) all outbuildings shall be to the rear, except for the guard house and garbage receptacles, and provided that the party walls and eaves are not regarded as a breach of the covenant.

[4] Volume 1048 Folio 563 relates to **14 Upper Montrose Road**. The existing covenants provide that:

(a) the land may only be subdivided in accordance with a plan approved by the Board established under the Revised Laws of Jamaica, and shall not be less than half an acre;

(b) only one residence is to be erected at a cost of not less than £800.00 and shall be fitted with proper sewer installations, and there is to be no pit closet; and

(c) no building shall be erected within 30 feet of any road boundary, nor within 10 feet of any other boundary.

[5] Sagicor wished that there would be a modification of these covenants along similar lines as those asked for in respect of 23 Seymour Avenue (above), except that

any building to be erected should be not less than 40 feet from the centre line of Upper Montrose Road, and 10 feet from any boundary.

[6] Volume 1292 Folio 183 is in respect of **25 Seymour Avenue**. There, the relevant restriction called for buildings to be no less than 30 feet from Seymour Avenue and 10 feet from the boundary of a specified lot. The outbuildings are to be to the rear except for the guard house and garbage receptacles. Sagicor required a modification for the buildings to be not less than 40 feet from the centre line of Seymour Avenue, and not less than 10 feet from the boundaries.

[7] In the face of objection from persons who claim to be affected by the proposed modifications, Sagicor placed before the learned judge evidence from Mr Rohan Miller, its Investment Manager, Mr Martin Lyn, a registered architect and planner, and Mr Connel Steer, a chartered valuation surveyor and land economist. Apart from the evidence of the objectors, there was evidence from Mr Gordon Langford, a chartered surveyor, in support of the objections. The evidence of these individuals was in the form of affidavits.

[8] The learned judge considered the affidavit evidence against the background of section 3(1) of the Restrictive Covenants (Discharge and Modification) Act ("the Act"). He accepted as an accurate statement of the relevant law, the principles set out by R Anderson J in the case **Hopefield Corner Limited v Fabrics De Younis Limited** (unreported), Supreme Court, Jamaica, Claim No 2003HCV0961, judgment delivered 15 June 2011. He found that Upper Montrose Road comprises a different neighbourhood

from Seymour Avenue. He said he was making that finding "despite the fact that these roads run immediately parallel to each other and that the backs of the properties on the east side of Upper Montrose Road, adjoin the backs of some of the properties on Seymour Avenue". He added that if he was wrong in making that finding, he was "prepared to accept that Upper Montrose Road is an enclave in the Golden Triangle neighbourhood". Upper Montrose Road, he said, is "a neighbourhood by itself".

[9] In considering whether the covenants were obsolete, Brooks J took into account that there have been changes since the covenants were imposed in the 1920s. At the time of their imposition, "the emphasis was for single family dwelling houses on fairly large lots and well set back from the roadway and from the other boundaries". The changing times have seen the erection of "upscale townhouse and apartment developments", he said. However, once the original object of the covenant can still be achieved, the learned judge was of the view that the covenant was not obsolete. In the instant situation, he observed that there was a preponderance of single-family residences which made it impossible for him to find that the covenants are obsolete. At paragraph [56] he said:

> "[56] … It is still eminently feasible for a purchaser in the Golden Triangle, Seymour Avenue and Upper Montrose areas to buy or build a single family residence with ample set-backs from the boundaries thereof, and that such a residence would not be out of step with the surrounding environment."

On that basis, he found that Sagicor had failed to satisfy section 3(1)(a) of the Act.

[10] Section 3(1)(b) requires an applicant to show that the restriction impedes the reasonable user, and that it secures no practical benefits to any person sufficient to justify its continuance. The learned judge found that Sagicor had failed to satisfy those requirements. He said that Sagicor has not shown that the properties cannot be developed in accordance with the existing covenants; it has not said that building single family residences on each of the three lots would amount to unreasonable user of the land. Such an assertion, he said, would fly in the face of the existence of the many single family dwellings in the area generally.

[11] On the other hand, the learned judge found favour with the common argument of the objectors that there would be significant increase in noise and traffic by the addition of 55 families to the area, consequent on increasing the density from the present 74 habitable rooms per hectare to 123. This finding also incorporates the learned judge's acceptance of the evidence of Mr Langford that the planned development would cause an additional 100 cars per day to use Seymour Avenue.

