

EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number: **NEVHCV2019/0037**

Between **TBAR Limited** Applicant
and
1970 HEATHCOTE LLC
Tod Johnson
Cindy Johnson
Four Seasons Resorts Estates Limited Respondents

Before: His Lordship Justice Ermin Moise (A.g)

Appearances:

Mr. Ravi Bahadursingh with Mrs. Dahlia Joseph-Rowe
and Ms. Shakieda Sealy of counsel for the Applicant

Mr. Gyan Robinson with Ms. Nadia Chiesa of counsel for the 1st Respondent

Mr. Sylvester Anthony with Mrs. Angelina Sookoo-Bobb for the 4th Respondent

Ms. Bonnie Berger present for the Applicant

Mr. Eric Johnson present for the 4th Respondent

2019: March, 29th
April 5th (Further Written Submissions)
April, 15th

JUDGEMENT

[1] **Moise, J (A.g.):** This is an application made pursuant to rule 17.1 and 17.2 of the Civil Procedure Rules 2000 (CPR). The applicant seeks an interim injunction restraining the 1st, 2nd and 3rd respondents from continuing construction on Lot No. 3 at Jessups-Estate, Belmont Estate in the parish of St. Thomas. The applicant also seeks an interim injunction restraining the 4th respondent from continuing, permitting and/or facilitating any further construction on Lot No. 3. I have

determined that the application should be dismissed with costs to the respondents. These are my reasons for doing so.

The facts

- [2] The applicant is the registered proprietor of Lot No. 4 at the Four Seasons Resorts Estate. Though TBAR is a limited liability company, the shareholders are Mr. Frank Thomas Leighton and his wife Ms. Bonnie Berger (The Leightons). Mr. Leighton states that in 2004 he and his wife began a search for property at the Four Seasons Resort Estate (FSRE). A property was identified and purchased on 30th March, 2006. This is lot No. 4 on the estate and also referred to as Villa 1704. Mr. Leighton insists that the main reason for choosing to purchase this lot was the breathtaking view of the resort and the ocean. According to him, the primary view was westerly and focused on the resort itself and the sunset over the ocean. All the areas on the property were designed to take advantage of and maximize this view. He states in his affidavit of 14th March, 2019 that Ms. Maria Consolino, then sales manager of the FSRE, was the point person who dealt with him during the negotiations for the sale.
- [3] Ms. Consolino advised them that the FSRE had long recognized the importance of views from the properties it sells and has consistently enforced restrictive covenants to that effect. The FSRE, according to Ms. Consolino's representations, has required modification to home plans that are not in compliance with these covenants. Representations were made that the applicant's views would be protected and that Ms. Consolino, on several occasions, assured them that in recognition of the importance of views and other aesthetic concerns, all purchased properties are subject to certain restrictive covenants and guidelines which set out an approved process for construction projects. Mr. Leighton states that during the process of construction of Villa 1704 they were required to both lower the roofline and relocate the building on the property to avoid impacting the views from another lot.
- [4] Ms. Consolino also filed an affidavit in support of this application. She is no longer the sales manager of the FSRE. She states that at the time her role as the sales manager was to guide prospective buyers throughout the entire purchasing process. She was authorized to oversee the

sales purchasing process and to negotiate with buyers. She took steps to make clear to buyers that their protected views were a top priority of the FSRE and that no future construction would be allowed if it materially impacted the views from another property. She recalls the sale of the property to the applicant and states that this property formed part of the Belmont Estates which is considered a premium FSRE development because of its panoramic, unobstructed views of the Caribbean Sea, golf course and Resort. Ms. Consolino states that she informed buyers that the integrity of their views would be protected by the restrictive covenants, architectural guidelines and the Design Review Board by which all construction projects must comply in order to protect the integrity of the development and respect neighbouring homes.

- [5] The restrictive covenant to which Mr. Leighton refers is noted on the Certificate of Title issued to the applicant upon purchase of the property. It states as follows:

- (a) ***“No building shall be erected on the property except strictly in accordance with the Architectural Guidelines and Site Development Standards as established by the Vendor (FSRE) and with the prior written approval of Vendor of the site plan, the design drawings and the working drawings which shall include, without limitation, detailed plans, elevations, specifications, materials, exterior colour schemes and landscaping plans in its sole and absolute discretion. The Vendor, its successors and assigns, shall be under no liability to the purchaser, the purchaser’s heirs, executors, administrators, successors and assigns, or to any other person for any damages arising out of or in connection with its approval or disapproval of any plans or specifications for any such buildings. No changes in structure or exterior finish, whether colour, texture or designs, shall be made to the buildings erected on the property without the prior written consent of the vendor or Hotel Equity Fund (HEF) in their respective sole and absolute discretion. No awnings, shade or window coverings of the Vendor or HEF which reserve the right to determine shape, colour and materials of any such items”***
- (b) ***No building or buildings erected on the property shall... interfere in any way with the quiet enjoyment of the resort or any lots or properties within the project...***

[6] Ms. Consolino states that because of the importance and value of the view from the properties, the FSRE engaged the services of a surveyor to diagram the promised views and site lines of each of the Belmont properties. As part of this process there were optimal locations designated with a building envelope for each of the plots in order to maximize the views. With specific reference to the sale of the property to the applicants, Ms. Consolino states that ***“I assured them that a neighbouring set of plots, Sunset Hill Estates, then still in development, would be subject to certain restrictions in order to protect the views from plot 1704 and preserve the value of their property associated with such views... A height restriction was also put in place for the homes in Sunset Hill to ensure that they would not interfere with the views from the Belmont plots.”*** She goes on to state that she assured the applicants that all construction would be subject to review by the Design Review Board (DRB). Insofar as the DRB is concerned section 1.4 of the Architectural Guidelines state the following:

The vendor shall appoint an Architectural Review Committee to review and approve the design and working drawings submitted by the purchaser as set out in paragraph 7(a) Schedule A. Approval of designs, material, colour or exterior surfaces is subject to their compatibility with the architectural style of Nevis, the Hotel and the project in the reasonable opinion of the Architectural Review Committee. The Vendor May require additional drawings or detail information or actual materials or colour samples before final approval.

