COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2012/CLE/GEN/FP/00004

BETWEEN

NORBERT VON DIERGARDT

HEIDE VON DIERGARDT

Plaintiffs

AND

TREASURE CAY LIMITED

BEACH VILLA OWNERS ASSOCIATION LIMITED

Defendants

BEFORE	The Hon. Mrs. Justice Estelle Gray-Evans
APPEARANCES:	Mr Jacy Whittaker along with Mrs A. Kenra Parris-Whittaker for plaintiffs Mr Lief G. Farquharson for defendants
HEARING DATES:	2012: November 20 2013: February 4

RULING

Gray Evans J.

1. This is an application on behalf of the defendants by summons filed on 27 February 2012 for an order, pursuant to Rules of the Supreme Court Order 18 rule 19(1) (a) (b) and/or (d) and/or under the inherent jurisdiction of the court, that the plaintiffs' writ and statement of claim be struck out and the action dismissed as disclosing no reasonable cause of action, being scandalous, frivolous or vexatious, or, abusive of the Court's process on the grounds, inter alia, that:

(1) The said writ and statement of claim disclose no infringement of the plaintiffs' rights arising under Article 26 of the Constitution, as alleged; and

(2) The plaintiffs possess no entitlement in law to have the material restriction varied in their favour, as prayed.

2. The defendants' application is supported by the affidavit of David S. Kertland, Treasurer of the second named defendant, Beach Villa Owners Association Limited ("BVOA"), filed 9 August 2012.

3. The plaintiffs oppose the defendants' application and rely on the affidavit of Krishaunda Cartwright filed 12 November 2012.

4. Rules of the Supreme Court ("RSC") Order 18 rule 19(1) provides that the Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground, inter alia, that: it discloses no reasonable cause of action; or it is scandalous, frivolous or vexatious; or it is otherwise an abuse of the process of the Court. The Court may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

5. No evidence is admissible on the "no reasonable cause of action" ground. (See RSC Order 18 rule 19(2)).

6. In addition to the powers under RSC Order 18 rule 19(1), the Court also has inherent jurisdiction to strike out proceedings before it which are obviously frivolous or vexatious or an abuse of its process. (See The English Supreme Court Practice 1995 vol. 1, p.346). Such cases include, inter alia, cases which are obviously unsustainable or spurious; hopeless proceedings and cases involving the improper use of the court's machinery. (See The Supreme Court Practice supra, pp.342-345).

7. Claims for redress under the constitution are not immune from being struck out under RSC Order 18 rule 19 or in the exercise of the Court's inherent jurisdiction. (See the Privy Council's decision in the Bahamian case of Ingraham and others. v Glinton and another [2006] UKPC 40, paras 11-13; as well as the decision of the Court of Appeal for the Organization of Eastern Caribbean States in Spencer v Attorney General and others [1999] 3 LRC 1).

8. The plaintiffs commenced this action on 9 January 2012 by a generally indorsed writ of summons which was followed by a statement of claim on 10 February 2012.

9. The plaintiffs' case is that the first plaintiff is the owner of Villa 535 situate on Lot 16 Block 165 Beach Villas Subdivision in Abaco, The Bahamas ("the said property"), and the second plaintiff, his wife, is a sitting tenant thereof. The said property was originally sold by the defendants to Baroness Hertha Von Diergardt by a conveyance dated 11 February 1971 ("the principal conveyance") and subsequently conveyed to the first plaintiff by the said Baroness by virtue of a deed of gift and an indenture of covenant and release both dated 30 September 1982. The principal conveyance contained, inter alia, the following provisions:

(1) Third Schedule:

"3. No poultry or animals shall be kept raised or maintained in or on the Lot."

(2) clause 4:

"...the [1st defendant] shall have power in its discretion at any time or times to modify vary or release all or any of the said restrictions in respect of all the lots or any lot or part of a lot but so that no such modification or release shall be made without the concurrence of the [2nd defendant]."