Grounds of appeal

[12] The appellant's grounds of appeal may be summarized thus:

i. the judgment conflicts with other judgments of the Supreme Court;

ii. the learned judge failed to have due regard to the evidence that there has been a profound shift in the character of the neighbourhood;

iii. the Supreme Court has on two previous occasions modified the covenants in respect of number 25 Seymour Avenue to allow Sagicor to subdivide with the approval of the relevant authorities, and to allow the building of townhouses and apartments;

iv. the learned judge erred in considering the issue of density in finding that the persons entitled to the benefit would be injured by the proposed modification of the restrictions;

v. the learned judge erred in finding that Upper Montrose Road was a neighbourhood by itself;

vi. the learned judge failed to have regard to the fact that the objectors presented no evidence of what injuries they would suffer as a result of the modification of the covenants; and

vii. the learned judge erred in failing to specifically define the neighbourhood for the purposes of the claims.

The submissions

[13] This Court has had the benefit of written submissions as well as oral arguments from Mr Vincent Nelson QC for Sagicor and Mr Emile Leiba for the respondents. It is the contention of Sagicor that the learned judge was wrong in arriving at a different decision from that arrived at by R Anderson J in the Supreme Court in the case of **Hopefield Corner** . According to the submission, the covenants were similar in

structure and import to those relating to 14 Upper Montrose Road. Further, it was submitted that the Supreme Court having twice modified the covenants in respect of 25 Seymour Avenue, and the other covenants being almost identical to that in 25 Seymour Avenue, it is difficult to reconcile the decision of the learned judge.

[14] Mr Nelson embraced the approach of R Anderson J in the **Hopefield Corner** case, in that R Anderson J described a covenant as obsolete when either the objective of the covenant cannot be fulfilled **or** it served no useful purpose. In the instant circumstances, it has been submitted that there was much evidence indicating that the character of the neighbourhood had changed. The purpose of the covenant was to retain the single-family character, but there has been a "proliferation of a plethora of multi-family homes" in the neighbourhood, thereby rendering the covenant obsolete.

[15] Sagicor further contends that given the modifications granted in respect of 25 Seymour Avenue, to allow multi-family units, it followed that all surrounding subdivisions and lands such as 23 Seymour Avenue and 14 Upper Montrose Road have been impacted, and the single-family character of the neighbourhood fundamentally affected, so that the covenant can no longer achieve its original purpose.

[16] Sagicor complained that the learned judge did not give consideration to certain relevant facts, namely:

i. that Seymour Avenue is already a through road along which traffic flows;

ii. the relevant authorities have installed a major sewerage main to facilitate much higher densities for the purpose of disposal of waste; and

iii. the proposed development has been approved by the relevant agencies, including the National Environment & Planning Agency, the Kingston and St Andrew Corporation and the National Water Commission.

[17] Mr Nelson urged us to adopt the reasoning of R Anderson J in the **Hopefield Corner** case as regards the assessment of whether a proposed modification will cause injury to the beneficiaries of the covenants. In their written submissions, it was said that the objectors' averment as to injury from increased traffic is unsustainable as modification of the covenant is not likely to cause a significant increase in the density of developments in the neighbourhood. In any event, Mr Nelson submitted that the learned judge was not supposed to be concerned with density. That, he said, is a planning matter. "Density looks towards the future, whereas section 3 looks towards the past", said Mr Nelson. In his closing argument, Mr Nelson added that "if the character has changed, so as to make the covenant obsolete, density is immaterial as the covenant would be regarded as dead". He said further, "Density is not important in the existing situation – it is not the *raison d'etre* for the changes in the neighbourhood."

[18] There was criticism of what was described as the learned judge's reliance for support on the case of **Regardless Limited v Anis Haddeed and Shirley Haddeed**

and Alice May Chang (1996) 33 JLR 417. The criticism was to the effect that the facts therein showed clearly that the development was intrusive and would effectively have taken away the privacy and tranquility that the Haddeeds and Changs enjoyed. In the instant situation, that is not the case.

[19] In response, Mr Leiba submitted that there was no uncertainty in the law as each case was dependent on its particular facts. This accounted for whatever differences may appear in the various judgments emanating from the Supreme Court. Mr Leiba submitted that it should be borne in mind that the decision of R Anderson J does not bind that of another judge of equal jurisdiction (Brooks J). The position of the respondents is that the issue of whether a covenant is obsolete will vary in each case. As regards the question of a change in the character of the neighbourhood, Mr Leiba submitted that multi-family units were not as widespread as put forward by Sagicor. The proposed modification would result in an increase in the density of the area, which was designed for single-family homes. As the situation stands, the object of single-family homes can still be attained and serves the useful purpose of maintaining the type of residential neighbourhood envisioned by the developers at the time the covenants were created.

