JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 90/94

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE WALKER, J.A. (Ag.)

BETWEEN	REGARDLESS LIMITED	APPELLANT
AND	ANIS HADDEED AND SHIRLEY HADDEED	1ST RESPONDENTS
AND	ALICE MAY CHANG	2ND RESPONDENT

Dennis Morrison, Q.C., instructed by Dunn, Cox, Orrett & Ashenheim, for the appellant

Ransford Braham, instructed by Livingston, Alexander & Levy, for the 1st respondents

Maurice Long, instructed by Clough, Long & Co., for the 2nd respondent

October 22, 23, 24 and December 9, 1996

DOWNER, J.A.:

On November 16, 1984, Morgan J, as she then was, delivered a judgment in the Supreme Court refusing the application by the Livingstons to discharge or modify the restrictive covenants which run with 48 Norbrook Drive. The principal ground of the learned judge's decision was that there were no changes as outlined by the Livingstons in the "neighbourhood" since the covenants were

imposed 24th September, 1956, and that even if there were changes "other circumstances of the case were not such as to make the restrictive covenants obsolete" within the intendment of the Restrictive Covenants (Discharge and Modification) Act (the Act).

So considered crucial to the learned judge's decision was how she interpreted "neighbourhood" and "obsolete" and applied them to the facts found. It is relevant to state the parties to those proceedings. Carlton Fitz-roy Livingston and his wife Ruby-Lee were the applicants. Astec Limited at 46 Norbrook Drive was an objector, while the other objector was Alice Chang at 50 Norbrook Drive. So the physical situation was that the applicants were in the middle and immediately on their right and on their left were the objectors.

Ten years afterwards the Livingstons made another application to discharge or modify the same restrictive covenants binding 48 Norbrook Drive. The litigation in this instance was instituted by Regardless Limited, a company which bought out the Livingstons. The dominant director is Donovan Crawford the banker. Whereas the Livingstons proposed to build eight townhouses their successor proposed to build six. Alice Chang was again an objector while Astec was succeeded by the Haddeeds. Harris J in a comprehensive judgment refused the application. It is this refusal which is the subject-matter of appeal.

It is, however, useful to examine the factual situation as found by Morgan J to determine whether the objectors were correct in stating that there were no material changes in the neighbourhood between the first and second applications. That would be a sound ground to affirm the decision if Morgan J

came to the right decision. For emphasis, it is useful to refer to the relevant paragraphs of Alice Chang's affidavit. They read:

> "**6.** THAT the original Applicants were CARLTON FITZ-ROY LIVINGSTON and his wife, RUBY-LEE, were the former registered proprietors of the said land and had previously made an Application to this Honourable Court by way of Suit No. E.R.C. 160 of 1982 for the modification of the restrictive covenants numbered 1, 2, 3 and 4 endorsed on the Certificate of Title for the said land for the specific purpose of erecting thereon eight (8) Townhouses, and that such Application was disallowed by way of a Judgement given by MISS JUSTICE MORGAN, and I attach hereto a copy of such Judgement marked with the letter 'A' for the purposes of identity.
>
> **7.** THAT the conditions under which the then Applicants had their Application refused have not changed to any extent and the Application of Regardless Limited is in essence the same Application as was made by the said CARLTON FITZ-ROY LIVINGSTON and RUBY-LEE, his wife, on the 30th day of June, 1982, and I attach hereto a copy of such Affidavit marked with the letter 'B' for the purposes of identity."

The affidavit of the Haddeeds contains a similar statement. It reads:

> "**5.** That the grounds for my objection are as follows:
>
> (a) that there are no changes in the character of the property or the neighbourhood or other circumstances which justify the restrictions being deemed obsolete.
>
> ...
>
> **6.** That my land and Applicant's land along with others bordering on the links of the Constant Spring Golf Course are regarded as premium lots for which premium prices were paid and in fact the lots that border the links of the Constant Spring Golf Course form a separate neighbourhood from those lots which do not border on the links of Constant Spring Golf Club."

Then the Haddeeds further stated:

> "**16.** That by a judgment of the Supreme Court in Suit E.R.C. 160 of 1982 a similar application for modification and/or discharge of the restrictive covenant was refused, and that since the judgment of the Supreme Court the circumstances have not changed to warrant this present application."

Also, if the Haddeeds and Alice Chang were correct then they could have succeeded on the basis of res judicata and so dispose of the case without investigating the merit in the second instance. This approach might be of some guidance to future applicants as well as to judges who have to decide those issues when objectors aver that there were no material changes in the neighbourhood between a first and second application.

> **How did Morgan and Harris, JJ interpret "neighbourhood" and "obsolete" in relation to 48 Norbrook Drive?**

In defining the scope of his appeal in his skeleton argument, Mr. Morrison posited his submission thus:

> "**4.** In the instant case, the learned judge found that there had been a change in the character of the neighbourhood (page 212), but that the covenants could not be deemed obsolete (pages 213-217). It is submitted that in so ruling she erred and that on the facts the changes in the character of the neighbourhood in the instant case were so extensive as to render the covenants obsolete."

