IN THE SUPREME COURT

OF VICTORIA

1975 No. M.10850

BEFORE THE FULL COURT

MELBOURNE

BEFORE THE HONOURABLE THE CHIEF JUSTICE (SIR JOHN YOUNG)
and
THEIR HONOURS MR. JUSTICE BARBER and MR. JUSTICE NELSON

IN THE MATTER of the Property Law Act 1958

- and -

IN THE MATTER of the Restrictive Covenant contained in Instrument of Transfer No. A.214172

- and -

IN THE MATTER of an Application by ANTON STANI

J U D G M E N T

(Delivered 7th December, 1976)

YOUNG, C.J.:
BARBER, J.:
NELSON, J.: This was an appeal from an order of Gillard, J. made on 25th March, 1976, dismissing an application by the appellant Stani to modify a restrictive covenant pursuant to the Property Law Act 1958, s.84. The land in question is the rear portion of an allotment numbered 94 in a plan of subdivision, situated in Clayton. Allotment 94 has been subdivided into two portions, the front portion having a frontage to Turnbull Avenue and the rear portion facing into Leumear Street. Throughout the hearing and before this Court for convenience the front or Turnbull Avenue portion of Lot 94 has been referred to as Lot 1 and the rear or Leumear Street portion as Lot 2, and they are so

VF. 1. (CONT'D)

referred to in this judgment. Lot 2 has a frontage of 58 feet 1½ inches to Leumear Street. At the hearing and before this Court it was conceded by the objector that the subject land had a right of access to Leumear Street. Lot 94 was one lot in a large subdivision consisting of some 48 acres subdivided into over 150 allotments. The original owner was George Samuel Gordon. He died in 1958, and on 13th May, 1959, his executor, one George Stanley Gordon, became the registered proprietor of a number of allotments which were still in the ownership of the original proprietor at the date of his death. George Stanley Gordon is the present objector to this application. On 21st September, 1973, George Stanley Gordon transferred to himself in his own right seven allotments. These properties have since been sold, but at the date of the hearing before the primary judge five of these were still held by George Stanley Gordon as legal owner and trustee for the beneficial ownership of the respective purchasers.

On 24th August, 1956, the original proprietor had transferred Lot 94 to one Robert Thornton. On 27th April, 1964, the appellant Stani became the registered proprietor, erected a dwellinghouse on the front portion of the block, and moved into residence in the year 1965. At some unspecified date in 1973 the appellant subdivided Lot 94, and in consequence two separate titles were issued to Lot 1 and Lot 2. The transfer by the original proprietor to Thornton, dated 24th August, 1956, and being transfer numbered A.214172, contained a covenant as follows:

> That the transferee "will not at any time use the said land for the purpose of any trade or business and shall not erect nor allow nor permit to be erected on the said land hereby transferred or any part or parts thereof more than one dwellinghouse with the usual outbuildings and fences nor excavate carry away or permit to be excavated carried away or removed any earth clay stone gravel or sand therefrom except as may be necessary

in connection with excavating for the foundation of any building to be erected thereon."

The covenant is contained and repeated in all subsequent transfers, including the transfer to the appellant, and appears also notified as an encumbrance on the appellant's title to the whole of Lot 94 and on each of the two separate titles issued following this subdivision into the two allotments.

A summons was issued by the appellant pursuant to the Property Law Act 1958, s.84, and Rules of the Supreme Court, Order 54, rules 14 and 19. The summons sought a declaration as provided in s.84(2) in relation to the land comprised in Lot 2 and

"(3) If the said land is so affected an order pursuant to s.84(1) of the said Act wholly discharging the restrictions in the said instrument of transfer or alternatively discharging or modifying the restriction contained therein upon the erection of more than one dwelling-house with the usual outbuildings and fencing."

In an affidavit in support of the summons the appellant stated, "I desire to erect upon the land a single-storey building containing two self-contained flats." He went on to say that he had prepared plans and drawings and had applied for and obtained from the Council of the City of Oakleigh the necessary town planning permit. However, counsel for the appellant stated that the appellant would be content with a modification sufficient to permit the erection of one dwellinghouse upon Lot 2, making, of course, two houses on the whole of Lot 94.

