IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

S CI 2015 00256

RACHEL SHEILA KATHLEEN CAMPBELL MACLURKIN — Plaintiff

v

ANTHONY JOHN SEARLE — Defendant

JUDGE:	DERHAM AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	12 August 2015
DATE OF JUDGMENT:	18 December 2015
CASE MAY BE CITED AS:	MacLurkin v Searle
MEDIUM NEUTRAL CITATION:	[2015] VSC 750

REAL PROPERTY – Restrictive covenant – Application for modification – Applicable legal principles – Covenant that "no building other than one private dwelling-house of brick or brick veneer with roof of tiles" shall be erected on the land – Whether modification will not substantially injure the persons entitled to the benefit – Application granted – s 84(1)(c) *Property Law Act 1958*

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr W Rimmer	Aughtersons Lawyers
For the Defendant	Mr M Townsend	Michael Fleming & Associates

TABLE OF CONTENTS

Introduction and Summary of Conclusions **1**

Background **3**
The Land and Immediate Neighbours 3

The Evidence, Including Experts Reports **4**
Affidavits 4
First Easton Report 5
Evidence of Anthony Searle 10
Second Easton Report 13
Neville Sanders 15
Third Easton Report 17

Applicable Law **18**

Submissions **22**
Plaintiff's Submissions 22
Defendant's Submissions 25

The View **28**

Consideration **28**
Purposes 30
Single Dwelling 30
Building Materials 30
Network of Covenants 31
Precedent – Single Dwelling Restriction 33
Building Materials Restriction 35
The Absence of Objection from Immediate Neighbours 36
The Plans for the Proposed Development 37
Impact on Traffic 39
The Immediate Neighbours 39

Conclusions **40**

HIS HONOUR:

Introduction and Summary of Conclusions

1 The plaintiff applies under s 84(1) of the *Property Law Act 1958* (**'the Act'**) for the modification of a restrictive covenant contained in Instrument of Transfer No. 2290443 dated 30 December 1949, in so far as it affects her property situated at 70 Boronia Road, Boronia (**'the Land'**). The Land is Lot 15 on Plan of Subdivision No. LP26826, described in Certificate of Title Volume 8043 Folio 948.

2 The covenant contains a composite restriction, which has two components. First, it prohibits the construction of more than one dwelling house on the Land. Second, that dwelling house must be made of brick or brick veneer with a roof of tiles.[1] The proposed modification will permit the construction of up to four dwellings, and remove the building materials covenant. The plaintiff proposes to subdivide the Land to allow the construction of four two-storey dwellings. Each dwelling will be accessed via a common property driveway in the same location as the existing driveway on the Land.

3 The plaintiff relies solely on the ground in s 84(1)(c) of the Act, that the proposed modification will not cause substantial injury to any person having the benefit of the covenant.

4 The defendant, Mr Anthony John Searle, who jointly owns and lives at 16 Marie Street, Boronia,[2] and has the benefit of the covenant, objects to the plaintiff's application.

5 I undertook an unaccompanied view of the Land and the surrounding area shortly after the conclusion of the trial, with the consent, indeed encouragement, of the parties.

6 The central issue in the trial was whether the plaintiff has established that the proposed modifications will not substantially injure the persons entitled to the

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1 The covenant is of course expressed appropriately in the negative.

2 Lot 5 on Plan of Subdivision No. LP26826.

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.

7 In my view, the beneficiaries will not suffer a substantial injury should the covenant be modified and up to four dwellings are constructed on the Land substantially in accordance with the plans exhibited to the Second Easton Report without any building materials restriction, having particular regard to:

(a) the location of the Land in a cul-de-sac or service road close to the Boronia Shopping Centre and facing Boronia Road, a four lane highway, being physically separate from the hinterland to the south, particularly the residential network based on Marie Street, Gwyn Crescent and Ethel Street where most of the properties having the benefit of the covenant are located;

(b) the discharge of the covenant over 66 Boronia Road having established a precedent for a multi-unit development in the Subdivision. The modifications of the covenant sought in this case will not have any significant precedential effect;

(c) the subdivision of a number of properties in Marie Street, Gwyn Crescent and Ethel Street to enable a second dwelling to be built has already affected the density of dwellings in the neighbourhood and created precedents for further subdivision; and

(d) the fact that in my view the immediate neighbours will not be substantially injured by the modifications sought.

8 For these reasons, 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 Land and Immediate Neighbours

9 The Land is a generally rectangular-shaped Lot located on the south side of a service road forming part of Boronia Road. The Land has a frontage of 19.2 metres and depth of approximately 50.9 metres, with an approximate area of 978 square metres. Access to the site is via a gravel service road, which enters the west bound carriageway of Boronia Road approximately 20 metres to the east of the Land. Boronia Road is classified as a major road at this location.[3]

10 The Land originally formed part of Certificate of Title Volume 3560 Folio 825 ('**the Parent Title**'). The Parent Title comprised approximately 161 acres and was subdivided by Plan of Subdivision LP5783 in 1912. That subdivision created five Lots fronting Boronia Road; Lots 1, 2, 3, 4 and 14, with the balance of the Lots being remote from Boronia Road. Lot 14 on LP5783 was subsequently subdivided by LP26826 ('**the Subdivision**') in October 1953 to create 28 residential lots (including the subject land - Lot 15 on LP26826) together with Lots 13 and 29, being 2 large balance lots of approximately 12 and 6 acres respectively.[4] The covenant was signed on 30 December 1949, but was only registered on title when the Land was transferred on 30 March 1954. The Land was the only Lot in this transfer. It is the only land burdened by this particular covenant,[5] although there are numerous covenants in much the same form burdening land in the Subdivision.[6]

11 The Land is on the northern edge of the main Parent Title. This is depicted in Plan A, tendered at the trial, a copy of which is annexed to these reasons. In that plan the numbers in each lot are the Lot number (top number) and the Street number (bottom number). The lots shaded blue on the Plan identify that the lots are not subject to the burden of any restrictive covenant, save for some lots identified in the course of the trial, being Lot 58 (6 Gwyn Crescent) and Lot 48 (12 Ethel Street).

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3 First Easton Report, paragraph 3.1-3.2.
4 The first sheet of that Subdivision is attached.
5 First Easton Report, paragraph 5.1.
6 See the affidavit of Anthony John Searle sworn 31 May 2015, paragraphs 8-12 and exhibits AJS 3 - AJS-27.

12 There are only three properties having a common boundary with the Land, 68 and 72 Boronia Road (on the east and west boundaries, respectively) and 2 Marie Street (adjacent to the rear boundary):[7]

(a) 68 Boronia Road is located on the corner of the service road and Marie Street;

(b) 72 Boronia Road adjoins the west boundary of the Land. It has a double storey attic style dwelling; and

(c) 2 Marie Street is a double storey dwelling fronting Marie Street which extends across the southern boundary of Lots 14, 15 (the Land) and 16.

The Evidence, Including Experts Reports

Affidavits

13 The plaintiff's affidavit evidence is comprised of:

(a) the affidavit of Glen Andrew Egerton, Solicitor for the plaintiff, sworn 20 January 2015;

(b) the affidavit of Robert Walter Easton, expert Town Planning Consultant, sworn 20 January 2015 to which is exhibited his expert planning report ('**First Easton Report**');

(c) a further affidavit of Mr Easton sworn 19 June 2015, to which is exhibited a supplementary expert report ('**Second Easton Report**'). The Second Easton Report includes reasonably detailed development plans for the plaintiff's proposed four townhouse development on the Land;

(d) a second supplementary report of Mr Easton introduced in the course of his evidence ('**Third Easton Report**');[8] and

(e) a second affidavit of Mr Egerton, Solicitor for the plaintiff, sworn 6 May 2015, proving the giving of notices to those owners and mortgagees of the land

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7 First Easton Report, paragraph 10.16; and my own observation in the course of the view.

8 Exhibit "B" tendered on 12 August 2015.

benefited by the covenant as ordered by the Court to be given notice. This affidavit also includes correspondence received from persons expressing objections to the modification sought.

14 The defendant's affidavit evidence is comprised of:

(a) the affidavits of Anthony John Searle, the defendant, sworn 31 May and 3 August 2015;

(b) the defendant's second affidavit sworn 3 August 2015;

(c) the affidavit of Neville Sanders, another beneficiary of the covenant, sworn 12 August 2015; and

(d) three undated brochures entitled 'The Daffodil Farm Estate', 'The Daffodil Farm Estate (Extension)' and 'Bowling Green Estate-Boronia'.

First Easton Report

15 In the First Easton Report, Mr Easton expresses the opinion that the modifications of the covenant will not substantially injure the persons entitled to the benefit of the restriction. In support of these opinions, Mr Easton refers to the history of the title to the Land, identifies those Lots on the plan of subdivision that have the benefit of the covenant and gives a comprehensive account of the changes that have taken place in the area covered by the Parent Title, including the Subdivision, since about 1922.