10. The plaintiffs allege that the second plaintiff suffers from "severe anxiety" or "anxiety disorder" and "mild depression" and that part of the treatment recommended by her doctors is the use of a "therapy dog"; that when the second plaintiff uses the "therapy dog", she responds well, and when she does not, her condition worsens; that the second plaintiff's diagnosis and condition with and without the use of the "therapy dog" have been confirmed by medical practitioners and such information made available to the defendants, who nevertheless insist on "enforcing the prohibition on the keeping of pets on the property"; that the defendants have fined the plaintiffs, and have threatened to continue doing so, whenever the dog is on the said property.

11. The plaintiffs claim that, given the second defendant's medical condition the said restriction is discriminatory in nature, and that in light of the fact that the defendants have been made "fully aware of such condition", their continued enforcement of the said restriction is also discriminatory as it contravenes Article 26(8) of the Constitution of The Bahamas.

12. The plaintiffs also claim that despite their knowledge of the second plaintiff's condition and her need for the "therapy dog", the defendants have refusedto exercise their discretion under clause 4 aforesaid in the plaintiffs' favour and vary the said restriction to enable the plaintiffs to keep a dog on the said property, and they allege that, in the circumstances, such refusal is unreasonable.

13. As particulars of said unreasonableness, the plaintiffs say that the defendants have not given any "coherent reasons" why they refuse to allow the use of a therapeutic dog in light of the facts and their refusal is having a direct and pronounced effect on the plaintiffs' enjoyment of the said property and is causing them unnecessary suffering, distress and inconvenience.

14. The plaintiffs, therefore, seek the following relief:

1) An Order requiring the defendants to vary the restriction and/or covenant to allow the plaintiffs to bring the medical therapeutic animal onto the said property.

2) A declaration that the said restriction and/or covenant is null and void due to the discriminatory nature of the same.

3) A declaration that any restriction and/or covenant preventing the keeping of pets and/or medical therapeutic animals on the property in the current circumstances is null and void under the Constitution of the Bahamas.

4) Damages, interest and costs.

15. It is clear from the foregoing that the plaintiffs' complaints against the defendants are in essence the following:

(1) The restriction against the keeping of animals, as well as its continued enforcement in relation to the plaintiffs, is discriminatory in nature and contravenes Article 26(8) of the Constitution of The Bahamas; and

(2) The defendants' refusal to exercise their discretion in the plaintiffs' favour by varying the said restriction is unreasonable.

16. Indeed, when this court inquired of counsel for the plaintiffs what was the plaintiffs' cause of action against the defendants, he responded:

> "Two causes of action, one being the Constitution....and the unreasonableness of [the defendants] to exercise their discretion. That is it."

The discrimination claim

17. Counsel for the defendants points out that the plaintiffs do not aver nor is there any evidence before the Court showing that either plaintiff has been subjected to differential treatment by the defendants as it relates to the enforcement of the said restriction. Indeed, counsel points out further that by seeking a variation of the said restrictive covenant in their favour, the plaintiffs are, themselves, seeking preferential treatment. Moreover, counsel argues, there is no allegation or evidence by the plaintiffs showing that the restriction was enforced by reason of the second plaintiff's race, place of origin, political opinions, colour or creed, which, he submits, are the only forms of discrimination that Article 26 of the Constitution is intended to protect against: (see Fawkes v Attorney General and Minister of Finance [1994]BHS J No. 1).

18. On the other hand, counsel for the plaintiffs argues that the statement of claim discloses serious questions of law and constitutional rights that should be heard and considered in full at a trial and ought not to be dealt with on a strike out application. In his submission, given the second plaintiff's medical condition and her need for the therapy dog, the restriction against keeping animals on the said property clearly affects the plaintiffs' use and occupation of the same and, therefore, contravenes Article 26 aforesaid.

19. Counsel for the plaintiffs argues further that there is a question of whether the aforesaid restrictive covenant was meant to include "pets" or, for that matter, the therapy dog, since, in his submission, it is clear that the said restriction is aimed at raising or keeping livestock; to prevent residents from raising chickens or any other farm yard animals on the said property.

