JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 89/94

COR:	THE HON MR JUSTICE CAREY JA THE HON MR JUSTICE FORTE JA THE HON MR JUSTICE GORDON JA	
BETWEEN	CLAUDE BROWN BURLETT BROWN	APPELLANTS
A N D	VAYDEN MCMORRIS	RESPONDENT

Norman Wright & Mrs Maureen Moncrieffe
for appellants

Michael Hylton QC & Miss Debbie Fraser
for respondent

6th, 7th, 8th March, 2nd, 3rd, 4th, 5th October
& 20th December 1995

CAREY JA

The protagonists are adjoining neighbours whose lots numbered 12 and 12A in Block "A" respectively, form part of Forest Hills in St Andrew, and are registered respectively at Volume 585 Folio 91 and Volume 585 Folio 90 of the Register Book of Titles. These lands are subject to restrictive covenants of which that numbered "1"

> "There shall be no subdivision of the said land"

is the concern of this appeal. The appellants desired to have this restriction removed: the respondent objected. Chester Orr Senior Puisne Judge by an order dated 29th July 1994 dismissed the appellants' summons. This appeal is against that order and judgment.

In terms of importance, those grounds of appeal numbered 5 - 6 which dealt with changes in the neighbourhood, the extent of the neighbourhood and the judge's visit to the neighbourhood, appear to qualify as Mr. Wright deployed extensive arguments with respect to them. In considering his submissions in this regard, I would begin with a recital of the evidence adduced by the appellants. Paragraph 7 of the appellants' supplemental affidavit stated as follows:

> "7. That the character of the neighbourhood has changed to the extent that many of the lots have been further subdivided into lots of less than one-quarter acre in size. Thus the restriction sought to be modified ought to be deemed obsolete. Also because of the economic circumstances and the acute housing shortage the needs of the population would be more adequately served by subdividing large lots into smaller lots. There is also the added benefit of greater security occasioned by living on smaller lots."

The only change in the character of the neighbourhood to which the paragraph refers, is that the lots have been further subdivided into lots of less than one acre in size. This exiguous material suffices to dispose of the arguments urged before the judge and pressed in the skeleton arguments before us, that :

> "... the 'style', 'arrangement' and 'appearance' of houses on sprawling estates of one acre and over, were consistent with 'the social customs of the inhabitants' in those days. It is our further contention however that this style and these arrangements and appearances have since changed to match the social customs of the inhabitants of the present day."

It seems to me that that argument cannot be sustained in the face of that evidence which also attenuates any force in those arguments by Mr. Wright in which he urged that the delay on the part of the judge in delivering judgment, prevented him from recording his impressions of the changes in the neighbourhood. Plainly, a visit would be altogether unnecessary to appreciate changes in the character of a neighbourhood brought about by a subdivision of lots. "Character," it was said in Re Davis' Application [1950] 7 P & CR.1 "derives from style, arrangement and appearance of the houses on the estate and from the social customs of the inhabitants." Nothing whatever was stated in the affidavit in regard to style, arrangement or appearance of houses.

It was said also in the appellants' affidavit in rebuttal of the respondent's who were the objectors.

> "6. That in relation to the many lands in the Forest Hills sub-division this Honourable Court has granted numerous orders modifying Restrictive Covenants relating to the said sub-division and we crave leave to refer to a few of these orders, in particular those relating to lots in close proximity to our lot and the lot owned by VAYDEN MCMORRIS."

Although the affidavit speaks of "many lands in Forest Hills," the concern of the learned judge, as it is of this Court, would be the lands in the "neighbourhood," a restricted as opposed to the entirety of Forest Hills. The appellants also referred to fourteen orders which modified restrictive covenants on lands in Forest Hills, some of which orders, it was said, were in "close proximity" to the respondents' lots. All the modifications related to sub-division of the lots. None of these orders

for modification in my view relate to the style, arrangement or appearance of the houses in the estate.

The learned judge held that there had been no change in the character of the neighbourhood. As he said in his judgment, "it remained a predominantly single dwelling housing area". This conclusion he could only have arrived at, upon a view of the area. But as I indicated, there really was no need for any view in the light of the changes mentioned in the appellants' affidavit.

This leads me to a consideration of what comprised the neighbourhood. The appellants contended that it comprised "those areas within close proximity of the objector and their environs," being Mayfair Avenue, Pembroke Terrace, Pembroke Road and Elmwood Terrace. The respondent on the other hand argues that the neighbourhood for the purposes of the neighbourhood is comprised of six lots viz:

(i) the appellants lot - Volume 595 Folio 91

(ii) the respondent's lot - Volume 585 Folio 90

(iii) Volume 585 Folio 81

(iv) Volume 585 Folio 82

(v) Volume 585 Folio 83

(vi) Volume 1162 Folio 843 formerly
Volume 584 Folio 84

All these lots, we were told, adjoin each other. Mr Hylton QC for the respondent supported this choice by pointing to their location, the size and shape of these lots in comparison to the other lots in the sub-division, but most importantly, the similarity of the relevant covenant endorsed on the several titles viz:

> "there shall be no subdivision of the said land."

Other lots in the subdivision, he said, have endorsed as the equivalent covenant:

> " 'there shall be no subdivision of the said land except with the approval of the Kingston and St. Andrew Corporation into lots of not less than one acre each with a road frontage of not less than 100 feet.' "

He urged that as there have been no modifications to any of the covenants on any of the titles of the six lots comprised in the neighbourhood, the character of the neighbourhood has not changed.

The learned judge did not accept the neighbourhood as contended for by the appellants. On the other hand, he extended the neighbourhood suggested by the respondent to include three other lots situate on Pembroke Terrace and registered as follows:

> Volume 587 Folio 75 stated in error instead of Volume 589 Folio 23
>
> Volume 586 Folio 53
>
> Volume 585 Folio 1

He gave as his reasons for this extension that these lots were all located on Pembroke Terrace and comprised single family dwelling houses. Mr Wright thought that the judge was wrong in his delineation of the neighbourhood and should have used the area of lands comprised in the title registered at Volume 475 Folio 90 which would include Pembroke Terrace, Elmwood and Mayfair.

I cannot accept in the circumstances of this case that in determining changes in the character of a neighbourhood that one can use as a starting point, the area of land comprised in the parent title viz, that registered at Volume 475 Folio 90. When the lands comprised therein were subdivided, they were

compartmentalized into Blocks viz, "A" "B" "C" "D". What is clear is that as to the six lots mentioned by Mr. Hylton QC which fall in Block "A", they all have a similar covenant prohibiting subdivision of those lots and can be said to constitute a neighbourhood. It is therefore entirely irrelevant in my view to consider changes in lots adjoining these six lots which are not subject to a similar covenant. The area selected by Mr. Wright, and he does not deny it, is comprised of lots which allow for subdivision with the approval of the K.S.A.C.. If I understand his argument, the only test of a neighbourhood is the visual, which requires the court to traverse the area in proximity to the lots, the subject of the proceedings and observe the nature of changes. If the changes are similar and extensive, then, it follows the character of the neighbourhood had changed. But in my view with all respect to that argument, it begs the question by assuming what is to be proved. I venture to think that the start of the enquiry should be what is the area or what are the lands covered by the common covenant, then to apply to that area, the "estate agent's test." Plainly, if there are lots subject to a covenant which allows for subdivision with the approval of the local authority, as was the position in the present case, subdivisions and therefore changes there must be. What a purchaser of a lot subject to a covenant which prohibited subdivision altogether thought he had acquired, would be no more than an illusion. That cannot be right and it is happily not the law as I perceive it. In extending the neighbourhood to include three other lots, the learned judge was, I fear, led into error.

For these reasons also, I cannot accept that Mr. Wright's submissions as to the extent of the neighbourhood, are correct. I would therefore agree with Mr. Hylton QC as to the area comprised in the neighbourhood and I also agree with

the trial judge that the restrictions ought not to be deemed obsolete. The conclusion is inescapable that no changes in the character of the property subject to the common restriction has been shown to have taken place.

Mr Wright further submitted that the learned judge had not adverted to section 3 (1) (c) of the Act which provides:

> 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 -
> ...
>
> (c) that the persons of full age and capacity for the time being or from time to time entitled to the benefit 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; ..."