16 In relation to the history of the title to the Land and surrounding properties, he gave evidence that:

(a) the covenant provides that the benefit shall extend to all land that remained in the Parent Title at the time the covenant was registered. The maximum extent of Lots having the benefit of the covenant is land previously derived from former Lot 14 of LP5783;[9] and

[9] The other Lots 1-4 of LP5783 were transferred out of the Parent Title prior to 30 March 1954.

(b) the neighbourhood was initially created in 1912 by Plan of Subdivision LP5783. In his opinion therefore, the best definition of the neighbourhood is the land originally contained within Lots 1, 2, 3, 4 and 14 of LP5783.[10]

17 In the First Easton Report, Mr Easton states that he has inspected the neighbourhood several times, most recently in November 2014. He then sets out an assessment of the changes in that neighbourhood. Because the view I take is that the neighbourhood is, at best, the area of the Subdivision (the area surrounded by a heavy black line in Plan A attached) I will limit my reference to the changes within the Subdivision that are relevant to the application for modification:

(a) 8 Marie Street[11] has been developed with 2 dwellings and further subdivided by PA 331309W on 22 November 1993. The existence of covenant 2506777 is recorded on the fact sheet of the subdivision. In addition, the covenant remains on the title to Lot 2.[12] Prior to 12 December 2000, there was no obligation on Councils to enforce covenants when approving development or related subdivision applications;

(b) former Lot 10 on LP26826 no longer exists as a lot. Lot 10 is burdened by covenant 229044, which also burdens Lot 17. Lot 10 has been incorporated in the road reserve for Rubida Court which provides accessed to subdivision No. LP 121228 to the west;

(c) former Lot 13 on LP 26826 was a large lot of approximately 12.5 acres located behind the lots fronting Boronia Road and east of Marie Street. The original transfer No. 2209002 did not contain a covenant. Ten acres of this lot was further subdivided by LP 41989 on 16 December 1957 to create 31 residential lots and the road reserves for Gwyn Crescent and Ethel Street. The remaining 2 acres of Lot 13 on LP 26826 was subject to transfer 2543954 from the Parent Title on 24 December 1952. No covenant was created in this transfer. This

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10 First Easton Report paragraph 6.4.
11 Former Lot 9 LP26826.
12 Volume 10144 Folio 351.

area is now known as 5 Marie Street and is occupied by the Boronia Bowling Club. A car parking area for approximately 60 cars is located at the rear of the site with access from both Gwyn Crescent and Ethel Street;

(d) 66 Boronia Road[13] is located 35 metres east of the subject land on the south east corner of Boronia Road and Marie Street. The covenant applicable to this site was discharged in the Supreme Court in August 2010 as recorded in instrument No. AH486422B. The redevelopment of the site has not yet proceeded;

(e) 44 Boronia Road[14] has been developed with 3 units and further subdivided by RP 3169 on 10 August 1972. The original transfer of this land from the Parent Title has not been imaged by the Land Title Office. This is normally because it does not contain a covenant; and

(f) former Lot 29 on LP26826 was a large area of over 6 acres contained in 2 separate parts. No covenant was created when these 2 areas were initially transferred from the Parent Title in transfer A405970 and A593599. The Lot was subdivided by LP 66433 on 6 November 1964 to create 7 residential lots and a large balance lot of 5 acres. The balance lot was then further subdivided by LP 215898M on 11 July 1990 to create Krystal Glenn Garden (a Court) and a further 15 residential lots. Some of the lots have been developed with double storey dwellings.

18 In his First Easton Report, Mr Easton also notes:

(a) that the neighbourhood as defined by him consisted of four large lots intended for further development. Today the same area has been fully developed and is in the process of being redeveloped. The original three large lots forming the western portion of the neighbourhood now include large numbers of small commercial lots oriented at Boronia Road with the areas behind them all developed for medium density housing, including an

13 Lot 17 LP26826.
14 Former Lot 28 LP26826.

elderly persons facility. The eastern portion of the neighbourhood has been progressively subdivided in stages to provide for a range of residential developments;

(b) that in 1954, when the Subdivision was registered there were only very basic planning controls in this area. The planning controls have now evolved into highly sophisticated provisions applying at a macro and at a micro level. The present planning controls include a wide range of standards covering amenity impacts on neighbouring properties and taking into account the general character of the neighbourhood.

(c) The Land has recently been included in a General Residential Zone as a part of the reform of planning controls throughout Victoria. Amongst other things, the purpose of this zone is to:

(i) implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and the Local Planning Policy;

(ii) encourage residential development that respects the neighbourhood character;

(iii) implement neighbourhood policy and adopted neighbourhood character guidelines;

(iv) provide a diversity of housing types and moderate housing growth in locations offering good access to services and transport; and

(v) allow educational, recreational, religious, community and a limited range of other non-residential uses to serve local community needs in appropriate locations;

(d) under the General Residential Zone, a permit is required for two or more dwellings on a lot. In determining whether or not to issue the permit, Rescode applies and requires Council to take into account 34 detailed

standards. In addition, the Land and the surrounding area are included in both a Vegetation Protection Overlay,[15] and a Design and Development Overlay.[16] The Vegetation Protection Overlay is primarily a tree felling control. The Design and Development Overlay is concentrated on the area surrounding Boronia Shopping Centre. It is an acknowledgement that more intensive development is to be anticipated in this area. It shows, however, that the area of the Subdivision between the Land and the Boronia Bowling Club is envisaged to have buildings with a height of 7.5 metres, or two storeys. The land to the south of the Land, on the east side of Marie Street, have been placed in a Significant Landscape Overlay area. This area does not cover the properties at 68, 70 and 72 Boronia Road, which sets them apart;

(e) the proposal to develop the Land with four dwellings, each of two levels, will be subject to the operation of Rescode which requires that there must be at least 40 square metres of open space. This will be easily achieved on the site as the height of the dwellings are also limited to 7.5 metres by the Design and Development Overlay. Mr Easton's view is that this is a modest height for a two storey dwelling;

(f) that in his view, because of the isolated nature of the Land on a 'dead end' service road, it is inconceivable that there could be any impact on any other property. It is also relevant that the covenant is very basic, in that it only restricts the development to a single dwelling to be made of brick or brick veneer with a tiled roof. It does not restrict the dwelling to a single storey, as is often the case; and

(g) that the dwelling at 2 Marie Street, which is burdened by a similar covenant, includes a flat steel deck roof on both its main structure and carport and has a weatherboard lined upper storey, both of which features are in breach of the building materials part of the covenant.

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15 Schedule 4 to the Knox Planning Scheme.

16 Schedule 7 to the Knox Planning Scheme.

19 The First Easton Report also deals with traffic impacts. He expresses the view that they are not significant. The service road in front of the property only serves 68, 72, 74 and 76 Boronia Road. Traffic going into the service road will not impact on the properties in the subdivision off Marie Street, Rubida Court, Gwyn Crescent or Ethel Street.

20 For these reasons, Mr Easton concludes that the construction of four dwellings on the Land will not substantially injure the persons entitled to the benefit of the restriction.

Evidence of Anthony Searle

21 In his affidavit, Mr Searle gives evidence of searches he has undertaken at Land Registry Victoria and the State Library of Victoria. There was no objection to his evidence in this respect. His researches revealed:

(a) that the Land was originally offered for sale as the Daffodil Farm Estate along with 26 other lots in or around 1949. He produced a copy of the sales brochure offering 27 lots in that estate by way of private sale, including the Land.[17] That brochure describes "28 brick or brick veneer home sites";

(b) that 23 of the 27 lots originally offered for sale in the Daffodil Farm Estate are still burdened by a largely similar form of restrictive covenant that burdens the Land. He produces title searches for those 23 burdened lots and a plan showing which of the lots are so burdened;[18]

(c) he refers to the discharge of the restrictive covenant burdening the land at 66 Boronia Road[19] by the Supreme Court in 2010, to the fact that Lot 10 on the Subdivision no longer exists as it was converted into the road reserve for Rubida Court and that 8 Marie Street[20] has been subdivided into two lots. Other than these changes, all the other 23 single dwelling covenants have

17 Exhibit AJS–2.
18 Exhibit AJS–27.
19 Lot 17 in the Subdivision.
20 Lot 9 in the Subdivision.

remained undisturbed for the past 60 years;

(d) he notes that Lot 28 in the Subdivision was never burdened with the covenant as it was transferred by the original subdivider, Percival Chandler, to his wife, Gwyn Chandler, in 1959. This lot has been developed and appears immediately to the right of Lot 27 on Plan A; and

(e) he agrees with Mr Easton that there are some other lots to the east of Marie Street that are burdened by covenants which were created when Lots 13 and 29 of the Subdivision were further subdivided.

