

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2023/0123 (formerly GDAHCV2020/0290)

BETWEEN:

CHRISTINE BRATHWAITE

Claimant

and

LEON DANIEL

Defendant

Before:

The Hon. Mde. Justice Agnes Actie

High Court Judge

Appearances:

Ms. James Bristol K.C. with Ms Shireen Wilkinson for the Claimant

Mr Dashan Ramdhani K.C. with Mrs Sabrita Khan-Ramdhani for the
Defendant

2023: July 18;
2024: February 14.

JUDGMENT

- [1] **ACTIE, J.:** This case raises the issue of a breach and enforcement of a restrictive covenant over a lot of land situate at L'Anse Aux Epines, St. George.

The Claimant's case

- [2] The claimant is the widow of Gordon Brathwaite (hereafter referred to as "the deceased"). The deceased was the owner of an estate situate at L'Anse Aux Epines, St. George. By his Will, the deceased devised all his real and personal estate to the claimant. Consequently, by virtue of a deed of assent dated 17th January 2017, the claimant became the owner of all remaining lands contained in

the said estate, together with all rights of way privileges and appurtenances thereto appertaining if any.

[3] By a correcting deed made on 22nd October 2020, the deed of assent was corrected to include an assignment of the benefits of all covenants from the deceased to the claimant together with the right to sue upon and enforce the same.

[4] By deed of conveyance dated 22nd March 1968 between Gordon Lester Brathwaite and Margaret Lawton (hereafter referred to as “the Margaret Lawton deed”), one, Margaret Lawton, became owner of a lot of land situate at L’Anse Aux Epines, St. George containing Eighteen Thousand Four Hundred Square Feet (18,400 Sq. Ft.) (hereafter referred to as “the lot”). The Margaret Lawton deed contained a covenant which stated that the purchaser:

“... hereby covenants with the vendor and the person or persons deriving title under her as follows:

(i) To use the dwelling house now upon the said property as a dwelling house only and not to use the same as a hotel apartment building or commercial building provided nevertheless that the purchaser and the persons deriving title under her may use the said dwelling house for the purpose of taking in paying guests so long as the character of the said building is not changed from that of a private dwelling house and the purchaser shall have the right to let the said dwelling house.”

[5] The lot of land was subsequently sold and mortgaged to the Bank of Nova Scotia and by a deed of conveyance dated 5th April 2013, the defendant purchased the lot at a public auction from the Bank of Nova Scotia.

[6] By an amended claim form filed on 27th October 2020, the claimant avers that the defendant, in breach of the covenant, erected an eighteen bedroom, three-storey apartment building on the lot.

[7] The claimant seeks, among other things, (i) a declaration that the apartment building erected by the defendant on the lot was so erected in breach of the restrictive covenant contained in a deed of conveyance; (ii) that she is entitled to enforce the restrictive covenant against the defendant; (iii) an injunction

restraining the defendant whether by himself or his agents or otherwise from using the lot except as a private dwelling house and from carrying on or authorizing or permitting to be carried on in or upon the lot construction of an apartment building; (iv) an order that the defendant demolish and remove the said apartment building from his lot; and (v) further or in the alternative damages with costs.

- [8] The claimant contends that by reason of the defendant's breach, she has suffered loss and damage, and that unless restrained by the court, the defendant will continue breaching the restrictive covenant.

The Defendant's case

- [9] The defendant contends that the covenant imposed by the deceased is personal to the deceased, and enforceable by him alone unless expressly assigned by him. The defendant alleges that the deed of correction purports to assign benefits to the claimant which was not expressly assigned by the deceased.
- [10] The defendant states moreover that the Margaret Lawton deed does not sufficiently define any land being retained by the covenantee, and that there was no breach of the covenant of the remainder of the estate of the deceased, to which the defendant avers the covenant is annexed.
- [11] The defendant also avers that the restrictive covenant was with respect to a specific dwelling house that was on the property at the date of the Margaret Lawton deed, and that that dwelling house is no longer present on the lot.
- [12] The defendant denies committing or permitting the commission of a breach of the restrictive covenant and denies that he has used the dwelling house on the property as a hotel, apartment building or commercial building.
- [13] The defendant contends however, that even if so, there has been such a change in the character of the neighbourhood that the object for which the said covenant was entered into has completely disappeared.