There was no evidence adduced by the appellants on whom the burden of proof lay, that the persons of full age and capacity entitled to the benefit of the restriction had agreed to the restriction being discharged or modified. Indeed the fact that the respondent has objected is evidence that the persons entitled, have not consented. In their application for modification, the appellants set out four

persons being the owners of adjoining lots including the respondent's as being entitled to the benefit of the covenant. But the appellants never addressed this provision in their affidavit supporting their application. No evidence was adduced that the persons entitled which means all, have expressly or impliedly consented to any modification. If blame there be, it could hardly be placed at the door of the judge. Such a complaint of silence sounds odd coming from the party who has the burden of proof. It seems to me that the applicants indiscriminately invoked all four of the subsections of section 3 (1) of the Act, never intending to support them all. In the United Kingdom, rules made under the Law of Property Act 1925, viz the Lands Tribunal (Amendment) Rules 1970 require the applicant to state under which paragraph of section 84 (1) (the equivalent of our section 3 of the Restrictive Covenants (Discharge and Modification) Act) his application is being maintained. Regrettably, we have no similar requirement.

It is enough to say that this ground was included in the appellants' application as a formality. It should be treated as such and ignored. The learned judge acted entirely correctly in according it the appropriate treatment.

Another submission by Mr. Wright was critical of the learned judge in holding that the appellants had failed to show that the modification would be uninjurious "in either respect". This last phrase in parenthesis is taken from certain dicta of Smith JA (as he then was) in **Stephenson v. Liverant** [1972] 18 WIR 323, in which after referring to a passage at p. 5 - **Preston & Newsom on Restrictive Covenants (4th Ed)**, said this:

> "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." (emphasis supplied)

The learned Judge of Appeal was there indicating the constituents of the evidential burden on an applicant under this subsection of the Act.

It is not disputed that to spoil a view is an injury; nor, that to deprive a proprietor of his privacy also ranks as such. I did not understand Mr. Wright to deny that these cannot be benefits conferred by a restrictive covenant. The respondent deposed (so far as material) as follows:

> "5. One of the benefits of the Covenant sought to be modified which vests in adjoining owners, such as myself, is the preservation of the private residential character of the area by restricting the number of dwelling houses which can be erected in a given area.
>
> 6. Any project which is implemented is capable of destroying or causing a change in the private residential character of the area and is therefore bound to cause injury to an adjoining owner, such as myself, who objects to the change.
>
> 7. If this application were to be allowed it would materially affect my enjoyment of my own property as any dwelling house constructed on a subdivided lot would interfere with (a) my right to privacy; (b) my view; and (c) general aspects of orientation. In particular, the uniqueness of the shape of the lots in question (at a corner) as against lots along the straight of a roadway dictates that in order to maintain the quality of life, care must be taken in the siting of building(s) so as to avoid offensive placement that deprive neighbours of

> privacy, view and general aspects of orientation."

The learned judge referred to **Re Henderson's Conveyance** [1940] Ch. 835 in which Farwell J stated:

> "There must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the person who is enjoying the benefit."

In **Stannard v Issa** [1986] 34 WIR 189 the Privy Council approved certain observations of mine which I would suggest are helpful in the present case. I had said:

> "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...
>
> ...the restrictions must be shown to have sterilized the reasonable use of the land. Can the present restrictions prevent the land being 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. ...
>
> ... If the evidence indicates that the purpose of the covenants is still capable of fulfillment, then in my judgment the onus on the [respondent] would not have been discharged."

Lord Oliver who gave the judgment of the Board said this:

> "What the court exercising this jurisdiction is enjoined to do is to consider and evaluate the practical benefits served by the restrictions ... 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?' "

The appellants in their affidavit to support the application indicated that the severe housing shortage prompted a maximising of land use. This evidence suggests to my mind that their proposed development would enhance the value of their land but does not show that the present restriction prevents the land being used for purposes the covenant is guaranteed to preserve. Is there anything worthwhile in preserving privacy and a view? That was a question for the learned judge which he decided in favour of the respondent. The judge said this (p. 139):

> " The objector states that the benefit of the restriction is the preservation of the private residential character of the area by restricting the number of dwelling houses which can be erected in a given area. This is a practical benefit which would justify the continuation of the restriction without modification."

I can find no basis for holding that the appellants have produced any proper evidence that the restriction is no longer necessary for any reasonable purpose of the person who is enjoying the benefit of it. He has not satisfied the burden identified by Smith J.A. in either respect and the burden rests on the applicant for modification, not the objector.

During the course of the hearing, by leave of the court additional evidence on behalf of the appellants was allowed in. That evidence showed that the

respondent had erected or converted an existing out-building into a two storey dwelling comprising a bedroom, bathroom, living-room and powder room. Mr Wright submitted that this construction amounted to a breach of one of the covenants which prohibited the erection of any building "other than a private dwelling house with appropriate out-buildings appurtenant thereto."... By reason of the breach of that covenant (no 2), a precedent which weakens the like covenant in the neighbourhood, was set and an objection on the ground that the proposed modification was uninjurious, would be severely eroded. The breach also showed mala fides.

Modification of restrictive covenants is not in my judgment governed by equitable principles. The Act gives to the judge a power to wholly or partially discharge or modify any restrictive covenant once he is satisfied that the requirements of one or other of the three subsections are met. It is a statutory power, which the judge exercises judicially according to the statute. Indeed, it is interesting to note that the power which in this country is exercised by a judge is exercised in England from which place our Act is derived, by the Lands Tribunal whose members are not always lawyers. The obligation of the applicant for modification is to satisfy the judge in Jamaica and the Tribunal in England. The principles applicable to such proceedings is the same in both jurisdictions, the same cases are cited in both jurisdictions. Nothing in the books provides any basis for asserting that equitable principles are involved or can properly be invoked.

Mr. Wright did not suggest that the construction of a one bedroom apartment contravened the covenant against sub-division but argued that it was

a breach of the covenant against more than one dwelling house. By reason of that breach, he urged that the proposed modification i.e. to sub-divide the appellants' lot will not injure the objector, the respondent.

But with all respect to Mr. Wright, that conclusion must be a non sequitur. The fact of the erection of a comparatively small structure, albeit in my view, a breach of covenant, does not remove or dissipate the injury which the respondent said he would suffer by the modification. His right to a view which is protected by the covenant against sub-division at the very least would remain impaired. So too would his right to privacy. Even his right to have the character of the neighbourhood remain essentially private residential, is not inevitably affected by that refurbished out-house into a one bed-room dwelling. It could be regarded in the same light as a lodge appurtenant to the main dwelling house. That is altogether different from the construction of a three storey 5 bedroom, 4 bath-room house which the appellants have constructed for this is to transform the character of the neighbourhood significantly.

However, what I think is fatal to the respondent's case is a concession by Mr. Hylton QC that the respondent, as the objector, is not troubled by the second dwelling erected by the appellants. That second dwelling house, in my view, amounts to a sub-division of the land. Indeed the structure was put up because the appellants had obtained an order for modification, which permitted a sub-division of the lot. That order was, in the event, set aside on the ground of irregularity of service of the proceedings. While that event could properly be regarded as irrelevant in considering whether the appellants had proven the grounds prescribed by the Act, it now has a bearing when the concession is

made. In my judgment, that concession effectively destroys all arguments that the modification by permitting a sub-division would injure the respondent. That is enough to dispose of this appeal in favour of the appellants.

I think it would be remiss not to remark on the delay by the learned judge in giving judgment. The hearings took place on March 8, 9, and 12, 1993. It was continued on July 28 when judgment was reserved. But that judgment was not handed down until July 29, 1994. It seems unnecessary to have to point out that such a delay in this instance, of twelve months, is wholly unfair to the parties; it is unjust. It is inexcusable. Mr Wright was not slow to use that delay as material for arguing that the judge's faded memory prevented him from properly assessing and evaluating the evidence including his impressions formed on his visit to the site. I have already dealt with this question of the effect of the delay on the judge's eventual reasons for his judgment and need not repeat it. Speaking on behalf of my brothers, I trust that a delay of this magnitude is not allowed to recur seeing that it erodes public confidence in the justice system.

But for the concession, I would have little hesitation in dismissing the appeal. I would therefore allow the appeal, set aside the order of Chester Orr J and make an order in terms of the motion of appeal. The appellants would be entitled to costs both here and below to be taxed if not agreed.

FORTE J.A.

The Browns and Mr. McMorris are adjoining neighbours in the area of Forest Hills in Red Hills. They are the owners of the land which they occupy, and are each occupants of a single dwelling house which sits on each property. Their properties are in size about 3/4 acre and originally formed part of the original Estate which was subdivided and sold. The Browns and Mr. McMorris have common restrictive covenants in their titles to those properties. Two only are of relevance to the matters for determination in this appeal. They are:

> 1. There shall be no subdivision of the said land
>
> 2. 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 aggregate not be less than One Thousand Pounds.

In 1991, the appellants applied for modification of the first Restrictive Covenant, and on 8th March 1991, it was modified to read:

> "That shall be no subdivision of the said land SAVE AND EXCEPT into two (2) lots for residential purposes."