22 Mr Searle also gave evidence that:

(a) he has resided at 16 Marie Street since August 2004. Apart from the suitability of the property for his and his family's needs, the area's attraction was and is the beautiful, spacious low density housing and great views to the Dandenong Ranges. He was advised by the real estate agent at the time of purchase that his property and the surrounding properties in the neighbourhood were subject to covenants and these would protect the future character of the neighbourhood. He enjoys walking in the surrounding streets where there are so many pleasant gardens and homes of superb build quality, with "nice" wide streets and greenery, giving a sense of tranquillity. A particular property he admires is 72 Boronia Road (the next property west of the Land) as it has a high pitched roof and is totally unique and "one would think it was in the English countryside." He adds that even to walk past the Land along the service road feels like being in a country town. The neighbourhood is special to him and is irreplaceable. They are the reasons he came to the area;

(b) there are some properties in the neighbourhood that have the benefit of the covenant but have been subdivided into two dwellings since 1954. These properties were, however, never burdened by a covenant in the first place and they have been developed with only two dwellings not four;

(c) in relation to the restrictive covenant over 66 Boronia Road which was discharged in 2010 by order of the Supreme Court, he says this came as a surprise both to him and other residents and to the Knox City Council. He says only eight beneficiaries with properties in close proximity to that land were notified of the application and advertisements were published in The Age and Knox Leader newspapers. He says that had he known of the application he would have objected. Apparently there were no objections by any person and the covenant was discharged rather than modified;

(d) he produces minutes from the Knox City Council meeting held on 24 April 2012 relating to the redevelopment of 66 Boronia Road. Those minutes note that Council was then considering a planning application for the development of a two storey apartment building containing 11 dwellings on 66 Boronia Road. The application attracted over 500 objections, including many citing the existence of the single dwelling covenant. The minutes record concern with the notification process in the Court and some of the reasons why residents may be unwilling to appear and object to a modification application in the Court;

(e) following the discharge of the covenant over 66 Boronia Road, the Victorian Civil and Administrative Tribunal ('**VCAT**') affirmed a planning permit for 11 dwellings with 13 car spaces on the site;

(f) twelve of the 23 lots burdened by the single dwelling covenants in the Daffodil Farm Estate come under the area of Boronia Activity Centre.[21] These are 58 to 64 Boronia Road, 68 to 72 Boronia and 2, 4, 8, 10 and 12 Marie Street. Clearly, 66 Boronia Road falls within that Activity Centre as does the Land. The particular Clause of the Knox City Planning Scheme which relates to the Boronia Activity Centre was referred to in the decision of the VCAT approving or affirming the permit for the development of 66 Boronia Road.

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21 Clause 22.06 of the Knox City Planning Scheme.

Mr Searle quotes from that decision as follows:[22]

> Clause 22.06 seeks to encourage a change in the character of the area from that of single 'residential hinterland' to that of a higher scale activity centre, albeit at the lower end of the scale at this point (two storeys or 7.5 metres). Residents in this area need to expect that the overriding scale will change from one storey to two, the density will increase to medium density and there will be greater occurrence of multi-unit development.

23 Mr Searle produced a letter 'To Whom it May Concern' from the Executive Secretary of the Boronia Bowls Club Inc of 5 Marie Street. The message of the letter is that the Club, having had 60 years of continual bowling, and having 150 enthusiastic members, is not going to close.

24 In cross-examination, Mr Searle agreed that there are a 2 lots in the Subdivision that have been subdivided and a number in what was Lot 13, the area bounded by Marie Street, Ethel Street and Gwyn Crescent, so that where originally there was only one dwelling there are now two. The detail of these changes is referred to later in these reasons.

Second Easton Report

25 In the Second Easton Report, Mr Easton responds to evidence given by Mr Searle in his affidavit of 31 May 2015. He makes the following points:

(a) that even though the starting point for the identification of the relevant neighbourhood is the Subdivision, he further narrows the neighbourhood to include the northern section of the Subdivision in close proximity to the Land;

(b) that the Subdivision was further subdivided by LP41989, which includes the Boronia Bowling Club. This is the area on Plan A identified as 5 Marie Street, a lot that extends south from Gwyn Crescent along Marie Street to Ethel Street. Mr Easton notes that the bowling club and the area behind it forms a significant part of the character of the area but is not itself protected by any restrictive covenants. The bowling club does not contain a covenant and the

22 Exhibit AJS-33.

City of Knox has placed it within a Residential 1 Zone where higher than normal densities are a part of the planning policy;

(c) in response to Mr Searle's comment that looking at 72 Boronia Road with its high pitched roof one would think it was in the English countryside, Mr Easton strongly disagreed. He noted that standing in front of the Land there is a four lane highway immediately to the north and a block of six villa units located 20 metres further to the west and a bit further to the west a three storey building at the end of the service road. Coupled with this there is no direct line of vision from in front of the Land to any point within the hinterland around Marie Street;

(d) he also responds to Mr Searle's concern that there has been no specific development plan for the Land put forward. He annexes detailed plans to the Second Easton Report. He says that standing directly in front of the Land as proposed to be developed there will be only one dwelling visible and, for all intents and purposes, it will not be immediately obvious that units exist. He says any overflow parking from the Land would need to be accommodated in the service road. Due to the difficulty in accessing Marie Street it would not be practical for any overflow parking to extend to that location;

(e) he refers to the decision of the VCAT related to the development of 66 Boronia Road. He notes that he acted for the owner in that application for modification of the covenant by the Supreme Court. At the time of that application the proposal was for development of the land to be limited to four units. The Court nevertheless removed the covenant altogether and the owner subsequently sold the land. It was the subsequent owner who proposed the development of 11 units. He notes that 66 Boronia Road is in a far more prominent location in terms of impact on the hinterland, particularly the residential amenity for the properties along Marie Street, as it would be clearly visible from within that street and would result in overflow impacts within Marie Street;

(f) he re-emphasises the proposition that the three lots in the Subdivision that are on the service road[23] are separate and distinct from the rest of the Subdivision and are "orphans". He refers in this regard, as he did in his First Easton Report, to the Significant Landscape Overlay which excludes those three properties;

(g) he notes that in terms of the precedential value of a modification of the restrictive covenant burdening the Land, that it would establish a precedent only for the lots in the service road, and probably not a precedent for the lot at the corner of Marie Street and the service road, being 68 Boronia Road. That is because it is not accessed from the service road but from Marie Street. He concludes that any development of the Land, or even 72 Boronia Road, will have absolutely no impact on the ambience, character or view lines within the Marie Street area. Nor will it have impact on the views of the Dandenong Ranges as they are in the opposite direction of the land; and

(h) the bulk of the Land having the benefit of the covenant does not itself have a covenant derived from the Parent Title. To the extent that it is a "nice" area, this is not a result of the extensive network of the restrictive covenants. He refers to a benefit plan called Plan B which identifies the lots that have the benefit of the covenant and the lots that are not subject to any covenant derived from the Parent Title. He notes that there are covenants created under other regimes.

Neville Sanders

26 Neville Arthur Sanders is a licensed estate agent and qualified valuer. His wife Julie and he are joint tenants of, and live at, Lot 37 on LP41989, being 3 Gwyn Crescent, Boronia. Between 2012 to 2014, he was the President of the Real Estate Institute of Victoria and at the time he gave his evidence was President of the Real Estate Institute of Australia. His property is marked on Plan A, and is on the north side of Gwyn Crescent. He and his wife and mother in law are also joint owners of Lot 1A

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23 Numbers 68, 70 and 72.

Gwyn Crescent, Boronia which is a battle-axe block immediate to the west of 3 Gwyn Crescent. This lot was derived from Lot 38, which was subdivided. Both of these lots have the benefit of the covenant over the Land.

27 He is a third generation resident of Boronia. He lived in what he calls the Boronia Bowling Green Estate from 1967 to 1973 in a home that his father built. He is opposed to the modification of the covenant to allow up to four dwellings to be constructed because:

(a) he values the amenity of the neighbourhood and the spacious blocks of land with a vast majority of single dwellings;

(b) he has a personal connection to the Bowling Green Estate as his family's real estate business sold all of the lots;

(c) in 1991 he gave evidence in an Administrative Appeals Tribunal decision in *Pletes v Knox City Council* (1992/2560). This case concerned an application to remove the covenant on Lot 9 on LP26826;

(d) there are approximately 81 lots that benefit directly from the covenant and a number that are unburdened by covenants;

(e) to commence the modification or removal of covenants from the burdened lots would see a drastic change to the streetscapes and a detrimental change to the character of the neighbourhood and the established pattern of housing;

(f) he produced the promotional sales brochure for the Daffodil Farm Estate, the Daffodil Farm - extension and the Bowling Green Estate, noting that the bowling club did not exist at that time but the term evolved later;

(g) for over 50 years, a network of covenants has meant that the whole area known as the Bowling Green Estate has been sought after by people that value the larger lots, brick or brick veneer dwellings on virtually every lot and an almost complete lack of units;

(h) the modification of a covenant and the construction of up to four dwellings on the site facing the unmade service road of Boronia Road will cause a loss of amenity and a loss arising from a detrimental change to the character of the neighbourhood; and

(i) the unmade service road is entered from the junction of Boronia Road and Marie Street. Both Boronia Road and Marie Street carry substantial volumes of traffic and the additional further dwellings on the service road will create more safety issues. This location is already a cause for safety concerns with vehicles regularly parked on Marie Street near the junction of Boronia Road and the service road.