[14] The defendant also states that he spent a considerable amount of money on construction on the lot since it began in January 2020, and the claimant was aware of the construction of the buildings since inception. The defendant states that an injunction would be prejudicial to him.

Legal Analysis

Whether the covenant can be enforced

[15] Neither party to this dispute is the original covenantee nor covenantor, thus the question of whether the covenant can be enforced was raised by the defendant.

[16] The Text **Preston and Newsom: Restrictive Covenants affecting Freehold Land**¹, citing the decision of Neuberger J in *Whitgift Homes Ltd. v Stocks*, in relation to restrictive covenants, states that:

- “(a) The covenant must be negative in nature.
- (b) The covenant must be either (i) For the protection of land retained by the covenantee or (ii) Part of a scheme; and
- (c) The subsequent purchaser must have notice of the covenant.”

[17] In **Osborne v Bradley**², Farwell J identified three classes of restrictive covenants:

- (1) Where the covenant is entered into simply for the vendor’s own benefit.
- (2) Where the covenant is for the benefit of the vendor in his capacity of owner of a particular property or properties; and
- (3) Where the covenant is for the benefit of the vendor, insofar as he reserves unsold property, and also for the benefit of other purchasers as part of what is called a building scheme.

[18] The question becomes, with which class of restrictive covenant is the court concerned. Fay J in **Robert Batihk v Christine Brathwaite**³ stated the below following reference to the above identified classes of restrictive covenants:

¹ George Newsom (10th edn., Sweet & Maxwell 2013)

² (1903) 2 Ch 446

³ GDAHCV2008/0349

"After identifying the three classes of covenant, Farwell J referred to the rule enunciated by Lord Cairns in *Doherty v Allman*⁴ in these terms:

'... where there are negative covenants which are binding on the defendant the court has, speaking generally, no discretion to consider the balance of convenience or matters of that nature, but is bound to give effect to the contract between the parties, unless the plaintiff seeking to enforce the covenant has by his own conduct, or by that of the persons through whom he claims, become disentitled to sue... Contractual obligations do not disappear as circumstances change, but a person who is entitled to the benefit of a covenant may, by his conduct or omission, put himself in such an altered relation to the person bound by it as makes it manifestly unjust for him to ask a Court to insist on its enforcement by injunction ... Further, it is material to consider whether the plaintiff has a right to sue at law or merely in equity. If the case is one of a common law action on a covenant, I apprehend that nothing short of such conduct as would supported [sic] an equitable plea under the Common Law Procedure Act, or before that would have justified the Court of Chancery in granting an injunction restraining the action, will suffice to bar the plaintiff's right to sue on his covenant ... But if the right of the covenantee is a right in equity only, different considerations might arise. At law the burden of the covenant does not run with the land, and although the covenants may perhaps be said to run with the land in equity, because the right to sue on the covenant does not arise from the notice, but by reason of the covenant which attached to the equitable interest in the land, this does not create a privity between the parties at law. As Sir George Jessel pointed out in *London and South Western Ry Co v Gomm* 20 ChD 562, it is the possession of the legal estate, without notice, by a purchaser for value, that enable him to plead an effectual legal bar to the equitable right to enforce that equitable covenant. When you have one established the absence of the legal estate, the equitable interest, as Sir George Jessel points out, remains unaffected, notice or no notice .. *Sayers v Collyer* was a case of the third class to which I have referred between two persons claiming as purchasers under a general building scheme. I think that is sufficient to show the distinction that may arise between the various classes of cases.