The appellants also applied for and obtained from the Government Town Planner in July 1990 approval to subdivide their land into 2 lots of 14,775.7 sq. ft and 16.032 sq. ft. respectively and to construct a 5 bedroom 4 bathroom dwelling-house on this second lot. They commenced construction in or about April 1992. However, the respondent,

subsequently applied for and obtained on the 2nd October 1992 an order setting aside the order for modification made on the 8th March 1991.

The reasons for setting aside the order of 8th March 1991 are not of great significance in this appeal, but it should be noted that the summons for setting it aside was not made until the 19th August, 1992 and the modification was not set aside until October 1992, 19 months after it had been made. In the meantime the new building had reached a stage where "all the block work [for the building] and a substantial part of the roof" had been completed. The order dated 28th March 1991 granting the modification, having been set aside on the apparent basis that the defendant had not been served, the appellants again filed an originating summons requesting an order that the restrictive covenant be modified as follows:

> 1. There shall be no sub-division of the said land SAVE AND EXCEPT into two (2) lots for residential purposes."

In their affidavit in support they stated the grounds of their application by virtue of Section 3(1) (a) to (d) of the Restrictive Covenants (Discharge and Modification) Act as follows:

> "(a) 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; (see Section 3(1)(b));

> (b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit 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 (see Section 3(1)(c));
>
> (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction (see Section 3(1)(d));
>
> (d) 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; (see Section 3(1)(a))."

Having examined the various affidavits, listened to the arguments of counsel, and visited the locus, the learned judge refused the application for modification. It is from this order that this appeal now lies.

The approach to be taken in these applications was addressed by Farwell J in the case of In re ***Henderson's Conveyance*** [1940] Ch. 835 when dealing with Section 84(1) of the (English) Law of Property Act 1925, which was in similar terms to Section 3(1) of our Act. In a subsequent case - ***Truman, Hanbury Buxton & Co Ltd's Application*** [1956] 1 Q B 266 Romer L J quoted with approval, the dicta of Farwell J who had in the Henderson case (supra) stated as follows:

> "Speaking for myself, I do not view this section of the Act as designed to enable a person to expropriate the private rights of

> another purely for his own profit. I am not suggesting that there may not be cases where it would be right to remove or modify a restriction against the will of the person who has the benefit of that restriction, either with or without compensation, in a case where it seems necessary to do so because it prevents in some way the proper development of the neighbouring property, or for some such reason of that kind, but in my judgment this section of the Act was not designed, at any rate prima facie, to enable one owner to get a benefit by being freed from the restrictions imposed upon his property in favour of a neighbouring owner, merely because, in the view of the person who desires the restriction to go, it would make his property more enjoyable or more convenient for his own private purposes. I do not think the section was designed with a view to benefiting one private individual at the expense of another private individual. At any rate, primarily, that was not, in my judgment, the object of this section. If a case is to be made out under this section, there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the person who is enjoying the benefit of it, or that by reason of a change in the character of the property or the neighbourhood, the restriction is one which is no longer to be enforceable or has become of no value."

Then in re ***Ghey and Galtons Application*** [1957] 2 Q B 650 Lord Evershed M.R. having approved the dicta of Farwell J in the Henderson Conveyance case (supra) and Romer L.J's citation of it in the ***Hanbury, Buxton*** case (supra) set out what an applicant for modification of a restrictive covenant must prove. Here is what he said:

> "...the citation adopted, as it was, by Romer L.J., in this court, seems to me a useful prelude to a consideration of the present case, because it indicates that what has to be

> done, if an applicant is to succeed, is something far more than to show that to an impartial planner the applicant's proposal might be called, as such, a good and reasonable thing: he must affirmatively prove that one or other of the grounds for the jurisdiction has been established; and, unless that is so, the person who has the proprietary right, as covenantee, of controlling the development of the property as he desires and protecting his own proprietary interest, is entitled to continue to enjoy that proprietary right."

Has the appellant proven the existence of any of the grounds upon which he urged the Court to grant the modification? It is convenient to deal with each ground separately and in the order in which the appellants set them out in their affidavit.

1. Section 3(1)(b) - Reasonable User

In their affidavits and written submissions in support of their application to modify the covenant on the basis of section 3(1)(b), the appellants (in affidavit of the 15th November, 1992) contended:

> "10. That because of the high land cost and the scarcity of residential lots in Saint Andrew it has now become standard practice to provide for a density of four to six lots in the acre in subdivision in residential areas. In fact in the Forest Hills sub-division in particular, this Honourable Court and the Kingston and Saint Andrew Corporation have allowed such subdivision. Thus our application to subdivide three-quarter of an acre of land into two lots will not adversely affect the user of the adjacent land."

Though obviously incorrect, in their contention which suggests that the required user of the land, would not adversely affect the user of "the adjacent land" (i.e. the

objector's land) and consequently the requirement of section 3(1)(b) would be fulfilled, the applicants in paragraph 6 of their written submissions corrected that contention in stating:

> "The applicants contend that the continued use of this land for a single family dwelling (i.e. its present permitted use) is no longer reasonable and would result in the remaining portion of land described above being sterilized against another use which would be reasonable i.e. for the construction of another single family dwelling."

In applications depending on this section the applicant must prove (1) that the continued existence of the restriction or its continued existence without modification would make the permitted user no longer reasonable and impedes another reasonable user of the land for public or private purpose, and (2) that no practical benefit sufficient in nature or extent to justify the continued existence of the restriction or its continued existence without modification would be secured to any person.

The principles upon which an applicant could be successful under this ground, was considered and settled by the Judicial Committee of the Privy Council in ***Stannard v. Issa*** [1987] A.C. 175, where dicta of Carey J A giving the dissenting judgment in this Court was approved.

Lord Oliver of Aylmerton in ***Stannard v. Issa*** (supra) at page 186:

> "Carey J.A. in a powerful dissenting judgment observed:
>
> > '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 In re Ghey and Galton's Application [1957] 2 Q.B. 650, 663 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."

In the instant case the learned judge relied on the dicta of Lord Oliver in the above case to come to his conclusion. After citing the passage referred heretofore he concluded:

> "The objector states that the benefit of the restriction is the preservation of the private

> residential character of the area by restricting the number of dwelling houses which can be erected in a given area. This is a practical benefit which would justify the continuation of the restriction without modification."

This conclusion does not address the question whether the restriction if unmodified would render the permitted user unreasonable. Nevertheless, there was no evidence advanced which could lend support to any such finding. It is clear on the evidence that the restriction relating to the subdivision of the lots, could continue, without hindering to a real sensible degree the land being reasonably used i.e. to be the site of one only dwelling house. The learned judge was therefore correct in finding that the applicant did not satisfy the requirements needed to effect a modification under this ground. That being so, there is no necessity to examine whether no practical benefit would be secured to any person.

(2) Section 3(1)(c) - Did the respondent agree either expressly or by implication by his acts or omissions to the covenant being modified?

The complaint in this regard was stated in an additional ground of appeal which was filed during the hearing of the appeal without objection by the respondent and with the leave of this Court. It reads:

> "That the learned trial judge failed and/or omitted to adjudicate on a Ground of the Plaintiff's application as set out in Paragraph 15(b) of the Applicant's affidavit in support of the originating summons herein dated the 26th November 1990 and appearing at page 9 of the Record."

The reference to the Record is in fact correct as the applications did allege in paragraph 15 of their affidavit that:

> "The persons of full age and capacity for the time being entitled to the benefits of the restriction have agreed either expressly or by implication by their acts or omissions to the same being modified."

At the hearing the appellant advanced this ground by contending that the respondent should be taken "to have impliedly agreed or to have waived his objections to the modification of the relevant restriction having regard to the number of variations from this restriction which were seen in close proximity to the objector's premises." They thereafter referred to several modifications granted in respect of named lots which they set out in detail, and against which there was no objection by the respondent.

The respondent relying on the cases of ***Stephenson v. Liverant*** [1972] 18 WIR 323 and ***Central Mining and Excavation Ltd v. Peter Croswell et al*** SCCA 16/92 (unreported) advanced the following propositions:

> (i) That fact that other persons who are beneficiaries of the covenant, have consented either expressly or impliedly, does not deprive the objector of exercising his right to preserve the covenant in its original form; (Stephenson v. Liverant was relied on, on the basis that in that case all except one of the owners of lots who benefitted from the covenant had consented to the modification yet the objection was upheld, and the modification refused), and
>
> (ii) the objector is not required to object to every application for modification made in the area as he may not be equally affected by those applications. The objector however has a right to object when he is injured and a lack of objection to the other applications should not be deemed as waiver of his right or an implied consent to the present application.