28 In cross-examination, Mr Sanders said the major part of his concern regarding modification of the covenant is the precedential issue of "breaking a covenant, breaking the contract" that he has with that Lot owner, the traffic and safety entering and exiting Marie Street, and a crumbling of the estate's values.[24] He also agreed that there were a number of dual occupancies developed in the subdivision, particularly in the inner core of the properties on Marie Street, Gwyn Crescent and Ethel Street.

Third Easton Report

29 In his Third Easton Report, Mr Easton corrects several items in his earlier reports and comments on the additional material contained in the affidavit of Mr Sanders. He notes that the brochures produced by Mr Sanders did not refer to any restrictive covenants protecting the developments on the Land and made other comments not presently relevant. He also comments on brochures that cover an area of 28 lots further to the south of the Subdivision, which was produced by Mr Sanders. In my view, this is not presently relevant. He then deals with the fact that in his Second Report he referred to a plan showing lots with no covenants. He acknowledges that it now appears that at a later date some covenants were created when lots were further subdivided, and this applied to 14 of the 15 lots in the in the Krystal Glenn

24 Transcript, 12 August 2015, p. 118.

area, five lots fronting Ethel Street and various other lots scattered through the Subdivision. He notes that the benefit of the Krystal Glenn covenants is limited to 15 lots in LP215898M which created that subdivision, that the benefit of the five lots fronting Ethel Street are limited to the five lots in LP66433. He notes that the Krystal Glenn covenants require that the relevant 9 lots have a single dwelling house with an internal floor area of not less than 150 square metres and having 76% of all external walls (save for the provision of windows, doors, fascias and gables) of brick veneer or stone. It also has restrictions on outbuildings and prevents any fence along the front or within seven metres of the front boundary.

30 He gives evidence that Mr Sanders' properties at 1A and 3 Gwyn Crescent do not have any restrictive covenant and both lots are zoned General Residential Zone Schedule 1, being the same zone as the Land. He notes Mr Searle's property at 16 Marie Street is in a more restrictive zone, being Residential 3 Zone. It is planning policy that land in the General Residential Zone be developed to a higher density and that any decision in regard to the covenant on the Land has absolutely no relevance in creating a precedent for the multi-unit applications in the General Residential Zone.

Applicable Law

31 The plaintiff relies only on s 84 (1)(c) of the Act. Section 84 of the Act 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:

...

(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.

32 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:[25]

(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.[26] It follows that each case must be decided on its own facts;[27]

(b) the applicant has the onus of establishing the matters set out in s 84(1)(c) upon which they rely,[28] meaning that the applicant must effectively prove a negative;[29]

(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);[30]

(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

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25 *Vrakas v Registrar of Titles* [2008] VSC 281, [23]-[48] (***'Vrakas'***); see also *Prowse v Johnstone & Ors* [2012] VSC 4, [97] per Cavanough J; *Re Comdain Homes Pty Ltd* [2013] VSC 487 at [32]; and *Wong v McConville & Ors* [2014] VSC 148 at [33].

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

27 See *Fraser & Ors v Di Paolo & Anor* [2008] VSC 117, [43], [58] (***'Fraser'***).

28 *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) 7; *Greenwood v Burrows* (1992) V ConvR 54-444, 65,192 (***'Greenwood'***); *Re Pivotel Pty Ltd* [2000] VSC 264, [28] (***'Pivotel'***).

29 *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) (***'Bevilacqua'***).

30 *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; *Pivotel* [2000] VSC 264, [37]; *Bevilacqua* [2005] VSC 235, [24] (unreported, Ashley J, 30 June 2005).

property;[31]

(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;[32]

(f) the injury must be something more than unsubstantial. The detriment must be real and not fanciful;[33]

(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;[34]

(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;[35]

(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.[36] 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);[37]

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

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

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

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

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

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

37 *Greenwood* (1992) V ConvR 54-444, 65,200.

(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).[38] However, town planning principles and considerations may be relevant to the exercise of the Court's residual discretion.[39] "Precedential" issues similar to those discussed above may also be relevant in the exercise of that discretion;[40]

(k) the absence of objectors to the discharge or modification of a covenant will not, in itself, necessarily satisfy the onus of proof;[41]

(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;[42] and

(m) the Court has discretion as to whether to modify a covenant if s 84(1) is satisfied.[43]

33 In *Re Stani*[44] the Court approved the approach to s 84(1)(c) given by Justice Gillard in *Re Cook*:[45]

> From the nature of the proprietary right arising from the restrictive covenant clearly the injury must occur in relation to the person's enjoyment of his property.
>
> Such injury can only be properly assessed by a comparison between the benefits intended to be conferred and actually conferred by the covenant initially on the persons entitled thereto and the resultant benefits, if any, remaining to such persons after the covenant has been modified.

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38 *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* (1992) V ConvR 54-444, 65,198; *Pivotel* [2000] VSC 264, [50]; *Bevilacqua* [2005] VSC 235, [22] (unreported, Ashley J, 30 June 2005).

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

40 *Greenwood* (1992) V ConvR 54-444, 65,201.

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

42 *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* (1992) V ConvR 54-444, 65,192, 65,200; *Stanhill* (2005) 12 VR 224, 239.

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

44 Unreported, Full Court of Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976, at 10).

45 [1964] VR 808, at 810-11.

> If from the evidence it appears that the difference between the two will not be substantial, then the applicant will have established a case for the exercise of the Court's discretion under paragraph (c).
>
> In other words any injury sufficient to prevent the Court modifying the restriction must be something more than unsubstantial, must be real and not a fanciful detriment.

Submissions

Plaintiff's Submissions

34 The plaintiff submitted that the initial intended benefit of the single dwelling covenant in this case is to be construed having regard to its context as a covenant created in the early 1950s. At that time, there was little in the way of comprehensive town planning controls protecting a particular neighbourhood's character. As Mr Easton opined, the single dwelling covenant was intended as a kind of rudimentary planning control imposed by developers to enable them to offer land to prospective residents as being in a low density residential neighbourhood. For its efficacy, therefore, such a covenant needed to be created in any particular case as one in a network of covenants burdening and benefitting all, or at least most, of the land in the intended neighbourhood.

35 Where, as in this case, many lots having the benefit of the covenant do not have the burden of a similar restriction, the ability to restrict the use of those unburdened lots derogates from the potential character of the neighbourhood.

36 It was unrealistic, the plaintiff contended, to consider the 28 lots in the 'Daffodil Farm Estate' marketed together in 1949 in isolation from the rest of the land in the Subdivision, as much more of the land having the benefit of the covenant in this case is contained in former Lots 13 and 29 of the Subdivision. The subsequent development of the land in Lots 13 and 29 and the somewhat haphazard creation of covenants burdening those lots detract from the efficacy of the covenant in this case preserving the low-density residential character of the area.

37 In addition, the plaintiff submitted that the restrictive covenant in this case does not protect any view of the Dandenongs (for which height limits on the buildings would

be needed) nor the leafy green neighbourhood and tranquil streets (for which other restrictions would be needed).

38 The feeling the defendant expressed when walking past 72 Boronia Road is not a result of anything secured by this particular covenant. The owner of that property could have constructed a large mansion or an eyesore in an unsympathetic architectural style quite unlike that attributed by the defendant to the house built on that land. Similarly, the plaintiff could construct on her property a single dwelling that occupies a very large part of the site, has little or no vegetation and is otherwise unattractive to the eye. None of this is inconsistent with the covenant.

39 The maintenance of the beautiful spaciousness of the neighbourhood cannot be maintained with any surety because of the absence of restrictive covenants burdening the majority of the lots in the inner core of the Subdivision.[46] These lots in the inner core should be regarded as integral to the neighbourhood and make up the bulk of the land in the neighbourhood. The absence of covenants burdening those lots is significant to the future maintenance of the ambience of the neighbourhood.

40 Moreover, some of the properties in the inner core, and in the two arms around it, being the west side of Marie Street and south side of Boronia Road have been developed with dual-occupancies. These are 1, 2, 4, 7 and 9 Gwyn Crescent, 3 and 8 Marie Street, 1, 2 and 3 Ethel Street and 44 Boronia Road.

41 The plaintiff contended that the proposal to develop 66 Boronia Road, on the corner of Marie Street and Boronia Road, with a two storey apartment block comprising 11 dwellings and a basement car park for 13 cars, and the discharge of the covenant over that property, provides a precedent and if the development goes ahead a significant change in the residential character of that part of the neighbourhood. This development deprives nearby properties of any amenity they formally had of living in an area of predominantly low-density housing.

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46 That is, the areas coloured blue on Plan A in Marie Street, Gwyn Crescent and Ethel Street.

42 The fact that 12 of the 23 lots in the Daffodil Farm Estate that are burdened by the covenant are included in the Boronia Activity Centre[47] is also significant.