[20] It was further submitted that the fact that there had been modification of the covenants in relation to 25 Seymour Avenue was irrelevant as the application in that case had not been contested. More value is to be placed on a "contested modification". In the instant case, said the respondents, the proposed modifications are likely to

interfere with their enjoyment, comfort and convenience, and the development will lead to increased traffic, noise and density, given the likely increase in the number of persons to live on the properties. Mr Leiba submitted that density was a relevant consideration and of significant importance in determining whether the covenants are obsolete.

[21] In dealing with the question of neighbourhood, he said that on the basis of the evidence, it really did not matter that the judge did not particularly define the area or that he regarded Upper Montrose Road as an enclave. On any scenario, he submitted, single-family residences outnumbered multi-family units.

The Legislation

[22] The relevant statute is **The Restrictive Covenants (Discharge and Modification) Act**. Section 3(1) gives a judge in chambers the power to wholly or partially discharge or modify any restriction arising under a covenant as to the user of any land or building on it. The judge is required to be satisfied that:

i. due to changes in the character of the property or the neighbourhood or other material circumstances of the case, the restriction ought to be deemed obsolete; or

ii. the continued existence of the restriction would impede the reasonable user of the land without securing to anyone such practical benefits that would justify retention of the restriction; or

iii. there has been consent expressly or impliedly to the discharge or modification of the restriction; or

iv. the proposed discharge or modification will not injure any beneficiary of the restriction.

The Evidence

[23] As stated earlier, the evidence before the learned judge was in the form of affidavits. Mr Rohan Miller said in his affidavit dated 1 October 2009 that in February/March 2008 he attended a meeting with representatives of the local neighbourhood watch to discuss the proposed development. Also present at the meeting were the Member of Parliament, a councillor, a representative of the Social Development Commission, the architect Mr Martin Lyn, Sagicor's President and Sagicor's Project Manager. Mr Miller left the meeting with the impression that there was "general approval of the community members provided that [the development] conforms with all planning requirements and receives the approval of the relevant government agencies".

[24] In an affidavit dated 23 June 2010, Mr Martin Lyn said that the 'building typology" for the area consists of three main categories: multi-family residential development, single family residential development and commercial and institutional developments. He said that in the 1970s, the most common building structure in the area was the single family residence which were typically no more than two storeys, approximately 20 feet in height, excluding the roof height, and these buildings were on very large lots, some 2 acres or more. However, he said, "between 1970 and 2009, the building typology within the area and surrounding perimeter has grown and varied to

include Multi-Family Residential Developments, typically three to four storeys high, approximately thirty to forty (30-40) feet in height (excluding the roof height); Commercial and Institutional building included". This information comes from the National Land Agency (Jamaica). The study by the Agency indicates further that "there are an estimated seventy-five (75) Multi-Family Developments within the Golden Triangle with building approval being granted for twelve (12) more future constructions [sic] developments".

[25] Mr Connel Steer in an affidavit dated 3 February 2011 said that he inspected the subject properties and the surrounding areas between 18 and 25 January 2011. He noted the restrictive covenants endorsed on the instant titles, and that modifications have been undertaken to covenants 1 and 2 on the title registered at Volume 1292 Folio 183 to allow for the construction of townhouses and apartments, but the modifications have not been effected on the other titles.

[26] In the preamble to his expert report and analysis on the proposed development, Mr Steer said he had been instructed to express an opinion as to "[w]hether there is a change in the character of this neighbourhood since the imposition of particular covenants on the titles of the above properties". He then proceeded to list the titles which are the subject of the suit.

[27] The lands, said Mr Steer, were developed "around the period of the mid-1920's and followed a pattern of secondary residential development for upper income family settlement, over the decades since". The residences were at first "single-storey with

some manorial two-storey types, all on larger sites, at a density generally not exceeding five units to the net hectare". However, all that has changed and a "number of townhouse and apartment type complexes at a density approximating 74-habitable rooms to the hectare have emerged on a controlled basis within the district".

[28] Under the heading **"PLANNING CONSIDERATIONS: Zoning**", Mr Steer's report reads thus:

> "Under the Town and Country Planning (Kingston) Development Order 1966, these premises fall within an area zoned for residential use at a density of up to 74 habitable rooms per hectare (30 habitable rooms per acre). However, an inquiry at the National Environmental and Planning Agency (NEPA), has revealed that since sewer mains have been laid in the neighbourhood; they would be prepared to give approval for an increase in density up to 123 habitable rooms per hectare (50 habitable rooms per acre), once all other planning requirements are met; in terms of set back, amenity/open space, parking requirements, and that the NWC is willing to accept the effluent waste."