In support of these contentions he relied on the following dicta of Downer J A in ***Central Mining and Excavation Ltd vs. Peter Croswell*** (supra) at page 21:

> "The fact that the objectors were not vigilant when those alterations occurred, does not preclude them from objecting successfully now. These alterations are scattered and are not of such an extent or difference to change the essential character of the neighbourhood:

In that case Downer J.A. was dealing with an application to modify a covenant on the basis that the character and nature of the neighbourhood had been changed and that the particular restriction had become obsolete. If therefore, the previous modifications were such, as could not have had that result it could not be said that they having failed to object to those, there was therefore an implied consent on the part of the objector to the particular application.

Mr. Hylton, however contended also that an implied consent is only applicable in situations where there is a "consent" in relation to the change in the property which is the subject of the application. He relied on the case of ***Hackney Borough Council's Applications*** [1951] 7 P & CR 37 where the application for modification in the use of the Square Garden was allowed because for over thirty years, the residents without objection had watched it being used as a public garden instead of a private garden as provided for in the restrictive covenant. In my view this contention of Mr. Hylton is correct - the implied or expressed consent must relate to the particular application to modify the covenant in respect of the particular property. During the course of his submissions before us, he conceded that "consent by implication - can only arise in a situation where the objector

stands by and watches the particular development on the applicant's land, does nothing and later seeks to object e.g. if the objector watched the building go up and did nothing". This, however is exactly what the appellants said occurred, though the objection was made, after the house had reached "roof height".

In this regard, the history of this application assumes some relevance. In reliance on the previous approval of the modification, the appellants proceeded with the construction of the building, at a location next door to the property of the respondent, who did nothing until over a year later when he applied to have the modification removed on the basis of not having been served with notice of the application. It is apparent then, that the respondent could have been taken to have impliedly consented to it, at least up until he applied to have the modification nullified.

3. Section 3(1)(d) - Is the requested modification uninjurious to the objector?

Because of the nature of the case it would be convenient to deal at this stage with the appellants' contention that the proposed modification will not injure the persons entitled to the benefit thereof - Section 3(1)(d) of the Act.

In determining this question, it has to be noted that all other persons entitled to the benefit of the restrictive covenant have either expressly or impliedly consented to the modification which was sought by the appellants. The law, in respect of this section, as

stated in ***Preston and Newsom on Restrictive Covenants*** (4th Edition), has been cited with approval by the learned trial judge, who placed reliance on a particular passage in the judgment of Smith J.A. in ***Stephenson v. Liverant*** [1972] 18 W I R 323 at 337. These are the words of Smith J. A. with which I also concur:

> "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 ***Preston and Newsom on Restrictive Covenants*** (4th edn.) on which reliance was placed. At p. 185 the learned authors said:
>
> > 'It is not the applicants' 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 restriction 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 learned trial judge, having stated that passage, without more concluded:

> "The objector has stated that the modification will injure in either respect. I agree. The applicants have failed to show that the modification will be uninjurious."

For my part some examination of the evidence needs to be undertaken to determine whether the conclusion of the learned judge is correct.

Is the proposed project injurious to the objector?

It is convenient to reiterate that the modification asked for is the subdivision of the appellants' property into two lots of land, and not to modify covenant #2, which relates to the restriction of having only one dwelling-house on the land. The reason for the application however is understood by both sides, to enable the construction of a second dwelling-house. Though the application is for subdivision, the project could be said to include the construction of the house. It will be useful therefore to see in what way, the objector contends that the project would be injurious to him. In his affidavit he states in so far as is relevant to this issue, the following:

> (1) The modification applied for is not consistent with the development of the area or with the further orderly development of a single family residential scheme (Para. 3 of the affidavit - page 26)
>
> (2) One of the benefits of the Covenant sought to be modified which vests in adjoining owners such as myself, is the preservation of the private residential character of the area by restricting the

> number of dwelling-house that can be erected in a given area (Para. 5 Affidavit)
>
> (3) Any project which is implemented is capable of destroying or causing a change in the private residential character of the area and is therefore bound to cause injury to an adjoining owner, such as myself, who objects to the change. (Para. 6 of Affidavit)
>
> (4) If this application were to be allowed it would materially affect my enjoyment of my own property as any dwelling-house constructed on a sub-divided lot would interfere with - (a) my right to privacy; (b) my view; and (c) general aspects of orientation. In particular, the uniqueness of the shape of the lots in question (at a corner) as against lots along the straight of a roadway, dictates that in order to maintain the quality of life, care must be taken in the siting of building(s) so as to avoid offensive placement that deprive neighbours of privacy, view and general aspects of orientation (Para. 7 Affidavit)

In his written submissions, counsel for the objector contended inter alia, and so far as this issue is concerned, the following:

> "(i) that the proposed project if implemented would remove the privacy and view of the area which the restrictive covenant was designed to preserve and of which the objector benefits, and
>
> (ii) that the preservation of a private owner's view is a practical benefit to him and an order reducing or removing such protection would injure him.

In summary, the objector maintains that the construction of the additional home, would deprive him of his privacy, his view having regard to the placement of the building,

and would deprive the neighbourhood of its private residential character because the restriction requiring one dwelling -house on each lot in effect would be removed.

The question in my view cannot be determined without consideration of the following:

> (i) During the arguments before us, counsel for the objector stated with great clarity, and as is expected with the security of his instruction from his client, that the objector had no objection to the construction of the second building on the appellant's lot, but objected only to the subdivision of the lot into two lots, and
>
> (ii) in the course of this appeal, counsel for the appellants, was allowed to tender with the consent of the respondent, fresh evidence, which showed that during the continuance of this appeal, the respondent had erected on his own premises, another building being a two-storey, one bed-room house.

Given the objector's reasons for the modification being injurious to him, his concession during the hearing of this appeal that he has no objection to the erection of the second dwelling-house by the appellants, is irreconcilable with his complaints in respect of deprivation of his privacy, the view of the area, and his own view, having regard to "the siting of the building." In addition, having himself constructed another dwelling-house on his own land without seeking modification of that particular restrictive covenant in the title, all these objections, listed heretofore which all relate to the appellants' construction of another dwelling, albeit a larger building than his, would certainly now together with his

concession in relation to the building, make his objection in this regard frivolous, and vexatious.

In my view, in the circumstances of the case the modification proposed by the appellants cannot be said to be injurious to the respondent for the reasons that "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" (**Preston and Newsom** - 4th Edn. page 185).

In reliance on certain dicta of Luckhoo J.A. in the case of ***Stevenson v. Liverant*** (supra), the objector on this point submitted that 'any project which, if implemented was capable of destroying or causing a change in the character of the neighbourhood was therefore bound to cause injury to an owner who objected to the change'. He referred to the judgment of Luckhoo J A at page 330 inter alia as follows:

> "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."

In the same case, Smith J A had this to say:

> "The benefit of the restrictions is a proprietory right vested in the owner of each lot of land in the subdivision which can be enforced in order to preserve the private residential character of the subdivision. 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 respondent in his affidavit asserted his objection also in this respect. He stated:

> "If this application were to be allowed, it would be of assistance to other persons who own lots in the area and who might wish to make similar application which if allowed would further deteriorate the character of the neighbourhood and would render the restriction valueless to the remainder of persons including myself who are at present entitled to the benefit thereof."

The question therefore is whether the modification if granted would tend to change the character of the area, so as to cause any similar application in the future to be more likely to be granted, because of such change.

The appellants' land is one of six lots all of which are subject to the same restriction in respect of subdivision. In close proximity, however i.e. on the same road and opposite the respondent's land, lie three other lots, which were subject to a restriction not to subdivide unless with the consent of the K.S.A.C. and which have now been subdivided into lots of 10,000 sq., ft., each. The subdivision requested by the appellants would result in two lots, one of 14000 sq. ft. and the other 16000 sq. ft. The building already erected by the appellants is a two storey building with five bedrooms and the usual amenities of a dwelling-house. The building appears to be in keeping with the high standard and attractive architectural design of the existing houses in the area. The project will not increase the density of houses in the area, to any extent over and above the increase that the respondent own additional building will do. Indeed, the appellants and the respondent have averred that the construction of their respective buildings is to accommodate members of their own family which assures that the habits and behaviour of the

inhabitants, will remain consistent with those already living in the area. There is no doubt, given these factors, that if the modification is granted, the area will continue to enjoy its private residential character.

Will the modification, make future applications vulnerable to the action of the Court?

The appellants contended in the Court below, and repeated that contention before us, that the special circumstances existing in this case, is unlikely ever to occur again, and submits on that basis, that no court in any future application would find itself vulnerable because of any success in this application.

