

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION

S CI 2013 02552 (**Proceedings**)

IN THE MATTER of the *Property Law Act* 1958, section 84(1)

and

IN THE MATTER of a restriction imposed by Instrument of Transfer No. 2389018 registered in the Register Book at the Office of Titles and on Certificate of Title Volume 08024 Folio 024

and

IN THE MATTER of an application by Rebecca Yokehoong Wong for modification of the restrictive covenant in the Register Book at the Office of Titles and affecting the land more particularly described in Certificate of Title Volume 08024 Folio 024

BETWEEN:

Rebecca Yokehoong Wong (**Plaintiff**)

And

Daniel Patrick McConville  
(and others according to the attached Schedule) (**Defendants**)

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Date of Document:

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## OUTLINE OF ARGUMENT ON BEHALF OF PLAINTIFF

### INTRODUCTION

#### Content of Originating Motion

1. By amended originating motion filed and served on 15 October 2013, the Plaintiff applies pursuant to s 84(1) of the *Property Law Act* 1958 (**Act**) that the restrictive covenant,

contained in Instrument of Transfer No. 2389018 (**Covenant**) registered on the property situate and known as 453 Pascoe Vale Road, Strathmore, Victoria, being the land more particularly described in Certificate of Title Volume 8024 Folio 024 and being Lot 493 on Plan of Subdivision 9986 (**Land**), be modified.

### **Orders and compliance with notice**

2. On 2 May 2013, the Court made orders for notice of the application be given by:
  - a) ordinary post to the registered proprietors and mortgagees of Lots 485, 486, 487, 488, 490, 491, 492, 495, 496, and 497 on Plan of Subdivision LP9986 on or before 12 June 2013; and
  - b) by notice of the application being placed at the front of Lot 493 on Plan of Subdivision LP9986 on or before 12 June 2013 until 26 June 2013.

These are successors in title of transferees that took their respective lots after the subject land was transferred out of the land described in certificate of title Volume 5402 Folio 374 (**Parent Title**).

3. In the usual way, the notice required that persons entitled to an estate or interest in land in the subdivision that may be entitled to enforce the covenant and to oppose the application give written notice to the plaintiff's solicitors and to the Prothonotary.
4. By way of letter to the Plaintiff's solicitors dated 25 July 2013, copied to the Court, Best Hooper gave notice that it acted on behalf of persons who objected to the application to vary the covenant. Those persons are now listed as Defendants to these Proceedings.

### **The restrictive covenant**

5. The Covenant provides, so far as relevant, that:

*" ... And the said Una Lillian Barrett doth hereby for herself her heirs executors administrators and transferees registered proprietor or proprietors for the time being of the land hereby transferred covenant with the said Glenview Proprietary Limited and its transferees registered proprietor or proprietors for the time being of the land remaining untransferred in the said Certificate of Title and every part thereof that the said Una Lillian Barrett her heirs executors administrators and transferees registered proprietor or proprietors for the time being of the land hereby transferred will not at any time hereafter carry on quarrying operations on the said land or dig carry away or remove any marl stone earth clay gravel or sand therefrom except for the purpose of laying the foundation of any building to be erected on such land and will not erect build or construct or allow to be erected built or constructed on the said land hereby transferred any shop factory warehouse or any other premises for use or suitable for use for the purpose of manufacturing vending or exhibiting for sale goods or merchandise of any description nor will she or they erect or allow to be erected or leave standing more than one dwelling house on each of the said lots hereby*

*transferred and such dwelling house including fences and outbuildings shall not cost less than Four hundred pounds and shall have its front elevation to be the road to which the Lot upon which such dwelling house shall be erected is shown to have a frontage on the said plan and be set back at a distance of at least thirty feet therefrom and any building erected upon the said land hereby transferred [and] shall not be used for any other purpose than that of a residence and no trade or other sign shall be displayed or caused or allowed to be displayed on the said land and no building (including outbuilding) erected on each of the said Lots as aforesaid shall have its roof or any of its exterior walls of iron or metal or any description or any material which shall be an imitation thereof or substitute therefor and the foregoing covenants shall be noted on and appear on the Certificate of Title to be issued for the said land hereby transferred and on every other Certificate of Title therefor of for any part thereof as an encumbrance affecting the same."*