This focuses on how "neighbourhood" ought to be defined and whether on the facts found the restrictive covenants were "obsolete" was emphasised in

grounds of appeal 1 and 2. Grounds 3, 4 and 5 were abandoned. Grounds 1 and 2 read:

> "**1.** The Learned Trial Judge was in error in finding that the restrictive covenants ought not to be deemed obsolete since the modifications and discharges of the restrictive covenants in the neighbourhood as found by the Learned Trial Judge were so widespread and so fundamental in the changes they effected that the scheme was so fundamentally altered as to be no longer recognisable nor the restrictive covenants enforceable in the form as originally imposed.
>
> **2.** The Learned Trial Judge erred in her findings in that by the mere accident of the lots of the First and Second Respondents being adjacent to the Applicant/Appellant's lot, she found that they were entitled to the benefit of the original restrictive covenants, which benefit was no longer capable of being enjoyed or enforced by other owners of lots in the neighbourhood. In so finding, the Learned Trial Judge failed to have any or any due regard to the changes occasioned by the modifications and discharges by the Court of the restrictive covenants in the neighbourhood."

The submission and helpful grounds of appeal meant that the live issue in this appeal was whether the restrictive covenants were "obsolete". So it is necessary to examine how the judge approached the issue of changes in the neighbourhood. Here is a significant passage:

> "The changes of several of the original lots by virtue of subdivision, re-subdivision of these lots and by the construction of, or, proposed construction of multi-family units and the layout and designs of the units have had a remarkable impact on the character of the neighbourhood. It is also obvious from the affidavits of both Mr. McDaniel and Mr. Pitter that they recognized that significant changes have taken place in the neighbourhood. Mr. McDaniel went as far as stating that 'major changes have taken place

> "in the relevant area to the applicants' land' but proceeded to add a caveat by introducing an element of distance between the applicants' land and premises numbered 34, 36, 42, 56, 64 and 66 Norbrook Drive (all of which have been re-subdivided) as a measure to counter his acknowledgement of changes in the neighbourhood. The fact is, changes have taken place in the character of the neighbourhood. It is immaterial whether these changes had taken place 350 yards or 150 - 200 feet from applicants' land. In my opinion the applicants have demonstrated that there have been changes in the character of the neighbourhood, and I am satisfied that there have been such changes."

Be it noted that in making this finding Harris J was relying on the evidence of two experienced and qualified experts. Furthermore, they were witnesses brought by the objectors Haddeed and Chang. If the finding was correct it disposed of the issue of res judicata.

What did these expert witnesses say as regard changes in the neighbourhood? Here is McDaniel's:

> "**6.** THAT from all of the foregoing, it is to be noted that the major changes that have taken place in the relevant area to the Applicants' land and that of the Objectors hereinbefore referred to are on the Western side of Norbrook Drive, the nearest being some 350 yards or more South of No. 48 Norbrook Drive, except for number 45E and this development is below road level. The only other developments on the Eastern side of Norbrook Drive are the South of No. 44 and of low density."

In assessing this evidence, it will be necessary at this stage to state that "neighbourhood", as found by the judge, was to be found on the south side of Norbrook Drive and further the limiting factors of those lots on the south side was

that they bordered the links of Constant Spring Golf Club. So number 45E and other odd numbers on the north side referred to by McDaniel would not be within the "neighbourhood" as defined. Furthermore, McDaniel detailed the specific changes in an exhibit to his affidavit which enable the learned judge to measure the extent of the changes.

The affidavit of Owen Pitter tells a similar story. He sees the changes as part of the impetus to achieve maximum benefits from the empty lots in the "neighbourhood". He put it thus:

> "**10.** The purpose and intention of these covenants in influencing the development of a high quality estate as part of the suburbs along the Norbrook foothills has been achieved. The subject subdivision and adjacent districts are fully developed but for the few remaining lots. The dominant pattern of development is that of single family residences not exceeding a two-storey profile, with influence of the Architect as against the Draughtsman more apparent in later development. Recently however there has been development of small building schemes as clusters of town-houses and/or apartments, as in-fill projects, maintaining a standard of finish sympathetic with the neighbourhood character."

Against this background, the finding that there were changes in the "neighbourhood" must be affirmed.