The circumstances relied on, relates of course to the history of the application, outlined earlier in this judgment, and in particular to the fact that the applicant, having been granted a modification of the covenant, proceeded to erect his building, and was only stopped from continuing some 19 months later, the respondent, having remained dormant for over 12 months, while the building went up on his adjoining premises. This was not the normal case, where applications are made before the building commences, nor is it a case where the appellants proceeded to build without having applied for modification. It appears that the appellant did all that was required of him in the first application, but because of a misunderstanding in sending the notice to the respondent, it was not received, and there being no objection, the modification was granted on that occasion. The erection of the building was commenced, in circumstances where the appellants, in their minds, thought they had a right to do so. In my view, there is very little practical difference in the circumstances of this case, between allowing the appellants to erect a second building, and

that of agreeing to the subdivision of the lot. The respondent agrees to the first but not to the second. I would conclude that the granting of this modification, given the peculiar circumstances of this case, would not be injurious to the respondent in either respect i.e in respect of the project itself, or the mere modification of the covenant. In respect of the latter, the modification could not be said to create or tend to create any change in the character of the neighbourhood so as to make the restriction vulnerable to the action of the Court in any future application.

4. Section 3 (1)(a) - Has the character of the neighbourhood changed?

In spite of my conclusion in respect of Section 3(1)(d) I nevertheless add a few words in respect of whether the evidence supported the finding of the learned judge that the character of the neighbourhood has not changed, and that the restriction has not become obsolete.

To determine this question, it must first be ascertained what is the neighbourhood. Before looking at the facts in the instant case, it is necessary to see how the law determines a "neighbourhood". It appears that the answer would depend on the circumstances of each case, and what the Court concludes on the evidence in a given case.

Preston and. Newsom on Restrictive Covenants 7th Edition at page 230 is of some help. Referring to the case of in ***re Davis Application*** [1950] 7 P & C.R. 1, the learned author cites a passage from the judgment thus:

> "Provided a neighbourhood is sufficiently clearly defined as to attract to itself and maintain a reputation for quality or amenity, the size of the neighbourhood and, within reasonable limits, the progress and nature of the development outside its boundaries is of little consequence."

The author continues:

> "The test is thus essentially an estate's agent's test: what does the purchaser of a house in that road, or that part of the road, expect to get? The matter was further elaborated by the Tribunal as follows:
>
> > 'Character (for the purposes of section 84(1) [similar to our section 3(1)(a)] derives from the style, arrangement and appearance of the houses on the estate and from the social customs of the inhabitants'
>
> The neighbourhood need not be large:
> it may be a mere enclave. Nor need it so far as this definition goes, be coterminous with the area subject to the very restriction that is to be modified, or other restrictions forming part of a series with that restriction."

In the instant case, the objectors contend that the neighbourhood consisted of the six lots including that of the appellants and the respondent, which shared the common restriction that the lots should not be subdivided. He separated these as a "neighbourhood" from those lots part of the original estate, and part of the original subdivision which had restrictions which allowed subdivision, into lots of not less than an acre but with permission of the K.S.A.C. These six lots however appear to have been the subject of modification which allowed three of the original lots to be subdivided into six lots each in size of less than an acre. The appellants, however, contended that all the lots,

numbering some 200, which were subdivided in the subdivision of the original estate constituted the neighbourhood. Of these, they argued below, seventeen had been modified. The neighbourhood, they contended comprised of the following area:

Mayfair Avenue

Pembroke Terrace

Pembroke Road

Elmwood Terrace

The learned judge, having made a visit to the locus in quo, concluded as follows:

> "A photogrammetric survey of the Forest Hills subdivision and sketch plan formed a part of the evidence. I visited the area and made observations. I do not agree with either of the areas submitted as the neighbourhood."

After referring to **Preston and Newsom** definition of "neighborhood" (supra) he continued:

> "In my opinion the neighbourhood comprises the six lots submitted by Mr. Hylton and in addition
>
> Volume 584 Folio 23
>
> Volume 586 Folio 53
>
> Volume 585 Folio 1
> All in Pembroke Terrace."

He concluded:

> "The previous modification do not affect the objector, most are out of sight and the view disclosed that there has been no change in the

> character of the neighbourhood, predominantly single dwelling houses. I hold that the restrictions ought not to be deemed obsolete".

Mr. Hylton was, for the purposes of this appeal, content to accept the area defined by the learned judge as the neighbourhood, as an alternative. However, he maintained that the six lots being subject to the same covenant to the exclusion of the other lots comprised the neighbourhood and as the covenants on none of those lots have been modified, it can not be said that there was a change in the character of the neighbourhood. Mr. Wright though holding fast to his submissions in the court below was willing to treat the learned judge's findings as a finding in his favour.

The three lots added by the learned judge to the six lots which Mr. Hylton contended to comprise the neighbourhood, have been subdivided into lots of 10,000 sq.ft. and now form a housing scheme called "Shaker Heights" which is on the same road as the appellants' land but on the opposite side of the road. These three lots are now fourteen lots. Mr. Wright therefore argued that there are now twenty lots in the neighbourhood, fourteen of which are 1/4 acre while the other six are above 3/4 acre. Therefore more than 50% of the lots are of 1/4 acre and consequently, he argues, the character of the neighbourhood has changed to such an extent as to make the covenant obsolete. The converse of that argument, however is that of the nine lots comprising the neighbourhood only three have had covenants modified, and consequently, the majority is still unmodified so that the character of the neighbourhood cannot be determined to have changed.

In any event whether the character of the neighbourhood has changed or not, and in my view the evidence does not support such a change, the appellants would still have to show that the covenant has become obsolete.

In treating with this subject Smith J A in the ***Liverant case*** (supra): (Page 336)

> "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 and Co., Ltd's application and Driscoll v Church Commissioners for England*** show that a change in the character of theneighbourhood 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 for resolving this question is whether the original purposes for which the covenants were imposed can or 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."

In my view there has been no reason advanced which convinces that the findings of the learned judge as to " the neighbourhood" should be disturbed. He came to the

conclusion after making a visit to the locus and making observations, and I also am content on the evidence that his finding as to the neighbourhood is correct.

In that event, considering both arguments in respect of the modifications of the covenants of the additional three lots, which resulted in the creation of "Shaker Heights - though Mr. Wright's argument is attractive, I prefer the view that only three of nine lots have had modification of their covenants, and in my view this has not caused a change in the character of the neighbourhood. Even if I were wrong however, applying the test formulated by Smith J. A. in reference to the case ***of re Truman Hanbury Buxton & Co.Ltd'Application*** it is my view that the covenant ought not to be deemed obsolete as its purpose would still be attainable.

In other words it is still possible for the beneficiaries to enjoy the comfort and privacy of living in an area in which their single dwelling house can remain on an acreage of 3/4 acre, to allow them all the advantages that go with living in a larger area of land.

Conclusion

In my view, the appellants should succeed on their application to have the covenant in respect to the subdivision modified, on the basis that such modification will be uninjurious to the respondent. In the event that there is an opinion that that conclusion is inconsistent with a view that the covenant cannot be deemed to be obsolete, I adopt the following paragraph from ***Preston*** and ***Newsom*** 7th Ed. pg. 237.

> "There is no doubt some overlapping between cases on para (a) [our sec. 3(1)(a)] and those on para (c) [our sec. 3(1)(d)]. For in ***Trumans*** case Romer L.J. said that because the discharge of the restriction would injure certain of the frontages it was

> almost impossible to say that the restriction was obsolete. On the other hand there have been three decisions which show that in an appropriate case those two paragraphs are separable. Thus in ***Re Hornsby Application*** where vigilant insistence on certain restriction had preserved the character amenity and a of an estate to a standard which planning control would lamentably have failed to achieve, the Tribunal held that the restriction ought not to be deemed obsolete. But it went on to hold that the particular modification of that restriction which was sought by the applicants could be authorised under para (c) because it would cause no injury to the persons entitled to the benefit of the restriction conversely in Re ***Luton Trade Unionists Club and Institute Ltd's Application*** the Tribunal held that the judgment of Romer L.J. left it open to hold in a suitable case that restrictions ought to be deemed obsolete and so should be modified under para (a) despite the fact that modification would cause injury to persons entitled to the benefit of the restrictions so as to preclude action under para (c)."

In ending I make note of the comments made by my learned brother Carey J.A. in relation to the learned judge's delay in delivering his judgment and to say that I am entirely in agreement. I need only emphasise that such an inordinate delay cannot leave parties to an action entirely confident that issues arising in their cases, have been adequately dealt with, and above all could undermine the public's confidence in our judicial system. It is hoped that this will never recur.