[7] Section 7(a) of Schedule A states that:

(a) ***The purchaser acknowledges that he is aware that it is a condition of the Alien’s Landholding Licence, granted by the Nevis Island Administration, and for which the Purchaser will apply pursuant to Paragraph 2 herein, for the purchase of the land, that the purchaser commence construction of the dwelling within 18 months after the closing date. Furthermore, it is the express intention of the vendor and the purchaser that there shall be no speculation with respect to the land.***

If the purchaser is retaining the purchaser's own architect to design the dwelling, the purchaser shall:

- (i) Within 9 months after the closing date submit design drawings for the dwelling to the vendor for its approval;***
- (ii) Within thirteen months after the closing date submit working drawings for the dwelling to the vendor for its approval; and***
- (iii) Within 16 months after the closing date submit working drawings for the dwelling to the appropriate governmental authorities.***

[8] Mr. Leighton states that the purchase of villa 1704 was based on the representation of Ms. Consolino. He now claims that a villa is currently being constructed on 1703 which will significantly obstruct the view from villa 1704. He exhibits a photo of a "story pole" which he claims shows that ***"the breadth of the blockage ... will span my entire western view given the enormous length of the construction along my property line."*** Ms. Consolino in her own affidavit states that ***"the guest cottages that are currently being constructed on lot 1703 would effectively destroy Tom and Bonnie's property value and views from Lots 1704 ... I am confident that the buildings do not abide by the architectural guidelines, restrictive covenants on the property, and are certainly not consistent with repeated representations I made on behalf of FSRE to Tom and Bonnie that their views would be protected."***

[9] Mr. Leighton states that he made contact with officials from the FSRE in December, 2018 upon realizing that the construction on 1703 would severely impact the view from his property. He received an email from Mr. Eric Johnson, who is the director of sales and marketing for the FSRE which states that the plans for construction on 1703 were approved subject to site/view study from villa 1704 over 1703. Mr. Leighton states that this study was never done; at least not to his knowledge. He also exhibits an email from an exchange in which Mr. Gonzalo Guelman Ros, General Manager of the Four Season Resorts Nevis, who I understand to also be a member of the Design Review Board, stated the following:

"... My main doubt is, that I wasn't aware that construction has already began!"

I don't remember seeing the plans and scope of work to be approved by the committee (Terry, Dana and me) ...

I remember we had a conversation with the new owners of 1703 to show them the renders of our renovation, and they asked how long the approval will take, and I clearly remember telling them that depends on the scope of the work and the sooner they can deliver the plans we will try to expedite. But I haven't received any plans or scope of work or hear from them since."

[10] This email was dated 30th December, 2018. Mr. Johnson responded to this email and indicated that he had reviewed the architectural designs and noted that the height of the new roof line is below the 30' height restriction placed in the architectural guidelines. Timothy Wyman, who is the head of the homeowners' association, also sent an email to Mr. Leighton stating that he had communicated with Mr. Ros and that it was agreed that the process should go through the necessary reviews.

[11] Mr. Tod Johnson filed an affidavit in reply on 25th March, 2019. He states that the first respondent is a limited liability company of which he is the manager. His wife is a director of that company. The property on 1703 is registered in the name of the 1st respondent. In 2015 Mr. Johnson and his wife, Cindy Johnson, began a search for property in Nevis to invest in as a family vacation home. They required a property which was move-in ready but when these attempts failed they were shown Villa 1703 and decided to purchase that property. It was their intention to renovate the premises so as to meet their needs. He states that in April, 2018 they entered into an agreement to purchase this villa and this was contingent upon:

- (a) Developing architectural and building plans for the renovation and extension of Villa 1703 that met the family's needs and complied with Four Seasons Resorts Estates' Architectural Guidelines; and
- (b) Obtaining the necessary approvals to proceed with construction in accordance with those plans;

[12] A fee of \$3,100.00US was paid in order to ensure that due diligence was done. This was to ensure that architectural and building plans were in place prior to closing the sale. Mr. Johnson states that the existing buildings and structure on the property at the time of purchase constituted approximately 50% of the proposed final project. He states that he had no knowledge that any restrictive covenant existed regarding the preservation of views of property owners. He states that he first became aware of this when Mr. Leighton raised it with him in December, 2018. He spent three years in search of property in Nevis during which time he also came into contact with Ms. Consolino. She was no longer employed with the FSRE but working with William Pitt Sotheby's International in Florida. Ms. Consolino sent him a number of potential listings within the Four Seasons Resorts. At no point did she mention to him that the views of the neighbouring properties were to be protected. At no time did anyone else from the FSRE make such representations.

[13] Mr. Johnson states that the plans for the renovations to the building on villa 1703 were designed by Mr. John S. MacDonald and Associates Inc. The landscaping designs were prepared by Henry Dowling. Both gentlemen informed Mr. Johnson that they had worked on properties at the Four Seasons Resort Nevis before. That included Mr. Leighton's property. The designs were submitted to the FSRE for approval in August, 2018. Mr. Johnson states that he always understood that only the FSRE had to sign off on the proposed design and construction plans before applying for the necessary planning approval with the Nevis Island Administration. His discussions at that stage were with Mr. Eric Johnson who was the director of sales with the FSRE and Mr. David Chekemain who was the Vice President of FSRE. Mr. Chekemain left the company in September of 2018. Before his departure however, Mr. Chekemain informed Mr. Johnson that all the requirements had been met and that construction could commence on the renovations to his property. Mr. Johnson states that he understood these representations to mean that:

- (a) The proposed construction was fully and finally approved by the FSRE;
- (b) The necessary planning approval was granted by the Nevis Island Administration;
and
- (c) The Johnsons did not need to take any further steps or require any additional approvals from the FSRE prior to commencing construction.

