IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

S CI 2013 02552

IN THE MATTER of the *Property Law Act 1958*, Section 84

and

IN THE MATTER of an application by Rebecca Yokehoong Wong for the modification of the restrictive covenant contained in Instrument of Transfer No. 2389018 registered in the Land Titles Office in the Register Book and imposed upon the land more particularly described as Lot 493 on Plan of Subdivision 9986 Certificate of Title Volume 08024 Folio 024

REBECCA YOKEHOONG WONG — Plaintiff

and

DANIEL McCONVILLE & ORS
(and others according to the attached schedule) — Defendants

JUDGE:	DERHAM AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	21 and 22 October 2013
DATE OF JUDGMENT:	7 April 2014
CASE MAY BE CITED AS:	Wong v McConville & Ors
MEDIUM NEUTRAL CITATION:	[2014] VSC 148

REAL PROPERTY – Restrictive covenant – Application for modification – Applicable legal principles – Covenant restricting, amongst other things, the erection of more than one dwelling on the land – Whether modification will not substantially injure the persons entitled to the benefit – Application granted – *Property Law Act 1958*, s 84(1)(c).

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr M Townsend	Michael Flemming & Associates
For the Defendant	Mr R Miller	Best Hooper

HIS HONOUR:

Introduction and Summary of Conclusions

1 The plaintiff owns the land at 453 Pascoe Vale Road, Strathmore (**the Land**).[1] It is on the west side of that road. Pascoe Vale Road, as is well known, is a substantial arterial road carrying a considerable volume of traffic.

2 Immediately to the north of the land is a parcel of vacant land owned by the Roads Corporation,[2] which is best described as a buffer, because immediately to its north is the Tullamarine Freeway where it overpasses Pascoe Vale Road. That freeway looms over the Land in an imposing way.

3 Immediately to the south of the Land, at 451 Pascoe Vale Road, is a house and land owned by the third defendant, Mr Zhang, and his wife. It is occupied by Mr and Mrs Zhang and their family.

4 The Land has an area of approximately 570 square metres. It is presently developed with a single storey rendered brick veneer dwelling located towards the front of the Land (although set back some 30 feet or nine metres). It has a driveway located on the north side providing access to a garage at the rear of the Land.

5 The plaintiff proposes to subdivide the Land into two lots, and, to construct another dwelling on the subdivided land.[3] The proposed new dwelling is a two storey residence at the rear of the existing house. Concept plans for this proposed subdivision and residence were in evidence.[4]

6 The Land is burdened with a restrictive covenant (**the Covenant**)[5] that prohibits, amongst other things, the erection of more than one dwelling house. The plaintiff applies[6] under s 84(1) of the *Property Law Act 1958* (**the Act**) to discharge or modify

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1 The land more particularly described in Certificate of Title Volume 08024 Folio 024, and being Lot 493 on Plan of Subdivision 9986.
2 Lot 454 on LP 9986, now forming part of the buffer to the Tullamarine Freeway, or City Link Project.
3 Exhibit "RYW-2" to the Affidavit of Rebecca Yokehoong Wong sworn 16 May 2013 (*Plaintiff's Affidavit*).
4 Exhibit "RYW-2" to the Plaintiff's Affidavit.
5 Contained in Instrument of Transfer No. 2389018 and set out in the Schedule to these reasons.
6 By Further Amended Originating Motion filed on 15 October 2013.

the restrictive covenant to enable her to carry out her development.

7 The defendants oppose the modification of the Covenant. The five properties owned by the six defendants have the benefit of the Covenant. The property immediately adjacent and to the south of the Land is owned by Mr and Mrs Zhang, as I have said, while the other defendants own land in various locations in the wider neighbourhood. Their locations are depicted on the plan in Schedule 3.

8 The central issue in the trial was whether the plaintiff has established that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction. That 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 in the manner proposed.

9 In my view, there is no difference of substance between what the plaintiff proposes if the modification of the Covenant is allowed when compared with what can presently be built on the Land if redeveloped for a single dwelling with no modification being made.

10 For this reason I find that the plaintiff has established that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the Covenant.

Background

The Covenant

11 The plaintiff became the registered proprietor of the Land on 8 February 2012. The land was formerly a part of a larger parcel, being the land described in Certificate of Title Volume 5402 Folio 374 (the **Parent Title**). The Parent Title was created by Instrument of Transfer 1351843 on 13 January 1928. Between 1929 and 1959 the Parent Title was subdivided into about 130 lots. The Land was then Lot 493 on Plan of Subdivision LP9986. The Land was transferred out of the Parent Title by

Instrument of Transfer 2389018 on 18 April 1951 ("the **Transfer**"). There were 64 lots that comprised the balance of the land in the Parent Title at the time of the transfer of the Land (and therefore have the benefit of the Covenant).[7]

12 The Transfer contained the Covenant, the text of which is set out in the Schedule 1 to these Reasons. That Covenant contains the following eight restrictions:

(a) a prohibition on quarrying operations for stone, earth, clay, gravel or sand;

(b) a prohibition on erecting or building on the land any shop, factory, warehouse or premises for use for the manufacturing or sale of goods;

(c) a prohibition on erecting more than one dwelling house on the lot;

(d) a requirement that any house on the lot shall not cost less than Four hundred pounds;

(e) a requirement that the dwelling house have its front elevation set back at least 30 feet free of the front of the lot;

(f) a requirement that the building on the lot shall be used solely for the purpose of a dwelling house;

(g) a prohibition on displaying any trade sign on the land; and

(h) a prohibition on using any iron or metal on the roof or any exterior wall of the residence.

Procedural

13 On 29 May 2013, I made orders for notice of the application to be given to the registered proprietors of 10 properties in the immediate neighbourhood of the Land having the benefit of the Covenant. They are the successors in title of transferees that took their respective Lots after the Land was transferred out of the Parent Title. I also required notice of the application to be placed at the front of the Land on or before 12 June 2013 until 26 June 2013.

14 I am satisfied by the affidavits filed that these requirements were duly carried out.[8]

15 The notice required that persons entitled to an estate or interest in land in the

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7 The benefitted lots are set out in a table in Schedule 1.