[29] Within the last 20 years, according to Mr Steer, the area has been undergoing steady transformation, and there are now several "multi-family residential enclaves and other use type buildings having two, three and four storey profile that currently exists in the locale". He anticipates a continued "redevelopment at the higher density as the dynamics of the urban property market continues to unfold/evolve".

His conclusion is stated thus:

> "We are of the opinion that, given the continued redevelopment of properties in the neighbourhood over the last twenty (20) years or so, coupled with the provision of central sewerage facilities in the area, that the subject proposed re-development poses no threat to the quiet enjoyment of the neighbourhood.

> We do not see the proposed increase in the number of family units along this roadway as significant, as long as the development remains within the planning guidelines."

The proposed development, according to the report, "should not in any way negatively affect the quiet enjoyment of property owners in the area; and that this new development will more than likely increase/improve property values in the neighbourhood".

[30] The respondents all say that the area is still a predominantly peaceful residential community with many single family dwelling houses. They express the view that the development will lead to an increase in the level of traffic in the neighbourhood, given the proposed increase in the number of persons living on the subject property. Furthermore, the proposed development will have 140 parking spaces and all vehicles will enter from and exit onto Seymour Avenue which already suffers from congestion every morning and evening. The respondents have also said that there are storm water drainage and sewage problems in the area, and the proposed development will bring increased problems to the area.

[31] Mr Gordon Langford's report dated 30 August 2010 gave support for the respondents' position. Mr Langford said that Sagicor acquired the Seymour Avenue property with the knowledge of the existing covenants which, although created in a different era, are relied on by existing residents to protect their investment in the area. The established development density for this area, he said, is 30 habitable rooms per acre. "Some townhouse developments", he said, "have been allowed that conform to this density." He cites "the Geon development" located to the south of the subject

property as an example. This, he added, conforms with the standard as do other townhouse developments in the immediate area.

[32] Mr Langford said in his report that, assuming "that the apartments and townhouses are built as per the planning approval and not extended as is the case with many developments, the density will be more than double the accepted norm". An aerial photo of the surrounding area revealed the presence of only one apartment building, 30 single family homes and 10 townhouse developments.

[33] The following portions of Mr Langford's report bear quoting:

> "Drainage
>
> Existing drainage for the area is very bad. The residents at 19½ are constantly having problems with runoff from the north. On the eastern side of Seymour Avenue ponding is a regular occurrence at the intersection of Seymour Avenue and Retreat Avenue. …"
>
> Sewage
>
> One of the reasons that the KSAC usually insists on a maximum of 30 habitable rooms per acre is to restrict the quantity of sewage produced. The NWC has plans to put in a new sewer main to serve the Seymour Avenue area but the KSAC has given approval without the mains actually in place. …"

[34] Mr Langford concludes his report with his opinion that there should be no development on the subject land with a density exceeding that given to other developers, that is, 30 habitable rooms per acre; and there should be no building containing more than 2 floors (ground and first). He agrees with the respondents that the development would have a negative impact on their property values.

Decision on the appeal

[35] The ground of appeal that refers to the differing decisions of the Supreme Court in matters of this nature does not appear to be of any strength as a court may only decide matters on the basis of the facts placed before it, and there is nothing to show that different decisions were given on the same set of facts. The instant appeal therefore has to stand on its own feet, so to speak. It has to be dealt with on the basis of the facts before the learned judge, and the relevant law.

[36] There can be no doubt that the main point in the appeal is whether the covenants are obsolete. The answer depends on the character of the neighbourhood, and whether there has been such a change in its nature as to require the removal of the restrictions. This required the learned judge to take several factors into consideration. Consequently, it was puzzling to hear a submission that the judge was in error in considering density.

[37] Although the written submissions on behalf of Sagicor make no reference to the case of **Stannard and others v Issa** (1986) 34 WIR 189, it was the first case referred to by Mr Nelson as he commenced his oral arguments. He referred to it for the purpose of the interpretation of section 3 of the Restrictive Covenants (Discharge and Modification) Act. In **Stannard v Issa**, an appeal from this court, the Judicial Committee of the Privy Council reversed the majority decision, preferred the "powerful dissenting judgment" of Carey JA, and restored the decision of Theobalds J. The case is important because it provides guidelines for dealing with restrictive covenants in a situation such as the instant one.