[14] Approval from the department of physical planning was obtained in October, 2018 and the FSRE was contracted as the general contractor for the project. According to the contract, construction was to commence within 10 days from the date of its signing. Construction therefore began in October, 2018. Mr. Johnson states that he vacationed in Nevis with his wife in December, 2018 and it was at that point that Mr. Leighton approached him regarding the construction on villa 1703. They met with the Leighton's and offered to assist with landscaping designs to obscure the view of villa 1703 from the Leighton's property. Mr. Leighton did not accept this offer. The parties remained in communication and Mr. Leighton complained that his view would be obstructed and that this was to be protected. He also complained that the Johnson's had not acquired the requisite approval from the Design Review Committee. Mr. Johnson goes on to state that in December, 2018 he met with Mr. Gonzalo Guelman Ros and Mr. Anthony Bradford, the Four Seasons Hotel Villa Manager to discuss his plans and the management contract for the construction. Neither of these gentlemen expressed any concerns about the plans for Villa 1703. Both of these gentlemen are members of the review board.

[15] Of particular importance is an email dated 5th January, 2019 received from Mr. Terrence Scanlan regarding FSRE's informal approval process. Mr. Scanlan states that the informal nature of the process was partly due to a turnover of managers at the FSRE. In my view, the 3rd to 5th paragraphs of Mr. Scanlan's email are important. They state as follows:

"None of us know exactly the impact on Tom's property. My first step, which I have already started, will be to erect story poles which will give us the exact position of the roof. I had a surveyor out to both properties yesterday shooting grades. We will then photograph from all areas of Tom's property. I told the architect that he met the guidelines and he could proceed. I was told by David Chekemain that the impact on the neighbours was minimal. Let's take the time to see exactly what the impact is. Hopefully David was right."

For 25 years the informal DRB process has worked. Until now. I ask for both of your patience and understanding while the three of us can work through this. It has my undivided attention..."

I understand both of your frustrations. There is a balance between the rights of property owners to do what they want on their property and the rights of the neighbours to protect their views. The guidelines need to be updated to reflect this."

[16] This email is important for a number of reasons. It confirms that there was an understanding that the views of the neighbours were to have been protected to some extent. Secondly, it acknowledges that the Design Review Board did not formally approve the construction and thirdly, that consideration had not been given to the effect this construction would have had on the applicant's property. Mr. Johnson goes on to state that he met with Mr. Ros on 5th February, 2019 and during this conversation Mr. Ros stated that he did not feel qualified to give an opinion on construction plans or whether they complied with the Architectural Guidelines.

[17] However, Mr. Scanlan, swore to an affidavit on 26th March, 2019 which gives details of the events which transpired subsequent to the complaints made by the Leightons. He states that he has been involved with the FSRE for 11 years and that for all of that time the design review process has never been formalized. Approval has always taken place in a casual manner. Many plans are approved without a formal meeting and decision of the review committee. This review committee, according to Mr. Scanlan, has not always been operational and that many projects have actually been approved by himself as chairman of the FSRE. Mr. Scanlan states that on 2nd January, 2019 he met with Mr. Kalcak of the Review Committee and they agreed that the documents in relation to villa 1703 met the guidelines. He states that the view corridor which TBAR is trying to preserve does not run with the land and is not contained or guaranteed by the purchase or title documents for villa 1704. Mr. Scanlan is adamant that the construction on villa 1703 will not significantly impede the primary view from villa 1704.

[18] In his affidavit Mr. Scanlan points to the restrictive covenants contained in the certificate of title issued to the Leighton's. He points to Guideline 1.2(h) which states that ***"fences are not to be installed which obstruct any other dwelling's view and are not in scale with the villa architecture, lot size and landscape."*** This, according to Mr. Scanlan, is the only restrictive covenant which addresses the issue of views. He goes on to state that there are no restrictive covenants on either lot 3 or 4 which restricts or protects sunset, ocean, secondary or primary views.

Mr. Scanlan is adamant that no representation made by a sales manager or employee of FSRE can create any such easement or restrictive covenant. He goes on to refer Guideline 1.2(a) which states as follows:

“Roofs must be steeply pitched to resist the uplift of hurricane force winds and allow hot air to rise above occupants. Roofs must have a traditional style, being either hipped or gabled. No monopitch roofs are acceptable. Roof height must be compatible with surrounding homes and topography of the project and must not exceed thirty feet (30’) above the finished floor level.”

[19] As it relates to the complaints made by the Leightons, Mr. Scanlan states that members of the FSRE, including Mr. Eric Johnson, and himself, met with them and illustrated that the construction on 1703 will not block, or will not block in a substantial way, any views from lot 4. At paragraph 23 of his affidavit Mr. Scanlan states that on or about 14th January, 2019, himself, Mr. Gonzola Guelman Ros and Mr. Anthony Bradford, on behalf of the hotel, visited villa 1704 and spent some time looking at the various viewpoints. Mr. Scanlan took photographs from the primary and secondary level of villa 1704. After doing so he used a program on his IPAD, drew in the building from villa 1703 on lot 3 using the story poles placed in the air at FSRE’s request by surveyors, to ensure that the map of the building is the exact replica of what Villa 1703 will look like when completed. He exhibited those photos to illustrate his contention that the view from the Leighton’s premises was not substantially obstructed as they have complained. For my part, having viewed these photographs alongside that of the applicant, and visited the site, I find great force in Mr. Scanlan’s conclusions. I also note that present at that meeting would have been members of the Design Review Board.

[20] Mr. Scanlan further contends that the orientation of the view from villa 1704 is towards St. Kitts. When considering the view from the new patio installed by the Leightons villa 1703 disappears among trees which form part of the landscaping on villa 1704. From the upper verandah however, the views from villa 1704 are not obstructed in anyway. Further to this Mr. Scanlan refers to certain restrictive covenants contained within the certificate of title of both parties. These covenants state as follows:

“The purchaser shall not oppose any development applications or plans of the vendor or HEF or their related companies nor shall the purchaser oppose or interfere with any further development of lands surrounding the companies. The purchaser shall not object to any construction by the vendor, HEF or their related companies and/or ... of any construction by the structures in the project and the purchaser shall not deem such construction to be an inconvenience or nuisance or make any claim for damages or injury (other than personal injury) or otherwise resulting as a consequence of such construction.”