8 Affidavit of Rebecca Yokehoong Wong sworn on 22 July 2013 and affidavit of Michael Fleming sworn 25 July 2013.

subdivision, that may be entitled to enforce the Covenant and to oppose the application, to give written notice to the plaintiff's solicitors and to the Prothonotary.

16 By way of letter to the plaintiff's solicitors dated 25 July 2013, copied to the Court, Best Hooper, Solicitors, gave notice that it acted on behalf of the owners of five properties in the neighbourhood having the benefit of the Covenant who objected to the application to vary the Covenant. The owners of those properties were added as defendants in this proceeding.

The Evidence

17 The plaintiff relied on the following evidence:

(a) affidavits sworn on 16 May 2013 and 22 July 2013;

(b) the affidavits of Michael Anthony Fleming, solicitor, sworn on 8 May 2013 and 25 July 2013; and

(c) the affidavits of Robert Walter Easton, an expert town planning consultant, sworn 10 May 2013, 11 October 2013 and 15 October 2013 and reports and documents exhibited to those affidavits. The substance of Mr Easton's evidence is in the form of two reports upon which he was cross-examined.[9]

18 The defendants evidence is as follows:

(a) Affidavit of the first defendant, Daniel Patrick McConville, sworn on 26 September 2013 on his own behalf and on behalf of his wife, the second defendant;

(b) Affidavit of the third defendant, Xin Zhang, sworn on 26 September 2013 on behalf of himself and his wife;

(c) Affidavit of the fourth defendant, Darren Peter Smallacombe, sworn on 26 September 2013 on behalf of himself and his wife; and

(d) Affidavit and an Expert Witness Report of Giovanni Gattini, Town Planning Consultant, sworn on 20 September 2013.

The location of the Land and the Neighbourhood

19 The ground of the application was limited to reliance on s 84(1)(c) of the Act, that is, limited to establishing that the proposed modification will not substantially injure

[9] Report of April 2013 and a Supplementary Report of October 2013.

those persons entitled to the benefit of the restriction. Nevertheless, reliance on that ground necessitates an understanding of the location and character of the neighbourhood, particularly where, as here, some of the objector defendants lived in parts of the neighbourhood remote from the Land and relied on the indirect effect of the modification on them by reason of the precedent that the modification might establish.

20 As mentioned above, the Land is an irregular shaped lot located on the west side of Pascoe Vale Road, Strathmore, immediately to the south of the Tullamarine Freeway overpass across Pascoe Vale Road. It has a frontage of 16.36 metres (about 54 feet) to Pascoe Vale Road and a depth of 41.15 metres (135 feet).[10]

21 The historical title searches for the 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 the Roads Corporation or VicRoads).

22 The evidence of Mr Easton in his report dated April 2013 (**the First Easton Report**) establishes some basic facts, which I have confirmed from my own inspection of the Land and its surrounds, as follows:[11]

(a) The Land is near the north eastern corner of the subdivision in LP 9986. The aerial photograph in Schedule 2 shows the position of the Land in relation to the surrounding Lots and the Tullamarine Freeway. The Land is Marked "A";

(b) The Lots in the subdivision in the immediate neighbourhood, and their proximity to the Land, are shown in a part of the subdivision in Schedule 3;[12]

(c) Immediately to the north of the Land, as I have said, is a parcel of land owned

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10 Mr Easton's (town planner) report dated April 2013.

11 With the consent of the parties I viewed the Land and its neighbourhood without the presence of the parties.

12 Extracted from Exhibit GG-6 to the affidavit of Giovanni Gattini, sworn 20 September 2013.

by the Roads Corporation that forms a buffer between the Land and the Tullamarine Freeway. It is paved with asphalt leading to a former VicRoads depot to the northwest of the Land. It is not known whether this land will ever be sold and developed;

(d) Immediately to the west of the Land are Lots 495-503 on LP 9986. These Lots were previously used as part of the VicRoads depot. In June 2011, six of the Lots were sold, being Lots 498, 499 and 500 (1, 3 and 5 Term Street respectively) and Lots 501, 502 and 503 immediately behind them. At the time of the First Easton Report and my inspection in November 2013, these Lots remained vacant. In July 2012 VicRoads sold the other three Lots (Lots 495, 496 and 497), being 2, 4 and 6 Term Street. Two of these Lots remain vacant, whilst the third, Lot 497 (2 Term Street) had a large house under construction;

(e) Lots 489 and 490, previously 445 and 447 Pascoe Vale Road and two Lots south of the Land on the northwest corner of Loeman Street and Pascoe Vale Road, no longer exist as such. They are now a part of the diversion of Loeman Street into Pascoe Vale Road and partly a small park or reserve;

(f) The First Easton Report sets out a large number of changes to the neighbourhood since the time the Covenant was created in 1951. In the wider area of the neighbourhood around the Land (to the west and southwest) there have been the following significant changes:

(i) The subdivision of Lot 299 (7 Loeman Street and 77 Hillsyde parade – without modification of the restrictive covenant which burdens the land);

(ii) The subdivision of Lot 300 (9 Loeman Street);

(iii) The subdivision of Lot 356 (29 Loeman Street) as a consequence of modification of the Covenant burdening that land (also a single dwelling covenant in the same terms as the Covenant) in 1988. The

recital to the order endorsed on the title (which removed the single dwelling, the cost and the setback restrictions) states:

> The Court being satisfied that by reason of changes in the character of the neighbourhood part of the restriction if continued in the Covenant...would impede the reasonable user of the land without securing practical benefits to other persons and that the proposed modification will not substantially injure the persons entitled to the benefit of the restriction;

(iv) The closure of Vale Street and the sale of the front section facing Loeman Street and its development into a two lot subdivision with two semi-detached dwellings;

(v) The development of 31 Lots (Lots 463 - 475 and 504 - 521) and parts of Holiday, Ascoe and Vale Streets for community uses: The Max Johnson Reserve, the Strathmore Children's Centre, a carpark, the Strathmore Bowls club, Strathmore Tennis Club and Strathmore Kindergarten.