In the case before me it is a question of equitable liability, and the real point for determination is whether the covenants in this case fall within the first or third class. It cannot be successfully contended that this case comes within the second class of cases, of which, in my opinion, *Duke of Bedford v Trustees of the British Museum* 2 My & K 552 was one. In that case, on the construction of the deed, it was apparent that the covenants were entered into for the better protection and enjoyment of Southampton House, which then belonged to the predecessor of the Duke of Bedford. When Southampton House, as a residential mansion, was taken away, it was held that the Court of Chancery would not grant an injunction..."

⁴ 3 App Cas 709

[19] Neither of the parties have identified the property concerned as part of a building scheme. This leaves either 1 or 2 as the appropriate classification.

[20] Like the indenture containing the restrictive covenant in **Robert Batihk v Christine Brathwaite**⁵, the preamble to the covenants in the Margaret Lawton deed provides that:

“the purchaser as to the property hereby conveyed and with intent to bind all persons in whom the same shall for the time being be vested but not so as to be personally liable under the covenant after she shall have parted with the said property hereby COVENANTS with the [deceased] and the persons deriving title under him as follows...”

[21] There are no other words in the Margaret Lawton deed which purport to annex the benefit of the covenant to any particular piece of property. Further, the above words are not sufficient in themselves to annex the benefit of the covenant to any particular piece of land retained by the deceased.

[22] Having only the benefit of the indenture with respect to the identification of the type of restrictive covenant with which the court is concerned, this court finds that the restrictive covenant allegedly breached by the defendant can be subsumed in either class 1 or 2 restrictive covenant, entered for the benefit of the vendor. The defendant acknowledged that the covenant placed on the land by the deceased is personal to the vendor.

[23] The question then follows of whom, if anybody, is entitled to enforce the restrictive covenant. In the Court of Appeal decision in **Westerhall Point Residents Association Limited v Anthony Batihk**⁶, the court, through Webster JA stated that:

“The successors in title of the parties are not bound by the terms of the conveyance unless it can be shown that the provision or covenant in question falls under an exception to the common law rules relating to privity. One notable exception to the common law rules is that equity regards

⁵ GDAHCV2008/0349

⁶ GDAMCVAP2015/0004

restrictive covenants as covenants that deprive an owner of rights over his own property and such covenants are said to run with the land as a matter of property and bind the parties to the conveyance and their successors in title and assigns. This is the long standing and well known rule in *Tulk v Moxhay*.”

- [24] In ***Tulk v Moxhay***⁷ Lord Cottenham LC considered the enforcement of restrictive covenants against subsequent purchasers of land alleged to be subject to such a restriction as a consequence of a covenant entered into by a previous owner. At page 11 of the judgment he said:

“It is said that, the covenant being one which does not run with the land, this court cannot enforce it, but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.”

- [25] Counsel for the defendant sought to argue that based on the fact that the defendant was not the original party to the Margaret Lawton deed, the covenant could not be enforced.

- [26] On the other hand, counsel for the claimant contends that the claimant is entitled to enforce the covenant against the defendant, being a person deriving title under the deceased. The Margaret Lawton deed explicitly states that Margaret Lawton:

“... hereby covenants with the [deceased] and the person or persons deriving title under him as follows...”

before reciting the restrictive covenant.

- [27] The claimant relies on ***Newton Abott Co-Operative Society Ltd v Williamson & Treadgold Ltd***⁸, wherein it is stated that:

“... in my judgment, when her estate was duly wound up and administered... the benefit of the covenant was held by the executors as

⁷ (1843-60) All ER Rep 9

⁸ [1952] Ch. 286

bare trustees for the residuary legatee... who was himself one of the executors. He therefore became entitled to the benefit of this restrictive covenant in equity and, in my judgment, he was entitled to assign the benefit in equity on an assignment.”

- [28] Applying the learning from **Westerhall Point Residents Association Limited v Anthony Batihk**⁹, **Tulk v Moxhay**¹⁰ and **Newton Abott Co-Operative Society Ld v Williamson & Treadgold Ld**¹¹, it is evident that the defendant had notice of the contract entered into by his vendor and that it would be inequitable that the property could be sold to allow an assignee to escape from the liability undertaken. Moreover, by the deed of correction, the covenant was assigned by the claimant in her capacity as executrix to herself as beneficiary pursuant to the Will of the deceased, and that she therefore became entitled to the benefit of the covenant in law by virtue thereof. Accordingly, this court finds that the claimant is entitled to enforce the restrictive covenant.

