BUILDING APPROVAL AS A CONDITION FOR THE DISCHARGE OR MODIFICATION OF A RESTRICTIVE COVENANT: A THORNY ISSUE

1. Any practitioner who attends the Master-in-Chambers on a Tuesday and Friday of each week to deal with applications to discharge or modify a restrictive covenant would be familiar with the following comment:

   "***Applicant to submit Approved Building Plans"***

2. It is the insistence by the authorities and by extension the Court that applicants must submit building approval as a pre-requisite for the granting of applications to discharge or modify a restrictive covenant which has become a very thorny issue for applicants and the Attorneys-at-Law that represent them.

3. I have identified at least five (5) ways in which the thorns of building approval have pricked applicants and practitioners:

   1) The request for building approval by authorities is untimely;
   2) Obtaining building approval results in additional costs and delays;
   3) The requirement appears to be arbitrary;
   4) The requirement for building approval has somehow replaced the grounds set out in the Act for modification or discharge of a restrictive covenant; and
   5) The discretion given to Judge has now been usurped the authorities.

4. Before discussing the five (5) thorns identified above we must first take a brief look at the nature of restrictive covenants and the law, procedure and practice relating discharge and modification.

What is a Restrictive Covenant?

5. A restrictive covenant is an agreement which restricts the use or enjoyment of land belonging to the covenantor at the date of the agreement for the benefit of land belonging to the covenantee. In other words, it is an agreement between two land owners restricting the use of one property for the benefit of the other.

6. A restrictive covenant is negative in nature as it requires the covenantor not to undertake particular activities or exercise certain rights. It also binds the land and not the parties personally and it is said to "run with the land". A restrictive covenant is therefore a burden upon the land of the covenantor enforceable against his assignees and it confers an interest upon the covenantee transmissible to his assignees.

7. Restrictive covenants are usually imposed by the developer of land to protect and preserve the physical, social and economic integrity of the subdivision. Thus covenants may control lot size, architectural design, lot set back and regulate activities.

8. Below are examples of restrictive covenants:

    - There shall be no subdivision of the said land.
    - No building of any kind other than a private dwelling house with appropriate out-buildings appurtenant thereto and to be occupied therewith shall be erected on the said land.
    - No building or structure shall be erected on the said land nearer than twenty-five feet to any road boundary which the same may face nor less than five feet from any other boundary thereof.
    - No building erected on the said land shall be used for purposes of a Shop, School, Chapel or Church or Nursing Home or for racing stables and no trade or business whatsoever shall be carried on upon the said land or any part thereof.

Law, Procedure and Practice

9. Applications to discharge or modify a restrictive covenant are made pursuant to the provisions of the **Restrictive Covenants (Discharge and Modification) Act** which gives a Judge of the Supreme Court the power to

grant an order to modify or discharge a restrictive covenant if an applicant can affirmatively establish one of the grounds specified in Section 3(1) of the Act.

10. The grounds set out in Section 3(1) are as follows:

    a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Judge may think material, the restriction ought to be deemed obsolete; or

    b) that the continued existence of such restriction or the continued existence thereof without modification would impede the reasonable user of the land for public or private purposes without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of such restriction, or, as the case may be, the continued existence thereof without modification; or

    c) 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; or

    d) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.

11. The power given to the Court under section 3 (1) of the Act is in addition to the Court's inherent power to discharge or modify a restrictive covenant if there is sufficient evidence that a covenantee or assignee has acquiesced in a course of conduct which is inconsistent with its continuance or that the character of the neighbourhood has changed to such an extent that it would be inequitable or senseless to continue to insist on observance of a covenant which, in effect has become redundant.

12. The procedure for making applications is governed by the The Restrictive Covenants (Discharge and Modification) Rules, 1960, the Supreme Court Civil Procedure Rules of 2002 (CPR) and Supreme Court Practice Direction No. SC 2003 – 1.

13. CPR Rule 8.1(4)(e) provides that a fixed date claim form must be used to start proceedings whenever its use is required by a rule or practice direction. Practice Direction No. SC 2003-1 states that applications for discharge or modification of restrictive covenants pursuant to Section 3 of the **Restrictive Covenants (Discharge and Modification) Act** are to be by fixed date claim form and must be supported by affidavit and the affidavit must contain the 8 particulars laid down in Rule 4 of the Restrictive Covenants (Discharge and Modification) Rules, 1960.

