JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 7/06

BEFROE: **THE HON. MR. JUSTICE HARRISON, P.**
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

BETWEEN	**HOPEFIELD CORNER LTD**	**APPELLANT**
AND	**FABRICS De YOUNIS LTD**	**RESPONDENT**

Miss Hilary Phillips, Q.C., Patrick Bailey & Miss Audre Reynolds instructed by Patrick Bailey & Co., for the appellant

Maurice Manning & Miss Sherry-Ann McGregor instructed by Nunes, Scholefield Deleon & Co., for the respondent

16th, 17th, 18th, 19th, 26th, 27th, April; 17th, 21st, 22nd, May 2007 & 24th October 2008

HARRISON, P.

1. This is an appeal from the decision of Beckford, J., on the 14th June 2005, setting aside the order of Cole-Smith, J. made on the 20th February 2004 modifying restrictive covenants nos. 2, 5 and 6 on property registered at Volume 288 Folio 35 of the Register Book of Titles.

2. The relevant facts are that the appellant Hopefield Corner Ltd, a limited liability company is the owner of property registered at Volume 288 Folio 35, no. 3 Hopefield Avenue in the parish of Saint Andrew. The appellant, with its registered office at Simmonds Building, 30 DeCastro Street, Wickham's Cay,

Tortola, British Virgin Islands, purchased the said property by transfer dated 6th June 2003. The property known as 3 Hopefield Avenue comprises three titles, registered at Volume 946 Folio 195, Volume 792 Folio 72 and Volume 288 Folio 35. The last title contains the relevant restrictive covenants.

3. The respondent is a limited liability company with its registered office at 7 – 7 1/2 Constant Spring Road, Kingston 10. This office has been so situated since the 6th October 1993. Its principal officer, as director, is Sameer Younis. The company is the owner of no 1 Hopefield Avenue; adjacent to the appellant's at no. 3

4. In order to effect development plans for the building of six houses on the said property, the appellant applied to modify the relevant restrictive covenants on property registered at Volume 288 Folio 35, no. 3 Hopefield Avenue, in accordance with the Restrictive Covenants (Discharge and Modification) Act.

5. On the 31st October 2003 Miss C. McDonald, Master-in-Chambers, at a first hearing of the application for the modification of the covenants, ordered the appellant to serve specified proprietors with notice of the application for modification and to advertise the application twice on consecutive weeks in certain newspapers. This order, inter alia, reads:

"1. Notice of this application to be served on all registered proprietors or their authorized agents as set out in paragraph(s) 2(i)-(x) of Further Affidavit of Vinay Walia and Rai Tarun Handa dated 31st October 2003 plus registered proprietors and their authorized agent of Lot 4 Hopefield Avenue to be identified and served.

2. Notice of this application to be advertised twice in the Observer/Daily Gleaner Newspaper one week, apart and in strict compliance with practice direction dated 13th February 2003."

The relevant practice direction no SC 2003-1 dated the 20th February 2003 with reference to notice, inter alia, reads:

"**Notices**

6. On being directed as above, the claimant shall give such notices as directed, to persons who appear to be entitled to the benefit of the restrictions. The persons who appear to be so entitled may be decided by the Judge or Master from his perusal of the affidavit in support and any other documents such as title deeds supplied to the registrar.

7. The notices served and or advertised by the claimant shall give persons entitled to object to the discharge or modification of the restrictions at least 14 days from the giving of the notice, an opportunity to object if they so desire.

8. The time for objecting must be specified in the notice.

9. Notices should clearly and prominently show the civic address or if no street and number, the exact location of the premises the subject matter of the application so as to make its description readily identifiable by any layman. It will be sufficient if the civic address or

> description of the subject matter is shown at the heading of the notice as shown below."
> (Emphasis added)

6. Notification of the notice of application was evidenced by the affidavit dated the 9th December 2003 of one Denzil Manning, a legal clerk in the office of the attorneys-at-law for the appellant. This affidavit reveals that the legal notice of the application for modification of the covenant was published in the Daily Gleaner on the 18th November 2003 and again on the 25th of November 2003.

7. In a second affidavit of the same date, Denzil Manning declared that on the 10th November 2003, he effected the posting of the said legal notice by registered mail to the respondent, addressed in this form:

> "(iii) Fabric De Younis Limited
> 151 Harbour Street
> Kingston
> Volume 203, Folio 69
> Civic Address, No. 1 Hopefield Avenue"

8. Further exhibited to this affidavit is a certificate of posting no. 790462 addressed to the respondent at "151 Harbour Street, Kingston."

On 30th January 2004 Master McDonald, at a further hearing, being concerned with the service of the notice, ordered as follows:

> "Adjourned to February 20, 2004 at 12:40 p.m. for service on registered proprietors of notice containing civic address."