The application having been dismissed, the appellant gave notice of appeal dated 31st March, 1976, wherein he relied upon some nineteen grounds of appeal. It is not necessary to set out these lengthy grounds because at the hearing before this Court Mr. Goldberg, for the appellant, was content to rely upon three

succinctly stated grounds or propositions as follows:

> "That the learned judge should on the evidence have found:
>
> (1) that the continued existence of the covenant impeded the reasonable use of the land, that is either the whole of Lot 94 or the subdivided portion Lot 2 thereof;
>
> (2) that the continued existence of the covenant would not secure any practical benefit to the persons entitled to the benefit of the covenant;
>
> (3) that the proposed modification would not substantially injure the persons entitled to the benefit of the restriction created by the covenant."

Mr. Goldberg for the appellant submitted that on the evidence the learned Judge should have been satisfied that the existence of the covenant impeded the reasonable user of the land, whether that meant the whole of Lot 94 or merely Lot 2 thereof, in that its existence rendered Lot 2 "sterile land", because, he said, no dwellinghouse could be erected upon it, and that having regard to the situation of the land in a residential subdivision, this constituted an impediment to what was a reasonable user. On the other hand, he submitted the other residents in the subdivision, of whom about fifty were entitled to the benefit of the covenant, would in no way derive any practical benefit from the continuance of the covenant and would not be injured in any way that could possibly be regarded as substantial in the words of the section. On this aspect we are of the opinion that it would have been desirable in the appellant's interest to have made the necessary examination of titles and transfers to provide the Court conveniently with information as to precisely which lot-holders were the persons entitled to the benefit of the covenant. No such exercise was undertaken, the learned Judge being merely informed that there were some fifty such persons in the subdivision, which amounted to about

one-third of the total allotments. However, this was a matter which the appellant could have undertaken, and because the onus was on him he cannot complain if this lack of information affected the finding.

Mr. Goldberg relied upon the affidavit and the evidence of Mr. Michael Van Assche, a gentleman qualified in town and regional planning and land valuation. The opinion of this witness was that so far from any detriment arising from the removal of the restriction imposed by the covenant, the amenities of the area would be improved thereby. He gave as reasons in support of this opinion that the proposed building would front Leumear Street, would be out of sight for the most part of those houses which front Turnbull Avenue and Albany Road, that the subject land abuts only the rear sections of such dwellings, and the proposed building would be largely unnoticeable, if at all, from the abutting housing. Further, that the construction in brick veneer of the proposed building would add to the amenity of the area, and whereas in Leumear Street there was an extensive and unsightly length of paling fence forming the rear of the allotments fronting Turnbull Avenue, the proposed new building would remove one section of the paling fence and thus improve the appearance of Leumear Street. He further stated that as the new house faced Leumear Street, the occupants would use that street by way of access, thus not interfering with the traffic flow in Turnbull Avenue. He drew attention to two previous breaches of covenant on Lots 149 and 74.

Mr. Goldberg submitted that the learned Judge had virtually rejected Mr. Van Assche's evidence. What His Honour said in his judgment was that he found this evidence interesting but "it did not really touch the problem". By this we understand that His Honour was not rejecting the evidence insofar as it bore directly on the

issues the Court had to decide, but that much of the evidence was concerned with town planning aspects, and that it was from the point of view of town planning that the witness had considered the matter and formed his opinion. It is of course true that the Court was not concerned with town planning considerations, as has been pointed out more than once in the authorities: see, for example, the observations of Adam, J. in Re Robinson (1972) V.R. 278 at p.285. We think the learned Judge in commenting on Mr. Van Assche's evidence was doing no more than reiterating this principle.