20. As I understand counsel for the plaintiffs further submission, the fact that the therapy dog is beneficial to the second plaintiff, coupled with the fact that when she does not have the use of the dog her condition worsens, the defendants' refusal to permit the plaintiffs to have the dog on the premises in contravention of the restrictive covenant is discriminatory as it affects the plaintiffs' use and occupation of the said property.

21. Article 26(8) of the Constitution provides as follows:

> "(8) Subject to the provision of this Article no person shall be treated in a discriminatory manner –
>
> (a) In respect of any conveyance or lease or agreement for, or in consideration of, or collateral to, a conveyance or lease of any freehold or leasehold hereditaments which have been offered for sale or lease to the general public;
>
> (b) In respect of any covenant or provision in any conveyance or lease or agreement for, or in consideration of, or collateral to, a conveyance or lease restricting by discriminatory provision the transfer, ownership,

use or occupation of any freehold or leasehold hereditaments which have been offered for sale or lease to the general public."

22. Article 26(3) of the Constitution defines "discriminatory" for the purposes of Article 26 as:

> "...affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

23. Of note are the comments of Massiah, JA, in the case of Nielsen v Barker [1982] 32 WIR 254, at page 280, regarding the meaning of "discriminatory" as it appears in Article 149(2) of the Constitution of Guyana, which is identical in wording to Article 26(3) of the Constitution of The Bahamas, and which were cited with approval by Gonsalves-Sabola, CJ (as he then was), in the case of Fawkes v Attorney General supra, and are set out hereunder:

> "The word 'discriminatory' in Article 149 [Article 26 BHS] does not bear the wide meaning assigned to it in a dictionary. It has a precise and limited connotation. Although it contains the elemental constituent of favouritism, or differentiation in treatment, its application is confined only to favouritism or differentiation based on 'race, place of origin, political opinions, colour or creed.' No other kind of favouritism or differentiation is 'discriminatory' within the narrow constitutional definition of that word in Article 149(2) [Article 26(3) BHS]. It is to be profoundly in error to think that there has been a contravention of a person's fundamental rights under Article 149 [Article 26 BHS] where the alleged discrimination is based on some ground other than those referred to above, no matter how reprehensible such grounds may appear to be. Such a situation clearly does not come within the purview of the constitutional guarantee, although there may well be other means for its investigation and for securing redress."

24. It seems to me that in order for the plaintiffs to have any chance of success in their claim of discrimination under Article 26(8) of the Constitution, each of them must show, firstly, that the defendants have, in enforcing the restrictive covenant, treated them differently from other persons, and secondly that such different treatment was attributable to their respective race, place of origin, political opinions, colour, or creed.

25. In that regard, I accept the submission of counsel for the defendants firstly, that with regard to the first plaintiff, there is no averment in the statement of claim that he is being discriminated against in the enjoyment of his rights, so he could have no standing to claim redress for constitutional relief pursuant to Article 26 aforesaid, nor, for that matter, could he maintain such a claim on behalf of his wife, the second plaintiff.

26. Article 28 of the Constitution clearly states that only a person who alleges that his fundamental right under the Constitution has been, is being or is likely to be breached can bring an action for constitutional relief. See also the decision of Allen J (as she then was) in Bahamas Bar Council v Christie [2007] 4 BHS J. No. 2.

27. Secondly, there is no averment on the face of the statement of claim, nor have the plaintiffs provided any evidence to show, that in their enforcement of the restrictive covenant as

aforesaid, the defendants have treated the plaintiffs, or either of them, any differently from other unit owners.

28. In fact, the evidence, according to Mr Kertland's affidavit filed on 9 August 2012 is that the defendants have sought to enforce the said restriction "across the board".