9. As a consequence of that order of the Master a second legal notice was presumably re-served. The affidavit of Lanza Turner-Bowen filed on the 7th October 2004, on behalf of the appellant reveals that legal notice dated 30th January 2004, amended to include the phrase,

> "... and known as number three (3) Hopefield Avenue, Kingston Six (6)"

was posted to the respondent "Fabrics de Younis Ltd" The certificate of posting no. 790639 shows that the said notice was posted to "... 151 Harbour Street Kingston." Lanza Turner-Bowen, an attorney-at-law, in the office of the attorneys-at-law for the appellant, in her said affidavit filed on 7th October 2004, in paragraph 8, said of the legal notices,

> "... to the best of my knowledge, information and belief the Legal Notices which were sent by registered mail to the Applicant pursuant to the Orders of the Court have not been returned unclaimed to date."

In a further affidavit by Lanza Turner-Bowen dated 9th November 2004, in paragraph 8, she restated,

> "... further to my Affidavit filed on the 7th October 2004, at paragraphs 8 and 10, to the best of my knowledge, information and belief the Legal Notices which were sent by registered mail to the Applicant pursuant to the Orders of the Court have not been returned unclaimed to date."

10. Sameer Younis for the respondent, in an affidavit dated 3rd January 2005, revealed that he was advised by the Postmaster General of Jamaica, by letters dated 26th November 2004 and 6th December 2004,

(a) In respect of item no. 790462, that it –

> "... was returned to the Cross Roads Post Office on December 31, 2003, then re-directed to the Half-Way-Tree Post Office on the same day ..."
>
> ... was collected from the Half-Way Tree Post Office by Mr. Denzel Manning on January 20, 2004 after notification was sent to Mesdames Jennifer Messado and Co., on January 2, 2004."

(b) In respect of registered item no. 790639, that it –

> "... was returned to the Cross Roads Post Office on February 13, 2004 ..."
>
> "... was collected from the Half-Way-Tree Post Office by Mr. Bernard Ewers on March 16, 2004 after notification was sent to Mesdames Jennifer Messado and Co., on February 19, 2004."

11. On the back of both notices to Mesdames Jennifer Messado & Co., in respect of registered items 740462 and 790639, the stamp of the said company and the signature of Lanza Turner-Bowen appears, authorizing the delivery of each notice to a named bearer.

12. Lanza Turner-Bowen, in her affidavit dated 14th January 2005 in paragraph 6, said:

> "That the first time I became aware that the items addressed to Fabric de Younis may have been returned was when the Fifth Affidavit of Sameer Younis [d/d 3.1.05] was brought to my attention on Friday the 6th January 2005."

She stated further in paragraph 9, that both Denzil Manning and Bernard Ewers, whom she Lanza Turner-Bowen had instructed to receive the returned notices,

evidenced by the phrases, "... deliver to bearer Denzil Manning ..." and "... deliver to bearer Bernard Ewers ..." on returned mail registered slips 790462 and 790639, respectively,

> "... when shown copies of their respective signatures they both acknowledged their respective signatures."

13. Previously, in May 2004, Sameer Younis, the occupier of no. 1 Hopefield Avenue, "... observed that significant development had commenced on property situated at No. 3 Hopefield Avenue ..." (vide affidavit dated 26th August 2004). On the respondent's instructions, its attorneys-at-law, Messrs Nunes, Scholefield Deleon & Co., on enquiries to the appellant's attorneys-at-law, discovered that the relevant restrictive covenants had been modified on 20th February 2004. On a further examination of the Court records, and in particular, the affidavit of service of the respondent in respect of the application for modification, it was discovered that the respondent was not served at its then registered office at 7 – 7 1/2 Constant Spring Road, but instead the notices had been sent to "151 Harbour Street, Kingston."

14. Previously in 1994, the respondent had objected to an application for modification of covenants nos. 2, 5 and 6, on premises no. 3 Hopefield Avenue, in order to construct multi-family dwellings.

15. There were several discussions between Kenneth Benjamin, a principal of the appellant and Sameer Younis, on behalf of the respondent. Benjamin, in his affidavit dated 8th October 2004, at paragraphs 3 and 4, said:

> "3. That sometime after Hopefield Corner Limited acquired an option to purchase the property in December 2002, I was approached by Mr. Sameer Younis, Principal of Fabrics De Younis Limited, who indicated that he 'owned the restrictive covenants' on the property at No. 3 Hopefield Avenue and that Hopefield Corner Limited should deal with him directly in respect of purchase of the property and not Dennis Joslin Jamaica, Inc. which had acquired the mortgage over the property. He specifically wanted one of the units, which we proposed to construct, to be assigned to his son free of cost. I told him that, that proposal was unacceptable.
>
> 4. Sometime later, possibly in March 2003, just before we exercised our option to purchase the property, I met Mr. Sameer Younis at Constant Spring Golf Club, when he reiterated that 'he owned the covenants' on the subject property and asked me whether we had thought about his proposal. I advised him that our purchase was in train and we intended to follow due process to amend the restrictive covenants then attaching to the titles."

