

A GUIDE TO PRACTITIONERS

APPLICATIONS FOR THE MODIFICATION OR DISCHARGE OF RESTRICTIVE COVENANTS

- 1 Section 84 of the *Property Law Act 1958* confers on the Court a power to modify or discharge a restrictive covenant. The discretion arises only if the plaintiff can prove one of the grounds in section 84(1)(a), (b) or (c).
- 2 There is also an associated declaratory power. Section 84(2) of the Act empowers the Court, on application of any person interested, to make a declaration -
 - (a) whether any particular land is affected by a restriction; or
 - (b) about the nature and extent of the restriction, whether it is enforceable and, if so, by whom.
- 3 The final hearing of these applications is a trial (on admissible evidence), entailing final relief and an alteration to a registered encumbrance on land. Rule 77.01(2)(a)(viii) of the *Supreme Court (General Civil Procedures) Rules 2015* gives an Associate Judge the authority to hear and determine the application. There may be occasions when an application is heard by a Judge of the Court.
- 4 The application is made by originating motion. As a first step, a summons on the motion is made returnable *ex parte* before an Associate Judge for procedural directions under s 84(3). An essential Court direction is for the giving of notice of the application to persons who appear to be entitled to the benefit of the covenant. For this reason, it is essential that there is an affidavit filed with the summons that deals with the following evidence:
 - (a) the relevant transfer (and for convenience in older and faded transfers, a reproduction of the full text of the words of the transfer) containing the covenant sought to be modified or discharged;
 - (b) the title of the land burdened by the covenant, and the parent or antecedent titles to show the title history;
 - (c) the plan of subdivision by reference to which the benefited lots are usually identified;

(d) an analysis of the title history (usually by a solicitor expert in conveyancing or another independent expert, for example a town planning expert) that shows the properties entitled to the benefit of the covenant.

5 It is also expected that the affidavit evidence accompanying the summons will deal with the merits of the application and it is typical for applicants to rely on expert reports. That will enable recipients of the notice of application, on enquiry, to see the basis of the application and the proposed development on the land, and enable them to properly consider their attitude to the application. The evidence as to the merits of the application varies according to the nature of the restriction in the covenant, the number and location of the beneficiaries, the ground or grounds of the application and whether the application is for modification or discharge. In a typical application for modification, the affidavit in support is expected to include most, if not all, of the following:

(a) a plan of the buildings on the land, and a description of the materials out of which they are constructed, including photographs;

(b) the changes, if any, that have taken place on the property since the covenant was created;

(c) the boundaries of the neighbourhood, any relevant changes that have taken place in the neighbourhood since the covenant was created and the contemporary character or features of the neighbourhood at the present time;

(d) a description of the proposed development of the land, if the discharge or modification is allowed, with concept plans or proposed plans;

(e) all facts and other circumstances by which the applicant contends the covenant ought be modified and discharged according to the statutory grounds; and

(f) a proposed form of modification to the wording of the covenant.

6 Depending on the title history and the area in question, there may be a multitude of beneficiaries that are widespread in a locality or subdivision. Some lots may not be proximate to the burdened land, which may mean there is an issue as to whether they are sufficiently affected by the application. For that reason, the Court generally adopts the practice of not necessarily requiring the applicant serve all of

the beneficiaries. The Court will look to the evidence at the first directions hearing and identify the benefited lots of land that are in the immediate vicinity of the burdened land and those lots that are further away but may still be affected. Much depends on the nature of the restriction, the configuration of the subdivision, the uniformity and character of the subdivision, whether there have been any previous similar modifications or discharges of similar restrictive covenants, the location of roads and the topography of the neighbourhood (which may be relevant where, for example, the restriction in the covenant concerns the height of any building on the burdened land.)