29. In his said affidavit, Mr Kertland, at paragraphs 12, 13 and 14 avers as follows:

(1) Over the years, as far as I am aware, whenever it has been brought to the attention of the Board of Directors of BVOA that a dog or other animal was being kept on premises in Beach Villas, the Board has taken action to address the matter. This would normally include making a verbal request of the lot owner that the animal be removed and, if this is not complied with, a written request. Where this failed, the Board has, on occasion imposed fines on lot owners for violations.

(2) The restriction against the keeping of dogs and other animals on the premises has always enjoyed the support of the majority of the villa owners. The issue of lifting the restriction has been considered in the past, both at the Board of Directors level and amongst the BOVA general membership. On each occasion, it was determined to leave the restriction in place.

(3) The BVOA has endeavoured to maintain and enforce the restriction in a consistent fashion and, as far as I am aware, no dogs or other pets are presently being kept on any premises in Beach Villas.

30. That evidence has not been refuted by the plaintiffs.

31. Thirdly, nowhere in their statement of claimdo the plaintiffs claim that by enforcing the restrictive covenant as aforesaid, the defendants are treating the plaintiffs, or either of them, differently on the basis of their race, place of origin, political opinions, colour or creed.

32. Indeed, the allegation of discrimination in the statement of claim appears to be solely on the basis of the second plaintiff's medical condition. In that regard, the plaintiffs plead at paragraphs 14 through 17 of the statement of claim as follows:

"(14) The restriction on the keeping of animals is discriminatory in nature given the medical condition of Mrs Von Diergardt.

15. In light of the fact that the defendants have been made fully aware of Mrs Von Diergardt's medical condition, the continued enforcement of the restriction is discriminatory and unconstitutional.

(16) The plaintiffs clearly have a genuine medical need and it is discriminatory not to allow them the use of the therapeutic dog given the medical circumstances.

(17) Given the discrimination that the restriction is causing it is obvious that it contravenes Article 26 (8) of the Constitution of the Bahamas and should be declared null and void."

And although counsel for the plaintiffs sought to rely on the Canadian cases of Niagara North Condominium Corp No. 125 v Kinslow [2007] O.J. No. 4469 (QL) and Judd v Strata Plan LMS 737, 2010 BCHRT 276, I agree with counsel for the defendants that those cases deal with the issue of discrimination on the basis of disability and come from a jurisdiction which, unlike The Bahamas, has legislation that deal specifically with that form of discrimination. In both cases, reference is made to the Human Rights Code. Counsel argues, and I agree, that on that basis those cases are distinguishable from the present case.

33. So, in the absence of an averment in the statement of claim that the alleged discriminatory treatment was meted out to them by reason of their race, place of origin, political opinion, colour or creed, or evidence to that effect, the plaintiffs would not, in my view, be entitled to the relief soughtpursuant to Article 26 aforesaid.

34. During the course of his arguments, counsel for the plaintiffs intimated that the plaintiffs may wish to amend their statement of claim to raise the issue of discrimination on the basis of creed as well as a possible contravention of the plaintiffs' rights under Article 27 of the Constitution. However, I agree with counsel for the defendants that the plaintiffs' creed is neither pleaded nor evidenced and relief under Article 27 aforesaid, which deals with compulsory acquisition of property by the State, is not available against a private citizen.

35. I, therefore, accept the submission of counsel for the defendants that the plaintiffs' allegations against the defendants of discrimination under Article 26(8) of the Constitution disclose no reasonable cause of action, and are scandalous, frivolous or vexatious and otherwise an abuse of the process of the court.

36. The plaintiffs' complaints of discrimination and constitutional infringement along with the various reliefs referable thereto are therefore struck out under the inherent jurisdiction of the court as well as under the provisions of RSC Order 18 rule 19(1)(a), (b) and (d),for the reasonsaforesaid.