The next step is to determine the area which constitutes "neighbourhood", in the circumstances of this case. It is essential, therefore, to examine section 3(1)(a) and (b) of the Act so as to see the context in which "neighbourhood" and "obsolete" appear. The material section reads:

> "**3---(1)** A Judge in Chambers shall have power, from time to time on the application of the Town and Country Planning Authority or of any person

> "Interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied--
>
> > **(a)** that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Judge may think material, the restriction ought to be deemed obsolete;
> >
> > **(b)** that the continued existence of such restriction or the continued existence thereof without modification would impede the reasonable user of the land for public or private purposes without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of such restriction, or, as the case may be, the continued existence hereof without modification..." (Emphasis supplied)

In ***Central Mining and Excavating Limited v. Creswell et al*** unreported Supreme Court Civil Appeal 16/92 delivered November 22, 1993, I said:

> "The first issue to be decided is the extent of the neighbourhood in which the applicant and the objectors have holdings. It is a question of mixed law and fact. The generally accepted test is the 'estate agents test.' It is generally put thus - 'What does a purchaser of a house on that road or part of the road expect?' When considering this approach, it must be against the training and experience of an estate agent. He generally has expertise in valuation and a feel for the qualities which make for good real estate. He is a professional who brings buyer and seller together. He must understand features which make up a neighbourhood. He would have a knowledge of the original subdivision. He would know of the covenants which exist. He would know the area of the subdivision, the flow of traffic and he would know

> "that the Wellington Drive neighbourhood was an upper middle class area. He would know of the changes in the area since 1958 when the neighbourhood was laid out. Using the test, I think he would come to the conclusion that the area exhibited in the various plans and aerial photographs has distinct physical and social characteristics which make up a neighbourhood. It has a style, privacy and atmosphere as well as amenities which persuaded the learned judge that the original subdivision was still and is a neighbourhood within the meaning of the Act."

Harris J adopted a similar approach. She said:

> "The generally accepted test in determining a neighbourhood is the 'estate agent's test' as stated in Preston Newsome's Restrictive Covenants 7th Edition page 230:
>
> > 'The test is thus essentially an estate agent's test; what does the purchaser of a house in that land, or that part of the land expect to get.'
>
> The author also states:
>
> > 'The neighbourhood need not be large, it maybe a mere enclave nor need it, be so far as definition goes, be coterminus with the area subject to the very restriction that is to be modified, or other restrictions forming part of a series with that restriction.'
>
> I am of the opinion that this approach is correct."

The learned judge delimited the neighbourhood to the south side of Norbrook Drive. Her Ladyship eliminated the north side thus:

> "The original subdivision in which the lands of the applicants and objectors are sited is divided by Norbrook Drive which runs from east to west. The lands to the north of Norbrook Drive face the Spring Garden Gully. The terrain of these lands is of a

> "sloping nature. This physical feature of the lands has resulted in the houses being built below street level. The lots in this section of the sub-division were originally approximately a half an acre in size."

Turning her attention to the southern side the learned judge said:

> "On the southern section of Norbrook Drive are situated much larger lots, the vast majority of which are approximately an acre in size. The terrain of these lots is fairly even although some parts slightly undulating, the greater portion offer expansive level surface space on which elegantly designed houses have been sited, with much room for spacious lawns and gardens. These lots on the south are contiguous with the Constant Spring golf links. The golf links provide a scenic view. The sizes of the majority of these lots dictate that the distances between each registered proprietor grants an assurance to each of them, the enjoyment of far greater measure of privacy from those on the north. The panoramic view of the golf links which is available to the owners on the south is not enjoyed by those on the northern section of the subdivision. An extensive pleasant view of the surrounding hills which is accessible to owners on the south is restricted to those on the north. The amenities which accrue to owners of lots in the south are markedly superior to those in the north. It follows therefore, that the distinguishing characteristics between the two sections of the subdivision lead to the conclusion that the north and southern segments of the subdivision ought to be regarded as two distinct neighbourhoods."

The learned judge then quoted with approval a passage from Morgan J which was equally eloquent. It runs thus:

> "To satisfy the estate agents test I would say that a purchaser of a house on the south side of Norbrook Drive expects to get privacy, seclusion, a view on either side of his house of beautiful gardens and to enjoy peace and quiet occasioned by low occupancy in a place where private single-family dwelling houses exist. If that is right, then I am constrained to find that there are special peculiarities

> "in features and amenities which redound to the benefit of the south side, amenities which are not available to and could not have so been intended for the north side. These lots are on a higher level than the north side which would tend to give them a special view; there are facilities for walking on the golf course with its beautiful green grass and lush vegetation. The spaciousness of these lands and that of the golf course in front of them attracting privacy, seclusion and quietude creating an enormous aura of calm and peace, all these are undoubtedly amenities not available to the north side. This area must have been intended by the covenants to create and possess a tone and character of its own far different from the area on the other side to which many of these amenities are limited if at all."

Then there is a slight disagreement on a further limitation. Morgan J said:

> "I therefore conclude that 'neighbourhood' in the context of this case consists of those houses only in the sub-division on the south side of Norbrook Drive numbers 20 to 74 being even numbers only and fronting the Constant Spring Golf links as appears on the planametric map."

Then Harris J said:

> "I feel constrained to state that Morgan J's approach was correct. I must however differ with regard to that part of her finding in which she confined the neighbourhood to lots 20-74. In my opinion, the neighbourhood incorporates all lots facing the golf links which are lots 2 to 74 (even numbers only)."