- 7 The practice of requiring the applicant to give public notice of the application by an advertisement in a daily or suburban newspaper is, in contemporary times, no longer observed, as a rule. The Court's experience is that such advertisements are not effective. Instead, to add to the awareness in the neighbourhood, the Court will usually order the applicant erect a prominent public notice of the application at the front of the property. The orders made on the first directions hearing identify the landowners to be served directly according to street address and subdivisional lot number, and also attach the form of the notice to be given by post and by public display. See Appendix One for a typical order made on the first directions hearing.
- 8 To allow proper notification to occur, a second directions hearing also before an Associate Judge usually occurs six to eight weeks after the first directions hearing. For that occasion, the plaintiff must file an affidavit proving compliance with the previous directions concerning the giving of notices. If the Court is satisfied that the applicant has complied with those directions, a declaration to that effect is made under rule 52.09(3).
- 9 If landowners having the benefit of the covenant appear at that second directions hearing and seek to oppose the application at a contested hearing, then they must be joined as defendants. In that event, directions are then made for the filing of responding affidavits, and a trial date is usually fixed. See Appendix Two for a typical order. If objectors attend that directions hearing without legal

representation, the Court encourages them to obtain legal advice and representation, most effectively as a group. If objectors are not willing to be joined as defendants, the Court may permit them to state their objection in an informal way and, depending on the content, may take them into consideration in determining the application.

- 10 If the matter proceeds to trial, applicants ought to be aware of the possibility that unless objection to the removal or modification of a covenant is frivolous, an unsuccessful objector may nonetheless be entitled to costs, in the discretion of the Court. The parties should consider the benefit a mediation might afford in resolving the objections, although the ultimate power to make an order under the Act resides in the Court, not the parties. There are cases where the number of beneficiaries is not large and notice is given to them all. An agreement from all beneficiaries for a discharge or modification of a covenant under s 84(1)(b), whether through a mediation or otherwise, is a ground for the exercise of the Court's power to make the order. The Court will often encourage the applicant to convene at least a private consultation with the objectors.
- 11 If there is no appearance by any beneficiaries on the second directions hearing in response to the notices, then the Court may proceed to hear and determine the application on that occasion as unopposed, depending on the burden of the Court's business and the expected duration of the hearing. If the application is granted, orders may then be made. See Appendix Three for a typical final order. The order is served on the Registrar of Titles to enable an amendment of the register.

APPENDIX ONE TO GUIDELINES:
TYPICAL ORDER FOR FIRST DIRECTIONS

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
PROPERTY LIST

S CI 20** 0****

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

- and -

IN THE MATTER of an application for the discharge or modification of a restriction arising under a covenant in a transfer of land registered no. [insert] affecting the land at [street address] being the land in certificate of title volume [insert] folio [insert] by:

ABCD EFGH

Plaintiff

ORDER

JUDGE: The Hon. Associate Justice XYZ

DATE MADE:

ORIGINATING PROCESS: Originating motion filed .

HOW OBTAINED: At the hearing of the motion

ATTENDANCE:

OTHER MATTERS:

THE COURT ORDERS –

1. By [insert date] the plaintiff shall give notice of this proceeding and a copy of this order to each person who is a registered proprietor and registered mortgagee of the land identified in Schedule A to this order by pre-paid Priority post at the last recorded address of that person appearing on register held by Land Victoria (the Office of the Registrar of Titles) or rate book (if any), or otherwise to the last

known address of that person and to the street address of the land if different to those addresses.

2. The notice shall be in the form of Schedule B to this order.
3. By *[insert date]* the plaintiff shall display publicly a copy of the notice which is to be enlarged to size A3 and encased in a waterproof cover and affixed in a conspicuous position on the property at *[insert address]* facing *[insert address]*.
(note: not required if all beneficiaries are to be directly notified)
4. The public notice (if required) shall remain displayed until *[insert date]*.
5. The further hearing of the proceeding is adjourned to *[insert date]* at 10.30am in Court No. 2, 436 Lonsdale Street, Melbourne.

DATE AUTHENTICATED:

.....
THE HON ASSOCIATE JUSTICE XYZ

SCHEDULE A

LAND FOR THE BENEFIT OF WHICH
NOTIFICATION IS TO BE GIVEN

Lot on plan of subdivision LP [and insert street address]

Lot on plan of subdivision LP [and insert street address]

etc.