[21] Further reference was made to section 9 of schedule A to the purchase and sale agreements which states that:

“The purchaser acknowledges that the vendor or others may construct further buildings on part of the lands in the project and Hotel Equity Fund V LLC may undertake improvements or renovations to the resort facilities or the hotel and the purchaser agrees not to object to such construction or claim such construction and/or the resultant noise, dust or vibration is an inconvenience or nuisance. The purchaser hereby waives any right to which he has or may obtain to make a claim for damages or injuries or otherwise arising from such matters. The purchaser agrees that he shall not object to any application for necessary government approvals regarding such building and acknowledges and agrees that the covenant shall survive the closing of this transaction and may be pleaded as an estoppel or bar to any opposition or objection raised by the purchaser thereto.”

[22] Further to this Mr. Scanlan draws reference to clause 12 of the purchase and sale agreement which provides that ***“the purchaser shall not interfere with the completion by the vendor or any other person or other dwellings in the project. Until all dwelling lots in the project have been sold and closed, the vendor may make any such use of the unsold dwelling...”*** Together with the terms of the restrictive covenants outlined above, Mr. Scanlan notes that the applicants have covenanted not to pursue the course of legal action which they have undertaken against the respondents.

[23] With regard to the view corridors referred to by Mr. Scanlan in his affidavit, the 4th Respondent has filed an affidavit from Mr. Douglas Hunt who is a surveyor by profession. He states that he was contracted as one of the surveyors on the FSRE project in 1994. He corroborates Mr. Scanlan's assertion that the properties were oriented to feature a view of St. Kitts. This is not the view which the applicants are now attempting to preserve. He states that as it relates to Villa 1704, he initially staked out the overall planning of where the proposed lot/property lines were to be placed. As a potential purchase came about he staked out a building envelope location based on the site plan prepared by the architect. A similar exercise was conducted in relation to villa 1703. He states at paragraph 11 of his affidavit that when he staked out villas 1703 and 1704 he was unaware of any restrictive covenants as to maintaining permanent view lines and corridors.

[24] FSRE's sales director, Mr. Eric Johnson also filed an affidavit and states that the lots at Belmont Estate are positioned to face Saint Kitts. This he describes as the primary view. He goes on to state that the only view that FSRE can guarantee to a potential homeowner is the fence line view. It cannot guarantee unobstructed views of the surroundings. He was present in early January, 2019 when the site/view study was conducted and it confirmed that the roof of Villa 1703 falls within the guidelines and does not significantly obstruct the views of 1704 as alleged by the applicants.

[25] Mr. John MacDonald also filed an affidavit in opposition to the application for an interim injunction. He states that prior to being consulted by the 2nd defendant he had some history in working for projects with the FSRE. In fact he states that he was contracted by Mr. Leighton in 2016 to study a prospective development of a lot of land adjacent to Villa 1704 which was also owned by Mr. Leighton. This development was eventually reduced to the construction of a driveway and additional landscaping. He states that to the best of his knowledge plans were never submitted or approved by the Design Review Board. He goes on to give details of the extension of the main house of the Johnson's property. These were:

- (a) An enlarged master suite to the west of the existing building;
- (b) A two story addition to the 3 en suite bedroom to the north of the existing main house;
and
- (c) A new wing, consisting of a two story building with three en suite bedrooms built to the north of the existing main house.

[26] The new wing being constructed is attached to the main house by a covered walkway. Once completed this structure will include 7 bedrooms intended for the Johnson's children and grandchildren. Mr. MacDonald states that prior to drafting the designs he was informed of the setback requirements and height restrictions for the site by Mr. David Chekemian. He was told that as long as the design for the villa did not violate the setback requirements or height restrictions the design would be approved. He states that he received no further guidelines. According to Mr. MacDonald, he was instructed to submit the plans to Mr. Chekemian who obtain approval for the plans. Mr. MacDonald enquired as to whether the plans had to be submitted to a Design Review Committee and was informed that he did not need to do so. All that was required was to send the plans to Mr. Chekemian. He states that he was informed that the approval process of the FSRE was very informal. He states that he received notification from Mr. Chekemian, Mr. Scanlan and Mr. Eric Johnson that the plans were approved prior to commencing construction.

[27] In his experience in designing buildings with the project of the FSRE he had never been aware of any restrictive covenants relating to the protection of the views from lot 1704. Until this issue arose in the present case, he was completely unaware of such restrictions. As far as his evidence is concerned the external material in this design are "in keeping with the regional aesthetic consistent with the Four Seasons Resort..." The highest point in the construction at Villa 1703 will be approximately 27'. This is 3' lower than the required height under the guidelines.

[28] Mr. MacDonald in his affidavit states that on 28th December, 2018 he received a text message from Mr. Eric Johnson informing him of Mr. Leighton's complaints. In that text Mr. Johnson states that he informed Mr. Leighton that villa 1703 falls below the finished floor requirement. He however, enquired as to whether the 2nd floor from the new wing can be removed and placed elsewhere. He exhibited a further email dated 8th January, 2019 from Mr. Eric Johnson which states that story poles were installed so as to reflect the height of the new three bedroom wing. In that email Mr. Eric Johnson goes on to state that "the story poles have a bigger impact than what they expected. I spent an hour with her (Mrs. Leighton). Their opposition is solidified."

[29] Mr. MacDonald spoke to the photographs attached to the Leighton's application and noted that these were taken from the lower deck. He is of the opinion that "any interruption of the view of the

water line and horizon from the pool deck is minimal, and there is little to no interruption of the view of the waterline and horizon from the main living area.” As is relates to the impact an injunction will have on the construction Mr. MacDonald states that this would result in the loss of the local construction crew currently engaged in the job. He also states that the roof will have to be installed well before the advent of the hurricane season in order to weather proof the Villa. In short, the granting of an injunction at this stage would have a significant impact on the Johnson’s construction project.

[30] Mr. Henry Dowling, Licensed Landscaping Architect also swore to an affidavit on 25th March, 2019. He states that he has been involved in work on projects at the FSRE for over 5 years and has never been provided with formal design guidelines, restrictions or requirements. He has been advised verbally of the setback and height restrictions for the property as issue. He has also not been involved in an approval process which requires approval by a Design Review Committee.

[31] Mr. Dowling states that Mr. Leighton was aware of the construction on Villa 1703 from early November, 2018. He exchanged an email with Mr. Leighton on 14th November, 2018 outlining a summary of actions with respect to Mr. Leighton’s property. This included additional plans to screen the construction taking place on villa 1703. Mr. Leighton replied and expressed concerns about the impact the construction would have on his view. Mr. Dowling stated that this would not be “too impactful”.

