RESTRICTIVE COVENANT MODIFICATION – The DEVELOPERS DILEMMA

The recent decisions of our Courts relating to objections raised by neighbours to modification of restrictive covenants affecting land is indicative of current common law where the "sociology of jurisprudence" is coming to the fore.

That jurisprudential posture is apparent in a series of recent decisions where the challenge by neighbours has been vindicated by the Courts. That position however is not new as one of the oldest reported Court rulings on an Application under the 1960 Restrictive Covenant (Discharge and Modification) Act (the RCDMA) was in 1966 in the case of Federal Motors for property at the corner of Lady Musgrave and Leinster Road, which was refused.

It is noteworthy that the "developers" who have been stalled by the Courts are not those who are members of the JDA who have been conducting the business of development over several decades. It is also noticeable that the type of real estate developments which are the subject of negative Court decisions is primarily high rise apartment buildings. On certain suburban roads the recent frequency of high rise apartment development on former single family house lots could best be described as contagious construction.

One may ask why the proliferation of apartment buildings?
That may be attributed to the law that Restrictive covenants on a title which state "*There shall be No subdivision of this land"* **do not prevent strata developments**.
The law is found in ***Section 3 (5) of the Registration Strata Titles Act*** which states;
"The provisions of any enactment, other than this Act, relating ,to the subdivision of land for sale or for the purpose of building thereon shall to such extent as may be prescribed by regulations under this Act not apply to land comprised in a strata plan."
It clearly exempts strata plans from the no subdivision covenant restriction. So once an approved construction is validated and registered as a Strata Plan the no subdivision restrictive covenant on the title for the land then becomes redundant.

A stop order or injunction may still be issued before completion because when a multi-unit building is erected it is technically in breach of the no subdivision restrictive covenant if no strata plan is yet registered. This is important because a strata plan is not ordinarily approved until the buildings in the development have reached roof level and until the strata plan is approved, it ought not to be registered at the Office of Titles. This may mean that construction will be underway for quite some time, before the strata plan is able to be registered.

A developer who adheres to the requirement in the new Building Act to have neighbourhood consultations may therefore be able to avoid complaints that could trigger such stop orders or injunctions from being issued.

The Real Estate Board has instituted a policy to restrict registration of developments unless Restrictive Covenants that would impede the issue of individual titles are first modified and actually endorsed upon the relevant title. This policy is reasonable as a means to prohibit pre-construction sale of units in a development to the unsuspecting public.

Attorneys are also cautious to advise clients against entering into pre-construction sale agreements where Restrictive Covenants have not been modified to permit the development.

Bankers are now risk sensitive to the prospect of developments being stalled due to non compliance with terms and conditions of approvals and the powers under the Building Act 2019 for Municipal Authorities to issue and enforce "Stop Orders" which are supported by heavy fines.

That general approach is consistent with protecting the public from consequences such as the Courts decision in **Young & Others v *The KSAMC & NEPA (2020) JMSC Civ 251*** *(re 17 Birdsucker Drive)* in which the KSAMC was found to have breached its statutory duties and failed to follow procedural requirements prescribed by law while NEPA was deemed to have exceeded its authority in granting an environmental permit retrospectively.

You may also recall the Supreme Court's decision in the case involving property at Upper Montrose Road where it was ordered that the buildings which had been erected in contravention of the covenant should be demolished. The Court of Appeal decision in that case ***Hsia & Others v Lyn(2023) JMCA Civ 16*** has allowed that the buildings should not be demolished but the more important factor is that the modification of the restrictive covenant against subdivision was refused so no separate titles may be issued for the lots unless the entire development becomes a Strata Plan.

The need for Subdivision or Building Approval as a pre-requisite for the restrictive covenant modification application.

The technical problem with first making an application to modify Restrictive Covenants to permit multi unit development of a plot of land is that in the current dispensation, for over a decade or so, the Court requires that a Covenant Modification application may not proceed beyond the first stage until formal development approval is first given.

The Court is always vigilant in enforcing S. 3(2) of the Restrictive Covenant (Discharge & Modification) Act which states;

"the Judge shall, before making any order under this section, direct such enquiries as he may think fit to be made of the Town and Country Planning Authority and any local authority, and such notices as he may think fit, whether by way of advertisement or otherwise, to be given to the Town and Country Planning Authority and any persons who appear to be entitled to the benefit of the restriction sought to be discharged, modified, or dealt with."

The Court is entitled by that provision in the statute to make enquiries of NEPA and the Local Authority regarding any proposed development that requires modification of the restrictive covenants.