The unreasonableness claim

37. Counsel for the defendants points out that restrictive covenants are proprietary rights (Tulk v Moxhay [1848] 2 Ph 777 and Rhone v Stephens [1994] 2 AC 310) and while he accepts that the Court has an inherentjurisdiction to grant relief from enforcement of a restrictive covenant, he submits that such power is limited to cases (i) where the covenantee has consented to or adopted conduct inconsistent with the covenant's continuance; or (ii) where the nature of the neighbourhood has changed so completely that retaining the covenant would be inequitable or redundant. See the judgment of Sawyer, J in the case of Paradise Island v El Condor Enterprises Ltd [1993] and Chatsworth Estates v Fewell [1931] 1 Ch 224.

38. In Mr Farquharson's submission, neither of the aforesaid common law grounds has been pleaded nor evidenced by the plaintiffs and therefore neither has any bearing on this case. In any event, he submits, there is no material before the court from which it can be deduced that the defendants have waived or acquiesced in breaches of the said covenant or that the neighbourhood has changed so completely as to warrant the varying of the said covenant.

39. Furthermore, counsel for the defendants submits, the plaintiffs' complaint of unreasonableness on the part of the defendants in refusing to exercise their discretion in the plaintiffs' favour is flawed. Firstly, counsel argues, complaints of unreasonableness simpliciter are invariably raised within the context of a statutory regime expressly giving broad powers to a public body to vary or discharge a covenant; and secondly, while the defendants understand the plaintiffs' desire to keep a dog at the said property, the defendants' refusal can hardly be characterized as unreasonable when one considers the type of development of which the said property is a part.

40. In the case of his first argument, counsel for the defendants points out that The Bahamas has no statutory provisions,such as exist in jurisdictions such as Jamaica, Barbados and the United Kingdom, which in addition to embodying the aforesaid common law grounds of acquiescence and change of neighbourhood, also speak to the issue of reasonableness.

41. In that regard, counsel referred to the relevant identical statutory provision in the aforesaid jurisdictions which empowers the court, on the application of, inter alia, any person

interested in any freehold land affected by any restrictionas to the user thereof to discharge or modify any such restriction on being satisfied, inter alia:

> "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."
>
> (See Restrictive Covenants (Discharge and Modification) Law, 1960, Jamaica; The Restrictions (Discharge and Modification) Act, 1967, Barbados both of which are modeled after section 84 of the English Law of Property Act, 1925)

42. As for his second argument, counsel for the defendants points out that Beach Villas isand always has been a touristic development primarily for second-home owners comprising villas and condos with small lots, very close together; that the conveyances for all of the lots contain the same restrictions, including the restriction relating to the keeping of animals, which is uniformly enforced, and impose strict rules with respect to the use, maintenance and upkeep of the respective properties. Furthermore, counsel points out, the principal conveyance emphasizes the unique nature of the development and makes reference to the purchaser's enjoyment of the said property as a "holiday residence" or "holiday estate".

43. In his submission, the plaintiffs are effectively requesting the court to override the proprietary rights of the defendants (and other lot owners) agreed in the principal conveyance and further confirmed by the first plaintiff in the aforesaid indenture of covenant and release and deed of gift which he executed, while the defendants are merely seeking to hold the plaintiffs to the covenant agreed to upon joining the Beach Villas building scheme.

44. In support of the defendants' position, counsel for the defendants rely on the English Court of Appeal decision in Sutton Housing Trust v William Edward Lawrence& Miriam Lawrence (1987) 19 H.L.R. 520 in which the landlord sought an injunction against tenants prohibiting them from keeping a dog on their premises in violation of a covenant contained in a license agreement prohibiting the keeping of "animals". One of the tenants suffered from multiple sclerosis and wanted to keep the dog for what can be characterized as "therapeutic purposes". The trial judge in that case refused the injunction; the landlord successfully appealed and was awarded the injunction prohibiting the defendant from keeping a dog on the premises.

45. Counsel, therefore, submits that the allegations in the statement of claim predicated on "unreasonableness" should also be struck out.

46. Counsel for the plaintiffs accuses counsel for the defendants of misunderstanding the plaintiffs' case and he makes the following arguments on the plaintiffs' behalf:

(1) The wording of the provision in the principal conveyance for the exercise of the defendants' discretion implies that upon a request being made, the consent to modify and/or vary the restriction would not be unreasonably withheld.