The Law

[32] In accordance with Section 26 of the Supreme Court Act¹, this court is empowered to grant an interlocutory injunction in all cases where it appears to the court to be just and convenient that such an order be made. Rule 17 of the CPR makes provision for an injunction to be granted as an interim remedy pending the full hearing of a claim. In particular rule 17.2(3) states that the court may grant an interim remedy before a claim has been made only if the matter is urgent; or it is otherwise necessary to do so in the interests of justice.

¹ CAP 3.11 of the Laws of Saint Christopher and Nevis

[33] The applicants have made this application prior to the filing of a claim form and attached a certificate of urgency. The basis of this application is that if the respondents are allowed to continue the construction beyond its current height, the applicant will be unable to enforce the restrictive covenants which it claims are designed to preserve the view from Villa 1704. I note that the respondents have all contended that there has been no urgency. The applicants knew about this construction as far back as November, 2018 and took no action. To date there has been no claim filed and the respondents are therefore unable to adequately respond to this application. On that basis, it is submitted that the application should be dismissed. However, given that the construction of the project has already gone up to the ring beam I would not dismiss the application on that basis as any further construction may very well have limited the applicant's capacity to pursue this claim. However, I do take the point that the applicant was aware of the construction from November, 2018 and this may impact the decision I am about to make for different reasons than reliance on the certificate of urgency.

[34] In general the grant of an interim injunction is said to be based on the criteria set out in the case of ***American Cyanamid v. Ethicon***². The factors which the court must consider are:

- (a) Whether there is a serious issue to be tried; and if the answer is yes, then;
- (b) Would damages be an adequate remedy for the applicant; and
- (c) Whether the balance of convenience is tilted in favour of the applicant.

[35] I will examine the issues raised by the parties in light of these principles.

Is there a serious issue to be tried?

[36] Counsel for the claimant relies firstly on the text Commonwealth Caribbean Property Law which states the following at page 166:

“A scheme of development comes into existence where land is laid out and sold to different purchasers ... each of whom enters into a restrictive covenant with the common vendor ... agreeing that his particular plot shall not be used for certain

² HL 5 Feb 1975

purposes. In such a case these restrictive covenants are taken because the whole estate is being developed on a definitive plan, and it is vital, if the value of each plot is not to be depreciated, that the purchasers ... should be prevented from dealing with their land so as to lower the tone of the neighbourhood. When the existence of a scheme of development has been established, the rule is that each purchaser and his assignees can be sued by every other purchaser and his assignees for breach of restrictive covenants."

[37] On that basis, counsel argues that the applicant is entitled to take action against the 1st, 2nd and 3rd respondents for what the applicant states is a breach of the restrictive covenants relating to the Belmont Estate. Reference is also made to the case of ***Elliston v. Reacher***³ where Parker J noted that a restrictive covenant may be enforced by one purchaser against another if four conditions are met. These are:

- (1) Both parties derived title under a common vendor;
- (2) The Vendor has laid out his estate or a defined property for sale in lots subject to restrictions intended to be imposed on all the lots;
- (3) Those restrictions were intended by the common vendor to be for the benefit of all the lots intended to be sold; and
- (4) Both plaintiff and defendant purchased from the common vendor on the footing that the restrictions were to enure for the benefit of the other lots.

[38] Parker B noted in his judgment that the fourth of these conditions can be inferred if the first three are established, provided that the purchasers have notice of the facts involved in them. He goes on to state that ***"where the four points I have mentioned are established, the community of interest imports in equity the reciprocity of obligation which is in fact contemplated by each at the time of his own purchase."*** The relevance of this principle is that it is designed to address the common law doctrine of privity of contract. For all intent and purposes the property owners have not contracted with each other and have no enforceable rights unless these rights are available under the common law or by statute. However, as noted by Redhead JA in the case of ***Raphael***

³ [1908] 2 Ch 374

Donald et al v. Egmont Development Inc⁴. “covenants, were imposed for the benefit of the land owners and, each of them can enforce the covenants against each other.” Equity has therefore provided an avenue for mutual enforcement of restrictive covenants where the strict application of the doctrine of privity of contract would otherwise lead to an unjust outcome.

[39] Insofar as the restrictive covenants are concerned the applicants argue that there are two main breaches which they are entitled to enforce. These are the failure on the part of the 1st respondent to first obtain the acquired approvals prior to commencing construction. Counsel states that approval is required from the FSRE, the Architectural Review Committee (also referred to as the Design Review Board) and the Nevis Peak Holdings LLC. Counsel argues that ***“it is pellucid that failure to obtain (or even seek) these approvals are, without more, a direct breach of the covenants.”*** The argument is that the purpose of obtaining these approvals is to ensure that all buildings are compatible with the surrounding homeowners and it is therefore fit and proper for the applicant to seek to enforce this covenant.

[40] However, a close examination of the covenants, guidelines and the facts of this case draw me to a conclusion which is different from that of counsel for the applicant. The Managing Director has stated that the project was in fact approved by the FSRE and I can find nothing in the evidence to prove otherwise. In fact the FSRE has been employed as the building contractor for this project in a similar manner as it was employed to construct the applicant’s building on Lot 1704. Counsel argues that the project must also be approved by the Nevis Peak Holdings LLC. I do not accept this submission. The terms of the covenant speaks to the approval of the FSRE or the NPH and I am satisfied that given its plain and ordinary meaning there is no need for approval by the NPH once that approval has been obtained from the FSRE. That approval is said to be in the sole discretion of the FSRE.