In this instance, Morgan J's finding is to be preferred. It is supported by one of the objectors' witnesses McDaniel, and Mr. Braham for the objector Chang, in his submission, also gave his support to that finding.

Here is how the relevant evidence emerged from McDaniel's affidavit:

> "**10.** That it is my opinion that at the time that the subdivision of Constant Spring Estate took place it was the intention that lots of land immediately bordering

"on the Constant Spring golf course were to be regarded as premium lots for which the purchasers did in fact pay premium prices and in my experience this is also the case in development in countries outside Jamaica.

11. That on my inspection of Norbrook Drive I observed that by and large the dwelling houses that border the Constant Spring Golf course including the Hadeed's land are all very substantial, modern and attractively designed residences enjoying pleasant views of the surrounding areas including the Constant Spring Golf course.

12. That the construction of town houses on the Applicant's land would certainly affect the Hadeed's land and reduce the value of same."

Then eliminating the north side, from his reckoning, he said:

"**13.** That the premises across from the Hadeed's land are Nos. 45B and 45C Norbrook Drive and these premises are below the level of the street and I am of the opinion that developments that took place on these premises would not directly affect the objectors' land because they are out of the view area of the occupants.

14. That it is my opinion that lots in a subdivision which are sited at a lower level than that of a roadway are usually priced lower than those which are at a higher level and I have found this to be case in this instance and therefore subdivision on this side of the road would not have had the same impact as those on the higher side of the road."

At this point he gave his opinion that:

"**15.** Those lands that border the links of Constant Spring Golf Club including from No. 20 to 76 Norbrook Drive, are in excess of 1 acre when originally subdivided and in fact front on the fairways of Constant Spring Golf Club's Course whereas those on the northwestern side are in the main just over one half an acre.

> "**16.** That in my opinion those lots that border and front on the lands of the Constant Spring Golf Club form a separate community from those lots which do not. Those lots which border and front on the fairways of the Constant Spring Golf Club's Golf Course form a quiet and excellent section of St. Andrew. The restrictive covenants were imposed for the specific purpose of preserving to the owners of those lots amenities of an exclusive and quiet area known for its architecturally designed homes of grace and elegance with expensive lawns and gardens affording seclusion from adjoining premises."

The other important word to interpret and apply to the findings of facts in this case is "obsolete". The principles which ought to guide this court on this issue were set out with clarity and elegance by Smith JA, as he then was, in ***Stephenson v. Liverant*** (1972) 18 WIR 323 at 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 & Co. Ltd's*** (1956) 3 All E R 559; (1956) 1 Q B 261 and ***Driscoll v. Church Commissioner for England*** (1956) 3 All E R 802; (1957) 1 Q B 330; (1956) 3 W L R 996, show that a change in the character of the neighbourhood does not necessarily result in the covenant being deemed obsolete. The court is obliged to consider the further question whether the changes are such that the covenants ought to be deemed obsolete. The test laid down by Romer LJ, in the ***Truman, Hanbury*** case (supra) 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. Applying this test to this case, there is no valid basis, in my view, on which to justify a finding that the original object of the

> "covenants cannot still be achieved. All the physical characteristics necessary for a private residential neighbourhood seem to be still substantially intact. In my opinion, there is no reason to disturb the finding of the learned judge that the covenants cannot be deemed obsolete."

I cited this passage with approval in ***Central Mining*** (supra). So did Harris J in the court below.

It is now appropriate to refer to the main covenants which it was sought to discharge or modify. They are as follows:

> "**1.** There shall be no subdivision of the said land.
>
> **3.** No building of any kind other than a private dwelling house with appropriate out-buildings appurtenant thereto and to be occupied herewith shall be erected on the said land and the value of such private dwelling house and out-buildings shall in the aggregate not be less than Two Thousand Pounds.
>
> **4.** The main building to be erected on the said land shall face the roadway or one of the roadways bounding the said land and no building or structure shall be erected on the said land nearer than sixty feet to any road boundary thereof and all gates and doors in or upon any fence or opening upon any road shall open inwards and all out-building shall be erected to the rear of the main building."

The appellant claimed the following modifications would be in conformity with the Act:

> "**1.** There shall be no sub-division of the said land into more than Eight (8) lots.
>
> **3.** No building of any kind other than a private dwelling house with appropriate out-buildings appurtenant thereto and to be occupied therewith shall be erected on each of the said lots and the value of such private dwelling house and out-

> "buildings shall in the aggregate not be less than One Hundred Thousand Dollars.
>
> **4.** The main building to be erected on each of the said lots shall face the roadway or one of the roadways bounding the said land and no building or structure shall be erected on each of the said lots nearer than twenty feet to any road boundary and all gates and doors in or upon any fence or opening upon any road shall open inwards and all out-buildings shall be erected to the rear of the main building."