23 Mr Easton summarises these changes in the following terms:[13]

> 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 [no] longer used for that purpose and now [form] part of the range of community uses, referred to earlier.

24 Mr Gattini, the expert witness for the defendants, generally agreed with Mr Easton's summation of the changes to the neighbourhood summarised above.[14]

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13 First Easton Report paragraph 9.2.

14 Affidavit of Giovanni Gattini, sworn 20 September 2013, paragraph [15].

The Beneficiaries

25 Mr Easton states in his First Easton Report (para 4.7 and A22-23), that there are 64 beneficiaries who have the benefit of the Covenant.

26 The six defendants are entitled to the benefit of the Covenant. Mr Zhang and his wife Yankun Li, own Lot 493 (451 Pascoe Vale Road), which is immediately adjacent to the Land; Mr and Mrs McConville own Lot 485 (8 Loeman Street, on the corner of Loeman and Term Streets); Mr and Mrs Smallacombe own 74 Hillsyde Parade; Ms Haverfield owns 68 Hillsyde Parade; and Mr Markopoulos owns 48 Bournian Avenue.

27 The third defendant, Mr Zhang, and his wife as co-owner, are the only owners that are directly affected by any modification of the Covenant.

28 Both Mr McConville and Mr Smallacombe swore affidavits opposing the modification and stating that they had purchased their properties either with knowledge of the Covenant or upon the advice of a real estate agent of the benefits of the Covenant. In the case of Mr McConville, he stated that he was advised by the agent that the Covenant would protect him and his wife from the construction of multiple dwellings, increased traffic problems and maintain the existing residential amenity. He believes those benefits were 'incorporated in the purchase price of our property'.

29 Mr Smallacombe said that he and his wife purchased 'at a premium price which was influenced by the covenant effecting the area'. He and his wife liked the protection that the Covenant offered in preventing multi-unit development and townhouses being constructed next door to them and in the area.

30 The defendants' witnesses all gave evidence that the benefits of the Covenant included the preservation of a quiet residential community, with a general consistency of single dwellings, resulting in a lower density neighbourhood with more landscaping and gardens.

31 Mr Zhang, gave extensive evidence, both by affidavit and viva voce and in cross-examination, to the general effect that:

(a) he had been advised by the estate agent acting for the vendor of the land he and his wife purchased that he and his family would be protected by the Covenant from multi-unit developments and additional dwellings being constructed on neighbouring properties. This, he said, was an influence on their decision to purchase the property; and

(b) An additional dwelling on the Land would bring unwelcome noise, traffic and inconvenience to his family. It would reduce their privacy as the two storey house to be constructed, of considerable visual bulk, would look over their backyard; it would restrict their sunlight, it would overshadow their vegetable patch and generally reduce the amenity of the backyard. The backyard is very important for the Zhang family as it is quiet (away from Pascoe Vale Road), it has a garden, and it is "my home", said Mr Zhang;

Applicable Law

32 The Plaintiff relies only on s 84(1)(c) of the Act. Section 84 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 –
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> (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
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> (b) ...
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> (c) that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction:.....
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> .....
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> (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.

33 The principles that govern an application to discharge or modify a restrictive covenant under s 84 (1)(c) of the Act may be summarised as follows.[15]

(a) Whether a person entitled to the benefit of a covenant would be substantially injured within the meaning of s 84(1)(c) is a question of fact.[16] It follows that each case must be decided on its own facts;[17]

(b) The applicant has the onus of establishing the matters set out in s 84(1)(c) upon which he or she relies.[18] This means that the applicant must effectively prove a negative;[19]

(c) The test for whether a discharge or modification of a covenant would 'substantially injure' a person entitled to the benefit of a covenant is similar to that in relation to 'practical benefits' in the second limb of s 84(1)(a);[20]

(d) The emphasis is on the injury suffered by the persons entitled to the benefit. From the nature of the proprietary right arising from a covenant, the injury must occur in relation to the person's enjoyment of his or her property;[21]

(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 a covenant, and the benefits, if any, which would remain after that 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;[22]

(f) The injury must be something more than 'unsubstantial', it must be real and not a fanciful detriment;[23]

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15 *Vrakas v Registrar of Titles* [2008] VSC 281, [23]-[48] (***Vrakas***); see also *Prowse v Johnstone & Ors* [2012] VSC 4, [97] per Cavanough J.

16 *Re Alexandra* [1980] VR 55, 60.

17 See *Fraser & Ors v Di Paolo & Anor* [2008] VSC 117, [43], [58].

18 *Re Cook* [1964] VR 808, 809, 812 (in relation to s 84(1)(c)); *Re Robinson* [1972] VR 278, 281; *Re Stani* (unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976); *Greenwood v Burrows* (1992) V ConvR 54-444, 65,192; *Re Pivotel Pty Ltd* [2000] VSC 264, [28].

19 *Re Cook* [1964] VR 808, 812-13; *Greenwood v Burrows* (1992) V ConvR 54-444, 65,199; *Bevilacqua v Merakovsky* [2005] VSC 235, [24] (unreported, Ashley J, 30 June 2005).

20 *Re Robinson* [1972] VR 278, 283; *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 10; *Re Pivotel Pty Ltd* [2000] VSC 264, [37]; *Bevilacqua v Merakovsky* [2005] VSC 235, [24] (unreported, Ashley J, 30 June 2005).

21 *Re Cook* [1964] VR 808, 810.

22 *Re Cook* [1964] VR 808, 810-11; *Fraser* [2008] VSC 117, [36].

23 *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 10; *Greenwood v Burrows* (1992) V ConvR 54-444, 65,199.

(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 a covenant is annexed;[24]

(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;[25]

(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.[26] 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);[27]

(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).[28] However, town planning principles and considerations may be relevant to the exercise of the Court's residual discretion.[29] 'Precedential' issues similar to those discussed above may also be relevant in the exercise of that discretion;[30]

(k) The absence of objectors to the discharge or modification of a covenant will not, in itself, necessarily satisfy the onus of proof.[31]

(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.[32]

(m) In *Stanhill Pty Ltd v Jackson*, Morris J, after considering the ordinary grammatical meaning of s 84(1), the history of the provision and the provision's policy basis, departed from what he described as the narrow traditional approach to s 84(1) in favour of a more 'robust' interpretation of the provision and indicated that, in his view, 'some of

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24 *Re Cook* [1964] VR 808, 810.