Younis, in his affidavit dated 14th October 2004, in response, at paragraph 3, said:

> "... it is clear from the Benjamin Affidavit that he knew or ought to have known at all times prior to July 2003 that the Company objected to the modification of the restrictive covenants."

He did not deny paragraph 3 of the Benjamin affidavit. Neither did he deny paragraph 7 of the said Benjamin affidavit, which reads:

> "7. That in January 2004, just before the final hearings in the matter to amend the restrictive covenants set for January 30th 2004, I received a telephone call from Mr. Sameer Younis who advised me that:
>
> (i) He intended to sell his adjoining property (No. 1 Hopefield Avenue, Kingston 6) to the American International School of Kingston.
>
> (ii) In order to facilitate the said sale, the covenants governing the use of his property would have to be modified and/or be discharged.
>
> (iii) He wanted our consent to an arrangement whereby we would not object to his application for modification and/or discharge of the restrictive covenants governing the use of his property and in turn he would not object to our application for modification and/or discharge of the subject restrictive covenants."

Benjamin admits that it was in "May 2004 that Younis enquired of him the nature of the proposed construction. In paragraph 9 of his said affidavit dated 8th October 2004, Benjamin said:

> "9. In May 2004, Mr. Younis contacted me soon after construction had commenced on the property, advising that he noticed construction had started and asked what we were planning to erect on the premises."

16. Thereafter, Sameer Younis contacted the respondent's attorneys-at-law, who discovered the existence of the order of Cole-Smith, J. made on 20th February 2004, and consequently applied to set it aside. This appeal resulted from the setting aside of that order.

The grounds of appeal are:

(a) The Learned Judge erred and misdirected herself as to the interpretation of Section (3) Subsection 3 of the Restrictive Covenants (Discharge and Modification) Act and the binding nature of the Master's Final Order.

(b) The Learned Judge erred as to the meaning of the phrase 'liable to be set aside' appearing in the Practice Direction and misdirected herself and *wrongly treated the word 'liable' as leaving her with no discretion as to how to deal with the 'irregularity' found by her.*

(c) The Learned Judge having concluded that the Court had an inherent jurisdiction to set aside the Order of the Master made on the 20th day of February 2004 misdirected herself as to the weight of the evidence before her and having regard to the word liable appearing in the Practice Direction erred in ordering that the entire order be set aside and failed to appreciate her ***discretion*** in the matter and to consider the option of remitting the matter to the Judge or the Master for the hearing of the sole issue of compensation, if any.

(d) The Orders made by the Learned Judge are too wide in their effect resulting in the following:

(i) Threatening the security and certainty of the Torens Title System, as, where there is no allegation of proof of fraud, her Order has implications which could interfere with the registered Certificates of Title which could be issued subsequently pursuant to the Registration of Titles Act.

(ii) Being outside of her jurisdiction as it is inclusive of other parties who were properly served with the requisite

Notices, and had brought no claim before the court, and in doing, has left the Appellant at great risk.

(iii) The remedy of the Claimant should only be reasonable compensation, if any. The Orders granted do not take into consideration the fact that the Appellant had obtained all the necessary approvals and permission, and in so doing the Order creates an injustice to the said Appellant.

(e) That the Learned Judge misdirected herself as to her powers in relation to the Order of a Judge of co-ordinate jurisdiction (viz. Her Ladyship Mrs. Justice Cole-Smith) and erred in failing to appreciate that the Appellant complied with the Order of the Court as made on the 30th January 2004 and also to the satisfaction of the Judge (Mrs. Justice Cole-Smith) who made the Final Order on February 20, 2004. Accordingly, the Learned Judge purported to exercise appellate review matters on an issue which ought properly to be reserved for a Court of Appellate Jurisdiction.

(f) The Learned Judge erred in not finding Mr. Sameer Younis as a Director of the Respondent had actual Notice of the Advertisement published in the Gleaner pursuant to the Court Order made on January 30, 2004 and confirmed in the Court Order of 20th February 2004.

(g) The Learned Judge erred and misdirected herself as to the utility of a visit to the ***locus in quo*** and deprived herself of an opportunity to observe the state of construction at the premises 3 Hopefield Avenue to better inform the exercise of her discretion having regard also to the fact that such construction was being done, inter alia, pursuant to an Order for

Modification endorsed on the subject title and the Appellant's contention that the construction enhanced the neighbourhood.