In interpreting the Act as a whole and the authorities specifically on "obsolete", recognition must be given to the property rights of the objectors. Applicants are generally seeking to derogate from or discharge those rights. These are rights which are recognised and protected in the Act, and since 1962 they are entrenched as fundamental rights in our Constitution. The onus is on the applicant to satisfy the judge in chambers that the discharge or modifications he seeks are in conformity to the Act. In this context, it is useful to cite ***Stannard v. Issa*** (1986) 34 WIR 189 especially since in ground 2 of the Notice of Appeal the appellant suggests that it was by "accident" that the applicant's lot adjoined the objectors'. When the land was subdivided the covenants were in place and any purchaser would have had notice of them. If the court below were to yield to an applicant who chooses to build town-houses on unoccupied lots, shrewd speculators could subvert intangible property rights which have been preserved by careful investment over many years. Property owners who have the benefit of restrictive covenants are entitled to the protection of the law. Turning to the relevant passage in ***Stannard v. Issa***, it reads:

> "It hardly needs stating that, for anyone desirous of preserving the peaceful character of a neighbourhood, the ability to restrict the number of dwellings permitted to be built is a clear benefit, just as, for instance, was the ability in ***Gilbert v Spoor*** (1983) Ch 27 to preserve a view by restricting building. It scarcely requires evidence to demonstrate that the privacy and quietude of an enclave of single dwellings in large gardens is going to be adversely affected by the introduction on adjoining lands of no less than forty additional families."

It would be difficult to contend successfully that the present covenants do not preserve the peaceful character of the neighbourhood. Therefore, the covenants cannot be said to be "obsolete" in relation to the "neighbourhood" or objectors who own property there.

Two impressive passages from the judgment in the court below show that the learned judge grasped the significance of the objectors' claim and that their rights ought to be upheld. The first runs thus:

> "On my visit to the neighbourhood I had observed that single family residence is still the prevailing feature of development in the area. The evidence proffered showed that the majority of the lots have not been made subject to re-subdivision. Even in a case where houses were built at a greater density than originally contemplated in the later stages of a development of an estate which had developed over a long period, the scheme was not rendered obsolete as the inhabitants were broadly on the same footing as those for whom the estate had originally entered, see **Re Harris application** (1964) 16 p & C.R. 185. The discharge or modifications of covenants on some lots have not caused the area to have lost its private residential character, which affords the owners of lots in the neighbourhood the benefit of privacy, tranquillity, peace, seclusion and a view."

The second is as follows:

> "There is evidence that the objectors enjoy a pleasant view of the mountains and surrounding scenery from their respective premises. The plan showing the proposed townhouses to be erected indicate that the units running from north to south across the applicant's land with spaces between each unit would occupy the greater portion of the land. When one stands at the back of the Hadeed' residence, looks to the east, there is a pleasant view of the mountains. Surely, if these townhouses are built they would substantially, or wholly exclude the view of the hills of the Hadeeds to the east. This would certainly deprive them of a right to which they are entitled."

Conclusion

Both in his skeleton arguments and in his submissions before this court, Mr. Morrison in his logical and economical submissions confined himself to the contention that the covenants were now obsolete. He was correct to do so. The other grounds of appeal were unarguable. The objectors were correct. The restrictive covenants are not "obsolete".

The learned judge exercised her discretion correctly pursuant to section 3(1)(a) of the Act. So this court ought to affirm the learned judge's order and dismiss the appeal. The objectors, Mr. & Mrs. Haddeed and Ms. Chang, are entitled to the taxed or agreed costs of this appeal.

PATTERSON, J.A.:

A parcel of land, known as 48 Norbrook Drive in the parish of St. Andrew and registered at Volume 804 Folio 1 of the Register Book of Titles, ("the said land"), is part of a larger parcel known as part of Constant Spring Estate in the said parish, comprised in Certificate of Title registered in Volume 794 Folio 84. It is one of the lots into which the larger parcel of land was sub-divided and sold to various proprietors for private residential purposes. Each lot was transferred subject to a number of restrictive covenants endorsed on the Certificate of Title which were made to run with the land and enforceable by the registered proprietor for the time being of the other lots.

Carlton Fitz-Roy Livingston and Ruby-Lee, his wife, were registered as the proprietors of the said land on the 11th October, 1965. By way of an Originating Summons dated 17th April, 1990, they sought an order to modify a number of the restrictions affecting the said land. The modifications were necessary to permit the sub-division of the said land into lots for them to construct a number of town-houses. Anis Hadeed and Shirley Hadeed, the registered proprietors of No. 46 Norbrook Drive, and Alice May Chang, the registered proprietor of No. 50 Norbrook Drive, being persons entitled to the benefit of the restrictive covenants, objected to the modifications. But before the matter came on for hearing the proprietors of No. 48 Norbrook Drive transferred all their estate and interest in the said land to Regardless Limited. The transfer was registered on the 4th May,

1990, and Regardless Limited was substituted as the applicant by virtue of an order of the court made on the 29th November, 1991.