SCHEDULE B

NOTICE OF APPLICATION TO
MODIFY OR DISCHARGE A RESTRICTIVE COVENANT

LAND AT [*street address and certificate of title particulars*]

THIS NOTICE is given by order of the Supreme Court of Victoria.

The owner of the land, [*name*], has applied to the Court for an order to modify a covenant that is registered on the title to this land. The covenant is stated in a transfer of land dated [*insert*]. The covenant prohibits the land owner from, among other things, [*insert the relevant prohibition such as building more than one dwelling house on the land*]. The covenant is not for the benefit of all land in the area, but only for certain lots of land according to the transfer and as shown on title searches [*within an identified subdivision or title*] [*alternatively, the covenant is for the benefit of all land*].

The plaintiff seeks to modify the covenant so as to be able to [*insert concisely the proposed development e.g. to construct two double storey dwellings on the land*]. The application is made under section 84 of the *Property Law Act 1958* (Vic). This application is different to a planning permit application to the local Council.

Any person who is entitled to the benefit of the covenant and who wishes to oppose the application should:

1. by [*insert date*] give written notice to the plaintiff's solicitors [*identify*]; and
2. attend the Supreme Court on [*insert date*] at 10:30am in Court 2, Ground Floor, 436 Lonsdale Street, Melbourne,.

An attendance in person, or by a legal practitioner or other person that the Court permits, is required in order to make an objection. Objectors may wish to act as a group. Written objections without an attendance may not be considered. If the application is opposed, the Court will not decide the application on that day, but will set procedures for the progress of the case. If no person appears in Court on that day to oppose the application, the Court may hear and decide the application on that day.

Copies of documents relating to this application and any further information may be obtained on request from the plaintiff's solicitors [*name of firm, practitioner acting and telephone number*].

DATED:

.....
[*Name of plaintiff's solicitors*]

APPENDIX TWO TO GUIDELINES

**TYPICAL ORDER ON SECOND DIRECTIONS HEARING
ADDING OBJECTORS AS DEFENDANTS ***

[* Note: there may be various orders and
directions depending on the particular case]

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
PROPERTY LIST

S CI 20** 0****

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

- and -

IN THE MATTER of an application for the discharge or modification of the restriction arising under a covenant in a transfer of land registered no. [insert] affecting the land at [street address] being the land in certificate of title volume [insert] folio [insert] by:

ABC

Plaintiff

ORDER

JUDGE: The Honourable Associate Justice XYZ

DATE MADE:

ORIGINATING PROCESS: Originating Motion

HOW OBTAINED:

ATTENDANCE:

OTHER MATTERS:

On [previous date] the Court ordered the plaintiff to give notice of this application to certain landowners in the immediate vicinity of the subject land, who have the benefit of the covenant. The Court also required the plaintiff to display publicly an enlarged copy of the notice on the subject property. Under rule 52.09(3) of the *Supreme Court (General Civil Procedure) Rules 2015* ('the Rules') the Court declares the plaintiff has given the notices as required.

THE COURT ORDERS –

1. The persons named in the Schedule to this order are joined as defendants to this proceeding.
2. The plaintiff shall file an amended originating motion under rule 9.11 of the Rules by [date] and serve it on the added defendants by [date].
3. The defendants shall file and serve an appearance by [date].
4. Any affidavit on which the defendants intend to rely shall be filed and served by [date].
5. Any affidavits in reply on which the plaintiff intends to rely shall be filed and served by [date].
6. *[The proceeding be referred to a Mediator to be agreed between the parties or in default of agreement to be appointed by the Court, such mediation to take place by/not to take place before [date].*
7. *Subject to the terms of this order, the solicitor for the Plaintiff must, after consultation with all parties, deliver to the Mediator a copy of this order and a copy of any other relevant information, and take all steps necessary to ensure that the mediation commences as soon as practicable.*
8. *The mediation must be attended by those persons who have the ultimate responsibility for deciding whether to settle the dispute and the terms of any settlement and the lawyers who have ultimate responsibility to advise the parties in relation to the dispute and its settlement.*
9. *The Mediator not later than [date] report back to the Court whether the mediation is finished.*
10. *Subject to any further order, the costs of the mediation shall be paid in the first instance by the Plaintiff.]*
11. The plaintiff shall file and serve an outline of submissions and a list of authorities by [date].