43 The plaintiff submitted that there is no network of covenants benefitting and burdening properties in the interior part of the subdivision close to the plaintiff's property. There are similar covenants burdening the properties on the outer edge of the subdivision, including properties along the west side of Marie Street and along the north side of Boronia Road. The properties at the western end of the core of the subdivision do not have the burden of single dwelling covenants. The effect of this, the plaintiff submitted, is that the covenant over the Land never effectively secured for the benefit of the properties in Marie Street or Gwyn Crescent the benefits asserted by the defendant. At all times, the parts of the subdivision closest to their properties could be re-developed (subject to planning controls) with multiple dwellings. This is manifest in the property at 1A Gwyn Crescent, owned by Mr Sanders, which is itself a product of such a development. Mr Sanders' property in Gwyn Crescent, and the defendant's property in Marie Street, both face the Boronia Bowling Club. The Boronia Bowling Club land does not have the burden of a covenant, and could be developed at any time as an apartment block or four townhouses.

44 Thus, there is in this case no network of covenants securing the amenity of the area as a low-density housing estate and no one living in the area could reasonably regard the covenant burdening the Land as ever having conferred the benefit of protecting the streetscape and environment in the western part of the subdivision.

45 The plaintiff submitted that the Land belongs physically and environmentally to an island nest of properties located on the unsealed service road. The service road, or cul-de-sac, is not accessible from Marie Street or any other road within the Subdivision of which the Land forms a part. The service road has its own separate intersection with Boronia Road, distinctly formed and separate from the nearby intersection of Marie Street and Boronia Road. The plaintiff's property is an integral

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47 58 to 64 Boronia Road, 68 to 72 Boronia Road and 2, 4, 8, 10 and 12 Marie Street.

part of the group of properties facing the service road and Boronia Road. That area includes two six unit development further to the west and a three storey building.

46 The plaintiff submits that no one accessing the service road, including any owner of land with the benefit of a covenant, could reasonably regard the improvements on the Land proposed to be constructed, if the covenant is modified, as contributing in any way to the amenity of properties elsewhere in the Subdivision.

Defendant's Submissions

47 The defendant made both written and oral submissions. In the written submissions, after referring to the nature of the covenant, the proposed change and the relevant law, it was submitted the purpose of the covenant is to:

(a) preserve a subdivision enjoying a reasonable density of population and a consequential tranquil and quiet existence, in an area of spacious homes and gardens; and

(b) ensure that a quality, aesthetically pleasing building is constructed on the burdened land, as distinct from one made of cheaper materials, perhaps of corrugated metal, as in the past, or tilt slabs in more recent times.

48 The defendant also submitted that:

(a) the evidence of Mr Searle and Mr Sanders demonstrates that the purpose of the covenant is largely achieved and this will be confirmed by the Court;[48]

(b) the benefits following any modification as proposed would mean that the tranquillity that comes from a single house will be diminished through an increase in noise from occupants and their vehicles, the notion of a spacious home surrounded by gardens will be lost and four dwellings may be constructed of low cost materials, cheapening the appeal of the neighbourhood that, for the most part, enjoys a consistent theme of built form and quality

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48 Section 54 of the *Evidence Act 2008* provides that the court may draw any reasonable inference from what it sees, hears or otherwise notices during a demonstration, experiment or inspection.

construction;

(c) the modification sought will have a precedential impact which may see a drastic change to the streetscapes and detrimental change to the character of the neighbourhood and the established pattern of housing. The effect of the modification as a precedent may amount to substantial injury within the meaning of s 84(1)(c) of the Act; [49]

(d) the Land forms a part of the bulwark against the influx of high density housing, overflowing from the Boronia Activity Centre. It was said that if this can be defended, the neighbourhood and its network of covenants should remain intact;

(e) a lack of specific plans made it more difficult to show that there will be no substantial injury to persons entitled to the benefit of the covenant;

(f) the plans in the First Easton Report were little more than a "sketch on the back of an envelope" whilst the plans in the Second Easton Report did not provide the Court with any degree of confidence as to whether an application such as that might get through the council planning process and no indication as to what impacts that might have on beneficiaries land by way of overshadowing, overlooking and so on. In the result, the Court was being asked to sign a "blank cheque;"[50]

(g) there is no difference between an absence of plans and an application to the court that is not prepared to seek to be bound by a set of plans; and

(h) the Court has, on a number of occasions, dismissed the argument that the covenants may be significantly modified on the basis that they are on main roads and thus removed from the heart of the relevant neighbourhood.[51]

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49 *Freilich v Wharton* [2013] VSC 533.

50 Transcript 12 August 2015 at p 54.

51 See *Prowse v Johnston* [2012] VSC 4; *Freilich v Wharton* [2013] VSC 533 and *Re Morrison* [2015] VSC 269.

49 The defendant submitted that this is a relatively clear cut case in which the proposal to modify the covenant should fail the reasonably stringent tests in s 84(1)(c) of the Act because:

(a) at four units on a standard house block, it is a more ambitious proposal than the Court has hitherto been prepared to allow in recent contested cases;

(b) the plaintiff has not prepared detailed plans for the Court to consider and, in any event, she is not proposing to be bound by any such plans;

(c) the covenant is not just a single covenant, but is a building materials covenant as well, adding a further layer of injury to the beneficiaries should modification be made;

(d) there is a demonstrable pressure for more intense forms of development on the Land and on the adjoining lots that are also subject to the same, if not, a similar covenant;

(e) the area in which the application is sought is reasonably intact. This may not be the first incursion of medium density housing into the area, but the covenant still has much work to do;

(f) the purpose of a single dwelling covenant of density control is still capable of achievement even though the network of covenants is incomplete;[52]

(g) the proposal may increase traffic flow in and out of the Land via the service road and increase the impacts on visitor parking, particularly in Marie Street; and

(h) the purpose of the building materials restriction in the covenant to protect the appearance, strength, durability, cost and fire proof qualifies of the buildings to be erected.[53]

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52 *Re Pivotel Pty Ltd* (2000) VSC 264; (2001) VConvR 54-635, at [48].

53 See *Jacobs v Greig* [1956] VLR 597 at 603. See also *Iacono v Hobsons Bay City Council* [2015] VCAT at [769]; *De Sousa v Monash City Council* [2014] VCAT 1201; *Beman Pty Ltd v Boroondara City Council* [2013]

The View

50 After the trial concluded on 13 August 2015, I went on an unaccompanied view of the Land and the surrounding areas, including the Subdivision. I was immediately struck by the different impression gained upon a view when compared with analysing the plans and seeing photographs in the reports and evidence. It immediately became apparent that the service road and the houses and developments along the service road after passing 68 Boronia Road, are quite different and are in a discrete area away from the bulk of the Subdivision.

51 Next door to the Land, to its west side, there is another single dwelling on a large lot. To the west of that, at 74 Boronia Road, there is a double block with six villa units on it. Immediately to the west of that, at 76 to 78 Boronia Road, there is a large development of six villa units. Then to the west of that, is a three-storey development. At the end of the service road there is a footpath going downhill (the service road being elevated above the level of Boronia Road) to the Boronia Shopping Centre. The noise from Boronia Road is considerable.

52 But the remarkable feature about my view of the service road area is that it is quite clearly, as Mr Easton described it, an "orphan" area with a significantly different character from, and with no real relationship to, the land elsewhere in the Subdivision. The character changes as a result of the two large 6 villa unit developments and the three-storey town house. It is discrete area because of the separation of the service road from the rest of the Subdivision. It is not safe to drive into the service road from Marie Street. It is necessary to enter it from Boronia Road. Moreover, the only way to see the service road properties is either to drive or walk up the service road. They are not visible from other parts of the subdivision and are barely visible from Boronia Road because of an embankment.[54]

Consideration

53 The plaintiff has the task of proving a negative under s 84(1)(c) of the Act, namely that the proposed modifications will not substantially injure those persons having

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VCAT 1249.

54 Evidence of Mr Sanders in cross-examination at Transcript p 116 and my own observation.

the benefit of the restriction. It has been common in submissions as to the applicable law to refer to the observation of Justice Adam in *Re Robinson*,[55] where his Honour noted that the adverb "substantially" did not occur in the equivalent English legislation and took the view that this did not lead to any significant difference in the manner in which the respective statutes should be interpreted since, as was held in *Ridley v Taylor*,[56] the purpose of s 84(1)(c) was, according to Adam J:

> ... to preclude vexatious opposition cases where there is no genuineness or sincerity or bona fide opposition on any reasonable grounds. There one can say that despite the opposition the proposed discharge or modification does not injure the persons entitled to the benefit of the restriction. In *Ridley v Taylor*, I think, it was stated that paragraph (c) was 'so to speak, a long stop against vexatious objections to extended user and is to deal with frivolous objections.'