### **The modification**

6. The Further Originating Motion seeks the following changes:

*"And the said Una Lillian Barrett doth hereby for herself her heirs executors administrators and transferees registered proprietor or proprietors for the time being of the land hereby transferred covenant with the said Glenview Proprietary Limited and its transferees registered proprietor or proprietors for the time being of the land remaining untransferred in the said Certificate of Title and every part thereof that the said Una Lillian Barrett her heirs executors administrators and transferees registered proprietor or proprietors for the time being of the land hereby transferred will not at any time hereafter carry on quarrying operations on the said land or dig carry away or remove any marl stone earth clay gravel or sand therefrom except for the purpose of laying the foundation of any building to be erected on such land and will not erect build or construct or allow to be erected built or constructed on the said land hereby transferred any shop factory warehouse or any other premises for use or suitable for use for the purpose of manufacturing vending or exhibiting for sale goods or merchandise of any description nor will she or they erect or allow to be erected or leave standing more than ~~one~~ two dwelling house houses on each of the said lots Lot 493 on LP 9986 hereby transferred and such dwelling house including fences and outbuildings shall not cost less than Four hundred pounds and shall have its front elevation to be the road to which the Lot upon which such dwelling house shall be erected is shown to have a frontage on the said plan and be set back at a distance of at least thirty feet therefrom and any building erected upon the said land hereby transferred and shall not be used for any other purpose than that of a residence and no trade or other sign shall be displayed or caused or allowed to be displayed on the said land and no building (including outbuilding) erected on each of the said Lots as aforesaid shall have its roof or any of its exterior walls of iron or metal or any description or any material which shall be an imitation thereof or substitute therefor and the foregoing covenants shall be noted on and appear on the Certificate of Title to be issued for the said land hereby transferred and on every other Certificate of Title therefor of for any part thereof as an encumbrance affecting the same."*

7. In substance, this means:
- a) an increase in the number of dwellings that can be built on the Land from one to two;
  - b) deletion of a requirement to have any dwelling facing its road frontage;
  - c) deletion of any front setback requirement; and
  - d) deletion of any prohibition on the use of iron or metal for roof for wall structures.
8. In her affidavit dated 16 May 2013 the Plaintiff has also given evidence that if she is successful in these she intends to construct one further dwelling on the Land after subdividing the Land into two lots and to build in accordance with the plans exhibited at RYW-2 to that affidavit.

### Background facts

9. The Land was formerly one of a number of lots contained in the Parent Title. The Parent title was created by instrument 1351843 on 13 January 1928.
10. On 18 April 1951, the Land in the Parent Title was transferred, by Instrument of Transfer 2389018, to Una Lillian Barrett. That Transfer contained the Covenant. The parcels of land that comprised the balance of the land in the Parent Title at the time of the transfer of the Land (and therefore having the benefit of the Covenant) are as set out in the following table.

<b>Date of Transfer</b>	<b>Instrument</b>	<b>Vol/Folio</b>	<b>Lots</b>
6 Aug 1951	2424905	7612/048	485
6 Apr 1950	2293544	7726/087	250
2 Oct 1951	2441809	7726/088	492
10 Oct 1951	2445507	7726/089	356
19 Oct 1951	2448766	7726/090	249
8 Nov 1951	2454813	7831/108	491
9 Nov 1951	2453811	7831/109	248
22 Feb 1952	2474230	7831/110	495-497
9 May 1950	2300479	7923/049	246
3 Aug 1950	2324982	7923/982	299
9 Dec 1952	2532860	7923/051	305

27 May 1953	2561880	7958/183	476
28 May 1953	2562432	7958/184	481-484
28 May 1953	2562433	7958/185	479-480
28 May 1953	2562145	7958/186	245
15 Jun 1953	2565749	7982/019	488
27 Sep 1954	2677588	8063/006	463-475, 507-521
12 Oct 1954	2681524	8078/411	251
21 Oct 1954	2683833	8078/412	252
14 Dec 1954	2697805	8078/413	478
9 Aug 1955	A20764	8093/344	369
3 Feb 1956	A107659	8105/981	489-490
4 Feb 1959	A682138	8215/646	255
18 Feb 1959	A689792	8234/429	254
3 Mar 1959	A696623	8234/430	504-506
6 May 1959	A733003	8234/431	253
31 Oct 1986	M544810Y	9760/226	Vale Street lot
31 Oct 1986	M544811N	9760/227	Vale Street lot
15 May 2000	W780802C	The Queen	Lot A Northern laneway
16 April 2012	AJ600629E	11376/324	Lot 1 TP948266K Part of Vale Street

11. There are approximately 64 lots taking the benefit of the Covenant.
12. The Plaintiff became the registered proprietor of the Land on 8 February 2012. It is developed with a single storey house.

## The location of the Land and the neighbourhood

13. The plaintiff relies on the evidence of Robert Easton, town planner. Mr Easton's evidence is in the form of:
- a) a report dated April 2013 (**Report**); and
  - b) a supplementary report dated October 2013 (**Supplementary Report**).