(h) The Learned Trial Judge erred and misdirected herself in refusing to order that Mr. Sameer Younis attend for cross-examination and thereby deprived herself of an opportunity to assess his demeanour and credibility and bona fides as to the salient issues before her for consideration viz:

(i) Whether as a Director of the Respondent Company he had Notice of Application to Modify the Covenant and whether such Notice was imputed to the Respondent Company.

(ii) Whether he was objecting to the modification proposed *in toto* or whether his real motive was to extract compensation as a precondition for the modification of the covenant to be allowed although the Respondent would have suffered no loss as a consequence of the modification sought.

(j) The Learned Judge erred in failing to give consideration to the matters set out in the various Affidavits filed on behalf of the Appellant having wrongly excluded those matters as being irrelevant although Mr. Sameer Younis gave specific reasons that if the Order made on February 20, 2004 was not set aside it would, inter alia, be likely to cause injury, loss and damage and lead to a reduction of the value of 'his' property and accordingly the Appellant's response to Mr. Younis' assertions was of great relevance and Mr. Younis' failure to provide any evidence in support of those specific reasons were also of great relevance to the exercise of her discretion."

Grounds (a) (b) & (c)

17. Counsel for the appellant argued that section 3(3) of the Restrictive Covenants (Discharge & Modification) Act ("the Act") made the decision of Cole-Smith, J. binding on all persons and final, whether or not they were served with the notice of modification, and therefore may not be set aside by Beckford, J. a judge of co-ordinate jurisdiction. (The order should have been appealed.) The provisions of Practice Direction no. SC 2001-1 of February 2003, which provide that non-service of the notice is an irregularity and makes the order liable to be set aside cannot override the Act. The respondent's chairman and managing director, Sameer Younis, is presumed to have had notice of the newspaper advertisement and living next door he must have observed the construction on premises 3 Hopefield Avenue, and therefore the respondent had notice of the removal of the covenants. Cole-Smith, J. had exercised her discretion properly in finding that the respondent had received notice, despite the fact that the advertisement did not contain the civic address, and made the order, modifying the covenants. Beckford, J. was therefore in error, to conclude that the notices were insufficient, and thereafter failed to exercise her discretion in setting aside the order of Cole-Smith, J., a final order.

18. The restrictive covenant imposed for the benefit of adjoining land owners, may be modified, as provided by the Restrictive Covenant (Discharge & Modification) Act ("the Act") section 3(1) inter alia reads:

> "(1) A Judge in Chambers shall have power, from time to time on the application of the Town and Country Planning Authority or of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) ..."

The procedural steps are dealt with in the following subsections,

> "(2) 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.
>
> (3) Any order made under this section shall be binding on all persons, whether ascertained or of full age or capacity or not, then entitled or thereafter capable of becoming entitled to the benefit of any restriction, which is thereby discharged, modified, or dealt with, and whether such persons are parties to the proceedings or have been served with notice or not.
>
> (4) Rules of court may be made regulating applications under this Act, the recording and registration of orders made under this Act, and all matters incidental thereto."

Under the authority of section 3(4) of the Act, the Restrictive Covenants (Discharge & Modification) Rules 1960, were made and published in the Jamaica

Gazette, Proclamations, Rules and Regulations dated 13th June 1960. Rule 7 reads:

> "(7) (1) The applicant, shall, on being directed so to do by the Judge, give such notices by way of advertisement or otherwise as the Judge may direct.
>
> (2) The notices shall require persons claiming to be entitled to the benefit of the restriction who object to the discharge or modification of the restriction proposed by the application, or who claim compensation for the discharge or modification thereof, to file with the Registrar and serve on the applicant within such time not being less than fourteen days from the giving of the notices, as may be specified in the notices, any objections that they may have to the application, and the grounds thereof, and if they claim compensation for the discharge or modification of the restriction, the amount of the compensation claimed."

19. The Civil Procedure Rules 2002 apply to all civil proceedings in the Supreme Court (Rule 2.2(1)), with stated exceptions, which do not include restrictive covenants modification. Rule 4 makes provision for practice directions to be issued by the Chief Justice. Rule 4.2(2) reads:

> "(2) Where there is no express provision in these rules for such a direction, the Chief Justice may give directions as to the practice and procedure to be followed in the court."

Practice Directions complement the Rules and provide detailed assistance of the manner in which the Rules are to be implemented –

> "... a Part generally [contains] the 'bare bones' of the rules, while the corresponding practice direction contains practical guidance on how the rules are to be

> implemented" (The Civil Procedure Rules in Action 2nd edition by Ian Grainger and Michael Fealy, 2000, p. 6)

20. Rules made under the authority of an Act are regarded as aids to construction of the Act and must be read together with the Act. See ***Attorney-General v De Keyser's Royal Hotel*** [1920] A.C., 508. Lord Moulton, at page 551, said:

> "... Regulations and the Act under which they are made must be read together..."