I would allow the appeal set aside the order of the Court below, and grant modification of the covenant to allow the covenant to read:

> "There shall be no subdivision of the said land save and except into two (2) lots for residential purposes."

I would also order that the cost of this appeal be the appellants' to be taxed if not agreed.

GORDON J A

This is an appeal from an order made by Chester Orr J, on the 29th July, 1994 dismissing an application made by the appellant for the modification of covenant No. 1 on Lot 12 Block A part of Red Hills in the parish of Saint Andrew. The covenant reads:

> 1."There shall be no subdivision of the said land."

And the modification sought would alter the covenant to read:

> "There shall be no sub-division of the said land save and except into two lots for residential purposes."

For a full understanding of the issue it is in my opinion necessary to chronicle the protracted history of the proceedings which culminated in the order impugned in this appeal and a reversal of which the appellants pray should be granted.

On or about the 10th April 1947 Lands known as "Forest Hills" formerly part of Pembroke Hall, Waddles, Sterling Castle, Kirklands and Leas Flats containing by survey 587 acres 3 roods 35 Perches and 4/10 of a perch was registered under the Registration of Titles Law in the name of Lands Limited a company duly incorporated under the Laws of Jamaica, and the titles recorded at Volume 475 folio 90 of the Register Book of Titles. These lands were subdivided into blocks and lots which were lettered and numbered. The subdivision Plan was deposited in the office of the Registrar of Titles on 11th November 1949. The lots were sold to various purchasers subject to incumbrances registered on the titles. The title to Lot 12A Block A in the subdivision registered at volume 585 folio 91 containing by survey 30807.75 square feet was by transfer no 369527 entered on 20th

February 1979 transferred to the appellants as joint tenants. The preamble to the covenants endorsed on the titles states:

> "The land comprised in this Certificate (hereinafter called "the said land") is subject to the under-mentioned restrictive covenants which shall run with the said land and shall bind as well the Registered Proprietor his heirs personal representatives and transferees as the registered proprietor for the time being of the said land his heirs personal representatives and transferees and shall enure to the benefit of and be enforceable by the registered proprietor for the time being of the land or any portion thereof now or formerly comprised in Certificate of Title registered as aforesaid in Volume 475 Folio 90."
>
> Covenant I:
>
> There shall be no sub-division of the said land.
>
> Covenant 2.
>
> 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 outbuildings shall in the aggregate not be less than One Thousand Pounds"

The appellants applied to the Town Planning Department on 27th February, 1990, for the subdivision of the lot into two lots. Approval of the subdivision was given by the Government Town Planner on 6th June, 1990. The Master of the Supreme Court on 8th March 1991, heard the application made by summons by the appellant for the modification

of Covenant No.1 and modified the covenant as prayed to read, 'There shall be no subdivision of the said land SAVE AND EXCEPT into two lots for residential purposes." The Government Town Planner in approving the subdivision changed covenant I on the title to read:

> (g) that there be no further subdivision of both lots.

This is a certain indication that this lot had reached its planning limit. The lots into which 12A was subdivided were of area 14775.7 sq.ft. and 16032 sq.ft. respectively.

Pursuant to the modification of the Covenant the appellants, who already had a dwelling on the lot, which dwelling now fell on one of the subdivided lots, obtained approval from the Government Town Planner for the construction of a five bedroom dwelling house on the other lot. Construction of this house commenced in or about April 1992. Construction of this house proceeded apace but on October 2, 1992, on the application of the respondent, the order of 8th March, 1991 approving the modification of the covenant was set aside by the Master. The erection at this stage had reached roof height. The Order rescinding the Order of the Master which approved modification of the Covenant states:

> "1. Order dated 8th March 1991, be set aside.
>
> 2. Mr. Vayden McMorris (the applicant herein) be personally served with a copy of the notice, said notice to be in strict compliance with the practice direction dated 18th June 1976.
>
> 3. The applicant file his objection within 14 days of the document being served on him."

The appellants found themselves in the untenable situation where the modification approval de jure was set aside while the de facto approval by the Government Town Planner remained intact. In this dilemna the appellants continued building while their renewed application was pending and by injunction ordered on 26th April 1993 they were restrained from doing any further work on the building.

The hearing of the Originating Summons commenced before Chester Orr, J on 8th March 1993 and on 12th March 1993 he visited the locus with the parties in attendance , the hearing concluded on 28th July 1993: on 29th July 1994 Orr J, delivered his decision which is the subject of this appeal.

On the hearing of the summons the appellants had to satisfy the judge that anyone of the following conditions as stipulated by the Restrictive Covenant (Discharge and Modification) Act (The Act) was applicable before the Court could be moved to modify the covenants:

> " 3(1)(a) that by reason of changes in the character of the property or 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 the 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 benefit 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:"

The appellant sought to show that the covenant without modification will impede the reasonable user of the land. The land when it was originally subdivided and sold in lots, was sold as building lots for the erection of single dwelling houses. As the house when built occupied but a small portion of the lot the remaining portion to be fully utilised could not be used for agricultural purposes as this would offend the covenant and could be the basis of objection. To utilise it for building consonant with its designation as building land required the modification of the covenant.

The appellants further submitted by affidavit evidence that by reason of changes in the character of the neighbourhood the restrictions ought to be deemed obsolete. To this end evidence was submitted of 17 Titles derived from the parent title which were

subdivided into lots ranging in size from 9000 sq. ft. to 25000 sq. ft. What was formerly 17 lots now number 49. The other submissions sought to show that the modification sought would not injure anyone and that covenantees had agreed expressly or by implication to the covenants being modified. These submissions all followed the provisions of section 3(1) of the Act.

The respondent objected to the modification on all the grounds set out above but more particularly he insisted that the proposed modification would injure him in the enjoyment of his property.

In his affidavit dated 14th October 1992 objecting to the appellants' application for modification of the covenant the respondent claimed that the continued existence of the covenant will not impede the reasonable user of the land for private purposes. The covenant was necessary for securing the practical benefit of "maintaining the value and amenities of the area." One of the benefits of the covenant vested in adjoining owners is the "preservation of the private residential character of the area by restricting the number of dwelling houses which can be erected in a given area."

In paragraph 6 he states:

> "Any project which is implemented is capable of destroying or causing a change in the private residential character of the area and is therefore bound to cause injury to an adjoining owner, such as myself who objected to the change."

Paragraphs 7, 8, 9 & 10 are set out below:

> "7. If this application were to be allowed it would materially affect my enjoyment of my own property as any dwelling house constructed on a subdivided lot would

interfere with (a) my right to privacy; (b) my view; and (c) general aspects of orientation. In particular, the uniqueness of the shape of the lots in question (at a corner) as against lots along the straight of a roadway dictates that in order to maintain the quality of life, care must be taken in the siting of building(s) so as to avoid offensive placement that deprive neighbours of privacy, view and general aspects of orientation.

8. The siting of the 'proposed housing unit' is approximately ten (10) feet from the common boundary, with a balcony established facing my property, thus removing all privacy from my living room, all terraces and lawn area. In fact, the 'housing unit' proposed is a multi-storey structure, having two and three floors, which is now the main feature of my view now reduced to 50 percent. This is considered offensive and inconsiderate.

9. The applicants' intention appears to construct a multiple dwelling which would be easily convertible into a duplex notwithstanding that the Notice states that the purpose of this application is to enable subdivision of the lot into 2 lots and for the construction of ' private dwelling'. The proposed structure or any duplex or similar structure could result in the creation of 2 additional private dwellings on the Applicants' lot which would further reduce the quality of life by overpopulation and do irreparable damage to the character of the neighbourhood.

10. If this application were to be allowed it would be of assistance to other persons who own lots in the area and who might wish to make similar applications which, if allowed, would further deteriorate the character of the neighbourhood and would render the restriction valueless to the remainder of

> persons including myself who are at present entitled to the benefit thereof.
>
> In the event of the said restriction being modified, I claim compensation to the amount of $500,000.00 as the amount of the loss and I and my successors in title will suffer thereby."

The gravamen of the respondent's objection is that his right to view, his right to privacy and the general aspects of orientation would be affected by any building erected on the subdivided lots by the appellants. This would do him irreparable injury nevertheless, if his objections were not countenanced by the court, he would be compensated by an award of $1/2 m in damages.