The application was heard in Chambers before Harris, J. (Ag.) (as she then was) on several days between the 3rd May, 1993 and 12th May, 1994. On the 27th July, 1994, the learned judge delivered a fully reasoned judgment. The objectors had triumphed; the court order reads:

> "The application fails. The Originating Summons is dismissed with costs to the objectors. Certificate of Counsel granted in respect of both objectors."

It is against that order that the applicant appealed and sought an order that:

> "The said Judgment be set aside by granting an Order for modification and discharge of the restrictions as prayed in the Further Amended Originating Summons filed herein."

The applicant filed five grounds of appeal, but Mr. Morrison, Q.C. confined his arguments to the two crucial grounds only:

> "1. The Learned Trial Judge was in error in finding that the restrictive covenants ought not to be deemed obsolete since the modifications and discharges of the restrictive covenants in the neighbourhood as found by the Learned Trial Judge were so widespread and so fundamental in the changes they effected that the scheme was so fundamentally altered as to be no longer recognisable nor the restrictive covenants enforceable in the form as originally imposed.
>
> 2. The Learned Trial Judge erred in her findings in that by the mere accident of the lots of the First and Second Respondents being adjacent to the Applicant/Appellant's lot, she found that they were entitled to the benefit of the original restrictive covenants, which benefit was no longer capable of being enjoyed or enforced by other owners of lots in the neighbourhood. In so finding, the Learned Trial

> "Judge failed to have any or any due regard to the changes occasioned by the modifications and discharges by the Court of the restrictive covenants in the neighbourhood."

The original sub-division consisted of 43 lots which were issued from the parent title registered at Volume 794 Folio 84 of the Register Book of Titles; lots 1 to 28 were on one side of Norbrook Drive, and lots 29 to 43 on the other side. The street numbers did not follow the lot numbers; consequently, the lots numbered 28 to 1 became known as Nos. 20 to 74 Norbrook Drive (even numbers only), in that order, and the lots numbered 29 to 43 became known as Nos. 17-45 Norbrook Drive (odd numbers only) in that order.

It was necessary for the learned judge to identify the neighbourhood within which the said land fell since the applicant was contending that:

> "**(a)** by reason of changes in the character of the neighbourhood, the restrictions without modification ought to be deemed obsolete."

In my view, the learned judge applied the right principles in deciding the issue, but since premises known as Nos. 2-18 Norbrook Drive (even numbers only) were not a part of the sub-division in question, the evidence did not disclose that those premises were subjected to the restrictions imposed on the lands within the sub-division. It is my judgment, therefore, that the neighbourhood, for the purposes of the application, should be confined to the premises known as Nos. 20-74 Norbrook Drive (even numbers only). This, however, will have no bearing on the outcome of the appeal, since the learned judge's decision in this regard was not questioned.

Having decided on the neighbourhood, the next issue that fell to be decided was whether there had been changes in the character of that neighbourhood. The learned judge examined the evidence and her finding is recorded in her judgment in this fashion:

> "The fact is, changes have taken place in the character of the neighbourhood. It is immaterial whether these changes had taken place 350 yards or 150-200 feet from applicant's land. In my opinion, the applicants have demonstrated that there have been changes in the character of the neighbourhood, and I am satisfied that there have been such changes."

Here again, the appellants did not contend that the learned judge was wrong in her finding of fact. There was ample evidence to support such a finding. The issue then must be whether there was evidence that should have satisfied the learned judge that by reason of the changes in the character of the neighbourhood, the restrictions ought to be deemed obsolete. Mr. Morrison, Q.C. frankly admitted that, given the way the learned judge had dealt with the matter, he could not take the matter higher than the following submission:

> "In light of the finding that the tendency to re-sub-division and the construction of multi-dwelling units had the result of effecting a change in the character of the neighbourhood, the learned judge erred in not going further to find that that change was so substantial so as to render the covenants obsolete."

The critical covenants affecting the land which the applicant sought to be modified are these:

> "1. There shall be no subdivision of the said land.
>
> 3. No building of any kind other than a private dwelling house with appurtenance out-buildings

> "appurtenant thereto and to be occupied herewith shall be erected on the said land and the value of such private dwelling house and out-buildings shall in the aggregate not be less than Two Thousand Pounds.
>
> **4.** The main building to be erected on the said land shall face the roadway or one of the roadways bounding the said land and no building or structure shall be erected on the said land nearer than Sixty feet to any road boundary which the same may face nor less than fifteen feet from any other boundary thereof and all gates and doors in or upon any fence or opening upon any road shall open inwards and all out-buildings shall be erected to the rear of the main building."

The modified covenants would read:

> **"1.** There shall be no sub-division of the said land into more than Eight (8) lots.
>
> **3.** No building of any kind other than a private dwelling house with appropriate out-buildings appurtenant thereto and to be occupied therewith shall be erected on each of the said lots and the value of such private dwelling house and out-buildings shall in the aggregate not be less than One Hundred Thousand Dollars.
>
> **4.** The main building to be erected on each of the said lots shall face the roadway or one of the roadways bounding the said land and no building or structure shall be erected on each of the said lots nearer than twenty feet to any road boundary and all gates and doors in or upon any fence or opening upon any road shall open inwards and all out-buildings shall be erected to the rear of the main building."