54 In *Greenwood & Anor v Burrows & Ors*,[57] Justice Eames referred to these observations of Adam J regarding *Ridley v Taylor* and said this:

> Whilst, in my opinion, the restriction of (c) to 'substantial' injury would enable the weeding out of vexatious objections to modification or removal of a covenant the dichotomy in the section is not between vexatious and non-vexatious claims but is between cases involving some, genuinely felt but insubstantial injury, on the one hand, and cases where the injury may truly be described as substantial, on the other. (See *Re Alexandra* [1980] VR 55 at 61.) The Full Court in *Stani's Case*, supra at 10, considered the interpretation of Adam J as to the effect of the word 'substantial' and did not take it as being inconsistent with the approach adopted by Gillard J in *Re Cook*, supra, which the Full Court approved. In that case, at 810, Gillard J said the approach which should be adopted is that the Court should approach the case from the point of view of the beneficiary of the covenant ...

55 His Honour, Justice Eames, went on to refer to the proper assessment of injury by a comparison between the benefits intended to be conferred and those actually conferred by the covenant initially on the persons entitled to the benefit and/or the resultant benefits, if any, remaining to such persons after the covenant has been modified.

56 In my view, the observations of Justice Eames in the passage I have quoted above put to rest the notion that s 84(1)(c) is somehow limited to dealing with vexatious or

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55 [1972] VR 278 at 284-285.
56 [1965] 1 WLR 611.
57 (1992) V Conv R 54-444 at 65, 199.

frivolous objections. It is a freestanding ground for the discharge or modification of a restrictive covenant where its conditions are satisfied.

57 The central issue for my determination is whether the plaintiff has established that the proposed modifications of the covenant will not substantially injure the persons entitled to the benefit of the restriction.

58 I will consider this question by reference to the matters the parties identified as particularly relevant.

Purposes

Single Dwelling

59 The purpose of the single dwelling restriction is, in my opinion, to limit the population density in the neighbourhood giving a reasonably quiet residential atmosphere. There is good Full Court authority for this interpretation of the purpose of such a covenant. In *Re Stani,* the Full Court of the Supreme Court of Victoria referred with approval to the description of the purpose of a similar covenant made by the primary Judge, Justice Gillard:[58]

> ...[I]t was imposed for the purpose of ensuring one residence only was to be erected on each block so that there would be a reasonable density of population giving a reasonably quiet residential atmosphere, attractive in that it would provide a tranquil, quiet existence.

Building Materials

60 It was made clear in the decision of Justice Sholl in *Jacobs v Greig,*[59] that a restriction of this kind cannot be read literally so as to apply the requirement for the private dwelling house to be of brick or brick veneer with a roof of tiles to apply to the whole of the construction. Scholl J noted:[60]

> Of course, all such covenants, including this covenant, must be read as they would be understood by an ordinary person, accustomed to the ordinary current use of the English language in the relevant locality, and acquainted

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58 *Re Stani,* Unreported, Full Court, Supreme Court of Victoria, 7 December 1976, p 8. See also *Re Miscamble's Application,* [1966] VR 596, 601.

59 [1956] VLR 597 at [603].

60 At [603].

> with the current social habits and usages. No one would read this covenant as requiring that floors, stairs, rafters, or doors should be of brick or stone, or as essaying to interdict on the estate the otherwise common practise of using glass windows, metal or porcelain plumbing materials, or concrete or terrazzo flooring, or cement or plaster rendering over brick walls. On the other hand, I am satisfied that an ordinary resident of Victoria, reading this covenant in the current decade, would understand it as requiring that the vertical construction of the relevant structures should be substantially wholly of brick or stone, and as forbidding inter alia the use of the method of construction known as 'brick veneer'.

61 *Jacobs v Greig* was an application for an injunction. It was not an application for the modification of a restrictive covenant. It was a different covenant that prevented any building except one of brick or stone. The issue in the case was whether as a matter of construction, a brick veneer building would comply with the covenant. This covenant permits brick veneer. Many of the comments about what the objective of preventing brick veneer may have been, such as, fire resistance, reduction of noise and so on, do not apply in this case.

62 In my view, the purpose of the building materials restriction in this case is to ensure a standard of construction principally concerned with the appearance of the dwellings constructed on the burdened land. The objectives of solid brick or stone construction are materially different from brick veneer. Most modern dwellings are timber or steel framed with either brick veneer or other materials forming the outer skin or cladding. As Mr Easton said, the modern materials and methods of construction take into account fire-ratings, noise control and quality of construction.[61]

Network of Covenants

63 There was a debate between the parties about the fact that there was a substantially incomplete network of covenants in the Subdivision. Within LP 26826, by which the two arms along Marie Street and Boronia Road were created (see attachment), almost all the lots had the burden and many the benefit of the other restrictions. But in the inner core, although most had the benefit of the covenant over the Land, few had the burden of a similar covenant. The plaintiff submitted this was significant

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61 Transcript, 12 August 2015, p.30.

because the covenant over the Land never effectively secured for the benefit of the properties in Marie Street or Gwyn Crescent the benefits asserted by the defendant. At all times, the parts of the subdivision closest to their properties could be re-developed (subject to planning controls) with multiple dwellings. On the other hand, the defendant submitted that it was a network of covenants, albeit and incomplete one, and the purpose could still be achieved, and relied on the observations of Justice McDonald in *Re Pivotel Pty Ltd.*[62] In that case, there was also an incomplete network of covenants and his Honour noted:

> ...[I]n subdividing the land the subject of a subdivision, the subdivider did not have the purpose or intent of having the land developed in a uniform manner. As best as it is able to be concluded at this point in time I have reached the conclusion that the purpose of imposing 'one dwelling only' restrictive covenants on some 31 allotments in the subdivision including lot 38 was to confine the use of those allotments to residential purposes and to strictly limit and control the number of dwellings that may be erected on each allotment in order to provide a spacious living environment when compared to the development that may otherwise occur on other allotments.

64 In this case there are significant differences from the situation examined in *Re Pivotel Pty Ltd.* Here the subsequent subdivisions of Lots 13 and 29 in the Subdivision have created a large area where the properties generally have the benefit of the covenant burdening the Land but are not themselves, generally, burdened by a corresponding, or any, covenant. This creates a situation where the density and appearance of the neighbourhood has the potential to change without restraints other than those imposed by the town planning laws and provisions.

65 In assessing whether the modification sought will not substantially injure those entitled to the benefit of the covenant, one is postulating a hypothetical future after the modification has been granted.[63] The spaciousness and reasonably quiet residential atmosphere of the neighbourhood cannot be maintained with any surety because of the absence of restrictive covenants burdening the majority of the lots in the inner core of the Subdivision. That is, the areas coloured blue on Plan A in Marie Street, Gwyn Crescent and Ethel Street. These lots in the inner core should be

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62 (2000) VSC 264; (2001) VConvR 54-635, at [48].

63 Per Gillard J in *Re Cooke* [1964] VR 808 at p. 813.

regarded as integral to the neighbourhood and make up the bulk of the land in the neighbourhood. The absence of covenants burdening those lots is significant to the future maintenance of the ambience of the neighbourhood.

Precedent – Single Dwelling Restriction

66 Mr Townsend, of Counsel, for the defendant conceded that the principal ground of objection was the precedential effect of the modification. Particularly in the circumstances where the only neighbour objecting, and the other supporting neighbour, Mr Sanders, are physically remote from the land. They are not going to be directly injured by the development that is proposed. The injury is very significantly limited to the precedential effect.[64]

67 From my observations during the view, I agree with the evidence of Mr Easton that a modification of the restrictive covenant burdening the Land would only establish a precedent for the lots in the service road, and probably not a precedent for 68 Boronia Road, at the corner of Marie Street and the service road. That is because 68 Boronia Road is not accessed from the service road but from Marie Street. The properties in the service road and accessed from it, including the Land, are in their own discrete area of the neighbourhood and have a closer proximity to the Boronia Shopping Centre. The Land is associated with the properties to the west and not to the properties in the bulk of the subdivision that is the inner areas of the subdivision shown on Plan A. The benefit of the view I undertook is that the Land when viewed on the plans does not appear so clearly to be separate and distinct, but on the ground in the course of the view it was striking how separate the Land is from the rest of the Subdivision.

68 The development of the Land, or even 72 Boronia Road, will have absolutely no impact on the ambience, character or view lines within the Marie Street area. It will not, in my estimation, affect the density and thus the 'tranquillity' of the rest of the Subdivision. The current covenant does not affect some of the elements that make up character of the neighbourhood, particularly the fact that most houses are well set

64 Transcript 13 August 2015 p. 133.

back from the streets, the gardens are well planted (although many are distinctly unkempt) and there are mature street trees. Thus there is a sense of spaciousness. But that is only partly attributable to the single dwelling covenant. That is a crude control of the density of the population and, as Mr Searle acknowledged in his evidence, at present the density of the population in the area is affected by the fact that there are many empty nesters, that is couples whose children have left home. This no doubt contributes to the quietness and sense of peace. This, however, is a transient phenomenon.

69 The evidence derived from Plan A, and that given by Mr Searle and Mr Sanders in cross-examination, confirmed that a significant number of properties in the Subdivision, in Marie Street,[65] Gwyn Crescent,[66] Ethel Street[67] and Boronia Road[68] had been sub-divided and where there had previously been a single dwelling there were now two dwellings. Many of these are in the inner area of the Subdivision away from the traffic of Boronia Road and the densities of the Business Activity Centre.