25 *Stanhill Pty Ltd v Jackson & Ors* (2005) 12 VR 224, 246 ("*Stanhill*"); *Bevilacqua v Merakovsky* [2005] VSC 235, [22] (unreported, Ashley J, 30 June 2005).

26 *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 11; *Greenwood v Burrows* (1992) V ConvR 54-444, 65,200; *Fraser & Ors v Di Paolo & Anor* [2008] VSC 117, [49]-[57].

27 *Greenwood v Burrows* (1992) V ConvR 54-444, 65, 200.

28 *Re Robinson* [1972] VR 278, 285; *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 6-7; *Greenwood v Burrows* (1992) V ConvR 54-444, 65, 198; *Re Pivotel Pty Ltd* [2000] VSC 264, [50]; *Bevilacqua v Merakovsky* [2005] VSC 235, [22] (unreported, Ashley J, 30 June 2005).

29 *Greenwood v Burrows* (1992) V ConvR 54-444, 65,200-65,201; *Bevilacqua v Merakovsky* [2005] VSC 235, [22] (unreported, Ashley J, 30 June 2005).

30 *Greenwood v Burrows* (1992) V ConvR 54-444, 65, 201.

31 *Re Cook* [1964] VR 808, 812.

32 *Re Cook* [1964] VR 808, 810; *Re Robinson* [1972] VR 278, 285-6; *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 7; *Greenwood v Burrows* (1992) V ConvR 54-444, 65,192, 65,200; *Stanhill* (2005) 12 VR 224, 239.

the restrictions adopted in earlier cases are without justification'.[33]

(n) In relation to s 84(1)(c), his Honour concluded, in effect, that it must only be shown that any harm caused to a person entitled to the benefit of a covenant would not be of real significance or importance. In the decision of *Fraser v Di Paolo*,[34] Coghlan J referred to, but found it unnecessary to express a settled view about Morris J's comments. In *Prowse v Johnstone*, Cavanough J declined to adopt the approach of Morris J in *Stanhill Pty Ltd v Jackson*, saying that in his view the longstanding principles should be followed by single judges of this Court unless and until the Court of Appeal or the High Court rules otherwise;[35] and

(o) The Court has a discretion as to whether to modify a covenant if s 84(1) is satisfied.[36]

Expert Evidence

34 Mr Easton was of the opinion that 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 Covenant. That opinion was based on the following factors:

(a) The proposal is based on using 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 were constructed;

(d) Due to the location of the Land fronting Pascoe Vale Road, and being almost 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.

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33 *Stanhill* (2005) 12 VR 224, 231, 239–40.

34 *Fraser & Ors v Di Paolo & Anor* [2008] VSC 117, [26]–[28], [32]–[36].

35 *Prowse v Johnstone & Ors* [2012] VSC 4, [99].

36 See for example, *Vrakas* [2008] VSC 281, [67]–[71]; and *Suhr v Michelmore* [2013] VSC 284, [47]–[48].

35 Mr Gattini's evidence addressed a number of questions that, by reason of the focus of the application shifting to reliance only on s 84(1)(c), are no longer material. He addressed the question relevant to the application of s 84(1)(c) expressing the opinion that the proposed modification would cause substantial or significant injury to the defendants and to the other persons entitled to the benefit of the Covenant as:[37]

(a) The covenant only permits one dwelling on Lot 453, it does not permit a two dwelling development on Lot 453. After modification what would be permitted are two dwellings on the same lot. The difference between the two is substantial;

(b) The height, bulk and shadow impact of the second two-storey dwelling on Lot 453, as well as its appearance on the neighbouring property at 451 Pascoe Vale Road, will substantially injure Mr and Mrs Zhang, the beneficiaries at No 451;

(c) There will be overlooking of the backyard at No 451 by residents in the new two-storey residence;

(d) There will be a loss of privacy to the neighbouring property at No 451;

(e) There will be an adverse impact on the garden character of the area with two dwellings on the lot largely covering the entire site;

(f) There will be a loss of the character of the area with the expectation by residents that low-density single-dwelling residence with gardens would be the norm will be defeated. That is, the precedential effect of the modification will result in an erosion of the character of the neighbourhood from a low-density and garden character to a higher density with less vegetation;

(g) There will be poor amenity involving the second dwelling with little open space and landscaping. The footprint of the proposed new two storey dwelling covers almost all of the subdivided lot. The new dwelling is to be built to within a metre of the boundary fence;

(h) There will be a diminution in the quality of life of the Zhang family through decreased enjoyment of their private outdoor living area and garden at the rear of their residence.

36 Mr Easton's Report of October 2013 ("the **Supplementary Report**") added to the above reasoning his views about the visual bulk, overlooking and overshadowing that were the subject of complaint by or on behalf of Mr Zhang:

(a) The upper level section of the plaintiff's proposed house, viewed from the Zhang's property, is only approximately 7 metres long measured parallel with

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37 Summarised in the defendant's written submissions dated 18 October 2013, at paragraph [57].

their boundary. This is considerably smaller than any other upper storey components on new buildings being constructed in the locality. Thus the visual bulk is not significant;

(b) 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; and

(c) In relation to the overshadowing of Mr Zhang's vegetable garden, he included in the Supplementary Report a photo of the vegetable garden as taken from over the fence from the Land (Figure 2). He noted that the vegetable garden is already adjacent to the fence and will be overshadowed even if there were no building on the Land. He observed that if the backyard of the Land were landscaped with significant vegetation, the result would be a greater possibility of significant overshadowing of the property to the south.

37 It was common ground between the experts, and it is plain from a reading of the Covenant, that it does not restrict either the size or height of the single dwelling, nor does it preserve in terms any 'garden character', otherwise than indirectly by virtue of the setback restriction and the single-dwelling restriction.