14. Rule 4 states that the affidavit shall state the extent to which or the manner in which the restriction is sought to be discharged or modified and the grounds on which such discharge or modification is applied for and shall contain particulars with respect to the following matters so far as known to the applicant:

    1) The nature of the restriction;

    2) The land affected by the restriction;

    3) The manner in which the restriction was imposed, whether by covenant or otherwise and the date of the imposition;

    4) The consideration for which the restriction was imposed;

    5) The names and addresses of persons entitled to the benefit of the restriction;

    6) The nature of the interests in virtue of which any such persons are entitled to the benefit of the restriction;

    7) The local authority affected by the application;

    8) The interest of the applicant.

15. The Rules and Practice Direction also require that at least two hearings must take place before the Court can grant an Order to modify or discharge a restrictive covenant.

16. Practice Direction No. 4 requires that at least seven (7) days prior to the date of first hearing copies of the fixed date claim form and affidavit must be served on the authority (The Town and Country Planning Authority (TCPA) now under the auspices of the National Environment and Planning Agency (NEPA)) and local authority (Kingston and Saint Andrew Corporation

(KSAC) / Portmore Municipal Council (PMC) / Parish Council) concerned with the application.

17. Section 3(2) of the Act further states that:

> "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."

18. It is at the first hearing of the application that the thorn called building approval surfaces.

Untimely request for approval by authorities

19. As mentioned above an applicant is required to serve both NEPA and the local authority affected by the application at least seven (7) days before the date of the first hearing.

20. In reality the authorities are served far in advance of the prescribed minimum of seven (7) days and in many cases service is effected one (1) to three (3) months prior to the date of the first hearing. Despite this fact it is often difficult to ascertain the position of TCPA or the local authority in advance of the hearing.

21. In the case of TCPA a comment sheet is provided to the Court on the day of the hearing setting out its position on each application. Court hearings begin at 10:00 a.m. but on many occasions NEPA's comments do not arrive on time.

22. In the case of the KSAC, PMC or the parish council if you do receive a remark it is likely to be subsequent to the date of the first hearing.

23. The overriding objective of the CPR is that the Court must deal with cases justly and as part of this objective the Court is to ensure that matters are dealt with expeditiously. It is also the duty of the parties to assist the Court to further the overriding objective.

24. Thus TCPA, KSAC, PMC and other local authorities must communicate its position on applications in a timely manner in order to properly assist the Court in making a determination.

Additional costs and delays

25. In almost all the matters that I have had to deal with the applicants are not in possession of approved building plans. Thus many applications are stalled because an applicant is unable to produce approved building plans and once the Court receives any objection from NEPA or the local authorities it will not grant the first hearing orders.

26. Where the applicant is not in possession of plans he/she is directed to obtain retroactive building approval from the local authority. In order to obtain retroactive building approval an applicant is required to submit detailed architectural and engineering drawings including the following:

- ✓ Accurate ground plan (showing land or site)
- ✓ Accurate floor plan
- ✓ Accurate plan showing frontage of building
- ✓ Electrical layout
- ✓ Plumbing layout
- ✓ Roof plan
- ✓ Foundation details
- ✓ Drainage plans
- ✓ Details of sewage disposal system

27. Therefore in addition to the cost of the application for modification an applicant is now required to engage the services of a draftsman or an architect to prepare the requisite drawings and thereafter submit them to the local authority along with the prescribed application fee.

28. The application fees differ from parish to parish however the fees are usually based on the area of the building. KSAC, for example, charges fifty-one dollars ($51.00) per square metre whilst the PMC charges one hundred fifty dollars ($150.00) per square metre.

29. The turnaround time for the authorities vary but in my experience an applicant will have to wait at least three (3) months before receiving an approval.

30. As a result an applicant may be looking at spending thousands of dollars to have a restrictive covenant modified and the additional setback of waiting on the parish council for an approval.

Arbitrary Requirement

31. An application for discharge or modification may originate from a number of circumstances. The most common types of applications for modification involve the following:
    - Distance breach
    - Subdivision restriction
    - Change of user

32. In my view each application before the Court must be looked at based on its own facts. An application to modify a restrictive covenant based on a distance breach must of necessity be treated differently from an application to allow change of use of a property from residential to commercial. Consequently, the requirement for building approval is not, in my opinion, always a relevant consideration for every application.