Breach of the covenant

- [29] The further issue to be resolved is whether the defendant breached the covenant. The covenant specifically refers to the use of the dwelling house which, at the time of the Margaret Lawton deed, existed on the property. The covenant states:

“(ii) To use the dwelling house now upon the said property as a dwelling house only and not to use the same as a hotel apartment building or commercial building provided nevertheless that the purchaser and the persons deriving title under her may use the said dwelling house for the purpose of taking in paying guests so long as the character of the said building is not changed from that of a private dwelling house and the purchaser shall have the right to let the said dwelling house.”

- [30] The claimant contends that this covenant would at all times thereafter be observed and performed, regardless into whose hand the lot might be conveyed. The claimant states that at the date of the purchase of the lot by the defendant, none of the prior owners of the property had breached the covenant contained therein.

⁹ GDAMCVAP2015/0004

¹⁰ (1843-60) All ER Rep 9

¹¹ [1952] Ch. 286

[31] On the other hand, the defendant argues that the covenant was specific to the dwelling house situated on the property, which dwelling house is not now being developed by defendant. Instead, the defendant is building on a separate part of the lot. In evidence, the defendant states that there is an old dilapidated building which is presently on the property which was situated on the property prior to any purchase of the said lot, which is not being used by him as a hotel, apartment building or commercial building.

[32] The claimant relies on **Investors' Compensation Building Scheme v West Bromwich Building Society**¹² for interpretation of the extant covenant. Therein it is stated as follows:

“(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) ...Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, [the background] includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent...

(4) ... the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v Salen Rederierna AB*, *The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:

¹² [1998] 1 All ER 98

'... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'

[33] The claimant uses dicta in the case of **Investors' Compensation Building Scheme v West Bromwich Building Society**¹³ which concerned a business contract, to argue the point that the parties did not intend to restrict the covenant to the dwelling house on the property but intended same to apply to the property on a whole.

[34] Fay J in **Robert Bathik v Christine Brathwaite**¹⁴ cited the decision in **Duke of Bedford v Trustees of the British Museum**¹⁵ which is a case that fell within the second class of cases under the Tulk v Moxhay principles. In that case, on the construction of the deed, it was apparent that the covenants were entered into for the better protection and enjoyment of Southampton House, which then belonged to the predecessor of the Duke of Bedford. When Southampton House, as a residential mansion, was taken away, it was held that the Court of Chancery would not grant an injunction.

[35] The restrictive covenant contained in the Margaret Lawton deed is specific to the use of the dwelling house erected on the lot. Unlike the case of **Robert Bathik v Christine Brathwaite**¹⁶ which was referred to by both parties and which also involves property formerly the deceased's, this covenant does not refer to the property conveyed, but solely to the dwelling house on said property. In respect of the interpretation of deed and other instruments, **Halsbury's Laws of England**¹⁷ illustrates that:

"If the intention of the parties can be ascertained from the written instrument, the court will give effect to that intention notwithstanding ambiguities in the words used or defects in the operation of the instrument. This is expressed by the maxim 'verba ita sunt intelligenda ut res magis valeat quam pereat', or by the wholly English paraphrase: 'a deed shall never be void where the words may be applied to any intent to make it good'. Hence, where words are capable of two meanings, the object with

¹³ [1998] 1 All ER 98

¹⁴ GDAHCV2008/0349

¹⁵ 2 My & K 552

¹⁶ Claim No. GDAHCV2008/0349

¹⁷ (5th edn., 2019) vol. 32, para 375

which they were inserted may be looked at in order to arrive at the sense in which they were used, and where one interpretation is consistent with what appears to have been the intention of the parties and another repugnant to it, the court will give effect to the apparent intention, provided it can do so without violating any of the established rules of construction...