70 The discharge of the covenant burdening 66 Boronia Road is also relevant as a precedent. It is, however, much more a part of the Subdivision, in that it is not separate from it in the same way that the Land is separate.

71 Mr Townsend, of Counsel, relied on the observations of Justice Bell in *Freilich v Wharton*[69] where his Honour likened the subject property in that case to a soldier guarding the residential character of the Coonil Estate against commercial encroachment from the south. He submitted that in this case, for the purposes of considering the precedential effect of the modification sought, the Land, and the land surrounding it, represents a bulwark against development pressure that is coming from the Business Activity Centre of the kind seen by the discharge of the covenant and the approval to build an 11 unit apartment building on the land at 66

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65 3 and 8 Marie Street.
66 1, 2, 4, 7 and 9 Gwyn Crescent.
67 1 and 3 Ethel Street.
68 44 and 66 Boronia Road.
69 [2000] VSC 533 at [71].

Boronia Road.

72 In my view, the soldier guarding against incursions into the spacious residential character of the Subdivision is 66 Boronia Road, and that soldier has fallen, so to speak.

Building Materials Restriction

73 In relation to the building materials restriction in the covenant, and the impact of a modification to the covenant burdening the Land as a precedent for the modification of other covenants in the Subdivision, the distinct and separate area of the neighbourhood in which the Land is located is, again, an important factor. It is also relevant that 2 Marie Street has clearly been constructed in breach of the covenant, thus creating a precedent.

74 When the purpose of the building materials restriction, as I have defined it, is borne in mind, and Mr Easton's evidence about, and the judicial knowledge I take of, the vast changes and improvements in building materials available for quality building construction since the covenant was given, I consider that there will be no substantial injury to those having the benefit of the covenant if this restriction is discharged.

75 I am fortified in this view by the evidence in cross-examination of Mr Searle and Mr Sanders. Neither of them appeared particularly offended or disturbed by the use of steel in the roof or the weatherboard setback in the upper storey of 2 Marie Street. No substantial impact on them or the neighbourhood was claimed. Mr Townsend claimed on behalf of the defendant that the building materials restriction is partly responsible for the character of the neighbourhood. But the presence of houses of the same or similar character in the areas where there are no building materials restrictions can really only be explained by the style and available material at the particular time the houses were built.

76 Mr Easton gave evidence that the second storey setback made of weatherboard or other lightweight construction materials is now a common and practical solution to

double storey setback constructions.

The Absence of Objection from Immediate Neighbours

77 It is well established that the absence of objectors to the discharge or modification of a covenant will not, in itself, necessarily satisfy the onus of proof.[70] In *Re Cook*, the applicant had enhanced the size of his large lot (which was subject to a single dwelling covenant) by consolidating it with land contiguous with it, subdivided the combined area and then sought to discharge the single dwelling covenant and impose a single dwelling covenant over each of the new lots. A number of owners having the benefit of the single dwelling covenant in the immediate vicinity of the subject land gave evidence that the modification sought would not damage any of the lots or depreciate their value, as did a real estate agent practising in the area. There were many more owners in the neighbourhood who had the benefit of the covenant. In this context, Sir Oliver Gillard said that:

> The absence of objectors, in my opinion, affords very little evidence in favour of the application.

78 The plaintiff submitted that the cases dealing with this aspect of the jurisdiction are really addressed to the situation where no objectors at all appear before the Court, so that no conclusion can be drawn simply because of the absence of objectors. He contended that where there has been substantial objection, as there was at least earlier on in this case,[71] and the evidence given of the opposition generally in the area, it is significant that the adjoining owners of 72 and 68 Boronia Road and 2 Marie Street, did not seek even to write to the plaintiff's Solicitor to state that they had an objection. In the context of there being much agitation in the area about the issue, having regard to the objections received to the planning application for 66 Boronia Road, some inference can be drawn by the Court that at least in their own mind the owners of the adjoining properties do not perceive there to be a substantial

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70 *Re Cook* [1964] VR 808, 812; *Vrakas v Registrar of Titles,* [2008] VSC 281 at [43]; Prowse v Johnstone & Ors, [2012] VSC 4 at [97].

71 13 local residents wrote letters objecting to the modifications, one resident with the benefit of the covenant signed a 'do not object form' (Mr Halse), but only one, Mr Searle, desired to defend the application, and one other, Mr Sanders, supported him.

injury to themselves. Those neighbours were, I should add, directly served with notice of the application.

79 On the other hand, as the defendant submitted, I should take judicial notice of the probability that many of the people who objected are working, or, not being from a particularly affluent area, are fearful of the cost and expense of Supreme Court proceedings. Further, they may well think that as the burden is on the plaintiff to prove a negative and the absence of objectors is very little evidence in support of the application, that the Court will protect their interests.

80 In my view, the absence of objection by the immediate neighbours of the plaintiff is merely *some evidence* of those adjoining neighbours being unconcerned about the proposed modification. By itself it is clearly not sufficient. But combined with the separate and discrete area of the neighbourhood in which the Land is located, I think it has some persuasive force. This is partly because an inference may be drawn that, from their subjective viewpoint, they do not consider their enjoyment of their properties will be injured by the modifications sought.[72] But this is not a matter that can attract much weight because of the many possible and unknown factors involved in the absence of objection, including ignorance, inattention, laziness and fear of involvement in proceedings in this court.

The Plans for the Proposed Development

81 The comments of Justice Kyrou in *Vrakas* that the absence of detailed plans make it more difficult to assess the question whether the plaintiff has discharged her onus of showing an absence of substantial injury, establishes no more than that the plans of the plaintiff's proposal will assist the Court properly to assess whether it gives rise to substantial injury. The plaintiff's Counsel, Mr Rimmer, submitted that there is no authority for the proposition that the lack of specific plans to which the plaintiff is committed is the same as no plans at all, as the plaintiff submitted.

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72 It having been established that the subjective tastes, preferences or beliefs of particular individuals may, within the limits of reasonableness, give rise to injury in a relevant sense to those individuals *Prowse v Johnstone & Ors* [2012] VSC 4 at [106].

82 It is true that in the First Easton Report the plans were just a sketch. But in the Second Easton Report the plans are much more detailed and, although plainly reduced from a larger size to an A4 size to fit the report, there did appear to be measurements and the like that would enable there to be some precision so that one could provide for the development to be substantially in accordance with those plans. The fact that they may not have been through the planning approvals process of the Responsible Authority may have the result that the plaintiff is not permitted to build substantially in accordance with those plans, but that is the plaintiff's problem.

83 In this case, the plans that are annexed to the Second Easton Report give sufficient detail of the four proposed two storey dwellings and the materials of which they are to be constructed, to satisfy me that, although they may not be entirely or even substantially of brick or brick veneer with a tiled roof, they are sufficient to meet the purpose of the original restriction in the covenant, if it be viewed, as the defendant submitted, of being directed to the purpose of ensuring a quality and aesthetically pleasing building on the Land. The plans show, in the front elevation of the north unit facing the service road, that the roof is of tiles and the walls are at least partly of brick and stone. No doubt there are mixed media used, as is considered in this day and age to be aesthetically pleasing. Nevertheless, there is sufficient in the plans to give detail of the method of construction to satisfy me that even if it does not meet the strict requirements of the restriction in the covenant it goes a long way towards meeting the purpose of that restriction.

84 But the plaintiff's central contention in relation to the building materials restriction is that the no substantial injury will be caused because the Land is in an area separate from the rest of the Subdivision, and the absence of a comprehensive network of covenants providing the kind of protection contemplated by the covenant burdening the plaintiff's land. These matters, combined with the impending and much larger and more direct detrimental effect of the development approved for 66 Boronia Road, demonstrates that there will be no substantial injury should the modifications sought be granted.

85 I agree that in this case because of the separate and discreet location of the Land, any injury to any of the properties having the benefit of the covenant is not substantial should the covenant be modified to remove the building materials restriction and the single dwelling restriction.

Impact on Traffic

86 In my view, the focus on traffic issues by the parties reflects the planning background of the expert and the lawyers. True it is that the defendant's witnesses expressed concern as to the impacts of traffic in the neighbourhood arising from the increased density of dwellings in the service road. But Mr Sanders gave evidence in his affidavit that Marie Street already has substantial volumes of traffic and vehicles regularly park on Marie Street near its junction with Boronia Road. Mr Easton's expert evidence was that overflow parking (by visitors) would only impact on the service road, as it would not be practical in Marie Street, due to the difficulty in accessing Marie Street.[73]

87 On my view, I noticed that there is space in the service road to accommodate parking by visitors. Nevertheless I also observed that visitors to the Land could easily park in Marie Street and have only a short walk to the Land. 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 Boronia Road, and entering and exiting Marie Street from and to Boronia Road, any effect deriving from the development will be insignificant.

The Immediate Neighbours

88 The properties to the west of the Land are, with the exception of 72 Boronia Road, already developed with multi-unit dwellings. The driveway of 72 Boronia Road is parallel with the driveway on the subject land and leads to a large outbuilding at the rear constructed at the common boundary. There will be a significant buffer between the Land and No. 72 by these combined driveways.

