

BARBADOS.

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

No. 2163 of 2003.

IN THE MATTER of all THAT certain piece or parcel of land being the Lot numbered 153 situate at Rowans Park (Section 4) in the parish of Saint George in this Island containing by admeasurements 1,123.1 square metres which represents a metric conversion of 12,058 square feet on a Plan first certified on the 5th day of October 1972 by C.C. Austin, Land Surveyor and secondly certified on the 24th day of June 2003 by Kenneth D. Ward, Land Surveyor (hereinafter called "the said land").

AND IN THE MATTER of an application by Darcy Wilton Boyce to discharge and/or modify certain restrictive covenants contained and/or mentioned in a Conveyance dated the 31st day of March 1977 made between Rowans Park Limited of the ONE PART and DARCY WILTON BOYCE etux of the OTHER PART recorded in the Registration Office of this Island on the 27th day of April 1977 as Deed No. 2847-2848 of 1977 (hereinafter called "the said conveyance").

Before the Honourable Mr. Justice Lionel Greenidge, Judge of the High Court.

Mr. Philip A. Pilgrim Attorney-at-law, in association with Ms. Susannah Thompson Attorney-at-Law, and Mrs. Joyce Griffith Attorney-at-Law, for the Applicant.

2004: January 29

June 3

DECISION

THE BACKGROUND

[1] This is an application made under section 196 of the Law of Property Act Cap. 236 of the Laws of Barbados to modify and/or discharge certain restrictive covenants imposed in 1977 so as to facilitate the erection of four townhouses on Lot 153 Rowans Park. These restrictions are found on pages 5 to 7 in paragraphs 'b', 'c' and 'g' of the above-captioned conveyance they read thus:

“ (b) not at any time to erect or maintain or cause or permit to be erected or maintain on the said lot or parcel of land hereby assured or any part thereof buildings or erection other than those comprising one dwelling house with or without boundary walls, gates, fences, garages, servant rooms and other buildings for use. In connection therewith which dwelling house and outbuildings shall be subject to the following restrictions namely:-

- (i) no such dwelling house garage servants' rooms and outbuildings shall be erected other than of freehold construction;
- (ii) no such dwelling house shall be of an original cost (exclusive of the cost of the land on which it stands and of such boundary, walls, gates, fences, garages, servants rooms, and other out buildings aforesaid) of less than twenty-five thousand dollars;
- (iii) such dwelling house and all alterations and additions thereto shall not be constructed or made otherwise than in accordance with Plans and specifications approved by the vendor and the vendor shall issue a certificate of such approval provided however that the word vendor only shall not be deemed to mean or include its successors or assigns and further that such approval shall cease to be required should the vendor go into liquidation.

(c) not at any time to use or permit to be used the said lot or parcel of land or any other part thereof or any buildings or erections thereon for the carrying on of any trade or business whatsoever;

(g) that the foregoing covenants or restrictions shall be binding in perpetuity upon the said lot or parcel of land and every part thereof and on the purchasers and the purchasers' heirs and assigns and all future owners thereof so far as the law will permit and shall enure for the benefit of and be enforceable by the vendor its successors and assigns and any person or persons claiming title to or interest in any of the other lots of the said building estate who may be aggrieved by the breach or neglect of any such covenant or restrictions.”

[2] Rowans Park is located in the central parish of Saint George and includes four separate residential divisions developed on the former lands of the Rowans Plantation.

[3] The restrictions were imposed by Rowans Park Limited upon sale of the said Lot in 1977 to the applicant Darcy Boyce and his wife Cicely Boyce.

[4] Lot 153 is a rectangular plot of land located in the north-eastern end of section 4 of a subdivision at Rowans Park. The lot consists of 1122.7 square metres, which is a conversion from 12,085 square feet including 243 square metres of road reserve. Lot 153 is currently undeveloped and covered with grass and low bushes.

[5] Planning permission was granted on 3rd April, 2003 for Mr. Boyce first to subdivide the said Lot into four separate lots and erect on these four said lots four townhouses. There is no evidence of any objection to the present application.

The issues for determination are as follows:-

- (1) Whether the particular sort of residential user required by the covenants is obsolete
- (2) (a) whether the continued existing of the restrictions would impede the reasonable user of the land
- (2) (b) whether the proposed development at Lot 153 is a reasonable user of the land.
- (3) Whether the persons entitled to the benefit of the restrictions would be injured by its proposed discharge and/or modification.