Where the deed is incapable of operating in the mode expressed, it will, if possible, be allowed to operate in some other way having a similar result...

In order to give effect to a contract according to what appears to have been the intention of the parties, the court will in certain cases imply a term or condition or a qualification of a clause which is not inconsistent with the general tenor of the document, but where the intention of the parties is not sufficiently clear the court will not make a contract for them in order to prevent the whole agreement from being void on the ground of uncertainty or otherwise."

[36] The expressed term required the persons deriving title to use the existing dwelling as a residence only and not as a hotel, apartment or commercial building, but went further to permit the rental or lease of the said dwelling to paying guests. The covenant is expressed in both positive and negative terms. It is settled law that a person who takes the benefit of a positive covenant must also subscribe for the burden attached to the covenant¹⁸.

[37] Webster JA in **Anthony Batihk**¹⁹, at paragraph 19 citing **Rhone v Stephens**²⁰ where Lord Templeman made the point that accepting the burden of the positive covenant must be a condition of enjoying the benefit of the covenant, and that conditions can be attached to the exercise of a power in express terms or by implication.

[38] However, applying the above principles, it cannot be said that when the original covenant was entered into it could have meant that the parties intended that the dwelling house on the property could be destroyed, and apartments built in its place. It appears to have been the intention of the deceased, that although the restrictive covenant was specific to the existing dwelling house and permitting rental of the same, that at the very least the construction of an apartment building

¹⁸ Westerhall Point Residents Association Limited v Anthony Batihk GDAMCVAP2015/0004

¹⁹ GDAMCVAP2015/0004

²⁰ [1992] 2 AC 310

was prohibited. Thus, the language of the covenant connotes the character of dwelling houses as opposed to commercial apartment buildings, to preserve the private residential nature of the property but allowed for the rental on lower scale as opposed to an apartment building.

- [39] The court therefore finds that use of the lot as an apartment commercial property is a breach of the covenant contained in the Margaret Lawton deed.

Change in Character of Neighbourhood

- [40] The defendant contends that even if it is found that there is a breach of an existing covenant that there has been such a change in the character of the neighbourhood that the object for which the said covenant was entered into has completely disappeared, the said neighbourhood having long since ceased to be a purely residential area. The defendant states that the change of the neighbourhood is to such an extent that it would be inequitable for the claimant to enforce the said covenant, and that it was brought about by the acts and omissions of the claimant and/or her predecessors in title. The defendant avers that there are commercial properties within close proximity to where he is presently carrying out the construction.

- [41] Gilbert Kodilinye states the following with respect to the discharge or modification of a restrictive covenant in **Commonwealth Caribbean Property Law**²¹:

“The court has an inherent power to discharge or modify a restrictive covenant if there is sufficient evidence: (a) that a covenantee (or any of his assignees) has acquiesced in a course of conduct that is inconsistent with its continuance, as where he has discharged past breaches of the covenant; or (b) that the character of the neighbourhood has changed to such an extent that it would be inequitable or senseless to continue to insist on the observance of the covenant that, in effect, has become redundant.”

- [42] In **Truman, Hansbury, Buxton and Co. Ltd’s Application**²² it was held that if the character of an estate as a whole or of a particular part of it gradually changed,

²¹ (3rd edn, Routledge 2011) page 172

²² (1955) 3 WLR 704

a time would come when the purpose for which such a covenant was imposed could no longer be achieved, for what was intended to be a residential area would have become substantially a commercial area, and when that time came it might be said that the covenant had become “obsolete”.

[43] In addition, per Farwell J in the case of **Chatsworth Estates Company v Fewell**²³

“In considering whether an area is residential or not there is a clear distinction between residential flats and boarding houses... A residential area means an area in which persons reside more or less permanently. A hotel or boarding-house is quite different... Although the area is no longer confined to single dwelling-houses, and the covenants have been somewhat relaxed in the sense that some boarding-houses or guest houses have been permitted, and some other houses have been put to uses not strictly within the covenants, still, on the whole, and taking it broadly, the area still retains its character of being a residential area.