12. The defendants shall file and serve an outline of submissions and list of authorities by *[date]*.
13. *[The Plaintiff shall prepare a paginated Court Book containing the following documents:*
 - (a) the Amended Originating Motion;*
 - (b) all affidavits and experts reports; and*
 - (c) such other documents, in date order, as any party expects to tender in evidence in chief or to be referred to in cross-examination.]*
14. *The Plaintiff by [date] serve on each other party a draft index for the proposed Court Book. Each of those other parties must send a list of documents to be included or documents to be excluded from the proposed Court Book and all parties must consult as to and agree upon the contents of the Court Book by [date].*
15. *The Plaintiff by [date] serve on each other party and file for the use of the judge a copy of the paginated Court Book. The Plaintiff must also provide the judge with the index to the Court Book in electronic form.]*
16. The proceeding is adjourned for further directions to *[date]* at 10.30am in Court No. 2, Ground Floor, 436 Lonsdale Street, Melbourne.

OR

Subject to the plaintiff filing a Notice of Trial by *[date]*, the trial of this matter is fixed for hearing on *[date]* at 10.30 am in *[allocated Courtroom]* on an estimate of *[one]* day.

17. The parties have liberty to apply to the Court.
18. Costs reserved.

DATE AUTHENTICATED:

.....
THE HON ASSOCIATE JUSTICE XYZ

SCHEDULE OF OBJECTING PARTIES JOINED AS DEFENDANTS

[insert full name and address]

etc.

APPENDIX THREE TO GUIDELINES

TYPICAL FINAL ORDER

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
PROPERTY LIST

S CI 20** 0****

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

- and -

IN THE MATTER of an application for the discharge or modification of the restriction arising under a covenant in a transfer of land registered no. [insert] affecting the land at [street address] being the land in certificate of title volume [insert] folio [insert]

BETWEEN:

ABC

Plaintiff

- and -

XYZ

Defendants

and others according to the schedule

ORDER

JUDGE:

DATE MADE:

ORIGINATING PROCESS: Originating Motion

HOW OBTAINED:

ATTENDANCE:

OTHER MATTERS:

- A. On [date] the Court made orders requiring notice of this application to be given to certain landowners in the immediate vicinity of the subject land, who have the benefit of the covenant. The Court also required the plaintiff to display an enlarged copy of the notice on the subject property. Under rule 52.09(3) of the *Supreme Court (General Civil Procedure) Rules 2015*, the Court declares the plaintiff has given the notice as required.
- B. [Any other matters the Court thinks fit e.g. the affidavit evidence; concise reasons for granting or refusing the application, etc]

THE COURT ORDERS –

1. Pursuant to section 84(1)(c) of the *Property Law Act 1958* the restrictive covenant contained in transfer of land registered no. [*insert*] affecting the land in certificate of title volume [*insert*] folio [*insert*], being the land known as [*street address*], be modified [*unless discharged*] by deletion [*and possibly insertion*] of the words as shown in the relevant part of the transfer so that the covenant reads –

AND ... COVENANTS withnot to erect or allow to be erected more than ~~one~~ two dwelling house houses on each of the said lots Lot XXX on LP YYY 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.

2. As soon as practicable after the authentication of this order, the plaintiff shall lodge an authenticated copy with the Registrar of Titles.
3. The plaintiff has liberty to apply to the Court for any further or other orders necessary or incidental for the effectuation of this order.
4. [*Costs*]

DATE AUTHENTICATED:

.....
THE HON ASSOCIATE JUSTICE XYZ