THE EVIDENCE

(i) Mr. Boyce's Affidavits

[6] Mr. Boyce filed two affidavits in this matter.

The first affidavit was filed on November 28th 2002 and sets out the circumstances surrounding Mr. Boyce's application to the Town and Country Planning Office (TCPO) for permission to subdivide the said Lot into four separate lots and erect four townhouses on the four subsequent lots. Annexed to this affidavit are the permission granted by the TCPO to subdivide Lot 153 and erect the said townhouses along with the proposed subdivision plans of the said Lot 153.

[7] A further affidavit was filed on 21st May 2004. Mr. Boyce in this affidavit sets out the reasons for the present application. At paragraph 3 Mr. Boyce states that in Rowans Park, like other developments in Barbados there is an increasing demand for residential accommodation. He further states that the restriction at paragraph 2(b) (iii) of the conveyance **“serves no useful purpose in the twenty-first century”**

[8] At paragraph 8 he contends that the continued existence of the said restriction would impede the reasonable user of Lot 153 and further, that due to changes in the character of the environs, the proposed discharge/modification of the restriction **“will not injure the persons entitled to the benefit of the restriction and it ought to be deemed obsolete”**.

[9] In addition, Mr. Boyce contends that the land will be better utilized by way of providing multiple dwellings which are compatible with the existing residential uses; and that such multiple dwellings would afford housing for a greater number of persons than one dwelling. In this affidavit Mr. Boyce refers to a report compiled by MS. Yolanda Alleyne of Alleyne and Alleyne Associates Inc. which is a comprehensive study and analysis of the Rowans Park Development in general and specifically as it relates to Lot 153.

(ii) Ms. Alleyne Affidavit

[10] Miss Alleyne filed an affidavit in this matter on May 26th 2004. Ms. Alleyne has a PhD in Natural Resources Management and an MPhil in Urban Design and Regional Planning. She has been practicing as a town Planner since 1986 and is a professional member of the Barbados Town and Country Planning Society. By all accounts Ms. Alleyne is qualified to give evidence in relation to the present application. In her affidavit Mr. Alleyne contends that in 1977 when Mr. and Mrs. Boyce purchased Lot 153, the covenants would have been made and relevant then in the context of a vision for the area, to reflect the existence of exclusive single dwelling units on each individual lot. She contends that the wider development context for the use of the lands at Rowans Park has **“fundamentally changed since the 1960's and 1970's when the development of Rowans residential estate was approved”**.

[11] She states that there is now a greater emphasis placed on providing housing for Barbadian citizens she points out that there is an increasing number of multi-unit dwellings in the Rowans Park development.

[12] Ms. Alleyne states at paragraph 26 of her affidavit that the National Development Plan 2003 has designated the Rowans/Walkers/Glebe area as a “**rural settlement with growth potential**” for inter alia, identifying conditions for new developments within these areas. In addition, she points out that the restrictions which were developed in the 1960’s are unable to reflect the role of communities such as Rowans Park in accommodating a range of residential arrangements and as such impedes the reasonable user of the land.

She adds that there has been a 10.8 per cent growth in the population of St. George between the years 1980 and 2000 which reflect an increasing demand for residential accommodation in that parish, inclusive of Rowans Park. In her opinion, these factors show that the continued existence of the restrictions serves no useful purpose today and impedes the reasonable use of the land by restricting the proposed development.

iii. **Report of Alleyne Planning Associates Inc. dated April 2004.**

[13] This report is compiled by Ms. Alleyne and annexed to her affidavit. It provides a description of Lot 153 in relation to the Rowans Park development as well as provides a history of the development of the area.

[14] In it Ms. Alleyne notes that there has been a significant level of residential development in Rowans Park since the land was subdivided in 1972. She makes reference to the Barbados National Physical Development Plan of 2003 in noting that the approach to the development of the Island’s lands is different today than in the 1970’s when Rowans’ s Park was first developed.

The said plan at section 3.11.3.2. sets out the policy with respect to residential development viz: namely

“It is generally envisaged that residential uses will be primarily single family dwellings; however, multiple dwellings or apartments may be permitted on appropriate sites as long as they are generally compatible with and do not negatively impact adjacent residential uses.”