[41] Secondly, the guidelines state that approval is necessary from the Design Review Board if the provisions of section 7(a) apply. That section refers to a circumstance in which the property owner makes use of his own architect to draw up his building plans. This provision corresponds with guideline 1.2 which states that ***“custom designs will be subject to review by the Vendor’s***

⁴ GDAHCVAP1999/0015

Architectural Review Committee to ensure overall conformity to the standards and architectural style of the existing residential community". No doubt the 1st respondent made use of its architect in order to facilitate the renovation of the premises. However, according to guideline 1.4, the approval of those drawings by the DRB "***is subject to their compatibility with the architectural style of Nevis, the Hotel and the project in the reasonable opinion of the Architectural Review Committee. The Vendor May require additional drawings or detailed information of actual materials or colour samples before final approval.***"

[42] I express serious doubt as to whether the purpose of this review committee has anything to do with the preservation of views. It appears to me to be designed more so to address issues of architectural style which, to my mind is a different concept. I say so especially in light of the fact that the guidelines in section 1.2 are very specific as it relates to height and other restrictions which must be complied with. Even in Ms. Consolino's affidavit she was careful to state that there were height restrictions designed to give effect to the panoramic views from the respective properties. The 1st respondent's roof falls within those guidelines. Given that the applicant's main quarrel with this project is the protection of a view, I have some difficulty in finding anything in the guidelines outlined in section 1.2 which have been violated in any way, sufficient to justify an injunction being granted.

[43] Further to this, I note that subsequent to Mr. Leighton's complaints, officials from the FSRE, as well as those who form the Design Review Board, did conduct a number of site visits in order to address Mr. Leighton's concerns. The findings were that the interference with Mr. Leighton's views were minimal and does not have a significant, if any, impact on the views which he complains of. To my mind, even though there was no initial review by the DRB, the evidence suggests that the specific complaints made by the applicant had been considered, even if subsequent to his concerns and certain findings were made. He clearly did not agree with these findings but has presented little more by way of his own evidence to show the extent to which the specific provisions of the Architectural Guidelines have not been followed.

[44] The second issue raised by the applicant is that his right to the quiet enjoyment of villa 1704 is breached by the interference with a view from his lower deck. Reference is made to section (b) of

the covenants which states that the 1st respondent should do nothing which ***“shall interfere in any way with the quiet enjoyment of ... any lots or properties within the project.”*** Insofar as that is the case, counsel for the applicant argues that ***“it is incontestable that a central feature of the projects is the views afforded from each of the homes constructed on the lots.”*** Therefore an interference with this view is an interference with the quiet enjoyment of the premises and a violation of this restrictive covenant.

[45] The claimant relied on the case of ***Richard Dennis et al v. Anthony Stephen Davies***⁵ in support of the proposition that an interference with the view from villa 1704 amounts to a breach of the restrictive covenant as to quiet enjoyment. In that case the restrictive covenants provided that the property owners were not to use the dwelling houses for anything ***“which may be or become a nuisance or annoyance to the owners or occupiers for the time being of the Estate or neighbourhood.”*** The claimants complained that the construction of a 3 story extension to the defendant’s property would ***“wholly or partially obscure the attractive views”*** of the River Thames. At paragraph 88 of this judgment it was stated that an annoyance is ***“an interference with the pleasurable enjoyment of the house.”*** On that basis, counsel for the applicant argues that if a construction, of the type being undertaken on villa 1703 creates a nuisance or an annoyance then it is a breach of the covenant of quiet enjoyment. In that regard, paragraphs 98 to 101 of the judgment is of some importance. They state as follows:

“In my view therefore the question is whether applying the guidance afforded by the case of Tod-Heatly v. Benham this extension would be or become a nuisance or annoyance to the claimants. Would reasonable people, having regard to the ordinary use of the Claimants’ houses for pleasurable enjoyment, be annoyed and aggrieved by the extension? To adopt the words of Lord Justice Lindley, would the extension raise an objection in the minds of reasonable men, and be an annoyance within the meaning of the covenant? Lastly, would the extension reasonably trouble the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of the Claimants’ houses?”

⁵ [2008] EWHC 2961

99. As I have noted the test is an objective one and must be judged by robust and common sense standards.

100. At the end of the day the issue is a relatively narrow one. As I indicated in the course of argument I think that some of the objections of the Claimants contained in their witness statements would fail that objective test. Thus I agree with Mr. Weekes that the objections with regard to the size of the gap, the view on the approach to Number 22, and the visiting of the water front would not reasonably trouble the minds of an ordinary sensible inhabitant of the Claimants' houses.

101. However I have had the benefit of a view from each of the Claimants' houses. I have seen the view of the river – admittedly in November. I have seen photomontages of the effect of the extension. I agree with Mr Derbyshire that the loss of view is significant from Numbers 17, 46 and especially from Number 16. In my view the three storey red brick extension would trouble the minds of the ordinary sensible English inhabitant of any of those three houses and in those circumstances it does constitute an annoyance within the meaning of the covenant.”

[46] In reliance on this authority, counsel for the applicants submits that **“a covenant restraining actions that constitute a nuisance or annoyance is synonymous with a covenant restraining actions that interfere with a person’s quiet enjoyment.”** Counsel states that the case **Dennis v. Davies** is on all fours with the present case and that there is therefore almost certain likelihood of success at trial, based on a breach of the covenant of quiet enjoyment.

[47] On the date of the hearing however, counsel for the 4th respondent raised an argument that the applicant did not plead breach of the covenant of quiet enjoyment in his application. The only covenant referred to in the application of 14th March, 2019 is the requirement for approval from the FSRE and NPH. In that regard, it is argued that counsel for the applicant has included in his submissions a breach of a covenant which had not been pleaded. However, I note that in number 9 of its grounds the applicant does indicate that the respondent’s building will block and significantly impede the view from its property and affect the enjoyment of his lot. To my mind, whilst the

specific provision of quiet enjoyment was not referred to I am of the view that this was sufficient to plead the cause which the applicant finds most offensive about the construction on Villa 1703.

[48] Counsel for the Respondents also argues that the law does not recognize a right to a view. Reliance was placed on the well-known authorities of **Aldred's case**⁶ and **Hunter v. Canary Wharf**⁷ for the proposition that a view is a matter of mere delight and not of necessity. In the absence of a specific restrictive covenant, there is no legal right to a view. It is further argued that there is nothing in the restrictive covenants on the title to both properties which guarantees a right to a view. Counsel states that the concept of quiet enjoyment is an element of the law of nuisance which is a private law doctrine. One of the categories of this tort is that the interference with the applicant's use and enjoyment of his land must be substantial. The respondents refer to the case of **Vanderpant v. Mayfair Hotel Co Ltd**⁸ where Luxmoore J stated the following:

"Apart from any right which may have been acquired against him by contract, grant or prescription, every person is entitled as against his neighbor to the comfortable and healthy enjoyment of the premises occupied by him, and in deciding whether, in any particular case, his right has been interfered with and a nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions obtaining among English people."