Mr. Larkins for the objector submitted that at the date of the original transfer in 1956 the covenant was of practical use to all the allotments in the subdivision in that it ensured the benefit of an area where the population density would be limited to one dwelling per allotment with consequent limitation on the annoyances and irritations that inevitably flow from a situation of dense population. He instanced as examples of such detriment arising from dense population a number of effects, the sum total of which was of considerable importance. To use the current jargon, increased density of population would affect the "quality of life" in the area in that it would be affected by a number of burdens, trifling in themselves, such as garbage collection, sullage collection, traffic density, noise level from the activities of inhabitants, pets and vehicles, crowd gathering, water pressure during dry weather, and many similar burdens. The limitation imposed by the covenant was a benefit and an attraction to those who purchased the lots in 1956 and later, with knowledge of the covenant, and relying upon it. Nothing, he said, had been demonstrated in the way of change in the character of the area to remove or negate the original benefit. It was further submitted that whereas the

appellant had sought to demonstrate that those residents in the immediate vicinity of the subject land would be adversely affected, if at all, to a minimal extent, that if this was true, which was not conceded, it was not the test to be applied. The benefit of the covenant inured for a number of residents in all parts of the subdivision, and to permit the benefit of the covenant to be eroded was a substantial injury to all of them.

The duty of a court in determining this class of application is well known. It is for the applicant to establish the existence of the conditions set out in paragraphs (a), (b) or (c) and if the Court is satisfied that the existence of any one of the conditions is established, the Court has power to discharge or modify the restriction. That is to say, if an applicant makes out a case for the exercise of the jurisdiction, the Court has a discretion as to whether or not it will exercise its discretion in the applicant's favour: see Re Cook (1964) V.R. 808 and the cases there cited; Re Robinson (1972) V.R. 278.

In the present case no reliance was placed upon paragraph (b) and accordingly the learned trial Judge had to consider whether the conditions in paragraph (a) or (c) had been established. No reliance was placed on the first half of paragraph (a): it was not suggested that there had been such changes in the character of the property or the neighbourhood or other circumstances that would render the restriction obsolete. But the applicant did rely upon the second half of paragraph (a) which is composed of two elements, viz. that the continued existence of the covenant would, unless modified, impede the reasonable user of the land and that it would do so without securing practical benefits to other persons.

The applicant in seeking to establish that the continued existence of the restriction would unless

modified impede the reasonable user of the land, argued that whatever might be thought of the original intention to erect two flats or units, the erection of one dwelling-house on Lot 2 is within the description of reasonable user and that such user was impeded by the restriction. As to this argument, the learned Judge observed that it was necessary to go back to the purpose or design of the subdivider in imposing the covenant; that it was imposed for the purpose of ensuring that one residence only was to be erected on each block so there would be a reasonable density of population giving a reasonably quiet residential atmosphere, attractive in that it would provide a tranquil, quiet existence. He further observed that to alter the density of residents, with the approval of the Court, in one instance, might well encourage others to follow suit. The learned Judge found that having regard to the purpose of the subdivider in imposing the restriction, to erect two dwellings on one allotment was not a reasonable user of the land.

In considering whether the restriction would, unless modified, impede the reasonable user of the land, the learned Judge was in our opinion correct in having regard to the purpose of the covenant: see Re Ghey and Galton's Application (1957) 2 Q.B. 650, especially at p.663 where Lord Evershed, M.R. said:

> "But I think it must be shown, in order to satisfy this requirement, that the continuance of the unmodified covenants hinders, to a real, sensible degree, the land being reasonably used, having due regard to the situation it occupies, to the surrounding property, and to the purpose of the covenants."

See also Re Miscamble's Application (1966) V.R. 596 at p.603. Cf. Re Robinson (supra) at p.283. We are by no means convinced that the learned Judge was in error in so far as he concluded that the continued existence of the

restriction would not impede the reasonable user of Lot 94. But His Honour did not rest his decision solely upon that consideration. He went on to consider the second element and came to the conclusion, contrary to the appellant's argument, that the continuance of the restriction would secure practical benefits to other persons. His Honour took the view that the practical benefits which the continuance of the restriction would secure to the persons entitled to the benefit of the covenant were "living in an area of light population density with the great advantages that go with that circumstance." (Cf. Re Robinson (supra) at p.283 and the cases there cited.)