[15] In fact, her report identifies as the present situation in Rowans Park several specific instances of Multiple-unit dwellings in Rowans Park and further instances of applications that have been made to the Chief Town Planner for the approval and erection of other multi-dwelling units. It identifies the increasing development occurring vis-avis the growth of multi-unit dwellings as contributing to the change in the character of the neighbourhood. In addition, she determines that the proposed development is a reasonable user of the land when one considers the national development plan as well as the national economic plan. In the economic context, she suggests that increasing land values have seen landowners seeking economic returns from their lands. Additionally she cites the importance of community accommodation such as the proposed development as a reasonable and logical counterpart to the tourism industry’s need for accommodation.

ANALYSIS OF THE EVIDENCE

[16] The Rowans Park neighbourhood has changed significantly in character over the years since it became a building estate. Indeed this change is ongoing. Since the first multi-unit dwelling was erected over 10 years ago, there has been an increasing growth in this type of dwelling. Mrs Alleyne observes that more and more people have been moving into the island’s central parishes such as Saint George and this has resulted in an increase in

the demand for residential accommodation.

- [17] These changes are a response by landowners in the area to the increasing need for residential accommodation in Rowans Park and are consistent with other established and growing residential areas on the island where second and third-dwelling units have become more common within the last ten years.
- [18] Such changes were envisaged in the context of national development as the need arose for the preservation of agricultural lands coupled with the emphasis placed on providing housing for citizens. As such, residential arrangements such as apartments and townhouses have increased in established residential areas.
- [19] As a result of increasing land values land owners are now seeking economic returns from their landownership.
- [20] Further, in view of the economic importance of the tourism industry, the proposed development at Lot 153 may be seen as a vital response to the need for accommodation. Ms. Alleyne cites the example of Barbados' success in hosting certain events of International Significance - proposed International Cricket Federation's world Cup in 2007.
- [21] Indeed development such as that proposed by Mr. Boyce can aptly provide accommodation for the large influx of visitors expected in 2007. In addressing Miss Alleyne observes that the proposed development will have minimal impact on current or future residential use given the fact that there are already numerous multi-unit dwelling in Rowans Park.

THE APPLICABLE LAW

[22] Section 196 of the Property Law Act, Cap. 236 of Law of Barbados states:

- (1) A Judge in Chambers may from time to time, on the application, in the prescribed manner,of any person interested in any freehold land affected by any restriction arising under a covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially discharge or modify any restriction... on being satisfied.

(a) that because of changes in the character of the

property or the neighbourhood or the circumstances of the case which the Judge may think material, the restriction ought to be deemed obsolete; or

(b) that the continued existence of such restriction or the continued existence thereof without modification would impede the reasonable user of the land for public or private purposes without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of such restriction; or, as the case may be, the continued existence thereof without modification; or

(c) ...

(d) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.”

The restriction ought to be deemed obsolete

[23] In order to act under this provision the Court must be satisfied that the restriction “**ought to be deemed obsolete**”. To reach this decision, the Court must take into account in this instance, the changing character of the Rowans Park neighbourhood. In determining whether the restrictions are obsolete, one must question whether the restrictions are now proving to be absurd given the occurrence of events on the surrounding premises. The issue here is whether the particular sort of residential user required by the covenants is obsolete.

[24] **Re Wards Construction (Medway) Ltd’s Application (1994) 67 P. & C. R. 379** concerned an application for the modification of a restrictive covenant imposed in 1978 permitting the erection of one bungalow only. The application was brought because planning permission has been obtained to permit the erection of five houses on the application site. It was contended that the restriction was obsolete by reason of the changes in the character of the neighbourhood. It was advanced by the applicant that the gradual growth and extension of the neighbourhood in conjunction with dense development had brought about an irreversible change in the character of the neighbourhood. Evidence of this development was produced which showed the layout of roads as well as an increase in the number of dwellings. There was also evidence to suggest that much greater emphasis was being placed on making the optimum use of land in existing build-up areas by exploiting in-fill and redevelopment opportunities. It was also acknowledged that the only practical benefit which the covenant conferred at the time was to limit the amount of traffic in the application site, but that was of little value. In holding that the covenant was obsolete due to the changes in the character of the neighbourhood, the Tribunal expressed the view that there was no real public interest for the objecting Council to protect. In addition, there was no practical benefit or advantage to the Council from the restriction. The reason for the imposition of the restriction was unclear, but if it was to preserve the status quo, that status quo ante had been subject to radical change since 1978 by the developments all around and as such the originally expressed purpose for the restriction could no longer be fulfilled.