21. Although, as the appellant argues, that "the primary obligation ... is to ensure compliance with the governing statute," the statute cannot be construed in isolation from the Rules which it authorizes and anticipates (See section 3(4) (supra).

22. Practice Directions nos. 4 and 5 detailing the requirements of a first hearing, mirror the provisions of rules 5 and 6, and read,

> "4. At least seven days prior to the date for the first hearing, copies of the fixed date claim form and the affidavit shall be served on the authority and on the local authority which may be concerned with the application.
>
> 5. At the first hearing, the Judge in chambers or the Master will direct what notices, if any, are to be given and to whom, and what advertisements should be placed, and may direct the claimant to furnish the registrar with certain documents mentioned in Rule 6 for the Judge's consideration and which documents are within the applicant's power to produce. Note that pursuant to rule 27.2(7) of the Civil Procedure Rules, 2002, at this first hearing the Judge or Master

shall have all the powers of a Case Management Conference."

Paragraphs nos. 6 to 11 of the Practice Direction, provide details of the nature of the notice required, as referred to in rule 7. They read,

"6. On being directed as above, the claimant shall give such notices as directed, to persons who appear to be entitled to the benefit of the restrictions. The persons who appear to be so entitled may be decided by the Judge or Master from his perusal of the affidavit in support and any other documents such as title deeds supplied to the registrar.

7. The notices served and or advertised by the claimant shall give persons entitled to object to the discharge or modification of the restrictions at least 14 days from the giving of the notice, an opportunity to object if they so desire.

8. The time for objecting must be specified in the notice.

9. Notices should clearly and prominently show the civic address or if no street and number, the exact location of the premises the subject matter of the application so as to make its description readily identifiable by any layman. It will be sufficient if the civic address or description of the subject matter is shown at the heading of the notice as shown below.

'Restrictive Covenants (Discharge & Modification) Act

Suit No.....

Re: 12 England Road, Kingston 7, St. Andrew

TAKE NOTICE .....etc.....

10. This requirement is in addition to, and not in substitution for, a full description by lot, volume and

> folio number which may be stated in the body of the notice.
>
> 11. The notice need not publish the statutory grounds on which the claimant relies unless so directed by the Judge/Master. However, the purpose of the application should be stated briefly so as to alert the persons to whom the notice is addressed of the nature of the application, e.g.
>
> 'PURPOSE:
>
> a) To rectify a building breach of the covenant.
> b) To permit the user of the premises for a purpose now restricted by the covenant;
> c) To develop the land into a subdivision of xx private dwelling houses/apartments/condominiums/town house development'
>
> or as the case may be."

23. The consequences of non-compliance with the requirements of a notice and the conduct of the final hearing, in breach of the relevant practice direction, are dealt with in paragraphs nos. 12 and 18 of the practice directions respectively. They read:

> "12. Where a notice (including one used in and advertisement) does not comply with the above requirements the court may regard the notice as being insufficient.
> ...
>
> 18. A final hearing conducted in breach of this Practice Direction or of Rule 8 of the Rules, is an irregularity and is liable to be set aside on application by anyone entitled to be heard."

24. Rule 10, by its wording, saves non-compliance with the rules from invalidity, but reserves to a judge the power to declare such conduct as invalid. Rule 10 reads:

> "Any failure on the part of any person to comply with the provisions of these rules shall not render the proceedings or anything done in pursuance thereof invalid, unless the Judge so directs."

25. In the instant case the requirement that the notice should contain the civil address, as required by paragraph 9, and emphasized in paragraph 10 of the practice direction, were not complied with. Neither the publications in the Gleaner 18th November 2003 or 25th November 2003 contained the civic address, "no. 3 Hopefield Avenue, Kingston 6." In addition, the service by post of the legal notice on 10th November 2003, and its second service by post on 30th January 2004, as a result of the order of Master McDonald on the said date were intended for the respondent, but were both sent to the incorrect address. Consequently, when Cole-Smith, J. on 20th February 2004, granted the application for modification, she was unaware that the respondent had not been served with the legal notice and on the contrary, she was wrongly advised that the legal notice had been properly served on the respondent by posting on 30th January 2004, vide certificate no. 790639. (See affidavit of Lanza Turner-Bowen filed on 7th October 2004.

26. Beckford, J. was correct to find that the respondent "... was not served with the Notice and is entitled to complain that he was not given a chance to object."