By Section 5(2) of the Local Improvements Act the development considerations which the Local Planning Authorities should consider and advise the Court on are the site location of buildings, whether the buildings meet the plot (land size) to plan (building size) ratio for the given area of land, how many buildings, the height, square footage, and compatibility to the neighbourhood, their design and external appearance and impact on neighbouring lands.

Restrictive Covenant obligations of Local Planning authorities

Under section 3(2) of the Act, the local planning authorities (essentially NEPA and the Municipal Corporations) have a duty to inform the Court:

a) where there are known breaches by the developer of any statute which the local authorities have a duty to enforce;
b) of the effect or potential impact of such development breaches on the public infrastructure in general, e.g. drainage, traffic flow, waste disposal etc.

Consequently there is a duty to bring to the Court's attention any existing breaches of the Building Act for the restrictive covenant application before it. That extends to informing the Court whether or not a building has been built without an approved building permit or built in a way that offends the approved building permit.

In ***Belgravia Development Co. Ltd Re 10 Roseberry Drive (2021) JMSC Civ 187*** the Court refused the covenant modification application because the Building Approval was irregular as the property size was 1705.281 square meters or 0.421 of an acre in size, which rendered it non compliant with the statutory guidelines for multi-family residential development.

As with other areas of law, it does appear that there is some misunderstanding as to the role of the relevant governmental agencies in restrictive covenant modification applications.

It should be noted that by and large, the role of NEPA and the local authorities in the development of land throughout the Island is regulatory. As a result, it is their responsibility to ensure that there is compliance with the legal requirements set forth in the various developmental laws. This highlights the need for their inspection processes to be revamped to ensure that the supervisory functions as it relates to developments which are under construction are properly and promptly being carried out.

As mentioned previously, their role in restrictive covenant modification applications is to comment and to inform the Court of any breaches in existence which would then assist the Court in determining whether the application for modification should be granted. Their ability to comment in this way, should not, however be the means by which they seek to conduct the regulatory functions which they are already duty bound to carry out. They should ensure that they carry out their functions regardless of whether there is an application for modification.

It can therefore be understood why the local planning authorities are reluctant to issue a "no objection" letter to the Court for a restrictive covenant modification application when it does not have an actual development application before it for the land. The local planning authorities have a statutory duty to discharge and must avoid the embarrassment of singing that song titled "**If I knew then what I know now".**

The development approval need not be the final Subdivision or Building Approval.
Outline Approval under S. 14 of the Town & Country Planning Act issued from the NEPA Development Assistance Centre may in some instances suffice to support the Restrictive Covenant Modification Application to the Court for example to facilitate a bare land subdivision.

Modalities for restrictive covenant change
Court Order or Consent of those entitled to the benefit of the covenant

The methodology for approaching restrictive covenant modification to allow development of land has an impact on the prospects of success.
It is important to appreciate that making an application to the Court under the Restrictive Covenant (Discharge and Modification) Act is discretionary, not mandatory and one is not obliged to use that method if there are other valid legal avenues for achieving the same result.
Obtaining the Consent of the persons entitled to the benefit of the restrictive covenant by execution of a Deed of Consent which the registrar of Titles will accept is the old common law method that existed before the statutory alternative was introduced in 1960.

Regardless of which method is to be adopted there first there has to be detailed legal research of the antecedents of the specific title to identify;

A. The origins of the restrictive covenant, how it came to be on the title
B. Whether the restrictive covenant had at anytime in the past been modified by Court Order or amended by Consent
C. Which parcels of land are entitled to the benefit of the restrictive covenant and who owns them.

There are only three bases on which a landowner can become entitled to the benefit of a restrictive covenant if they were not the original beneficiary of it upon their title:

I. The land for which the restrictive covenant exists was assigned to them;
II. There is a document which expressly confers the benefit of the restrictive covenant to the land they own;
III. Both the applicant seeking to change the restrictive covenant and the likely objector each own land bound by a scheme of reciprocal rights stated in the restrictive covenant.

Recently in conducting a title investigation for restrictive covenant modification we discovered that the no subdivision Covenant had in 1964 been modified to permit eighteen lots but the old title had been lost and due to an oversight the modification had not been endorsed on the new title issued to replace it. All that was required was a correction of error application to the Registrar of Titles.

Recommended methods of Restrictive Covenant Modification for Development

In 1960 when the RCDMA came into effect it came with a set of Rules & Regulations.

Those Rules not only prescribed that on Objection could be raised by neighbours they required that an objector state what quantum of compensation they required for the loss they would suffer in the event that the Court granted the covenant modification. In fact the rules carried a Certificate of Compensation which had to be signed by the Registrar before the Order could be registered upon the relevant Certificate of Title.