38 In his Supplementary Report, Mr Easton addressed the 'garden character' of the neighbourhood both by reference to the absence of any restriction in the Covenant that is directed to it, but also by reference to the existence of many Lots developed in the sub-division that have minimal landscaped areas, tennis courts and community facilities. He points out, rightly, that under the planning requirements the decision to undertake landscaping around a standard single dwelling in order to establish a garden is a matter of individual choice, whereas with a dual occupancy there is a standard planning permit condition requiring a plan by a competent landscape designer, which condition is then enforced by the Council.

39 There was no evidence of the impact of the part of the modification sought that removed –

(a) The building materials restriction, that is the restriction of the use of iron or metal on the roof and external walls of any dwelling; and

(b) The setback requirement.

40 The removal of these restrictions was assumed by the parties not to be important or

to have any detrimental effect on those having the benefit of the Covenant.

Submissions and Consideration

41 The question in this case is whether the plaintiff has established a negative, namely that the proposed modification will not substantially injure those persons entitled to the benefit of the Covenant. The test is similar to that applying in relation to 'practical benefits' in the second limb of s 84(1)(a).[38]

Plaintiff's submissions

42 The plaintiff submitted that, on 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, 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.

43 Mr Townsend, Counsel for the plaintiff, submitted that there was no substantial injury to any benefited owners, and particularly Mr Zhang and his wife and family, because:

(a) The presentation to the street is unlikely to change in the event the Covenant is modified;

(b) In relation to overlooking, there is effectively no difference between what is proposed following the modification of the Covenant, compared with no modification being made and the land being redeveloped for a single dwelling;

(c) The one particular window of the proposed house that does look south, will be screened to a height of 1.7 metres, both under the scenario of the dual occupancy, or alternatively a single dwelling;

(d) Overshadowing will be controlled by *ResCode* (*ResCode* is the name given to the provisions of Clause 55 of the relevant planning scheme). There will be little difference if a single dwelling were constructed;

(e) Visual bulk is a matter that is controlled by the planning provisions where a dual occupancy is allowed, but it's not something that is controlled if a single dwelling is allowed. Mr Zhang, who is the only defendant who may suffer

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38 *Vrakas* [2008] VSC 281, at [34].

any kind of injury is actually better off in terms of controls if a dual occupancy is approved;

(f) It is not enough to say that there will be a precedent created. There must be other opportunities in the neighbourhood for a similar development for a precedent to be created. There is nothing else like this Land in the subdivision. This is because:

(i) The Land is a lot on the outer northeast corner of the subdivision, as was the case in *Hermez*,[39] and *Stanhill*;[40]

(ii) There is a freeway overpass to the immediate north;

(iii) There is adjacent vacant land to the west, and none of the beneficiaries that own those houses or land have objected; and

(iv) The Land is on an arterial road.

44 The focus of the plaintiff's submissions was on the identification of the proper comparator. That is to say, whether the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the Covenant 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 in the manner proposed.

45 Some pertinent examples were given. In *Hermez v Karahan*[41] the application was to modify a single-dwelling covenant burdening 40B Paringa Boulevard, Meadow Heights (a northern suburb of Melbourne). The modification was to allow construction of two dwellings on the land, one to face Paringa Boulevard, and the other to face Golden Ash Court (the land was on the corner). The defendant was the owner of the land on the eastern boundary of 40B Paringa Boulevard. His case, and evidence, was similar to that of Mr Zhang. The Court found that the modification of the covenant to allow two dwellings would not amount to substantial injury. In doing so, Daly AsJ expressly took into account what might be built on the land in the absence of the modification, saying:

I agree that the removal of the single dwelling restriction will not

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39 *Hermez v Karahan* [2012] VSC 443 (Daly AsJ).

40 *Stanhill Pty Ltd v Jackson & Ors* (2005) 12 VR 224, 246 ("*Stanhill*").

41 [2012] VSC 443 (Daly AsJ).

> substantially injure the beneficiaries of the restriction in the covenant, including, notwithstanding his submissions and protestations, Mr Karahan and his family. The proposed development does not, in size or bulk, appear to exceed that of buildings developed on lots within close proximity, including 40A Paringa Boulevard. I accept the evidence of Mr Easton that there is unlikely to be any adverse impact in terms of traffic, particularly given the proximity of a school, a childcare centre, and a substantial shopping centre. The proposed development is unlikely to significantly add to the population density of the area.[42]

46 In *Prowse v Johnstone*[43] a question Cavanough J asked was: what situation should be compared with the situation that will result from the discharge or modification of the covenant?[44] In that case the plaintiff sought the removal of a single-dwelling covenant on a substantial block in Malvern. The plaintiff argued that, theoretically, given the planning and building regulations applicable to that block, a single dwelling could be constructed on the block of a similar size and bulk of the 18 unit apartment development proposed by the applicant. Cavanough J, while accepting this proposition as a theoretical possibility, stated that:[45]

> ... it seems to me that it would be artificial and wrong to pay no heed at all to the reality of the situation. So, even though the plaintiff is entitled to ask the Court to take into account the "worst" that could be done under the existing covenant, the defendant is also entitled to invite the Court to consider the realistic probabilities of the plaintiff actually bringing about the "worst" that could be done under the existing covenant.

47 The plaintiff submitted that it is important to understand the difference between what was proposed in *Prowse v Johnstone* and what was proposed both in *Hermez v Karahan* and the present case. In *Prowse v Johnston*, the application concerned two lots of land adjoining Wattletree Road in Camberwell. In order to build a single dwelling home that would take up a similar footprint of the proposed 18 unit development would have required a development approaching Buckingham Palace in scale.[46]

48 There is no indication in the decision of *Prowse v Johnston* that the plaintiff in that

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42 [2012] VSC 443, [29].
43 [2012] VSC 4.
44 [2012] VSC 4, [103].
45 [2012] VSC 4, [104].
46 *Prowse v Johnstone & Ors* [2012] VSC 4, [2], [12].

case could point to a single example of the type of development that would have a similar impact to the development proposed.