In response to these claims the appellants by affidavit submitted evidence of the 17 lots which have been modified claiming that some have been modified more than once. These modifications were prompted by economic crisis and the acute housing shortage. These factors necessitated the subdivision of large lots to serve the needs of an expanding population. None of the modifications granted have affected the private residential character of the neighbourhood and have added to the security and enhanced the value of adjoining lots. The appellants further responded that the building they were erecting was a 5 bedroom, 4 bathroom house "not larger than the numerous large 2 and three storey structures that grace the Forest Hills sub-division many of which were constructed on much smaller lots." The appellants further claimed that the respondent never heretofore objected to any of the sub-divisions effected and that the respondent would not be entitled to compensation as no loss would be occasioned by the modification. The appellants' affidavit claimed that the house was built 13 feet, not 10 feet from the common boundary.

They declared in paragraph 9 of their affidavit dated 15th November 1992 in response to the respondent's of 14th October, 1992:

> "There will be no balcony overlooking Mr. McMorris back yard and therefore his right to privacy will not be adversely affected."

This statement was made as the appellants modified their building plans obviously to meet the complaint of the respondent. The letter from the Town Clerk dated 11th December 1992 addressed to the appellants' attorney speaks to this:

> "re: Lot 12 Block A Forest Hills St. Andrew
>
> With reference to yours of the 18th November, 1992, kindly be advised that Revised Building Plans, were submitted on November 27, 1992, showing the deviations from the approval given on March 31, 1992, by the Government Town Planner.
>
> The plans which have been submitted, agree with the Kingston and St. Andrew Corporation's Building Regulations and have been approved.
>
> An inspection of the building which is still under construction was carried out by me on November 18, 1992, and I am satisfied that the construction complies with the requirements of the Building Regulations."

These affidavits provided the body of evidence on which submissions were made to Chester Orr, J. This evidence was supplemented by the visit to the locus, followed more than twelve months later, by the judgment dismissing the application with costs.

Counsel for the parties had agreed in their written submissions that "neighbourhood" in terms of section 3(1)(a) of the Act comprised all the lots into which

the original holding of 587 acres was sub-divided, a total of nearly 200 lots. In oral submissions the neighbourhood was reduced by appellants' counsel to encompass the area contained within Mayfair Avenue, Pembroke Terrace, Pembroke Road and Elmwood Terrace. Mr. Hylton for the respondent reduced neighbourhood to six lots "all situated on the same side of Red Hills road." These 6 lots resulted from an earlier subdivision of lots 11, 12 and 13 with the consequent modification of covenant No. 1 to read "there shall be no subdivision of the said land", Of these 6 lots the appellants' occupied lot 12A and the respondent lot 12.

In his judgment Chester Orr J said:

> "A photogrammetric Survey of the Forest Hills subdivision and sketch plan formed a part of the evidence. I visited the area and made observations. I do not agree with either of the areas submitted as the neighbourhood.
> ...
>
> In my opinion the neighbourhood comprises the six lots submitted by Mr. Hylton and in addition -
>
> Volume 587 Folio 75
> Volume 586 Folio 53
> Volume 585 Folio 1
>
> All in Pembroke Terrace.
>
> The previous modifications do not affect the objector, most are out of sight and the view disclosed that there has has been no change in the character of the neighbourhood, predominantly single dwelling houses. I hold that the restriction ought not to be deemed obsolete."

Neither counsel for the respondent nor the learned trial judge saw fit to include in the "neighbourhood" lot No. 20 which had a boundary contiguous to that of the appellants' and respondent's lots on the Eastern side. This lot showed a common boundary with lots 11, 12 & 13. Having excluded this lot, the trial judge essayed to include in his judgment of what falls to be determined as being in the neighbourhood 3 lots as given above.

In ***Preston and Newsom*** Restrictive covenants, 7th Edition at page 230 the learned authors state the test used to determine the meaning of "neighbourhood."

"The test is thus essentially an estate agents" test. What does the purchaser of a house in that road, or that part of the road, expect to get? The matter was further elaborated by the tribunal as follows: "Character derives from style, arrangement and appearance of the houses on the estate and from the social customs of the inhabitants.

The neighbourhood need not be large; it may be a mere enclave. Nor need it, so far as this definition goes, be coterminous with the area subject to the very restriction that is to be modified ... the test is a pragmatic one."

All the lots in the original subdivision as evidenced by reference to those exhibited had as covenant 1:

> "There shall be no subdivision of the said land except with the approval of the Kingston & St. Andrew Corporation into lots of <u>not less than one acre</u> each with a road frontage of not less than one hundred feet."

Except for Lot 43 Block C registered at volume 585 folio 80, which was 2 acres 1.9 perches, all the other lots in the scheme as exhibited including lots 11, 12 and 13 in

their original form were less than 2 acres in size: hence if the covenant were to be strictly applied, there could be no subdivision of any lot, because any subdivision contemplated could not produce from 1 lot, 2 lots complying with the stipulation as to size. Lots 11, 12 and 13 were however subdivided and the covenant No. 1 modified to read "there shall be no subdivision of the said land." This Mr. Hylton Q. C. submitted was final and unalterable, designed to preserve certain benefits to the owners.

Three lots thus became six and to this number, which Mr. Hylton Q C identified as the neighbourhood, the learned trial judge added three lots. These latter lots, it was the unchallenged evidence relied on in submissions by Mr. Wright, now form the housing development known as Shaker Heights. Shaker Heights is a scheme of 14 houses built on 14 lots carved from what was formerly 3 lots. The modified covenants in respect of this scheme provides for lots of not less than 10,000 square feet. The size of the lots proposed in the modification the appellants seek is approximately 50% larger than the Shaker Heights lots.

The Court as a matter of course visits a locus in quo as an essential part of adjudication. A visit can play an important role in the adjudication. The learned trial judge had an advantage denied to us. It is left to be seen what use he made of it. He did not refer to the development of Shaker Heights which he included in the neighbourhood. The original development required 6 houses one on each of the lots 2, 4, 5, 11, 12 and 13. This was subsequently altered to provide from lots 11, 12, & 13 six lots and from 2, 4 & 5 fourteen lots. There are now 20 lots where there were originally six. The character of a neighbourhood must be established with reference to some point in time from which

changes can be judged and the referral point in this case must be when the subdivision plan of Forest Hills was deposited in the office of the Registrar of Titles on 11th November 1949. Had the learned trial judge addressed the issue in this manner he would have found that there have been changes in the character of the neighbourhood. "Predominantly single dwelling houses" there are, but located on much smaller lots of land than originally envisaged by the developers. Instead of one house to 1 acre of land there are in parts four houses to the acre. In the light of these changes the restrictions in my view ought to be deemed obsolete. There has not been so complete a change in the character of the neighbourhood that there is no longer any value left in the covenant at all: per Farwell J., in Chatsworth Estates Ltd v. [1931] 1 Ch. 224 at p. 229-231.

Restrictive covenants like easements recognize the existence of dominant and servient tenements and in the case of covenants in land development schemes provide an exception to the rule that a third party ought not be able to enforce a benefit under a contract. At law and in equity the covenantee can enforce the rights given under covenants endorsed on his title. The covenants in these cases were imposed by the Government Town Planner under the aegis of the Kingston and St. Andrew Corporation.

They had the responsibility to determine house density hence population density in any development and their control was exercised by covenants imposed on titles. The covenant numbered 1 on Lot 12 and 12A stated that there should be no subdivision of the lots yet the same authority that imposed that covenant modified it on the application of the appellants to provide for a subdivision of lot 12A into 2 lots and on this occasion the authority also modified covenant 1 to read -

"There shall be no further subdivision of both lots."

Two other covenants as to the structure to be erected and access to the lots were imposed. The reason given for these additional endorsements on the title was:

> "To ensure safe and satisfactory standard of development."

A number of cases were referred to by the parties and relied on as authority for propositions advanced. For reasons which I shall hereafter indicate I, notwithstanding the cogent and persuasive submissions of counsel, do not find these cases relevant or particularly helpful in providing guidance to a consideration of the issues that fall to be determined in this case. These cases I accept establish the principles applicable in the ordinary case. This case however has features lacking in all the authorities cited.

In his judgment Chester Orr J, considered the application of section 3(1)(d) of the Act. He stated:

> "The objector states that his right to privacy and his view would be affected by the proposed modification."

He then quoted from the judgment of Smith J.A. as he then was in ***Stephenson et ux v. Liverant et al*** [1972] 18 W.I.R. 323:

> "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 from PRESTON & NEWSON ON RESTRICTIVE COVENANTS (4th edn.) on which reliance

was placed. At page 5 the learned authors said:

> 'It is not the applicants' 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 restriction 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."

He then concluded:

> "the objector has stated that the modification will injure in either respect. I agree. The applicants have failed to show that the modification will be uninjurious"

There is no common law right to privacy or to view. Were it intended that such rights should be given the covenants would have stipulated the size of the house to beconstructed on each lot and/ or its location vis-a-vis a neighbouring house. The lots in the development are on the hills to the west of the corporate area of Kingston and St.