The Consent of Neighbours is contemplated by Section 3 (1)(c) which provides a ground for granting modification of the restrictive covenant that;

> *"the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified"*

The established developers whom were mostly members of the JDA followed that process and interacted with the persons in the neighbourhood that would be affected by their proposed development to get their feedback and co-operation. It sometimes led to changes in the design of the proposed development and invariably there was a degree of cordiality and compromise that resolved the issues which would have caused formal objections to be raised in Court.

The experienced Attorneys representing those developers would produce special Consent to Modification of Restrictive Covenant documents that would confirm the wording of the modification of the restrictive covenant and be produced to the Court. Any compensation arrangement would be negotiated and undertakings given to ensure that they would be honoured.

In February of 2003 a new set of Court Rules were Gazetted to bring the process into alignment with the new Civil Procedure Rules of the Supreme Court which had come into effect in 2002. What is important is that the 2003 rules did not completely erase the 1960 rules and did not interfere with the methodology for neighbourhood consultation and consent established a half century ago.

Disregard for the old neighbourhood consultation process preceding development is an unfortunate practice which has emerged in the past two decades. There is no doubt that it has raised the level of objections to restrictive covenant modification Court applications. The non consultation may be attributed to the influx of first time developers who prefer to remain anonymous and do not wish to become known to the neighbours.

The change was noticed by Parliament and Sections 18-23 of the Building Act specifically mandate pre-application notices to be put up on site and a neighbourhood consultation process. The notices are put up but the neighbourhood consultation required by Building Act Sections 22-23 is generally being ignored, at the risk of invalidating the final approval..

Character of a neighbourhood

There is a tendency to believe that because of a few proximate multifamily developments along a roadway that the character of a neighbourhood has changed. That is not necessarily so.
The Court has a specific test for determination of a neighbourhood known as the “Estate Agent Test” Essentially it asks the question “What would a purchaser of a particular property expect to get?
Interestingly, a single road can be split into separate neighbourhoods on either side. The Court so ruled thirty years ago in **Regardless Limited v Hadeed & Chang re 48 Norbrook Drive.** There it was determined that properties on the South-Eastern side of Norbrook Drive bounded by the golf course were of a different neighbourhood from those of the North-Western side which had a ravine and paved gully behind them.

The expertise involved in the restrictive covenant modification process for developments has also been disregarded in the choice of legal representation.

On reading the Court rulings it is apparent that **Preston & Newsom on Restrictive Covenants** is the authoritative text on the subject to which the Court often refers for guidance.

So unfortunately, the common approach is to simply jump straight into a Court application under section 3 of the RCDMA without any prior neighbourhood consultation or in depth research to establish the "genealogy" of the specific restrictive covenant to be modified. The Supreme Court weekly list shows an average of sixty restrictive covenant modification applications each week. Of that number perhaps ten per cent relate to covenant modification to permit developments.

Section 5 of the RCDMA states;

1. *The Supreme Court shall have power on the application by motion of the Town and Country Planning Authority or any person interested:-*
    1. *(a) to declare whether or not in any particular case any freehold land is affected by a restriction imposed by any instrument; or*
    2. *(b) to declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is enforceable and if so, by whom.*

This provision allows that an application may be made to the Court to determine if a restrictive covenant has in fact become obsolete or, if not, who are the persons currently entitled to the benefit of the restrictive covenant to be modified.

As pointed out before there are only three bases on which anyone can claim to be entitled to the benefit of a restrictive covenant.

In the absence of neighbourhood consultation to obtain Consents or Non Objection and avoid any likely objections, a Section 5 RCDMA application is where the developer should start the process to modify the restrictive covenants rather than engage in the Russian roulette of a Section 3 application.

The case of ***Half Moon Bay Ltd v Crown Eagle Hotels Ltd*** which began in 1995 as an application under S. 5 & 6 of the RCDMA to determine if land was the beneficiary of a restrictive covenant culminated in the Privy Council's 2002 decision which gives an excellent analysis of the law.

The recommendation therefore is that serious developers may avoid the dilemma of restrictive covenant modification applications being refused by adopting the best practices of:

A. Starting the process with an advisory opinion from an independent lawyer, realtor and planning architect;
B. Engaging competent legal expertise;
C. Conducting neighbourhood consultations.
D. Conforming with the approvals granted

Bearing in mind the huge sums of money involved in the development process the correct approach to restrictive covenant modification has to be made a priority.
To do otherwise would be equivalent to going to the casinos in Las Vegas.

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