[24] Similarly, in **Re F. & H. Joyce, Ltd’s Application (1955) 7 P. & C. R. 245**, the applicant were interested in certain parcels of land, each of which was subject to covenants restricting its user as to enable only one house to be built on approximately one acre of land. In discharging the covenants, the Tribunal had regard to the change in the character of the application site as a result of the development of the surrounding district.

[25] Rowans Park is a residential neighbourhood and the covenant at 2(b) states that only one house may be constructed on a parcel of land. Construed literally this covenant is obsolete against the background of the increasing demand for housing as evidenced by the erection within the last ten years or so of multi-dwelling units; these said units are now a prominent feature of the Rowans Park neighbourhood. For these reasons I find that

the restriction serves no useful purpose today and should be discharged.

REASONABLE USER

[26] The National Development Plan contemplated the situation which is occurring in the Rowans neighbourhood vis-avis the growth of multi-dwelling units in recent years. Mr. Boyce contends and Mrs. Alleyne's evidence supports this contention, that the proposed development is a reasonable user of the land. In light of the above reasons it must be considered whether the proposed development at Lot 153 is a reasonable use to which the land can be put.

[27] The test was stated in **Re Henderson's Conveyance [1940] Ch. 835, where Farwell J** said:

"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."

[28] It was again restated in **Ghey & Goulton's Application [1957] 2 Q.B. 659, at p. 653 where Lord Evershed M.R.** said:

"I think it must be shown ...that the continuance of the unmodified covenant hinders, to a real, sensible degree, the land being reasonably used."

[29] In **Re Snowden's Application (1954) 7 P & C.R. 145**, the applicant owned a large house which was subject to a covenant forbidding its user except as a single private dwelling-house. The applicant wished to convert it into flats but there were objections that the proposed alteration would not be in tone with the character of the neighbourhood and would depreciate the value of the houses. The Applicant to modify the covenant was granted on the ground that the restriction impeded the reasonable development of the house. The tribunal accepted the evidence of the applicant that given the conditions at the time, the house was unsaleable as a single-dwelling unit. In light of the fact that one large house in the area had already been converted into flats the Tribunal did not think that the proposed alteration would be detrimental.

[30] Similarly, in **Re Kohout's Application (1952) 7 P.& C.R. 65** there was a covenant forbidding the user of the application site except for purposes of private residence. The site had seen increasing development with the neighbourhood changing from residential to the busiest shopping area in the district. In light of these existing economic circumstances, it was held that the covenants impeded the reasonable user of the property, which was now impossible as a single private residence. The Tribunal was of the view that although the restriction permitted the user of the premises for a wide range of professional purposes, unless it was modified, it would impede the reasonable user of the land for private purposes without securing practical benefits to other persons.

[31] Rowans Park has developed significantly since the 1970's when it was first developed. The growth of the multi-

dwelling, unit is an obvious response to the need for residential accommodation in this neighbourhood. The growth is precipitated by the land owners in the neighbourhood themselves who are obviously seeking, returns from their land in the form of such multi-unit dwellings.

[32] In addition, the economy of Barbados has within the last few years been primarily focused on tourism as its principle foreign income generator. Developments such as that proposed by Mr. Boyce are a viable economic response to the need for accommodation in the tourism sector. In light of these economic and development considerations, the proposed development at Lot 153 is not only a reasonable user of the land, but it fits within the National Development plan. Mr. Boyce has therefore satisfied the test as stated above by Lord Evershed. As such the said restrictions should be modified and/or discharged accordingly.

Will not injure the persons entitled to the benefit of the restriction

[33] It is contended by Mr. Boyce that the proposed discharge/modification of the restrictions will not injure the persons entitled to the benefit of the restriction. If the proposed development does directly injure anyone entitled to the benefit of the said restriction then his application cannot succeed.