49 In the present case, however, the Court was given a number of examples in the area subject to the Covenant in which development can be found that is comparable to, if not in excess of, the scale and bulk of the proposed development. An example was under construction on Lot 497 (2 Term Street) immediately to the west-south-west of the Land. There were others identified by Mr Easton in Loeman Street and elsewhere in the neighbourhood. My own inspection confirmed the fact that the more recently constructed houses were, as seems to be the trend all around Melbourne's suburbs, huge and bulky, taking up substantially all the available land of the Lot in question.

50 In *Prowse v Johnston,* the plaintiff submitted that town planning principles were relevant for the protections they afforded the neighbouring properties benefited by that covenant. The plaintiff contended that this protection is potentially relevant for the purpose of assessing substantial injury. Cavanough J was prepared to assume, without deciding, that planning provisions of that kind may be relevant in that way. But in that case the provisions upon which the plaintiff sought to rely did not sufficiently avail her in any event.[47]

Defendant's submissions

51 Counsel for the defendants submitted that the purpose of the Covenant is directed towards overall residential character. In particular, the Covenant is designed to achieve a low-density residential environment, with consistent front setbacks, restrictions on roof or wall material, and restrictions on commercial use, which is designed to achieve a particular type of residential character that will achieve spaciousness and opportunity for gardens. This is a Covenant for the protection of neighbourhood amenity.[48]

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47 *Prowse v Johnstone & Ors* [2012] VSC 4, [105].

48 Defendants' outline of submissions [33].

52 Mr Miller, Counsel for the defendants, submitted that Mr Zhang's evidence establishes that there will be a substantial injury to his family if the modification is approved because of:

(a) Loss of privacy and overlooking into the Zhangs' private outdoor rear garden area;

(b) Bulk and dominance of the proposed building particularly when viewed from his backyard;

(c) Loss of space of the adjoining backyard and loss of trees;

(d) Loss of spaciousness and privacy;

(e) The construction of a two-storey dwelling covering almost 50% of the neighbouring backyard and built to within 1.25 metres of the boundary fence;

(f) The 'thin edge of the wedge' with the precedent being set for other applicants in the area;

(g) The plaintiff purchased the land as an investment property;

(h) The Plaintiff does not live at the subject site. The house at 451 Pascoe Vale Road is the Zhang family home and the family spends considerable time in their backyard as their frontyard lacks amenity; and

(i) The backyard is a sensitive private area.

Consideration

53 Having regard to the authorities mentioned, in my opinion the principal question is, what is the purpose of the 'single dwelling' restriction found in the Covenant, that is to say, what is the benefit conferred on a beneficiary in precluding dual-occupancy, and would a beneficiary suffer a substantial injury should the Covenant be modified and more than a single dwelling constructed on the Land?

54 From the eight restrictions in the Covenant in this case, one can conclude that the intention of the Covenant is to encourage a substantial (400 pound minimum cost in 1951) single residential dwelling (no shops or factories, etc) made of brick, stone or timber (no iron or metal visible) with uniform setbacks from roadways.

55 There are therefore elements of the Covenant going to density of the neighbourhood,

appearance from the street (streetscape) and usage. It is important in this case, as it was in *Hermez* and *Koller v Rice* (to which I refer above and below), that the intention of the Covenant is evidenced by what it does not say as much as by what it does say. Importantly, there is no limitation on building coverage, site permeability or plot ratio, and no specified building envelope.

56 Apart from the front setback of 30 feet, the Covenant does not make any attempt to preserve large areas of private, open space. It does not impose any restriction that could have the effect of requiring any specific landscaping or require the planting of vegetation. There is no limit on dwelling height nor any reference to the scale of dwellings anticipated by the Covenant, other than a requirement for dwellings to cost not less than 400 pounds (in 1951 values). The defendants did not complain that the modification by removal of the setback restriction would injure them in any way, and that is not surprising having regard to the fact that the Land faces Pascoe Vale Road.

57 Thus, without any modification to the Covenant, the Land can be developed with a single dwelling of substantial dimensions. It was common ground between the experts that the planning laws did not restrict the size and bulk of a single dwelling on the Land in the way in which the current dwelling has been constructed. Thus, a large two storey dwelling could be erected on the Land which has the same characteristics as the additional dwelling proposed to be erected at the rear of the Land, with a second storey having shadowing and overlooking characteristics worse than the proposed development.

58 In relation to the shadowing effect of the second dwelling, there is no permit yet obtained for the proposed development. I accept that overshadowing will be controlled by *ResCode* and that there will be little difference if a single dwelling were constructed.

59 Mr Gattini, in his affidavit of expert evidence[49] expressed the view that the extent of

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49 Affidavit of Giovanni Gattini sworn 20 September 2013, at [18].

the built-form on the property would 'in all probability' be less than that which would be manifest if the property is developed with two dwellings. His view was that Mr and Mrs Zhang, as the owners of 451 Pascoe Vale Road, enjoy the benefit of an open area to the rear of their property. That open area would be lost if a dwelling were constructed at the rear of the Land and that construction will change the current outlook enjoyed by the owner.

60 In my opinion, the open area in Mr and Mrs Zhang's backyard would not be lost. There was a great deal of cross-examination of Mr Easton and Mr Grattini about the impact of overlooking on the 'amenity' of the backyard. Assuming for argument's sake that the overlooking aspect of the plaintiff's proposal is relevant, I am satisfied that the amount of 'overlooking' if the current proposal is constructed is not significant. It is limited by the nature of the areas of the proposed house from which the admittedly small windows 'look'; the stairwell and a toilet. I accept the evidence of Mr Easton in this regard. His expert opinion was that no overlooking is possible from the proposed building and that this is one of the strictest areas enforced by the planning system.[50]

61 The changed outlook from the backyard as a result of the plaintiff's proposal was equally minor. The existing outlook is significantly an outlook over the existing rear garden of the Land and to the Tullamarine Freeway overpass. The backyard of the Land may itself be substantially changed or built over without modification of the Covenant, in a number of ways. Firstly, by growing more trees that overshadow the Zhangs' property. Second, by the erection of outbuildings serving the single dwelling. Third, if a single dwelling were built at the rear of the Land. Last, if a very large single dwelling were constructed on the Land. The last scenario has been happening elsewhere in the neighbourhood.