33. However it looks like the authorities do not review each application on its own facts and the request for building approval has now become a blanket statement that covers any application brought before the Court.

Substitution of Grounds in Section 3(1) of Act

34. The case law has revealed that where an applicant seeks to modify or discharge a restrictive covenant the onus is on him to affirmatively establish at least one of the grounds specified in section 3(1) of the Act.

35. In ***Re Henderson's Conveyance***[1] Farwell J stated that an applicant must bring himself strictly within the terms of the Act if he is to make a case which will justify the release or modification of a covenant.

[1] [1940] Ch 835

36. There is absolutely no mention in Section 3 (1) that an applicant must satisfy the Court that he has received building approval before the Court can exercise its discretion to grant an order under that section.

37. One therefore has to question the relevance of building approval or absence thereof in relation to applications to modify or discharge restrictive covenants.

38. However, in my experience, it seems that the only factor considered by the Court is whether the applicant has building approvals or not and no consideration is given by the Court to the grounds set out in the Act.

39. In fact, many applications before the Court are now at a standstill because applicants cannot produce an approval.

40. Consequently the success of an application is not guaranteed even if an applicant can affirmatively establish that there has been a change in the character of the property or the neighbourhood which has rendered the covenant obsolete or that the persons entitled to the benefit of the restriction have agreed, either expressly or by implication, by their acts or omissions, to the covenant being discharged or modified.

41. In many subdivisions such as Greater Portmore, Duhaney Park and Havendale there has been such a wholesale departure from the original covenants by most land owners and the covenants on the title especially in relation to the distance of the house from the boundary have become obsolete.

42. But the questions of obsolence of a covenant or any of the other grounds set out in Section 3(1) do not seem to be given any weight and appear to have been replaced with the requirement for building approval.

43. It must be admitted that most land owners have not sought building approvals for additions or alterations made to properties. But it looks as if the provisions of the building acts have been forgotten and the authorities have turned to the provisions of the **Restrictive Covenants (Discharge and Modification) Act** as a means of enforcement.

44. Section 10 of the **Kingston & St. Andrew Building Act** states:

> "Every person who shall erect, or begin to erect or re-erect or extend, or cause or procure the erection, re-erection or extension of any such building or any part thereof without previously obtaining the written approval of the Building Authority … shall be guilty of an offence against this Act, and liable to a penalty not exceeding fifty thousand dollars, besides being ordered by the Court to take down the said building or part thereof, or to alter the same in such way as the Survey, shall direct, so as to make it in conformity with the approval of the Building Authority or the tribunal of appeal."

45. Why aren't the authorities making use of the building acts if building approval is so critical to development?

<u>Usurpation of Judge's Discretion</u>

46. Section 3(1) of the **Restrictive Covenants (Discharge and Modification) Act** states that:

> "a Judge in Chambers shall have the power, from time to time on the application of the Town and Country Planning Authority or any person interested in freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or building thereon, by order wholly or partially to discharge or modify any such restriction ..."

47. The case of ***Driscoll v Church Commissioners for England***[2] illustrates that the power given to the Court is discretionary and so even if the applicant establishes the grounds a judge may still refuse to make an order for discharge or modification.

48. It is not disputed that the Court must take in to consideration the comments made by the TCPA and the local authorities but ultimately the decision to grant or deny an application for modification or discharge rests with the Court.

49. In my opinion however the functions of the Court are presently being usurped as the success or failure of an application is dependent upon the views of TCPA and local authorities and whether an applicant is in possession of building approval.

[2] [1957] 1 Q.B. 330

50. I therefore believe that the present situation is untenable. Whilst the court must take into account the views of the authorities in coming to a decision, the views of the authorities especially as it relates to building approval cannot be sole consideration.

51. The Court must look at all the circumstances and determine whether on the facts an applicant has satisfied the grounds set out in Section 3 (1) of the Act.

RECOMMENDATIONS

52. I therefore submit the following recommendations as a means of overcoming the thorny issue of building approval as a precondition for the discharge and modification of a restrictive covenant:

1) A Public education campaign regarding the purpose of restrictive covenants and the requirement for building approval.
2) Assembly of a team within each of the relevant authorities with appropriate expertise to review applications and provide comments in a timely manner.
3) Authorities must make better use of building laws and implement stronger enforcement mechanisms.
4) The Court must exercise its discretion after considering the grounds set out in section 3 (1) of the Act and the views of the authorities (if pertinent).

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