[34] In **Re S. Bernards Park Ltd's Application (1963) 15P. & C.R. 90** there was a restriction that "any message or building thereon (the application site) shall be used as and for a private residence only. The applicant sought the modification of the restriction so as to permit the erection of a block of twelve flats with garages on about half an acre of land. The evidence presented showed that the proposed development was the only practical development for that area. Further evidence suggested that the development proposed would fit right in with the development which had already taken place at the application site. In granting the application, the Tribunal looked at the fact that the neighbourhood had materially altered due to ongoing development since 1873. As a result, it was thought that the proposed development could do no more than any other development which might have been carried out in compliance with the restrictions. In addition, the modification would have no injurious effect on the objectors (the persons entitled to the benefit of the restriction) who lived a quarter of a mile away.

[35] In **Re Zopat Development's Application (1966) 18 P. & C R. 156** the owner of a house sold part of its garden subject to a restriction that no more than two houses should be erected thereon. One house was built on the restricted land and the owner then sold part. A house had been erected on this part thus fulfilling the number of houses permitted by the restriction. The application site, which was part of the owner's grounds, was later sold. There was planning permission for the erection of a house on the site hence a modification of the restriction was sought. The covenant had been imposed for the benefit of the lands retained by the vendor. The objector submitted that to modify the covenant would be an imposition of his privacy since a new house would be directly overlooking his premises. The tribunal granted the application on the ground that there would have been no material effect on the objector's privacy. In his decision **Erskine Simes Esq., Q.C. stated at p. 159** in relation to the invasion of the objector's privacy that "it is a case where the prospect terrifies while the reality will prove harmless".

[36] The location of Lot 153 on the north-eastern edge of the Rowans Park development means that the proposed construction and use of the land will not intrude on other land users. There exists in the area good infrastructure and alternative access routes to the site so that any increase in vehicular traffic will have a minimal impact. In addition, the proposed buildings will be of the same design standards as required for developments such as Rowans Park, so that any difference between the proposed townhouses and these structures already built will be negligible.

[37] Mr. Boyce at paragraph 12 of his first affidavit undertakes that the conditions stipulated by the Chief Town Planner in his Permission will be duly executed to the satisfaction of the Chief Town Planner. Such conditions include the landscaping of the area and the provisions of footpaths which would enhance the aesthetic value of Lot 153 and its surrounding neighbourhood.

[38] As such, there will be no harm caused by the proposed development whether the residents or to the overall amenity of the area where multi-dwelling units already exist. As such no useful purpose can be served by enforcing the restrictions and they should be discharged and/or modified accordingly.

CONCLUSION

[39] When the Boyce's purchased Lot 153 in 1977 the covenants were relevant then in the context of the vision for the area viz the existence of single dwelling units on each plot. At present, Rowans Park is not the same Rowans Park as that of 1977. In deed the character of the neighbourhood has changed and is continuing to change.

[40] There is now a greater emphasis placed on providing housing for Barbadian and others and this is evidenced by the construction of several multiple-dwelling units in Rowans Park which have had the approval of the Chief Town Planner.

[41] Such dwellings were contemplated by the National Development Plan. As such, the continuance of the restriction does not reflect the important role which communities such a Rowans Park play in providing residential accommodation.

[42] In addition, when one considers the importance of providing adequate accommodation not only for citizens but in relation to the tourism sector, it is evident that the proposed development constitutes a reasonable user of the land which will have a minimal impact on the Rowans Park neighbourhood.

[43] For these reasons I find that the restrictive covenants attached to lot 153 Rowans Park, St. George are obsolete in the light of development in Rowans Park today, in so far as it relates to the construction of a single unit dwelling; that it continued existence of the restriction would impede the reasonable user of the lot; that the proposed development of lot 153 Rowans Park is a reasonable user of the land; and that no injury is likely to be caused to persons entitled to the benefit of the covenants, that Notice by advertisement having been given of the application for the modification or discharge of the covenants and since there has been no objection thereto from anyone, I think it would be reasonable to recognize the realities in the choice and change in residential

accommodation in Rowans Park by discharging the restriction relating to construction of a single unit dwelling on lot 153 and modifying the covenant to permit development of the said lot by the construction of multi unit dwellings approved by the Chief Town Planner.

Lionel D. Greenidge

Judge of the High Court.