62 Moreover, the view of the Tullamarine Freeway overpass and barriers is less than an edifying vista accompanied by significant noise and dust. Some aspects of this

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50 Easton Supplementary Report at paragraph [5.3].

would be blocked by the erection of a house at the rear of the Land, which may well improve the outlook.

63 Mr Gattini expressed the view that if the Covenant is not modified the Land would remain a low-density Lot, as envisaged by the Covenant. That would allow for the retention of vegetation and the maintenance of gardens consistent with the Lots in the neighbourhood. A further practical benefit secured by the Covenant, according to Mr Gattini, is that it will ensure that the two vacant Lots at the rear of the Land will not be able to be developed with two dwellings on each of them. One of those Lots, Lot 497, has a partially completed and very large house on it that imposes and affects the amenity of the McConvilles' property at 8 Loeman Street. In substance, what Mr Gattini was saying here is that the modification of the Covenant in the form proposed will set an undesirable precedent for building intensification in the neighbourhood.

64 The concept plans for the proposed development by the plaintiff at the rear of the Land was said by Mr Gattini to substantially injure Mr Zhang and his family. The development would increase the extent of building site coverage and reduce the rear and side setbacks as shown on the concept plan. The garden character of the neighbourhood would be impacted because vegetation could not be maintained on the property with two dwellings. The visual bulk of the buildings on the site would be increased.

65 In *Hermez,* the plaintiff proposed to develop a vacant lot with two double-storey residences. Daly AsJ considered that an undeveloped block of land is not a suitable comparator. She said in this regard:[51]

> having regard to the pattern of development in the neighbourhood, it is likely that any development on the land, even a single dwelling development, is likely to be consistent with a substantial proportion of properties in the neighbourhood (including 40A Paringa Boulevard), that is, the construction of a substantial, possibly double storey residence with a footprint which covers a major proportion of the area of the land. The construction of such a dwelling would raise the same amenity issues identified by Mr Karahan in his

51 [2012] VSC 443, [33].

affidavits and submissions, and Mr Karahan and other nearby residents would not have the opportunity to raise these issues in a planning approval process if only one dwelling was to be built on the land.

66 The only difference in this case is that there is an existing dwelling house on the Land. Whether that will be demolished and replaced with a house of the proportions now quite common in the neighbourhood is impossible to say with any certainty. But it is just as likely as not. It remains an appropriate comparator.

67 In relation to the concerns that Mr Zhang has regarding potential overlooking and overshadowing of his backyard, I observe that they are minor matters having regard to the surrounds and other aspects that I have pointed to above, and:

(a) These are matters that will and should be addressed in the planning process; and

(b) It is as likely as not that, given the nature and pattern of residential development in the neighbourhood, these concerns will arise with the construction of a single dwelling on the Land, especially if it were a double-storey dwelling with a substantial footprint.

68 In *Koller v Rice,*[52] Dixon J faced a similar development to that proposed here, but differing in the fact that the covenant in that case also included a minimum living floor area. He noted:[53]

> In undertaking a comparison between the benefits initially intended to be and actually conferred by the covenant and the benefits, if any, which would remain after the covenant has been modified, I accept the evidence of Ms Spinks. Leaving aside the issue of the materials used in construction, which is not presently relevant, the intention of the covenant appears to be to ensure single, large dwellings are constructed on the land. That intention is not to preserve large private open space areas or space around buildings. Had that been intended, other controls or restrictions would be found in the covenant.
>
> The distinction between the size and configuration of the form of a single building, observing the restrictions of covenant, compared with that the size and configuration of the form of two dwellings, if allowed, is negligible. The restrictive covenant impedes the use of the land for more than one dwelling but in practical terms does not limit the building footprint for a single dwelling. A permitted single dwelling could, in compliance with planning laws, be larger in form, bulk and plot coverage than two dwellings on the lot.

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52 [2011] VSC 346.

53 Ibid at [31]-[32].

> While observing the restrictive covenant, the plaintiff's land could be further developed with building extensions and/or other works that would be similar in form to a second dwelling.

69 So it is in this case as well. The evidence of the experts in this case is that a single dwelling could, in compliance with planning laws, be as large in form, bulk and plot coverage as two dwellings on the Land, or even larger, with more overshadowing, overlooking and loss of privacy.

70 I accept the evidence of Mr Easton that it is difficult to see how the development could affect –

(a) The traffic near the Zhangs' property (having regard to the presence of the heavy traffic on Pascoe Vale Road and the position of the access to the rear development being on the northern side, away from the Zhangs' boundary); and

(b) The traffic near the McConvilles' property at 8 Loeman Street or the traffic near the Smallacombes' property at 71 Hillsyde Parade.

71 In my view, based both on the expert evidence and my own inspection of the area, an effect on the traffic volume or frequency is very unlikely and, having regard to the traffic on Pascoe Vale Road, and entering and exiting Loeman Street from and to Pascoe Vale Road, any effect deriving from the development will be insignificant.

72 The issue of precedent is in my view not a factor in this case. The location of the Land is unusual, if not unique, when compared with the majority of other Lots in the subdivision, and the immediate neighbourhood. The factors making it unusual are that:

(a) The Land is very close to the far northeast edge of the subdivision. For all practical purposes, it is on the corner of the subdivision. It, and indeed also the Zhangs' property, are relatively isolated from the areas in a westerly direction that have the more tranquil environment usually consequent upon covenants of this kind;

(b) This isolation from the areas in that westerly direction is a product of the diversion of Loeman Street into Pascoe Vale Road, the position of the Land on such a major arterial roadway

as Pascoe Vale Road, and the closeness of the Land to the Tullamarine Freeway and its overpass; and

(c) There are few neighbouring residential properties. None of the owners of the adjacent vacant land to the west have objected.