Andrew and the geographical and physical situation provide for each lot a panoramic view of the corporate area to the north-east through east to the south west and for some lots into the parish of St. Catherine to the west south-west. Topographically the respondent's lot is elevated above the appellants' and the appellants enjoy the rare measure of a level lot hence their house built on the undivided lot is of two storeys whilst the respondent's needs are met by a bungalow. Photographs exhibited show several houses of two storeys or more built in the area. The respondent from his elevation looks down on the appellants' home and over his holding there views the scenery. The respondent complains not of any invasion of privacy. The respondent claims the modification sought would injure him in the enjoyment of his property. How sincere is his protestation?

From his commanding view the respondent could have seen the ground broken for the foundation of the appellants' second building. A construction site is a noisy place and before his eyes and in earshot he saw the building rise from the ground over months. He only acted when the building had reached roof height. The appellants not having had any protest from the respondent were entitled to accept that the respondent by his conduct acquiesced to the modification that had taken place. The respondent is by profession an architect and at that a leading architect in Jamaica. His training would have exposed him to aspects of the law of contract with particular reference to easements and covenants. These are areas that he must respect in preparing designs. He must have been aware from the moment the appellants commenced construction that there was a likely breach of the covenant on the title and he had a duty as a person claiming to be injured by that breach

to act promptly. His failure to act promptly could, and did, cause the appellants to conclude he had waived his rights and or consented to the modification of the covenants.

I had intimated that this case has features unknown to other cases cited by counsel and I will enumerate them briefly:

(1) The appellants in 1990 obtained approval permitting subdivision of the lot into two lots;

(2) Appellants obtained permission to erect 5 bedroom 4 bathroom residence on divided lot;

(3) Appellants on 8th March 1991 obtained modification of covenant by the court.

(4) Appellants commenced building;

(5) October 2, 1992 Court rescinds modification granted in 1991 and directs renewal of application for modification;

(6) 1993 renewed application for modification heard by court and decision reserved;

(7) 1994 modification refused;

(8) Appeal - hearing commenced and adjourned;

On 2nd October 1995 when the hearing of the appeal resumed the appellants sought leave to adduce fresh evidence. The respondent did not oppose. The evidence was photographs of a two storey house and affidavits by the appellants and the respondent. The appellants averred that during the adjournment the respondent had erected a second dwelling house on his lot in breach of the covenant and without modification of the covenants. The respondent admitted erecting the house but claimed it was the extension of a building appurtenant to the main building. He went on to state:

> "3. I was advised by my attorneys and verily believe that this addition to my house (which is being occupied by my son) is not in any way a breach of any of the Restrictive Covenants on my title. I have not and do not intend to apply for a subdivision of my Title."

In addition to these features Mr. Hylton Q.C. for the respondent submitted with some emphasis that the objector was objecting to the subdivision of the lot into two lots and not to the construction of the second house on the lot as it originally stood.

The complaint before the learned trial judge was that the house constructed on the subdivided lot infringed his right to privacy and his view, hence he was in that regard injured. The posture he has adopted is that:

> "I can accept and live with 2 houses on an undivided lot, I object to modification of the covenant to subdivide the lot."

The covenants on the title give no right to view or right to privacy as claimed by the respondent and his acceptance of the house as it stands must be taken to imply that his claim to aspects of orientation was abandoned. The claim therefore to injury would rest on an order ratifying the subdivision thus modifying the covenant. Subdivision of land is governed by the provisions of the Local Improvements Act. Section 5(4) of this Act declares:

> "5(4) For the purposes of this Act a person shall be deemed to lay out or sub-divide land for the purposes of building thereon or of sale, if he sells or offers for sale any part of such land whereon a house or other building may be erected, or if he shall form the foundations of a house or other building thereon in such manner and in such position so that such house or other building will or

> may become one of two or more houses or other buildings erected on such land."
> [Emphasis supplied]

This section makes the building of a second house on a lot of land, a subdivision, and this act prescribes the procedure to be followed before any such building is commenced. Section 12 of the said act makes failure to follow the procedure an offence punishable on summary conviction. It is clear from the evidence that the appellants followed the procedure stipulated by this Act. The evidence also shows that the appellants obtained building permission.

Covenant 2 on the title forbids the erection of more than one dwelling house on any lot, and the respondent has admitted that the additional building he constructed is the dwelling house of his son. The photograph certainly confirms this. The respondent has on his admission yielded to the pressure for providing housing for an expanding population and has built on his land in contravention of covenant No. 2 a house to accommodate someone, albeit his son. He cannot now be heard to complain about what the appellants have done. Mr. Wright submitted that there has been a general disregard of the covenants in the area. The act of the respondent in building as he has and his avowed intention not to apply for modification of the covenant supports Mr. Wright's submission made before Chester Orr J on 28th July, 1993.

The Act provides the legal framework for the consideration of modification of restrictive covenants, this does not exclude equitable principles. In Hanbury's Modern Equity 9th edition in the chapter captioned "Restrictive Covenants" the case of Tulk vs. Moxhay [1848]Ph. 774 was discussed. The principle flowing from that case is "that it was

inequitable that a person should come to the land with notice of a covenant restricting its user, and then use it in a way inconsistent with that covenant." (Hanburys P. 601). "The doctrine of ***Tulk vs. Moxhay*** applies only to negative covenants" (p. 604) "The reason why the doctrine applies only to negative or restrictive covenants is that the doctrine is one of equity and that the only available remedy was the injunction" (p. 605). "The interest of a person entitled to enforce a restrictive covenant is an equitable interest." I adopt these statements as correct.

The evidence Chester Orr J had to consider included the history of the attempts by the appellants to comply with the requirements of the law. From the appropriate authority they had obtained permission to subdivide and build, and had commenced building. The respondent looked on the appellants' building rise out of the ground and reach up to the heavens to be capped by the roof then he acted. This, in my view is a case which falls outside the parameters of any case previously cited by either counsel. If indeed a case which was on all fours with this one could be found the industry of counsel would have been rewarded and we would have been favoured with a reference to it. The principles which guided the consideration of the other cases provide little or no assistance. If the law is unhelpful then equity may provide some assistance. As I have intimated heretofore equitable principles may be brought to bear in a consideration of the issues.

"He who seeks equity must do equity." The respondent cannot be allowed to see the appellant act to his detriment in breaking ground and erecting at considerable expense a mansion, then step forward and claim a right he could have sought to enforce when ground was broken. Aware of his right or place on enquiry he should have acted

promptly. "Delay defeats equity." He may successfully claim he was not served with a notice but he saw what the notice would have told him.

The court seeks to do "right to all manner of persons" and in the quest to achieve this the judge is empowered to "direct such enquiries as he may think fit to be made of the Town and Country Planning Authority and any Local Authority:" Section 3(2) of the Act. This is a case in which the indicators are that such directions should be given. It is a cause of some concern that no where in the judgment of Chester Orr was any mention made of the history of the case in any form. The judgment is as of an abstract situation far removed from the realities herein related. In the judgment the learned trial judge states "The applicants propose to build a dwelling house in addition to the existing one on the premises." This supports the point I have just made. The building was in place at the time of the visit to the locus in quo by the Court.

I hold the view that the objection cannot be sustained, the objector must be taken by his laches to have consented to the modification. His claim for injury is unfounded. I would allow the appeal set aside the judgment of Chester Orr J, and grant the modification of the restrictive covenant sought by the appellant.

Having thus disposed of the appeal I will content myself by making some observations on what I regard as disturbing aspects. There seems to be a dichotomy in the authority governing the modification of restrictive covenants which need to be addressed:

> (a) The Town & Country Planning department is empowered to approve subdivisions and modify existing covenants and impose additional or new covenants as are necessary to accord with the overall development planning of an area.

> (b) The Government Town Planner approves plans for the erection of buildings on land;
>
> (c) The Court empowered by section 3 of the Act modifies covenants.

To avoid a repetition of what happened in this case the functions of the three agencies would be harmonized if the approval of the planning department were given provisionally subject to modification of the restrictive covenants by the courts. The Planning Department has grave responsibility to ensure the orderly development of construction in accordance with a settled plan and the input of this department in the deliberations of the court is recognized in the provisions of section 3(2) of the Act.

CAREY, J.A.

The appeal is allowed. The order of Chester Orr, J set aside and the application to modify covenant No 1 granted to wit:

> "There shall be no subdivision of the said land registered at Volume 595 Folio 91 SAVE and EXCEPT into two lots for residential purposes."

Costs both here and below to the appellants to be taxed if not agreed.