The restrictive covenants were imposed for the preservation of the neighbourhood as a high-class single-family private residential area. The applicant bought the land with full knowledge of the restrictive covenants

which run with the land. In order for the application to succeed, the burden is on the applicant to bring proper evidence to satisfy the court that at least one of the alternatives mentioned in section 1(a), (b) & (c) of the Restrictive Covenants (Discharge and Modification) Act is applicable. In this case, the relevant evidence must prove that the restrictions ought to be deemed obsolete. The learned judge was guided by the principles enunciated in the case ***In re Truman, Hanbury, Buxton & Co. Ltd's application*** [1956] 1 Q.B. 261.

In that case, Romer, L.J. considered the meaning to be ascribed to the word "obsolete", when used in reference to restrictive covenants. The character of the property or the neighbourhood had changed over the years that the covenants were in force, and the application for modification was sought on the ground that the covenant in question ought to be deemed obsolete in the circumstances. This is what Romer, L.J. said (p. 272):

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

Section 84(1)(a) of the English Law of Property Act is in terms similar to the provisions of the Restrictive Covenants (Discharge and Modification) Act - section 1(a). The learned judge found as a fact that "over the years orders have

been made by the court permitting the sub-division of several of the original lots to accommodate the construction of townhouses and apartment complexes." Multiple cottages were built on premises Nos. 22, 24 and 26 Norbrook Drive to house the Soviet Embassy; three town-houses were built on Nos. 34 and 36. The covenants imposed on No. 42 have been modified to accommodate town-houses. But the learned judge opined that this act in itself does not render the restrictions valueless. This is what she said:

> "On my visit to the neighbourhood I have observed that single family residence is still the prevailing feature of development in the area. The evidence proffered showed that the majority of the lots have not been made subject to re-subdivision. ... The discharge or modification of covenants on some lots have not caused the area to have lost its private residential character, which affords the owners of lots in the neighbourhood the benefit of privacy, tranquility, peace, seclusion and a view."

The learned judge found as a fact that:

> "The applicants have not shown that the privacy and peace of the objectors would not be eroded, or, that view would not be impeded. The preservation of the high quality and tone of the neighbourhood as a private high-class residential one is still attainable. The right to peace, privacy and a view still affords a real protection to those who were entitled to compel obedience to the covenants. The applicants have not established that the character of the neighbourhood has so entirely been altered, that, it would be inequitable and useless to insist on the observance of covenants which are valueless. The covenants cannot therefore be said to be obsolete."

I am in full agreement with the conclusion arrived at by the learned judge. I am satisfied that there was no sufficient evidence adduced by the

applicant which could satisfy the learned judge that the restrictions ought to be deemed obsolete. It followed, therefore, that there was no other course open but to dismiss the application on that score. The other issues argued before the learned judge were not pursued before us, and in my opinion, rightly so, as the resolution of those issues cannot be impeached.

It is my judgment that the appeal must be dismissed. The respondents must have their costs of this appeal to be taxed if not agreed.

WALKER, J.A. (AG.)

I have had the advantage of reading the judgment of my brother Downer, J.A. in which the facts and history of this case have been fully rehearsed. I agree entirely with his conclusion and also with the reasons advanced by him for reaching that conclusion. However, I wish, respectfully, to add a few observations of my own.

In support of this appeal five grounds of appeal were filed but at the outset Mr. Morrison, Q.C. abandoned grounds 3 and 4. Having done so, he proceeded to argue grounds 1 and 2 which read as follows:

> "1. The Learned Trial Judge was in error in finding that the restrictive covenants ought not to be deemed obsolete since the modifications and discharges of the restrictive covenants in the neighbourhood as found by the Learned Trial Judge were so widespread and so fundamental in the changes they effected that the scheme was so fundamentally altered as to be no longer recognisable nor the restrictive covenants enforceable in the form as originally imposed.
>
> 2. The Learned Trial Judge erred in her findings in that by the mere accident of the lots of the First and Second Respondents being adjacent to the Applicant/Appellant's lot, she found that they were entitled to the benefit of the original restrictive covenants, which benefit was no longer capable of being enjoyed or enforced by other owners of lots in the neighbourhood. In so finding, the Learned Trial Judge failed to have any or any due regard to the changes occasioned by the modifications and discharges by the Court of the restrictive covenants in the neighbourhood."

In urging these grounds Mr. Morrison's presentation was, characteristically, simple and concise. It was structured within a narrow compass and embraced a submission that the learned trial judge, having expressly found that the character of the neighbourhood in question had changed, should have gone on further to find that

such changes as had been found to have taken place were so extensive as to render obsolete the restrictive covenants as to which modification and discharge was being sought.