27. In respect of the two advertisements in the Gleaner of the notice of modification, Beckford, J. found –

> "The need for the civic address being readily identifiable by any layman can be understood when one looks at the heading of the legal Notice advertised by the Respondent in the Daily Gleaner. To wit:
>
> Claim No. HCV 0961 – 2003
>
> RE: MODIFICATION OF RESTRICTIVE COVENANTS ON ALL THAT PARCEL Of Land part of SAINT ANDREW being the lots numbered Ten and Eleven – Block "Y" and part of the Lot numbered Nine Block "Y" on the Plan OF VALE ROYAL comprised in Certificate Of Title registered at Volume 288 Folio 35 Of the Register Book of Titles.
>
> This heading does not tell the average person which property this advertisement relates to unless they know what is contained in the Register Title. The Applicant is a "layman" who the Practice Direction seeks to protect. Nowhere in the above heading is the word Hopefield mentioned so there is nothing to alert the uninitiated that this is a property Hopefield Avenue. That is the mischief the Practice Direction seeks to prevent."

28. The only words in that advertisement remotely referable, to the civic address of the relevant lot were "... part of St. Andrew" and "Plan of Vale Royal."

29. Those words could hardly have alerted "the layman" to the fact that "Hopefield Avenue" was intended, moreso no. 3. I agree with the finding of Beckford, J., in that regard, where, at page 38 of the record she said:

> "I hold that the Notices published in the newspaper were insufficient since they did not comply with the Practice Direction."

Being insufficient, the order made, in the circumstances, is an irregular order and "... is liable to be set aside "(paragraph 18 of the Practice Direction). In addition being a "... failure ... to ... comply with the provisions of ... [the] rules...", a judge may direct that the order resulting is invalid (rule 10 of the Proclamation Rules and Regulations 1960), and may set it aside.

30. An irregular order made by a court of unlimited jurisdiction may be set aside by the court which made it, by an application to that Court. In ***Isaacs v Robertson*** [1985] A.C. 97 (P.C.), their Lordships of the Judicial Committee of the Privy Council, speaking of an order made by a court of unlimited jurisdiction, at page 103, said:

> "Such an order is either irregular or regular. If it is irregular, it can be set aside by the court that made it upon application to that court, if it is regular it can only be set aside by an appellate court upon appeal if there is one to an appeal lies."

The said order made by Cole-Smith, J. was an irregular order. Beckford, J. so found and therefore she clearly had the power to set it aside. She was not purporting to exercise appellate powers, contrary to what the appellant has argued. The right of appeal is wholly statutory ***DPP v White*** [1977] 26 WIR

482 and no such right had been given by the Act. Nor would any such right exist if the order was stated to be final as the appellant has argued. (See also ***Grant v DPP*** [2004] 2 A.C. 550).

31. In making her order, Beckford, J. had considered the question of insufficiency of the notice, whether any loss or damage was occasioned to the respondent and also the question of delay. The learned judge was giving effect to the question of the "... irregularity (being) such as gives the Court a discretion as to whether or not it will set aside the Order." She did so "... (in) all the circumstances..." of the case. I agree with the respondent that the learned judge exercised her discretion properly and did not err in construing the meaning of the phrase "...liable to be set aside."

Section 3(3) of the Act which provides that any order for modification,

> "... shall be binding on all persons ..." whether such persons are parties to the proceedings or have been served with notice or not"

recognizes, that as a general rule, restrictive covenants run with the land, and would be binding on successive persons who subsequently acquire the land. In the context of the statutory provisions, read as a whole, the order, in order to be binding must be a valid one. In agreement with the respondent, because Section 3(2), in conjunction with rule 6 of the Rule, allows the judge hearing the application to consider and state who are the persons to be served with notice, a

valid modification order is binding on all, including persons whom the judge did not order to be served.

32. Consequently, it is my view that Beckford, J., was not in error as the appellant argues. The grounds therefore fail.

Ground (c)

33. The appellant argued that the learned judge erred in failing to appreciate that on the basis of the evidence available, she need not have set aside the entire order and in her discretion, may have remitted the matter for hearing on the sole issue of compensation.

34. As I had mentioned previously, the learned judge did exercise her discretion properly, in that she considered the issues of the sufficiency of the notice by advertisement, the disadvantage to the respondent and the issue of delay, prior to setting aside the modification order.

35. Section 3 of the Act provides for compensation to persons "... entitled to the benefit of the restriction ..." in circumstances where "the discharge or modification" creates loss. Such "discharge or modification" contemplates a prior notice properly given to "... any persons who appear to be entitled to the benefit of the restriction sought to be discharged...". Beckford, J., having found that the provisions of the Rules and the Practice Direction had not been complied with,

quite correctly found that the "... discharge/modification" had been invalid. In my view, no issue of compensation could have arisen in those circumstances.

36. There is no merit in this ground.

Ground (d)

37. The appellant argued that no fraud was alleged and therefore the order could affect the registered titles of new owners, contrary to the security of the Torrens system, would enable persons previously served, now to object to the modification and in any event the only remedy should be compensation to the respondent.