...

The defendant’s first ground of defence is that there has been such a complete change in the character of the neighbourhood... that the covenants are not unenforceable. But to succeed on that ground the defendant must show that there has been so complete a change in the character of the neighbourhood that there is no longer any value left in the covenants at all.”

[44] It is the evidence of the claimant that the estate is not a development scheme as some lots have covenants, some have none, and some covenants are different to others. The claimant’s evidence is that the estate consists of a commercial area at the entrance to the estate, hotels, marinas, restaurants and residential dwelling houses. According to the claimant, there are approximately two hundred and eighty residential homes in the estate, and the estate is still overwhelmingly and primarily one of private dwelling homes.

[45] The defendant contends however that the neighbourhood wherein the lot is situate contains both residential and commercial properties, and that there are many commercial properties within close proximity to his lot. The defendant states that the neighbourhood is no longer strictly a residential community as it was in the past as there is presently a mixture of commercial businesses in addition to

²³ [1931] 1 Ch. 224

residential homes. The defendant makes reference to properties namely the Blue Point Villa, 12 Degrees North, Park View apartments, Calabash Boutique and Mandela court. The defendant also makes reference to commercial properties situated in the neighbourhood being: Spice Isle Villa, Fushi Villa, Rolling Surt Villa, Azzurra Castle, Spice of Life Villa, Villa Ixora, Nutmeg Bay Villa, Morgan Villa, Captain's View Villa, Kingfisher Villa, Grenada Villa Beach Cliff, Solamente Villa and Mt. Hartman Bay Estate.

- [46] The case of **Robert Bathik v Christine Brathwaite**²⁴ is highly relevant to this case as it dealt with similarly located property in this jurisdiction, the defendant in that case being the claimant in the extant proceedings. It was held therein by Fay J in 2012 at paragraph 37 that:

“The fact that there has been development of parcels of land, and in particular the fact that it is likely that there has been the construction of a number of apartment buildings, since the imposition of the covenant in 1969 does not necessarily mean that there has been a change in the character of the neighbourhood during that time. In considering whether there has been a relevant change, I must give significant weight to what (or rather what the evidence reveals) was intended for L'Anse Aux Epines when the covenant was imposed in 1969. The fact that the parties agree that the sale of the parcels of land at L'Anse Aux Epines was done on an ad hoc basis is highly relevant. The claimant pleads that restrictive covenants were imposed on an inconsistent basis, that numerous lots were sold without restrictive covenants, and that some lots were sold with different restrictive covenants. The consequence of the methodology used by the deceased in imposing restrictive covenants on some but not all of the parcels at L'Anse Aux Epines was that there was a possibility, albeit not a certainty, that there would be development of apartment buildings on some parts of the development but a certainty (assuming that restrictive covenants were obeyed) that there would be a limited number of apartment buildings. It appears to have been the intention of the deceased, and of those that acquired parcels that were subject to the restrictive covenant, that at the very least those parcels would not be developed as apartment buildings. The determination as to which lots were subject to restrictions may have been haphazard but its intention seems to be clear. It does seem likely that there has been some development in breach of the restrictive covenants, but I am not satisfied that such breaches are so extensive as to amount to a change in the neighbourhood that was contemplated at the time the covenant was imposed of the disputed parcel. It seems to be that the neighbourhood has developed, at least substantially, as was contemplated

²⁴ Claim No. GDAHCV2008/0349

in 1968 when restrictive covenants were imposed on some but not all the parcels.”

- [47] The court adopts the above sentiments of Fay J and finds that the defendant has not sufficiently proven that there have been breaches of similar covenants as contained in the Margaret Lawton deed, so as to demonstrate a change in the character of the neighbourhood of the premises specifically to the estate. The court accepts the evidence that there are many commercial properties within close proximity to the lot however the defendant has not proved that a restrictive covenant of the similar nature with respect to those commercial properties applies as to the lot.

