

DEVELOPMENT BUILT IN BREACH OF COVENANT

CASE SUMMARY – SARAH CHIN-JEN HSAI ET AL V MARTIN LYN ET AL

The Supreme Court delivered its decision on January 21, 2020 in favour of the Objectors to an Application to modify restrictive covenants on premises at 18 Upper Montrose Road, Kingston 6, St. Andrew. The Objectors were represented by Emile Leiba of DunnCox.

There were two claims before the Supreme Court:

One filed in 2017 brought by Martin Lyn and his two children (“the Lyns”) to modify the covenants endorsed on Title which essentially restricted their user of the land at 18 Upper Montrose Road to a single residence.

The second claim was brought by the Objectors who sought, *inter alia*, that the Court declare that they are entitled to the benefit of the restrictive covenants which the Lyns sought to modify. This claim was later amended by the Objectors to seek that the structure erected by the Lyns at 18 Upper Montrose Road be demolished.

It was ordered by the Court that both these claims be heard together.

BACKGROUND

In April 2017, the Kingston and Saint Andrew Corporation approved the Lyns’ application to construct a multiple residence complex at 18 Upper Montrose Road. This was subject to their application to discharge any restrictive covenant endorsed on the Title that would prohibit the construction of such a structure. Failure to do so would render the approval null and void.

The Lyns made the relevant Application to the Court in September 2017 and served several residents with Legal Notice of the Application. Mrs. Hsia and her husband filed their Objection. The Lyns began to construct the complex notwithstanding and regardless of there being no approval. Even after Mrs. Hsia's Attorneys, DunnCox, wrote to the Lyns, requesting that they cease and desist with construction until the matter was resolved, the Lyns persisted to execute their plan.

In October of 2018 Mrs. Hsia, along with 5 other residents of Upper Montrose Road, filed their own Claim in the Supreme Court requesting that the Court declare that they were entitled to the benefit of the restrictive covenants and that the Lyns be restrained from continuing construction. The Objectors applied for and secured an interim injunction prohibiting the construction and occupation of the complex until the Court made a

determination in the Claim. In the face of the injunction, the Lyns completed construction of their complex at 18 Upper Montrose Road and caused it to be tenanted.

ISSUES

1. Whether the Objectors were entitled to the benefit of the covenants on the Lyns' Title.
2. What area constituted the neighbourhood in question.
3. Whether the character of the neighbourhood had changed.
4. Whether the covenants were obsolete, that is, should the covenants be modified in accordance with section 3 of the Restrictive Covenants (Discharge and Modification) Act.

ANALYSIS AND FINDINGS OF THE COURT

The Lyns and the Objectors are successors in title to lands emanating from the same parent title and subdivided with covenants which were negative in nature encumbered on the titles including as to the type of residence allowed on the land. The Court found that the Objectors were entitled to the benefit of those covenants created for the protection of lots in the original subdivision, that is, that the covenants were part of a scheme of development.

The Applicants and Objectors differed on what parameters should be used to demarcate the neighbourhood in which 18 Upper Montrose was located. The Objectors asserted that the neighbourhood should be restricted to only Upper Montrose Road and South Hopefield Avenue. The Lyns asserted that the neighbourhood should include the lots to the west of Seymour Avenue and Braemar Avenue, and lots to the northern side of Hopefield Avenue. The Court visited the area as part of its deliberation concerning both neighbourhood and character.

The Court found that the Upper Montrose Road was an enclave and a distinct neighbourhood and therefore the developments on Seymour, Braemar and Hopefield should not be considered when determining the character of the neighbourhood. The Court determined that the neighbourhood was one which maintained single family dwelling house structures, and that the only multi-family structure was the one constructed by the Lyns in breach of the covenants and building approval.

The Court refused the Lyns' Application to modify the covenants and found that the Objectors were entitled to the benefit of the restrictive covenants affecting the Title to the Lyns' land. In concluding that the development had been built in breach of covenants, the Court ordered in remedy that the offending complex be demolished in so far as the same is in breach of the restrictive covenants and convert the structure to a single residence dwelling house in conformity with the covenants endorsed on the Title to 18 Upper Montrose Road. In that regard, the Court is to hear submissions as to the specific work to ensure compliance with its Order.

The Case Summary was written by Mrs. Julianne Mais-Cox, Attorney-at-Law at the law firm, DunnCox. Partner and co-head of the firm's Litigation and Alternative Disputes Resolution Department.