38. The Registration of Titles Act modeled, as it was on the Torrens System of land registration, does, as the appellant emphasized, establish the indefeasibility of the registered title to land, in the absence of fraud (***Assets Co., Ltd. v Mere Roihi Consolidated Appeals*** [1905] A.C. 176). However, the legislature must be taken to have been aware of the law, when the later statute, the Restrictive Covenants (Discharge & Modification) Act was enacted.

39. A court must look at the mischief that an Act sought to correct.

40. The Restrictive Covenants (Discharge & Modification) Act specifically authorized a judge to discharge or modify a restrictive covenant, on the application of certain entities and persons, in particular circumstances. There is

no conflict, in fact, with the provisions of the Registration of Titles Act. There is harmony with the previous Act.

41. The order of Beckford, J., was in keeping with the intention of the Act and the Rules and Practice Direction made thereunder. No "risk" was created by the order of the learned judge, as the appellant asserts. It was the activity of the appellant which would create the state of affairs which the appellant fears and regards as putting "... the Appellant at great risk."

42. The affidavit of Sameer Younis dated 26th August 2004 reveals that in May 2004 he became aware of construction activity on premises, no. 3 Hopefield Avenue. He said at paragraph 3.

> "3. That in or about May, 2004 I observed that significant development had commenced on property situated at No. 3 Hopefield Avenue, Kingston 10 in the parish of Saint Andrew, such as the construction of a perimeter wall, and internal works, which suggested an intention to construct buildings on the site."

The respondent's attorney-at-law wrote to the appellant's attorneys-at-law on 31st May 2004 and received a response by letter also dated 31st May 2004.

43. The affidavit of Kenneth S. Benjamin for the appellant dated 8th October 2004 acknowledges that he was spoken to by Younis in May 2004. He said at paragraph 9 –

> In May 2004, Mr. Younis contacted me soon after construction had commenced on the property, advising that he noticed construction had started and

> asked what we were planning to erect on the premises."

The application of the respondent to set aside the order of Cole-Smith, J., was filed on 27th August 2004.

44. The appellant was therefore well aware from about August 2004 that the possibility existed that the order of modification of Cole-Smith, J. could have been set aside.

45. All the transfers and issues of registered titles consequent on such order of modification were made on dates in 2005 and one in 2006. I agree with counsel for the respondent that it was the appellant who took the risk.

46. A developer of land may not be led to believe that he may default in the statutory requirements for the removal of restrictive covenants created for the benefit of adjoining land owners, proceed with his activities and permitted to cure his default by a mere "recoverable compensation." This would clearly defeat the objects of the statute. As stated in the response to the previous ground, compensation can only arise after the valid removal of the covenant.

47. Persons who were properly notified in accordance with the Rules and Practice Direction and who did not object are unlikely now to reverse their stance.

48. This ground also fails.

Ground (f)

49. The appellant argued that the learned judge erred in not finding that Sameer Younis, as a director of the respondent had actual notice of the advertisement published in the Gleaner.

50. I maintain, as stated earlier, that the absence of the civic address in the Gleaner advertisements on the 18th and 25th November 2003, rendered such notices defective and insufficient and thereby would have failed to inform "the layman", of the specific premises which were the subject of the modification and accordingly was in breach of the Act.

51. The fact that Sameer Younis "observed ... significant development ... which suggested an intention to construct buildings on the site" does not irrefutably convey the fact that the covenants had been or would have had to be modified. Despite that, the respondent contacted its attorneys-at-law during the said month of May 2004. There was therefore, no notice to the respondent or to its managing director, to cause the respondent to be fixed with actual notice.

52. In any event, any notice received by a director of a company, which is not in a transaction as a director, is not notice to the company, vide ***The Societé Générale De Paris and Another v The Tramways Union Company, Limited, and Others*** [1884] 14 QBD 424. In that case the issue was whether or not notice to a secretary of a company, on an informal occasion when the will

of the deceased was read at a funeral was sufficient notice to the company of a party's right to the equitable interest in shares. Brett, M.R., at page 438 said:

> "... I confess that my mind never could go with the supposition that that was to be considered as a notice to the company; it was a casual notice, brought home to the secretary not as secretary, but in quite another capacity, namely, as a relative or friend of the deceased person whose funeral he was attending, and nobody, except in the stress of argument at the bar, would argue that that could be a notice to the secretary of the company as secretary of the company, and a notice to the company. Therefore, the equitable rights of the defendants existed first in point of time, but without any notice of their existence being given to the company."

Cotton, L.J. at page 443 said:

> "Where notice to the Board is necessary, it is not essential that notice should be given formally, but notice to be effectual must be information given or coming to them as directors, or in a matter relating to the interests of their company. But here the information given to the secretary was given to him, not as secretary to the company, but as a relation of the deceased, ..."