We are disposed to agree in this conclusion. To quote the final sentence from a well-known passage in the judgment of Farwell, J. in Re Henderson's Conveyance (1940) Ch. 835 at p.845:

> "If a case is to be made out under this section, there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the person who is enjoying the benefit of it, or that by reason of a change in the character of the property or the neighbourhood, the restriction is one which is no longer to be enforceable or has become of no value."

There was no such evidence in this case. Moreover, we agree that any alteration to the design of the original subdivision would affect the quality of living in the area and in particular would affect those living in the immediate vicinity of Lot 2 in that any relaxation of the restriction imposed by the covenant would almost certainly lead to further applications of a similar nature, resulting in a detrimental change to the whole subdivision. The fact that there have already been, in breach of the covenant, two instances of similar subdivisions of allotment, one of them Lot 74, in a very similar situation to that of the subject land, and the fact that the applicant relied upon

the existence of these breaches to support his application, point to the reality of this fear of the ultimate destruction of the original planner's design.

Having considered the application in so far as it was based on s.84(1)(a), we turn to the submission under s.84(1)(c). It is to be observed that the Victorian legislature introduced the word "substantially" in paragraph (c), thus differing from the equivalent English statute. Whether the addition of the word "substantially" changes the nature of the test to be applied in considering the possible injury to the persons entitled to the benefit of the restriction has been the subject of some divergence of views. Adam, J., in Re Robinson (1972) V.R. 278 at p.284, was of the opinion that in the case before him it made no difference. He referred to Ridley v. Taylor (1965) 1 W.L.R. 611, where Russell, L.J. at p.622 pointed out that the purpose of para. (c) was "to preclude vexatious opposition cases where there is no genuineness or sincerity or bona fide opposition on any reasonable grounds." Having regard to the purpose of para. (c) it may well be that this is the correct view, that in other words any injury sufficient to prevent the Court modifying the restriction must be something more than unsubstantial, must be real and not a fanciful detriment: Re Cook (supra). In the long run the test to be applied is similar to that to be applied in determining under paragraph (a) whether the continued existence of the restriction would secure practical benefits to other persons: see Re Chey and Golton's Application (supra) at pp.659-660, and Re Robinson (supra) at p.284.

The learned trial Judge ultimately concluded that in the instant case the modification sought did involve a real and substantial injury because the residents in this subdivision had the benefit of a restriction which ensured a limited density of population and protected them from the

detrimental effect of increased density. This benefit would be eroded by the modification sought in this instance. We are disposed to agree that, if the covenant were modified as sought, this might well be used to support further applications resulting in further encroachment and in the long run the object sought when the covenant was imposed would be completely defeated. An examination of the plan of subdivision shows that there are a number of allotments in respect of which an application such as this could be made, supported by the same arguments as were used to justify this application.

The function of an appellate court upon appeal from the decision of a judge sitting as a tribunal of fact has, of course, been the subject of much judicial consideration. It was said in this case that there was little, if any, conflict of evidence and that nothing turns on the trial Judge's view of the demeanour of witnesses, and that the Court is in as good a position as the trial Judge to draw inferences from the admitted facts, and should not hesitate to do so. In the case of Benmax v. Austin Motor Co. Ltd. (1955) A.C. 370 the House of Lords stated that there is a distinction between the finding of a specific fact and a finding of fact which is really an inference drawn from facts specifically found, and that in the case of the latter the appellate tribunal will more readily form an independent opinion than in the case of the former which involves the evaluation of the evidence of witnesses, particularly where a finding could be founded on their credibility or bearing. Commenting on this decision, Barwick, C.J. in the case of Edwards v. Noble (1971) 125 C.L.R. 296 at p.305, observed:

> "Lord Simonds in his speech said that the appellate court ought not to be reluctant to form its own view of inferences of fact, not themselves depending on the credibility or

> bearing of witnesses; but he pointedly subjects the formation of that opinion to the weight to be given to the opinion of the trial judge as to the inferences to be drawn. With this view, Lords Morton, Tucker and Somervell agreed."