In his Report, Mr Easton describes the location of the Land and the characteristics of the neighbourhood:

- 3.1 *The land is an irregular shaped lot located on the west side of Pascoe Vale Road, Strathmore immediately south of the Tullamarine Freeway overpass across Pascoe Vale Road. It has a frontage of 16.36 metres to Pascoe Vale Road and a depth of 41.15 metres.*
- 3.2 *It has an area of approximately 570 square metres. It is presently developed with a single storey rendered brick veneer dwelling. It has a drive located on the north side providing access to a garage at the rear of the dwelling.*
- 3.3 *The historical title searches (see pages A5 to A7) for the subject land indicate that the Country Roads Board purchased the land on 9 November 1964 (presumably as part of the Tullamarine Freeway project). The land was later sold on 8 February 2012 to the Plaintiff, as the land was no longer required by the Country Roads Board (now VicRoads or Roads Corporation).*

14. Mr Easton's Report sets out a large number of changes to the neighbourhood since the time the Covenant was created in 1951:

- 9.2 *Today the same area has now been subject to significant changes to the north of Loeman Street, with several minor changes to the south of Loeman Street. In particular, only 93 of the original 136 lots, now have either one or more dwellings constructed thereon. Three lots have had a second dwelling constructed. Two additional dwellings have been constructed in a former road reserve. Three lots no longer exist, as they have been incorporated in road reservations, or similar. Term Street has been truncated at its approximate mid-point. Vale Street has been totally closed and totally incorporated in other titles, including two dwellings now constructed within its original area. Ascoe Street, now forms part of a carpark, associated with the Strathmore bowls club, and Strathmore Children's Centre. Holiday Street no longer exists as it has been incorporated in the Strathmore Community Hall and the Strathmore Tennis Club. In addition, 42 original house lots are now longer used for that purpose and now part of the range of community uses, referred to earlier.*

15. Mr Easton also expresses the view that in his opinion the proposed modification satisfies the test in s 84(1)(c) of the Act as it will not substantially injure the persons entitled to the benefit of the restriction. That opinion is based on the following factors:
- a) the proposal is based on utilising the existing access point to Pascoe Vale Road;

- b) as the driveway is on the north side of the property there will be no impact, based on noise, to any adjoining dwelling;
- c) as any second dwelling will need to be constructed to the rear of the Land, it will have a relatively small footprint, the combined effect of which will be less than if a large replacement dwelling of the type referred to earlier were constructed;
- d) due to the location of the Land fronting Pascoe Vale Road, and being on the northeast corner of the subdivision, it is unlikely that there could be any negative detriment on other properties located on land within the Parent Title;
- e) the removal of part of the Covenant related to front setbacks would have no impact on neighbouring owners; and
- f) the proposed building has a short section of flat roof, which will be made of iron or metal. These building materials are now in wide use, and are not of the poor quality which existed in 1951. Likewise, this proposed change will have no detriment on neighbouring owners.

16. In his Supplementary Report, Mr Easton continues this analysis:

**Visual bulk**

*5.2 The plan contained in my original report showed a relatively small double storey dwelling at the rear of the existing dwelling. The upper level section viewed from No. 451 is only approximately 7 metres long measured parallel with that boundary. This is considerably smaller than any other upper storey components on new buildings being constructed in the locality, including the new dwelling being constructed to the north of that property. ...*

**Overlooking**

*5.3 No overlooking is possible from the proposed building. This is one of the strictest areas enforced in the planning system with any window oriented at that property, being required to be screened to a height of 1.7 metres above floor level*

**Overshadowing**

*5.4 I also note that in the Affidavit of Xin Zhang, a comment is made on sunlight overshadowing a vegetable garden. A photo of the vegetable garden as taken from over the fence from the subject land is contained in Figure 2. This vegetable garden is already adjacent to the fence and will be overshadowed even if there was no building on the subject land. Ironically, if the rear yard of the subject dwelling was landscaped with significant vegetation, there is potentially a greater possibility of significant overshadowing of the property to the south*

## Applicable law

17. Section 84 of the *Property Law Act 1958* provides, so far as relevant:

- (1) *The Court shall have power from time to time on the application of any person interested in any 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 ...upon being satisfied—*
  - (a) *that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Court deems material the restriction ought to be deemed obsolete or that the continued existence thereof would impede the reasonable user of the land without securing practical benefits to other persons or (as the case may be) would unless modified so impede such user; or*
  - (b) *....*
  - (c) *that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction:*
- (2) *The Court shall have power on the application of any person interested—*
  - (a) *to declare whether or not in any particular case any land is affected by a restriction imposed by any instrument; or*
  - (b) *to declare what upon the true construction of any instrument purporting to impose a restriction is the nature and extent of the restriction thereby imposed and whether the same is enforceable and if so by whom."*
- (3) *The Court may before making any order under this section direct such inquiries (if any) to be made of any local authority or such notices (if any) whether by way of advertisement or otherwise to be given to such of the persons who appear to be entitled to the benefit of the restriction intended to be discharged, modified or dealt with as, having regard to any inquiries, notices or other proceedings previously made given or taken the Court thinks fit.*
- (4) *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.*
- (5) *An order may be made under this section notwithstanding that any instrument which is alleged to impose the restriction intended to be discharged, modified or dealt with has not been produced to the Court, and the Court may act on any evidence of such instrument as it thinks fit.*

18. The Plaintiff presses its case in relation to s 84 (1)(c) of the Act. The principles that govern this sub-section may be summarised as follows.

