

BURDENS & BENEFITS

The Legal Implications of Restrictive Covenants



Most of the Certificates of Title issued for registered land in Jamaica have restrictive covenants endorsed on them. If you were to look at the Title for your property it most probably has the following phrase on it: “.... the land is subject to the under mentioned restrictive covenants...”

The nature and effect of restrictive covenants is an area that is of significant importance to property owners and land owners need to fully understand the implication of the above phrase.

Restrictive Covenants are agreements restricting the user of the land .Such agreements are primarily enforceable between the original contracting parties but may also be enforceable by and against future owners of the respective parcels of land. One such case where the covenants can be enforced by persons other than the original contracting parties is where the land in question is the subject of a housing scheme, there is a common vendor from whom all the various owners derived title and the restrictions were imposed on each lot for the benefit of all the lots in the development. In a number of instances these covenants are often aimed at maintaining the residential character of neighbourhoods and usually lay down restrictions with regard to:

1. the use of the land –e.g. stipulating that no trade or business is to be conducted on the land or prohibiting the erection of any building thereon other than a private dwelling house
2. the subdivision of the land into smaller lots
3. the erection of buildings/structures within certain feet of the side boundaries or road boundary.

Restrictive Covenants become an issue for landowners mainly when they are breached. The law provides remedies for the surrounding lot owners in the event of a breach by one of the owners in the development scheme. The person in breach may be restrained by an injunction from using his property in breach of the particular covenant. It is important however that the application for the injunction be pursued as soon as possible because the court is not willing to grant it where there has been a long delay or where there is evidence that the objectors have acquiesced in or accepted the breach.

Damages are another remedy available to persons objecting to the breach and the court has a discretion to award compensation instead of an injunction.

It is possible to have these covenants modified or wholly discharged from the title on which they are endorsed. Under The Restrictive Covenants (Discharge & Modification) Act an owner of land can make an application to the court to modify or to wholly discharge such restrictions. In order to succeed however the applicant needs to satisfy the court that one of the following conditions exists:

- (a) *that by reason of changes in the character of the property or the neighborhood or other circumstance of the case the restriction ought to be deemed obsolete; or*
- (b) *that the continued existence of such restriction 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*
- (c) *that the persons of full age and capacity entitled to the benefit of the restriction have agreed to the discharge or the modification*
- (d) *that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.*

Property Owners need therefore to be aware of the nature of the covenants on their titles as the breaches of these covenants can become troublesome issues in any of the following scenarios:

Sale of Property

All sale transactions should involve the obtaining of a surveyor's identification report. They are essential for purchasers and the mortgage companies as they basically confirm whether your title is in order or not. The reports address the following issues which all go to the integrity of your title::

- (a) whether there are any breaches of the restrictive covenants endorsed on the Title
- (a) whether the boundaries of the land on earth correspond with the boundaries of the land on the title
- (b) Whether there are any encroachments on the property

If the report reveals that any of the covenants have been breached ,then the purchaser or the mortgage company are entitled to require the vendor to cover the cost of making an application to the courts to have the covenant modified or discharged.

ALTERATIONS TO PROPERTY

Here again it is critical that the property owner be aware of the covenants on his Title so that he can ensure that any renovation or addition carried out on his property do not breach the existing covenants.

Restrictive Covenants can also create issues for real estate developers wishing to carry out housing developments on properties. The planning permission granted for a development may often breach some of the restrictive covenants endorsed on the title for the project lands. The system of control of development under the Local Improvement Act, the Town and Country Planning Act and the various Development Orders is separate from that under The Restrictive Covenants (Discharge & Modification) Act, so in the above instance the developer will nonetheless be required to apply to the court to have the breached covenants modified or discharged.

All Purchasers and existing owners of land –be they private home owners or developers –should ensure that they become familiar with the covenants on their Title as running afoul of the covenants can be a costly affair.

Natalie Farrell-Ross is a Partner at Myers, Fletcher & Gordon and a member of the Firm's property department. Natalie may be contacted at Natalie.Farrell-Ross@mfg.com.jm