[38] The judgment of Carey JA was quoted with approval by Lord Oliver of Aylmerton at page 195 d-h thus:

> " '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 MR in **Re Ghey and Galton's Application** [1957] 3 All ER 164 at page 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 [respondent's] proposals are reasonable and the restriction impedes that development …"

Carey JA 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 [respondent] would not have been discharged.' "

[39] In dealing with the question of whether the existence of the restrictions conferred a practical benefit on the objectors sufficient to justify their continuation without modification, the Privy Council said that 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?" [page 197 g]. The majority of the court had erred in their approach to the problem. It prompted Lord Oliver to say:

> "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." [page 197 c–d]

He went on to say:

> "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 …" [page 197 h]

[40] In the context of the instant case, where the removal of the restrictions would, according to the experts on both sides, result in more than the doubling of the established room capacity per hectare, the question of density was a live issue before the learned judge. **Stannard v Issa** demonstrates that. The "quality of the totality of the sub-divisions by restricting housing density" was a serious matter for consideration. Using the "estate agent's test", the learned judge concluded that the residential density that a purchaser would expect would be no more than 74 habitable rooms per hectare or 30 habitable rooms per acre. It does not matter whether Upper Montrose Road is classed as an enclave or together with Seymour Avenue as a neighbourhood. The density situation is equally applicable and the experts put both roads in the Golden Triangle and treat the area as one neighbourhood.

[41] There was criticism of the judge's regard for the case **Regardless Limited v Haddeed and Chang**, cited above. However, there can be no doubt that along with **Stannard v Issa**, this is a decision that ought to command the attention of, and be a point of reference, for a judge dealing with restrictive covenants in Jamaica. In that case, two judges of the Supreme Court separately, 10 years apart, in respect of the same lots, held that although there may have been changes in the character of a neighbourhood, those changes were not such as to render the covenants obsolete. The appeal from the second decision was dismissed by this court which upheld the application of the "estate agent's test", namely, what does the purchaser of a house in the area expect to get.

[42] In the instant case, the learned judge had a full command of the factual situation. In addition, he had for consideration the opinion of two acknowledged experts in the field, Mr Steer and Mr Langford. The experts expressed different opinions on certain aspects. The learned judge gave preference in certain areas to the opinion of Mr Langford. There has been no serious indictment of Mr Langford's opinion. The learned judge concluded that there was no plethora of multi-family and commercial developments in the neighbourhood, as contended by Sagicor. Instead, he found that single-family units outnumbered multi-family units. Maintaining the restrictive covenants would not result in a sterilization of the use of the land and as observed by Mr Langford, townhouse developments have been allowed within the established development density for the area, that is, 30 habitable rooms per acre. The proposed development calls for four storey apartments at more than double the accepted density

norm. Of course, it is open to Sagicor to develop the land along the lines contemplated by the covenants within the established density range. The proposed provision of 140 parking spaces is a clear indication of the traffic congestion and noise to follow. All entrances and exits by those vehicles would be on Seymour Avenue. These are matters that were properly within the contemplation of the learned judge.

[43] Mr Langford foresees such a development resulting in a fall in property values. The learned judge was skeptical of that opinion. However, he would have had in mind the caution by Downer JA in the **Regardless** case [page 424 G-H]:

> "In interpreting the Act as a whole and the authorities specifically on 'obsolete', recognition must be given to the property rights of the objectors. Applicants are generally seeking to derogate from or discharge those rights. These are rights which are recognized and protected in the Act, and since 1962 they are entrenched as fundamental rights in our Constitution. The onus is on the applicant to satisfy the judge in chambers that the discharge or modifications he seeks are in conformity to the Act."

[44] Finally, there may be the need for a reminder that the evidence before the learned judge was in the form of affidavits. The Court of Appeal is in no better position than the trial judge to deal with such evidence. He gave a decision which was in keeping with the evidence, as he saw it. There is nothing outrageous in his acceptance of such facts as he found. Furthermore, his interpretation of the relevant law does not reveal any flaw that would justify a reversal of his decision. In the circumstances, the appeal ought to be dismissed with costs of the appeal awarded to the respondents.

[45] The decision has been long overdue, and we sincerely apologize for the delay.

DUKHARAN JA

[46] I have read in draft the judgment of the learned President and agree with his reasoning and conclusion. I see no reason to disturb the findings of the learned judge. I too would dismiss the appeal with costs to the respondents.

MCINTOSH JA

[47] I too have read the draft judgment of the learned President. I agree with his reasoning and conclusion and have nothing to add.

PANTON P

ORDER

Appeal dismissed. Costs of the appeal to the respondents to be taxed if not agreed.