[49] Counsel for the 4th respondents in particular, go on to argue that the facts of the **Dennis v. Davies** case are distinguishable. Firstly, it is argued that the court in that case never determined that a covenant restraining actions which constitute an annoyance and a nuisance was synonymous with a person's quiet enjoyment. The respondents argue that in fact the court in that case confirmed the view that restrictive covenants should be construed strictly; giving due regard to paragraph 93 of that judgment where it was stated that ***"if the parties had wanted to cut down the ordinary meaning of the nuisance and annoyance covenant they should have done so expressly."***

⁶ (1610) 9 Co Rep 57b

⁷ [1997] AC 655

⁸ [1929] All ER 296

Counsel goes on to argue that the court in **Dennis v. Davies** also noted that the term annoyance is a wider concept than that of nuisance in that it is anything which disturbs the reasonable peace of mind of an ordinary sensible English inhabitant. This much was established in the case of **Tod-Heatley v. Benham**⁹ where the following was noted:

“annoyance is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house – if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort.”

[50] In light of this, it is argued that the court in **Dennis v. Davies** was able to apply this doctrine to the covenant in question because nuisance and annoyance were specific terms of the covenant. On the contrary, the covenant of quiet enjoyment cannot be interpreted as protecting views in general. It must be taken in light of the meaning already given to that term in law. As such, even if such views were protected this had to be an obstruction which was significant.

[51] For my part, I find some force in the arguments of the respondents; although I do not agree with it in its entirety. Firstly, I am of the view that an interference which creates an annoyance and a nuisance may very well be determined to undermine the quiet enjoyment of the applicant's property. That much may very well be implied into the covenant depending on the circumstances of the case and the extent of the disturbance complained of. However, in my view, the court in **Dennis v. Davies** was not establishing a legal concept which was entirely new. Rather it gave force to the common law concept of nuisance and indicated that an annoyance is a broader concept. What is important to note is that the test is an objective one and the extent to which the court may find the interference with the claimant's view to be enforceable will depend on whether that interference is significant enough to affect his quiet enjoyment. The **Dennis v. Davies** case makes it clear that the determination must be made on the individual facts of the case and it is an objective test which must be applied.

⁹ 40 Ch D 81

[52] In relation to some of the claimants' properties in **Dennis v. Davies**, the judge noted that *"the loss of view is significant from numbers 17, 46 and especially from number 16. In my view the three story red brick extension would trouble the minds of the ordinary sensible English inhabitant of any of those three houses and in those circumstances it does constitute an annoyance within the meaning of the covenant."* As the court of appeal noted in the appeal against the **Dennis v. Davies** case:

"During a four-day trial, he had the benefit of the claimants' written and oral evidence, plans, a three-dimensional model, photomontages, expert evidence from two witnesses on planning matters, evidence from a valuation surveyor and a site view. As regards the evidence directed at proving that the extension would occasion 'nuisance or annoyance' to the claimants in breach of paragraph 2 by interfering with their river views, Mr. and Mrs. Dennis obviously had the strongest case; and Mr. and Mrs. Tilsley and Mrs. Yentis the weakest."

[53] To my mind, the matter which the court will ultimately be called upon to determine is not merely whether there is an obstruction but whether there is such a significant obstruction of the view that it would trouble the mind of the ordinary sensible person. What was included in the restrictive covenant was not a carte blanche protection of the view from every square inch of that property but a restriction against the disturbance of the applicant's quiet enjoyment. The mere obstruction of a view, in and of itself, does not necessarily constitute the annoyance referred to as amounting to a breach of covenant in **Dennis v. Davies** and certainly does not interfere with the quiet enjoyment as the applicant argues. Therefore, I do not agree with the submissions of counsel for the applicant where it is argued that there is almost certain likelihood of success at trial. There must be at least a prima facie case here that the objective test set out in **Dennis v. Davies** has been met if the applicants wish to rely on that case and extend its principles to an interference with the applicant's quiet enjoyment.

[54] I do consider that the court is not called upon to embark on a trial at this stage. However, the court must be minded that the ultimate determination as to whether an interim injunction should be granted must be based on whether it is just and convenient to do so. In that regard, an applicant

seeking to halt a multi-million dollar construction project must do more than merely turn up to the court prior to filing a claim with little more than his own perspective that his views are substantially obstructed; especially in circumstances where he has been aware of this construction from as far back as November, 2018.

[55] Comparing the extent of the evidence the court was able to rely on in ***Dennis v. Davies*** with what has been presented in the present case, I find that the applicant has fallen short of what would have been required, even at this interlocutory stage, to satisfy the court that there is a serious issue to be tried here. All the applicant has presented is his own personal perspective on the construction as well as that of Ms. Consolino; who is not an expert in such matters. The applicant filed a further affidavit sworn by Ms. Ellen Capra on 4th April, 2019 in support of this application. However I do not find this affidavit to be helpful. Ms. Capra stated that she visited Nevis from 24th March, 2019 to 1st April, 2019 only to find that her property, Villa 1706 has now been diminished with a view of construction, equipment and building materials. She states that there was once a beautiful view of palm trees and greenery from her balcony. To that effect she states that ***“the injection of construction into my previously unobstructed view has undoubtedly interfered with the peace and quiet enjoyment of my vacation home”***. There is nothing in this affidavit which satisfies me that the specific allegations made by the applicant are corroborated by its content. Her complaint about construction, equipment and building material adds nothing to this case. There is also nothing to suggest that a view of palm trees and greenery is protected by any restrictive covenant. She has also not filed an action specific to her property in this claim.