Damages in Lieu of Injunction

- [48] The defendant argues that even if it is found that there is a breach of the covenant, it is inequitable and unconscionable to allow enforcement of the covenant in circumstances where the construction was done in the open for all to see and that the claimant had actual notice of the building. The defendant avers that there are two buildings on the lot of land to date. The external building work on both of the buildings is complete and with some interior work to be done in addition to the painting of the second building.
- [49] The defendant states that the sum of \$1,200,000.00 has been spent on construction, and that the funding for construction comes from investors who are due to be repaid.
- [50] **Halsbury’s Laws of England**²⁵ indicates the circumstances in which a mandatory injunction can be granted by the court. The learned authors state therein that:

“Where the injury done to the claimant cannot be estimated and sufficiently compensated for by damages, or is so serious and material that the restoration of things to their former condition is the only method whereby justice can be adequately done, or where the injury complained of is in breach of an express agreement, the court will exercise its jurisdiction and grant a mandatory injunction, even though the expense and trouble of

²⁵ (5th edn., 2020) vol. 12, para 1091

obeying the injunction will be far in excess of any sum which could reasonably be awarded by way of damages... If, on the other hand, no substantial damage is proved, or the injury admits of estimation and can be compensated for by damages, a mandatory injunction will not be granted but the court will assess damages or an inquiry will be ordered to ascertain the amount of the damages sustained.”

- [51] The court accepts that defendant’s evidence that the claimant had ample notice of the construction of the apartment buildings. It is evidence in a letter dated 7th July 2019 from Senior Planning Officer of the Physical Planning Unit to the claimant’s then attorney indicating the defendant’s development of an eighteen-bedroom three storey apartment building was pending approval. Thereafter on 1st August 2019, the claimant’s then attorneys wrote to the defendant asking him to cease and desist further construction, to which the defendant’s then attorneys responded on 30th August 2019 indicating that the defendant was within his rights to construct the proposed building.
- [52] It was only until almost a year after that the claimant filed claim against the construction undertaken by the defendant, originally filing on 31st July 2020 and amending her claim on 27th October 2020.
- [53] It is noteworthy, therefore, that the claimant had knowledge of the defendant’s intention to construct an eighteen storey building, that he indeed commenced construction, and that he was of the belief of his entitlement to so do, yet she acquiesced his development of the lot by taking no further steps until 31st July 2020 after the building had been substantially built.
- [54] The rule in equity regarding the time of bringing action to compel compliance with covenants is that it must be commenced promptly and before the persons in possession of the land have expended money or incurred liabilities in erecting buildings on the land. It would be unequitable to allow a party to lie by and see acts done which would involve expense to others, and then to permit him to enforce his rights, and injure, very materially, persons acting in good faith²⁶.

²⁶ 2 My & K 552 *Dulke of Bedford v Trustees of British Museum*

[55] The court accepts the evidence that the construction was done in the open with no immediate action taken to obtain an injunction to prevent commencement. It would be in equitable to order a demolition of the buildings which would constitute an economic waste having regard to all the circumstances.

[56] The claimant, in the alternative of an injunction or demolition, claims damages for the breach. This is more in keeping with the established principles. The measure of damage would be damage done to the contractual rights. The measure of damage is the depreciation in the value of the claimant's property by reason of the breach. The claimant has failed to establish the damage suffered for the court to make an award for damages. Accordingly, damages are to be assessed and awarded to the claimant in lieu of a mandatory injunction destroying the erected building.

Conclusion

[57] In summary, applying the law to the facts, it is therefore ordered and declared as follows:

- (1) The apartment buildings erected on the lot is in breach of the restrictive covenant contained in the deed of conveyance dated 22nd March 1968 made between Gordon Lester Brathwaite and Margaret Lawson.
- (2) Damages for the breach are to be assessed if not agreed by the parties upon the application by the claimant and for directions to be issued pursuant to Part 16.4.
- (3) The defendant shall pay costs in the sum of \$5,000.00 to the claimant within fourteen (14) days of today's date unless otherwise agreed by the parties.

Agnes Actie

High Court Judge

By the Court

Registrar