(2) If the defendants did not intend to consider an application for varying the said restriction at all, the provision requiring a request for consent would not have been included in the conveyance.

(3) Therefore, the plaintiffs having applied for the variation, it is not sufficient for the defendants simply to rely on the aforesaid restriction to prevent the plaintiffs from keeping the therapy dog on the said property, but rather they

are required to consider the plaintiffs' application and in the event such application is refused, they must then give reasons therefor.

(4) The defendants failed to give reasons, hence the commencement of this action.

(5) The question of unreasonableness should be addressed at trial.

47. In support of those arguments, counsel for the plaintiffs relies on several cases, including: Wrotham Park Estate Co v Parkside Homes Ltd. [1974] 1 WLR 798; Cryer v Scott Brothers (Sunbury) Ltd (1986) 55 P & CR 183; International Drilling Fluids v Louisville Investments [1986] Ch 513; West Layton Ltd v Ford [1979] QB 593 andLehmann v McArthur LR 3 Eq 746and he makes the following submissions:

(1) The leading authority governing the reasonableness of consent is International Drilling Fluids v Louisville Investments [1986] Ch. 513where Balcombe LJ summarized the principles to be considered as follows:-

i. The purpose of the covenant is to protect the defendants from having the premises used in an undesirable way;

ii. The defendants are not entitled to refuse consent on collateral grounds that have nothing to do with the relationship between the parties in regard to the premises.

iii. The burden of proving that consent has been reasonably withheld is on the defendants, which they have failed to satisfy.

iv. In order for the defendants to refuse consent on the grounds of an unacceptable purpose, they would need cogent evidence in support of such a decision.

(2) These are matters which need to be dealt with at a trial and not at an interlocutory procedural application. Witnesses need to be called and examined.

(3) There is a clear line of authority which supports the position that the defendants can only rely on reasons which were present in their mind at the relevant time when they considered the plaintiffs' request for consent to vary and/or modify the covenant and not on reasons which they could not have been aware of and facts which were not in their mind at the material time.

(4) <u>The question for determination at a trial in this matter is whether or not the defendants' conduct in refusing the plaintiff's was reasonable.</u> It is not sufficient for the defendants to seek to justify their refusal by way of an affidavit of the treasurer of the second defendant which only refers to the conveyance and does not speak to the application to vary itself. (underline added)

(5) The defendants attempt to state that they apply this provision to others. Obviously, this is something that needs to be looked at further and should be discussed at a trial. On the face of the defendants own affidavit, it raises facts in dispute, and the plaintiffs should be given the opportunity allowed to cross examine the affiant and the remainder of the board as to the reason for the defendants' refusal.

(6) West Layton Ltd v Ford [1979] QB 593 exhibited that in considering whether the consent is unreasonable, the Court should first look at the covenant in

the context of the document and ascertain the purpose of that covenant. As stated above, Section 3 was aimed at raising or keeping livestock. Roskill LJ in West Layton Ltd repeated Sir John Stuart VC in Lehmann v McArthur LR 3 Eq 746 and added:

> *"I think that the right approach, as Lord Denning M.R. suggested in [Bickel v. Duke of Westminster] [1977] Q.B. 517, is to look first of all at the covenant and construe that covenant in order to see what its purpose was when the parties entered into it; what each party, one the holder of the reversion, the other the assignee of the benefit of the relevant term, must be taken to have understood when they acquired the relevant interest on either side."*

48. It is accepted that the jurisdiction to strike out is only intended for plain and obvious cases. In Hubbuck& Sons v Wilkinson Heywood & Clark [1898] 1 Q.B. 86, Lindley M.R. stated at page 91:

> "The second and more summary procedure [application to strike out the statement of claim] is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks.

49. However, where the Court is satisfied that striking out would obviate the necessity for a trial or substantially reduce the burden of preparing for a trial, it will readily invoke its jurisdiction to strike out. (Williams and Humbert Ltd v W.& H. Trade Marks (Jersey) Ltd. [1986] A.C. 368).