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73 Second Easton Report [2.6].

89 The property at 2 Marie Street is a double storey dwelling fronting Marie Street, which extends across the southern boundary of lots 14, 15 (the Land) and 16. Its main amenity areas are not immediately adjacent to the Land. Any impact on that property would be minimal and due to the operation of Rescode where no overlooking of that property is likely to be allowed.[74]

90 The property at 68 Boronia Road is adjacent to the Land. Its main amenity areas are not immediately adjacent to the Land.[75] The open spaced areas along the east side of the Land will provide a significant buffer between this property and the Land. Because it fronts onto the service road it is already in an area that is substantially developed with multi-unit developments. In addition, it is accessed directly from Marie Street with garages and other outbuildings located in its rear yard. In so far as ingress and egress to and from the property by motor vehicle is concerned, it is thus substantially oriented to Marie Street.

91 In relation to potential overlooking and overshadowing of the immediate neighbours, these are concerns which would arise with the construction of a single dwelling on the Land, especially if it were a double-storey dwelling with a substantial footprint, and are matters that will and should be addressed in the planning process.[76]

92 I agree with the opinion of Mr Easton that the modifications to the covenant sought in this case will not substantially injure the owners of these properties in their enjoyment of them.

Conclusions

93 Having regard to the authorities mentioned above,[77] and the plaintiff's and defendant's respective evidence and submissions, in my opinion:

(a) the purpose of the single-dwelling restriction found in the covenant is to limit

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74 First Easton Report at paragraphs 10.17 to 10.19.
75 First Easton Report at paragraphs 10.17 to 10.19.
76 See *Wong v McConville* [2014] VSC 148 at [67].
77 See under the heading 'Applicable Law'.

the population density in the neighbourhood giving a reasonably quiet residential atmosphere. The benefit conferred on a beneficiary in precluding more than one dwelling on the Land at the time of the hearing of the application is extremely limited having regard to the separate area in which the Land is located; and

(b) the purpose of the building materials restriction in this case is to ensure a standard of construction principally concerned with the appearance of the dwellings constructed on the burdened land. The benefit conferred on a beneficiary by the building materials restriction as at the date of the hearing is also extremely limited because of the location of the Land and the different construction materials now available.

94 In my view, the beneficiaries will not suffer a substantial injury should the covenant be modified and up to four dwellings are constructed on the Land substantially in accordance with the plans exhibited to the Second Easton Report without any building materials restriction, having particular regard to:

(a) the location of the Land in a cul-de-sac or service road close to the Boronia Shopping Centre and facing Boronia Road, a four lane highway, being physically separate from the hinterland to the south, particularly the residential network based on Marie Street, Gwyn Crescent and Ethel Street where most of the properties having the benefit of the covenant are located;

(b) the discharge of the covenant over 66 Boronia Road having established a precedent for a multi-unit development in the Subdivision. The modifications of the covenant sought in this case will not have any significant precedential effect;

(c) the subdivision of a number of properties in Marie Street, Gwyn Crescent and Ethel Street to enable a second dwelling to be built has already affected the density of dwellings in the neighbourhood and created precedents for further subdivision; and

(d) the fact that in my view the immediate neighbours will not be substantially injured by the modifications sought.

95 For these reasons, 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.

96 I will therefore approve the modification of the covenant sought by the plaintiff. The plaintiff should circulate a draft proposed modification of the covenant giving effect to these reasons and including enlarged versions of the plans depicted in the Second Easton Report. I will then hear the parties as to the precise terms of the modification and the question of costs.

PLAN OF SUBDIVISION

OF PART OF CROWN ALLOTMENT 69.

PARISH OF SCORESBY

COUNTY OF MORNINGTON

VOL. 3560 FOL. 825

Measurements are in Feet & Inches
Conversion Factor
FEET x 0.3048 = METRES.

LP 26826

EDITION 2
PLAN MAY BE LODGED
08/10/53

2 SHEETS
SHEET 1

ENCUMBRANCES
AS TO THE LAND MARKED E-4
THE EASEMENT TO THE MMBW
CREATED BY L678399P

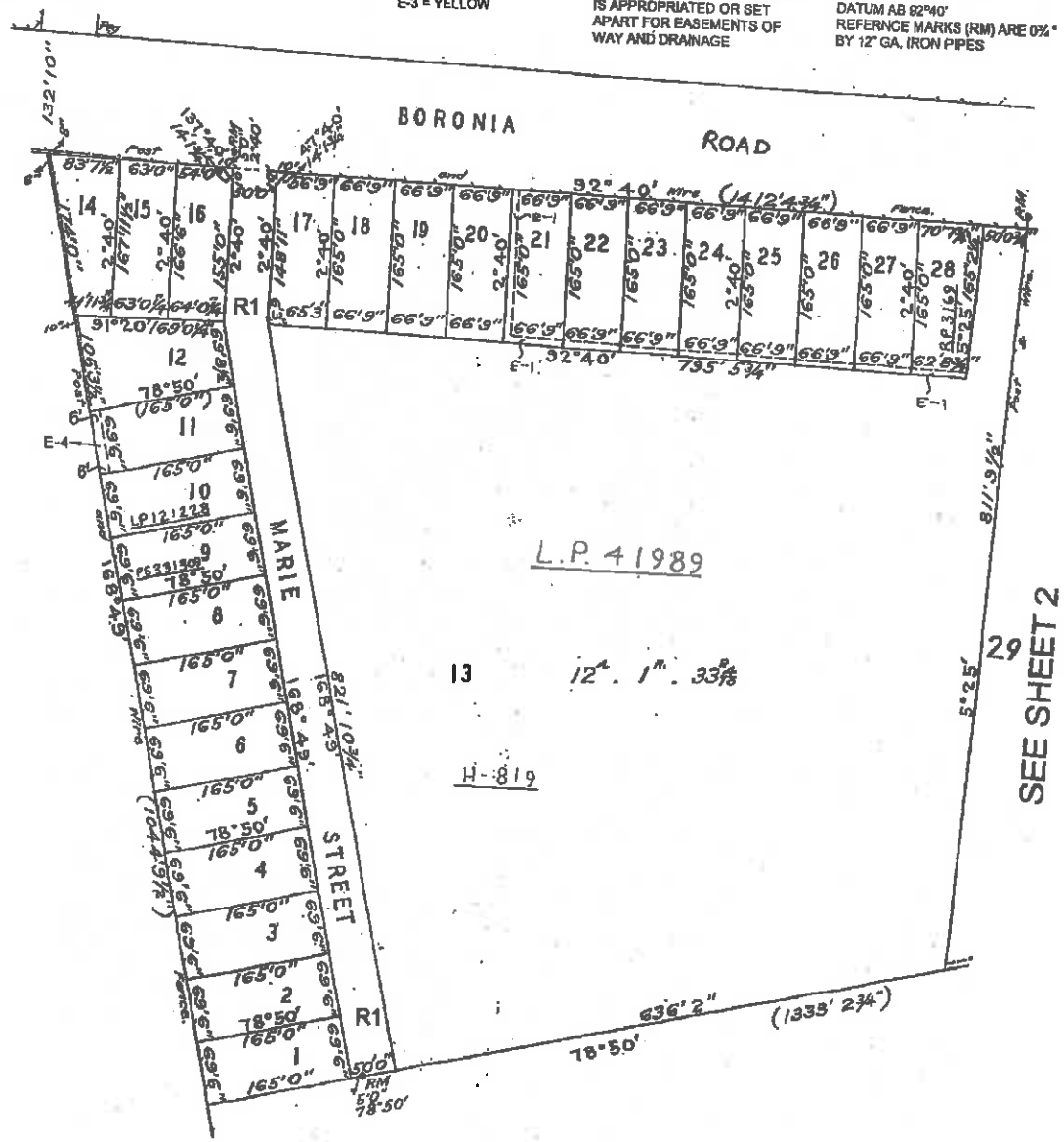
COLOUR CODE
E-1 = BLUE
R1 = BROWN
E-3 = YELLOW

APPROPRIATIONS
THE LAND COLOURED BLUE AND GREEN IS APPROPRIATED OR SET APART FOR EASEMENTS OF DRAINAGE AND IS 6 FEET WIDE

THE LAND COLOURED BROWN IS APPROPRIATED OR SET APART FOR EASEMENTS OF WAY AND DRAINAGE

APPURTENANCIES
THE LAND COLOURED YELLOW IS AN APPURTENANT EASEMENT VIDE C/T VOL. 3560 FOL. 825

NOTES:
DATUM AB 92°40'
REFERNCE MARKS (RM) ARE 0¾" BY 12" GA. IRON PIPES



A34

Figure 1

PLAN OF THE SUBDIVISION

CERTIFICATE

I certify that this and the 44 preceding pages are a true copy of the reasons for Judgment of Derham AsJ of the Supreme Court of Victoria delivered on 18 December 2015.

DATED this eighteenth day of December 2015.

Associate