The inferences to be drawn from the facts in this case must nevertheless be regarded as findings of fact, just as inferences drawn from the facts in a case of negligence are themselves findings of fact: see Edwards v. Noble (supra) at p.299. In the instant case the findings of the learned Judge were against the party upon whom lay the onus of proof. In the case of Townsend v. Townsend (1910) 10 S.R. (N.S.W.) 126 at p.131, the Full Court of New South Wales observed that upon appeal from the finding of a judge sitting without a jury where the judge has found an issue of fact against the party on whom lay the burden of proof, the Court will not review his decision unless satisfied that it is manifestly wrong.

Having reconsidered for ourselves the whole of the facts, we are of the opinion that the finding of the learned Judge cannot be shown to be erroneous; that there was evidence upon which the conclusions he reached can be properly supported, and that he has not erred either in ignoring some fact that he should have considered or by taking into account any irrelevant or inadmissible material.

For these reasons we think that the appeal should be dismissed. If, however, we had thought that the trial Judge had made some error which might have justified allowing the appeal, we would have had to consider what course to follow having regard to the fact that we think that inadequate notice was given in this case pursuant to s.84(3) to persons who appear to be entitled to the benefit of the restriction which it was sought to have modified.

By Order 54, Rule 14(e) of the Supreme Court Rules, a Master is empowered to exercise the powers of

the Court under s.84(3), and where the application is not opposed, the powers set out in the other provisions of s.84. Order 54, Rule 19, provides in substance for a certificate from the Master that all proper inquiries have been made and notices given. The procedure to be followed by applicants for the discharge or modification of a covenant is set out accurately and in sufficient detail in "Proceedings in the Master's Office" by Master C. P. Jacobs, at p.149. In our view, the procedure outlined by Master Jacobs is quite satisfactory provided the inquiries, advertisements or other notices ordered are appropriate to the circumstances of each application. We draw attention particularly to the passage in the directions of Master Jacobs reading as follows:

> "The order giving directions will generally contain in a schedule a form or notice to be given either by post or by advertisement or both to the persons appearing to be entitled to the benefit of the covenant. The notice will state that the application will be heard in the first instance on a summons returnable before a named Master at a stated time and place, and that if unopposed it may be dealt with then and there. The notice will of course also give the usual details of the covenant and of the modifications etc. sought and the name and address of the applicant's solicitor from whom further particulars can be obtained."

The persons who would appear to be entitled to the benefit of the restriction in the present case are all those persons who are in any way interested, whether as registered proprietor, registered mortgagee or otherwise, in any lots in the subdivision which had not been transferred out of the title of the original owner before Lot 94 was transferred on 24th August, 1956, to Robert Thornton. Ordinarily we would have expected all those persons (or at least such of them as were interested in lots in close proximity to Lot 94) to be notified directly by post or otherwise and we think that a mere advertisement

in a daily metropolitan paper and a local newspaper is insufficient notice for such persons. We also regard it as necessary that the notice should clearly identify the land affected by the application in a way to be readily apprehended by persons who may be interested. To identify the land by the particulars of title only is unsatisfactory for the purpose of identification. The order made in this case affords an illustration of what we regard as an insufficient and unsatisfactory form of notice. It requires an advertisement in a form set out in a schedule to be inserted once in the "Age" newspaper and once in the "Chadstone Progress", a local paper circulating in the area. The order also required a notice in the same form to the personal representative of George Samuel Gordon, the original transferor of the land. The order was defective in two respects. In the first place, the order should have required the giving of notice directly by post or otherwise to those persons who would appear to be entitled to the benefit of the restriction. Secondly, the advertisement identifies the land affected by the covenant merely by its title particulars and that it was situated "on the west side of Leumear Street, Clayton." As the subject land was the rear portion of an allotment which faced into Turnbull Avenue, the description might be regarded as misleading. As there are a number of properties on the west side of Leumear Street, it is at best an insufficient description not readily identifiable by the persons the advertisement was intended to notify. It is the responsibility of an applicant to ensure that adequate notice is given to the persons who appear to be entitled to the benefit of a restriction sought to be modified or discharged, or at least to such of them as would be directly affected if the restriction were modified or discharged, and if the Court is not satisfied that reasonable steps have been

taken to notify such persons the Court is very likely to refuse the application.

For the reasons stated earlier, the appeal will be dismissed.