Lindley, L.J., at page 450 said:

> The secretary was in no way representing the company at the funeral; no notice was given to him as the agent of the company, nor did he acquire any knowledge of the defendants' security ..."

Sameer Younis, although the managing director of the company, was in law, a mere occupier of the premises.

53. The learned judge did not err in finding that the respondent did not have actual notice of the advertisement through its managing director. This ground also fails.

Ground (g)

54. The appellant argued that the learned judge erred in declining to visit the locus in quo which visit would have assisted her in the exercise of her discretion, by viewing the construction and observing its enhancement of the neighbourhood.

The learned judge, at page 30 of the core bundle said:

> "... such a visit would not assist the determination of whether or not the failure to serve the Notice on the Applicant deprived him of his right to object and so set the foundation for the Court's intervention to set aside any order made in the event of such default."

The learned judge correctly focused on the precise nature of the application before her namely, the sufficiency of the relevant notice and refused to be diverted to the wider issue of the substantive application relative to the benefit to the neighbourhood, consequent on modification. Any subjective view of the learned judge of the benefit to the neighbourhood, in about May 2005, would be irrelevant to the issue then before her. As stated earlier, the issue of damage did not arise before the learned judge and may have, if considered, serve only to divert her from the proper consideration of the application before her. This ground also fails.

Ground (h)

55. The appellant complained that the learned judge erred in refusing to order Sameer Younis to attend for cross-examination. Such cross-examination could have assisted the court in determining whether he received notice which could be imputed to the respondent and whether his objection was in respect of the modification in *toto* or as a means to obtain compensation although he suffered no consequential loss.

56. As I previously stated in respect of the foregoing ground, Sameer Younis, as director of the respondent received no notice which could in law, be imputed to the respondent. Cross-examination of Sameer Younis "to assess his demeanour and credibility ..." could not have influenced the conclusion of lack of notice to the respondent.

57. The notice of application for court orders filed by the respondent on 27th August 2004 to set aside the order of Cole-Smith, J. was supported by the affidavit of its managing director dated 26th August 2004.

The order sought by the respondent was that,

> "(1) The order made by the Master (sic) Mrs. M. Cole-Smith on the 20th day of February 2004, be set aside."

58. The said affidavit of Sameer Younis on behalf of the respondent did state the reason for seeking the said order. In paragraph 18, he said:

> "18. If the Order is not set aside it is likely to cause injury, loss and damage to the Applicant for the following reasons:
>
> (i) The modification of the restrictive covenant to facilitate the construction of multi-family dwellings will lead to a reduction in the value of properties which currently have single family dwellings;
> (ii) There is likely to be an increase in traffic, noise and density in the area."

The respondent's application was therefore seeking to set aside the order of 20th February 2004, simpliciter.

Section 3(1) of the Act empowers a judge –

> "... by order wholly or partially to discharge or modify ... (covenants) ... (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order)

in stated circumstances.

59. The discharge or modification is a necessary precursor to the consideration of the issue of compensation. Beckford, J. on the issue of injury, loss or damage to the respondent, at page 39 of the core bundle said:

> "This is a matter that ought properly to be dealt with either when an objection to the grant of the modification is being heard or when the question of compensation is being considered. It cannot be relevant when the complaint is that the order was irregularly obtained."

60. In regard to an application to set aside an order for modification, the discretion of the learned judge, under the Rules, that "any failure ... to comply

with the provisions of these rules ... [does] not render the proceedings ... invalid unless the Judge so directs," or under the Practice Direction, that a "... breach of this Practice Direction is an irregularity and is liable to be set aside", is not a discretion which contemplates a consideration of compensation to the person seeking to set aside the faulty order for modification. Neither the Rules nor the Practice Direction, in such circumstances, seeks to do so. Such a consideration would be a validation of a clear default of the notification provisions.

61. I agree with the respondent that the issue of compensation was not before the learned judge. She was not in error. This ground also fails.

Ground (i)

62. The appellant argued that the learned judge erred in the exercise of her discretion in not considering the various affidavits filed in response to the respondent unsupported assertions that if the order of 20th February, 2004 was not set aside the respondent would suffer injury, loss, damage and a reduction in value of its property.

63. The assertions of a party are not the determining factor of the issues properly to be considered by a court. As I sought to convey in the response to grounds (g) and (i) above, the issue of defect in the notice to the respondent was that which was properly before Beckford, J. and not the substantive issue of the discharge and modification of the covenants. There is no merit in this ground.

64. Accordingly, this appeal should be dismissed. The order of Beckford, J. should stand and the matter should be remitted to the court below, with costs to the respondent to be agreed or taxed.

COOKE, J.A.

I agree.

McCALLA, J.A.

I agree.

HARRISON, P.

ORDER

The appeal is dismissed. The order of Beckford, J. stands and the matter is remitted to the court below. Costs to the respondent to be agreed or taxed.