Section 1(a) of the Restrictive Covenants (Discharge and Modification) Act is relevant here. That section provides as follows:

> "A Judge in Chambers shall have power, from time to time on the application of the Town and Country Planning Authority or of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied:
>
> > (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Judge may think material, the restriction ought to be deemed obsolete; or

It is against this legal background that the learned trial judge found that over time changes in the character of the neighbourhood of Norbrook Drive had, indeed, occurred. At pp 17-18 of her judgment Harris J found as follows:

> "It has been established that the character of a neighbourhood derives from its style, arrangement and appearance of its houses and from the social customs and habits of its inhabitants.
>
> The neighbourhood was originally designated to be occupied by single family residence only. It has been shown by the applicants, that over the years orders have been made by the court discharging or modifying covenants to accommodate construction of multi-family residence by splintering of the lots.
>
> It has been further established by the applicants that consequent on the fragmentation of lots, an

apartment complex has been constructed on No. 14 Norbrook Drive, multiple cottages, have been built on 20 - 26 Norbrook Drive, three sets of town houses have been erected on both 34 and 36 Norbrook Drive and seven town houses have been erected on No. 42 Norbrook Drive. They have also shown that 42 Norbrook Drive which has an area of 48,248.6 square feet was sub-divided to create a density of 6,892.6 square feet to each housing unit. 64 and 66 Norbrook Drive which are still empty lots, comprise 92,684 square feet but the covenants have been modified for its sub-division into lots not smaller than 2100 square feet and approval had been granted by the Kingston & St. Andrew Corporation for the erection of 17 townhouses thereon. The density resulting from erection of the townhouses would be 5,452 square feet of land to one housing unit. Premises No.56 Norbrook Drive had been sub-divided into 2 lots.

There is a general tendency towards re sub-division of the lots in the neighbourhood. The fragmentation of the lots have to some degree altered the physical state of the neighbourhood. These alterations have resulted in certain developments having taken place or about to take place in the neighbourhood which have created a difference in the style, appearance and arrangement of the houses. Whereas, previously where there were single family dwellings on some lots, there are now multiple dwellings. On other lots where single family units ought to have been built, multi-family residence in accordance with existing orders for modification and discharge of covenants will be constructed. The social customs and habits of the residents in the neighborhood is developing along the paths of erecting units to accommodate duplexes and apartment complex instead of single family residence.

The changes of several of the original lots by virtue of subdivision, re-subdivision of these lots and by the construction of, or, proposed construction of multi-family units and the layout and designs of the units have had a remarkable impact on the character of the neighbourhood. It is also obvious from the affidavits of both Mr. McDaniel and Mr. Pitter that they recognized that significant changes have taken place in the neighbourhood. Mr. McDaniel went as far as stating that 'major

> changes have taken place in the relevant area to the applicants' land' but proceeded to add a caveat by introducing an element of distance between the applicants' land and premises numbered 34, 36, 42, 56, 64 and 66 Norbrook Drive (all of which have been re-subdivided) as a measure to counter his acknowledgment of changes in the neighbourhood. The fact is, changes have taken place in the character of the neighborhood. It is immaterial whether these changes had taken place 350 yards or 150 - 200 feet from applicants' land. In my opinion the applicants have demonstrated that there have been changes in the character of the neighbourhood, and I am satisfied that there have been such changes."

Should she then have gone on further to find that such changes required that the relevant restrictive covenants should be deemed obsolete? In my judgment a question such as this must, in every case, necessarily depend upon the particular facts of that case, and be determined ultimately by the trial judge's interpretation and assessment of those facts.

A similar question arose for determination in **Stephenson v. Liverant** [1972] 18 W.I.R 323. There Smith, J.A. [as he then was] at p. 336 said this:

> "The cases of **Re Truman, Hanbury, Buxton & Co., Ltd's Application** [1965] 3 All E.R. 559, [1956] 1 Q.B. 261 and **Driscoll v. Church Commissioners for England** [1956] 3 All E.R. 802; [1957] 1 Q.B. 330; [1956] 3 W.L.R. 996 show that a change in the character of the neighbourhood does not necessarily result in the covenant being deemed obsolete. The court is obliged to consider the further question whether the changes are such that the covenants ought to be deemed obsolete. The test laid down by Romer, L.J., in the **Truman, Hanbury case** 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 the instant case, the learned trial judge addressed her mind to such a question and, having done so, came to the conclusion that the relevant restrictive covenants could not be deemed obsolete. She gave detailed reasons for her decision which was reached after what was, obviously, the most careful consideration of the evidence and the relevant authorities, including the cases referred to by Smith, J.A. (supra). And, quite correctly, she applied the test laid down by Romer, J in **Truman's** case (supra). It is clear, therefore, that she followed the right principles in coming to her decision, a decision with which I find myself in complete agreement. For these reasons I would dismiss this appeal with costs.