[56] On the other hand, whilst it was accepted by officials from the FSRE that further action was needed to verify the effect this construction would have had on the applicant's premises, the facts suggest to me that a number of site visits were subsequently done once the applicant had raised concerns about the construction. Story poles were put in place and the FSRE along with other members of the Design Review Board called on the applicant's residence to conduct a view analysis. The conclusion was that the obstruction to the applicant's view, if any, was minimal. What was also presented into evidence is that the plans for villa 1703 had met the architectural guidelines in that the roof was well within the 30' specification outlined therein. I note that the applicant complains that the floor height is 10'. However, the roof height is 27' and I am not satisfied that this violates

the architectural guidelines in any way, even at this early stage in the proceedings. There is also affidavit evidence of the architect, the landscapist as well as the surveyor who mapped out the development many years ago. They all agree that there is no significant interference with the applicant's views.

[57] The applicant presented photographs to substantiate the allegation that his views are severely impaired. The respondents, on the other hand, argue that this does not give a full picture. Photographic evidence was presented from a number of angles which show that there is no significant obstruction of the applicants' views. On the day of the hearing the court visited the premises and observed that there is no substantial or significant impairment of the views which the applicant has complained of. I also observe that much of the construction on Villa 1703 is obstructed by landscaping on the applicants' own property which impairs much of the very view which is complained of. Having seen the photographic evidence, read the affidavits and visited the site I am not satisfied that a prima facie case has been made out that the construction on the respondent's premises would meet the objective test described in *Dennis v. Davies*.

The Balance of Convenience and damages as an adequate remedy

[58] Counsel for the applicant argues that in a case for enforcement of a covenant the court ought properly to grant an injunction as a matter of course. The argument is that there is no need to consider the balance of convenience if what is sought is an interim remedy to restrain the respondent from breaching a clear duty arising from a restrictive covenant. Counsel relies on the case of *Hampstead & Suburban Properties v. Diomedous*¹⁰ where Meggery J noted that he saw ***"no reason for allowing a covenantor who stands in clear breach of an express prohibition to have a holiday from the enforcement of his obligations until the trial."*** In that case, Meggery J references the dictum of Lord Caines in the case of *Doherty v. Allman*¹¹ where he states the following:

¹⁰ [1969] 1 Ch 248, 256

¹¹ [1878] 3 App Cas 709

“if parties, for valuable consideration, with their eyes open, contract that a particular this shall not be done, all that a court of equity has to do is to say, by way of injunctions, that which the parties have already said by way of covenant, that the thing shall not be done... it is not then a question of balance of convenience or inconvenience, or the amount of damages or of the injury – it is the specific performance, by the court, of that negative bargain which the parties have made, with their eyes open, between themselves.”

[59] On that basis, counsel argues firstly that it is plain that the 1st respondent has not obtained the requisite approvals/written approvals required of the covenants and architectural control guidelines. Further it is argued that it is plain and uncontested that the impugned construction will interfere with the applicant's views. Without prejudice to these assertions however, counsel refers the court to the case of ***Robertson et al v. Maloney***¹² where Justice Chandler states that ***“it is clear that having regard to the allegations in breach of a restrictive covenant, there is a serious issue to be tried.”*** Chandler J also went on to note that ***“[d]amages would not be an adequate remedy. To order the defendant to continue construction and hold the Plaintiff's case sounds in damages only, would judicially sanction the breach of covenant...”***

[60] In so far as that is the case it is argued that even if the court were to consider the principles established by ***American Cyanamid v. Ethicon***, the applicants have established that there is a serious issue to be tried and that damages would not be an adequate remedy. Counsel finally refers to the case of ***Mortimer et al v. Bailey***¹³ where Jacob L.J stated the following at paragraph 41 of his judgment:

“where there is doubt as to whether a restrictive covenant applies ... the prudent party will get the matter sorted out before starting to build ... if he takes the chance, it will require very strong circumstances where, if the chance having been taken and lost, an injunction will be withheld.”

¹² BB950 of 2008

¹³ [2005] 1 EGLR 75

[61] I would have agreed with these submissions if I had found that there was a serious issue to be tried. What the authorities do suggest is that where there is ***“a plain and uncontested breach of a clear covenant not to do a particular thing, and the covenanter promptly begins to do what he has promised not to do, then in the absence of special circumstances it seems to me that the sooner he is compelled to keep his promise the better.”***¹⁴ However, there is not a plain and uncontested breach of a covenant here. As I stated earlier, whilst there may not have been an initial approval of the DRB, the 4th Respondent did take these considerations on board and, along with members of the DRB, did conduct a site review analysis on the project. The plans which are subject to approval must comply with the specific provisions of section 1.2 of the guidelines. This deals with specific guidelines relating to the roof height, the verandah, doors, windows and hardware, exterior walls and lights etc. I can find nothing in these guidelines which have not been complied with sufficient to warrant the grant of an interim injunction at this stage.

[62] Further, in his third affidavit, the applicant makes it clear that his “primary objection to the construction on Lot 3 is that it will interfere with the views and quiet enjoyment of Lot 4”. That is his main concern. Therefore, to my mind, the issues relating to the architectural review board must be considered from that perspective. As stated by Mr. Scanlan, who met with members of the DRB as well as the applicant, they are satisfied that the guidelines have been complied with. I am not of the view that sufficient evidence has been presented, even at this interlocutory stage, to satisfy the court that the 1st respondent’s construction should be put on hold. Ultimately, in the exercise of this equitable jurisdiction the court must seek to do what is just. The respondents have indicated that this is a very valuable project and significant sums have been invested in it. Further, Mr. MacDonald asks the court to take into consideration the damage which may be caused if the construction is put on hold at his stage given the onset of the hurricane season. Despite the authorities referred to by the applicant, the court must consider the effect that its decision will have on the respondents when balanced against the evidence presented in support of the application at this stage. The court never abandons its jurisdiction to do what appears to be just and convenient and I am not satisfied that an injunction should be granted.

[63] In the circumstances I make the following orders:

¹⁴ See *Hampstead v. Diomedous* at page 256

- (a) The application is dismissed;
- (b) The applicant will pay costs to the respondents to be agreed;
- (c) If the parties are unable to agree on reasonable costs the respondents are at liberty to apply for an assessment of costs pursuant to rule 65.11 of the CPR on or before the expiration of 28 days from the date of delivery of this decision

**Ermin Moise
High Court Judge**

By the Court

Registrar