50. In Three Rivers District Council and others v Bank of England (No. 3) [2000] 2 All ER 513, Lord Craighead, at paragraph95, said:

> "...The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well recognized exceptions. <u>For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event, a trial of the facts would be a waste of time and money and it is proper that the action should be taken out of court as soon as possible</u>." (underline added)

51. It seems to me that this is such a case.

52. The facts are not really disputed. In a nutshell they are simply that the plaintiffs reside on property that is part of a building scheme, which property is owned by the first plaintiff and subject to a restriction against keeping animals on the said property. The second plaintiff suffers from a medical condition for which the use of a therapeutic dog has been recommended. She desires to keep a therapeutic dog on the said property; the defendants have refused to give permission for her to do so, citing the said restriction. The first defendant,with the concurrence of the second defendant, has the power to vary the said restriction. They have refused to exercise such discretion in the plaintiffs' favour. The plaintiffs accuse the defendants of being unreasonable and they seek an order directing the defendants to vary the said restriction.

53. Nowhere in the statement of claim do the plaintiffs allege any legal entitlement to have the said restriction varied in their favour; nor do they seek a declaration to that effect or to the

effect that the defendants' refusal to exercise their discretion in the plaintiffs' favour is unreasonable. Instead, they ask the Court to order the defendants to exercise their admittedly absolute discretion in favour of the plaintiffs and vary the said restriction.

54. Counsel for the defendants does not dispute that the Court's jurisdiction to grant relief from the enforcement of restrictive covenants atcommon law is limited to the aforesaid grounds of acquiescence or waiver and change of neighbourhood, nor does he point to any legislative provision empowering the Court to vary or discharge restrictive covenants on some other ground.

55. Moreover, the cases to which counsel for the plaintiffs refers in relation to the reasonableness of consent all appear to relate to landlord and tenant situations where the lease or relevant document contained a provision that where consent was necessary, such consent was not to be unreasonably withheld.

56. Consequently, I agree with counsel for the defendants that all of those cases are, on that basis, distinguishable from this case in which the defendants' discretion is absolute.

57. In any event, even if, as counsel for the plaintiffs, relying on the case of Cryer v Scott Brothers (Sunbury) Ltd argues,it could be implied from the wording of clause 4 aforesaid, that upon a request being made the defendants' consent would not be withheld unreasonably, and even if the court were to find, as the plaintiffs allege, that the defendants, in refusing to exercise their discretion in favour of the plaintiffs and vary the restrictive covenant, acted unreasonably, the plaintiffs would still not, in my judgment, be entitled to the order sought for the reason thaton the authorities cited, thisCourthas no jurisdiction to grant relief from enforcement of restrictive covenants except where it is clear that the defendants have acquiesced in or waived the breach of the restrictive covenant or there has been such a change in the neighbourhood that there is no benefit to keeping the same, neither of which grounds is pleaded or evidenced, and neither of which grounds counsel for the plaintiffs says is being relied upon by the plaintiffs.

58. In the result, I accept the submissions of counsel for the defendants that the allegations in the writ and statement of claim as to the unreasonableness of the defendants in refusing to exercise their discretion in favour of the plaintiffs and vary the said restriction based on the second plaintiff's medical condition disclose no reasonable cause of action; are scandalous, frivolous and vexatious; and otherwise an abuse of the process of the court.

59. It is therefore ordered, pursuant to RSC Order 18 rule 19 (1)(a), (b) and (d) as well as under the inherent jurisdiction of the Court, that the plaintiffs writ and statement of claim be struck out and the action dismissed as disclosing no reasonable cause of action, being scandalous, vexatious and otherwise an abuse of the process of the court.

60. The plaintiffs are to pay thedefendantscosts, such costs are to be taxed if not agreed.

Delivered this 11th day of October A.D. 2013

Estelle G. Gray Evans
Justice