- a) Whether a person entitled to the benefit of the covenant would be substantially injured within the meaning of s 84(1)(c) is a question of fact. It follows that each case must be decided on its own facts.
- b) The applicant has the onus of establishing the matters set out in s 84(1)(c) upon which he or she relies. This means that the applicant must effectively prove a negative.
- c) The test for whether a discharge or modification of a covenant would “substantially injure” a person entitled to the benefit of the covenant is similar to that in relation to “practical benefits” in the second limb of s 84(1)(a).
- d) The emphasis is on the injury suffered by the persons entitled to the benefit. From the nature of the proprietary right arising from the restrictive covenant, the injury must occur in relation to the person’s enjoyment of his or her property.
- e) Whether the proposed discharge or modification “will not substantially injure the persons entitled to the benefit of the restriction” requires a comparison between the benefits initially intended to be conferred and actually conferred by the covenant, and the benefits, if any, which would remain after the covenant has been discharged or modified. If the evidence establishes that the difference between the two (that is, the injury, if any) will not be substantial, the ground in s 84(1)(c) is made out.
- f) The injury must be something more than ‘unsubstantial’, it must be real and not a fanciful detriment.
- g) It is not enough for the applicant merely to prove that there will be no appreciable injury or depreciation in value of the property to which the covenant is annexed.
- h) A lack of specific plans makes it more difficult for an applicant to show that there will be no substantial injury to persons entitled to the benefit of a covenant.
- i) The prospect that, if the application for the discharge or modification of a covenant were granted, that might be used to support further applications in a similar vein, may be relevant. Such “precedent value” may, in an appropriate case, of itself be a factor demonstrating that an applicant fails to establish the requirements in s 84(1)(c).
- j) Town planning principles and considerations are not relevant to the Court’s consideration of whether an applicant has established a ground under s 84(1). However, town planning principles and considerations may be relevant to the exercise of the Court’s residual discretion. “Precedential” issues similar to those discussed above may also be relevant in the exercise of that discretion.
- k) The absence of objectors to the discharge or modification of a covenant will not, in itself, necessarily satisfy the onus of proof.

l) Even if the matters set out in a limb of s 84(1)(a), or in s 84(1)(c), are proved by the applicant, the Court has a discretion to refuse the application.<sup>1</sup>

19. The Court has a discretion as to whether to modify the covenant if s 84(1) is satisfied.

## **CONCLUSION**

20. The Plaintiff relies on the Mr Easton's evidence to establish that there is no substantial or real injury, to the persons with the benefit of the covenant, which would result from the modification.

21. Insofar as the issue of precedent is concerned, the Land is unusual if not unique in relation to the remainder of parcels transferred from the Parent Title insofar as it is:

- a) on the periphery of the subdivision;
- b) close to the Tullamarine Freeway overpass;
- c) on a corner site; and
- d) otherwise having limited neighbouring residential exposure.

22. A comparison of the benefits intended to be conferred and actually conferred by the Covenant, and the benefits which would remain after the Covenant is modified, leads to the conclusion that the difference between the two is not substantial. There is no substantial or real injury to the persons with the benefit of the Covenant, which would result from the modification.

23. For this reason, the Plaintiff submits that the Court should grant the relief sought in the Further Amended Originating Motion dated 15 October 2013.

24. In the alternative, it is submitted that the Court should allow a modification that allows a development of the type set out in the evidence of the Plaintiff, referred to above.

**Matthew Townsend**  
Owen Dixon Chambers

Instructed by  
**Michael Flemming and Associates**

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<sup>1</sup> See *Re Comdain Homes Pty Ltd* [2013] VSC 487

SCHEDULE OF PARTIES

Rebecca Yokehoong Wong	Plaintiff
Daniel Patrick McConville	Firstnamed Defendant
Diana McConville	Secondnamed Defendant
Xin Zhang	Thirdnamed Defendant
Darren Peter Smallacome	Fourthnamed Defendant
Barbara Joan Haverfield	Fifthnamed Defendant
Avraam Markopoulos	Sixthnamed Defendant