73 All the defendants gave evidence of their reliance upon the existence of the Covenant in the decisions to purchase their properties. The evidence in this regard had an aura of 'boilerplate' evidence. In this regard it is important to observe that the legislative provisions for the removal or modification of restrictive covenants have been in existence in Victoria for a very long time. They were introduced in 1918 by s 10 of the *Property Law Act* of that year.

74 Thus, reliance on the existence of the Covenant preserving those aspects of it relevant to the several defendants (no multi-unit developments, no increased traffic problems and residential amenity)[54] has always been open to change under the legislation. The defendants' reliance on the existence of the Covenant in making their purchases brings with it, as a corollary, a necessary acceptance that the Covenant is subject to change where a modification will not substantially injure them in the enjoyment of their property. Further, should it be relevant, there is no evidence that the development of the Land will affect the values of the properties in the neighbourhood.

Conclusion

75 For these reasons, I am satisfied that modification of the Covenant in the way proposed will not substantially injure the persons entitled to the benefit of it.

76 I will make orders accordingly and hear the parties as to the costs of the proceeding.

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54 For example see the affidavit of the first defendant Daniel Patrick McConville sworn 26 September 2013 at [6].

SCHEDULE 1

The Material part of the Restrictive Covenant

" ... 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 Benefitted Land

Date of Transfer	Instrument	Vol/Folio	Lots
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

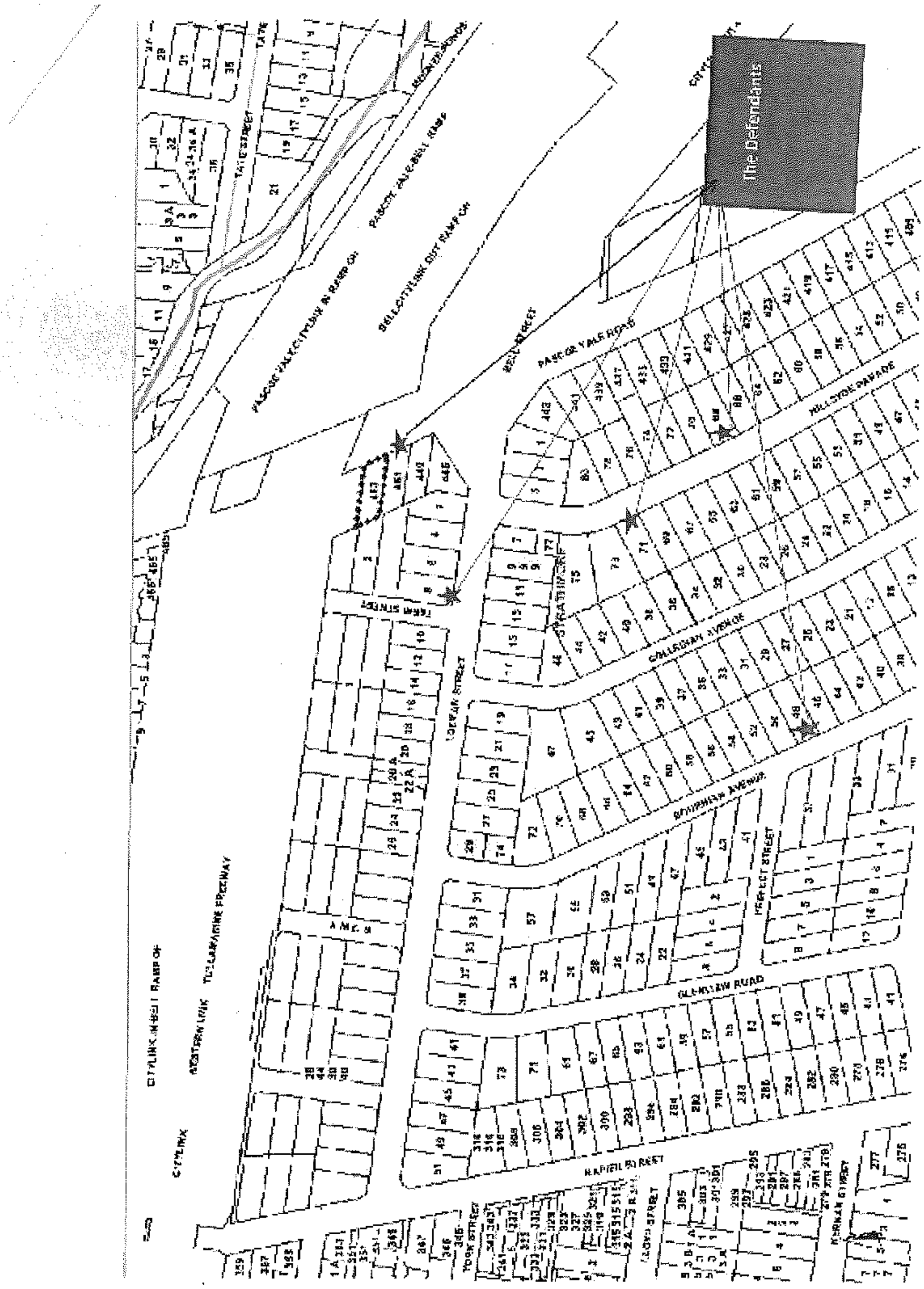
The Modification

"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."

Schedule 2


Citylink
Pascoe Vale Rd
Pascoe Vale Rd
Citylink
Citylink
Logman St
Pascoe Vale Rd
nearmap

Schedule 3


The Defendants
PASCOE VALE ROAD
HILLSYDE PARADE
GALLAGHAN AVENUE
BOURCHIER AVENUE
GLENLEITH ROAD
NAPIER STREET
PERFECT STREET
TULLAMARINE FREEWAY
WESTERN LINK
CITYLINK
YORK STREET
LLOYD STREET
FARM STREET

CERTIFICATE

I certify that the 30 preceding pages are a true copy of the reasons for Judgment of Derham AsJ of the Supreme Court of Victoria delivered on 7 April 2014.

DATED this seventh day of April 2014.

.....
Associate

SCHEDULE OF PARTIES

S CI 2013 2552

BETWEEN:

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