

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION

No. SCI 2016 03983

IN THE MATTER s84 of the *Property Law Act* 1958

and

IN THE MATTER of an application for the modification of the restrictive covenant contained in the Instrument of Transfer 912964 recorded in the Register Book at the Office of Titles affecting the land known as 6 Walker Street, Moonee Ponds more particularly described in Certificate of Title Volume 05289 Folio 682, wherein:

LAURENCE DAVID BLAKE
MAZEN FAHD
RIAD FARAH

are

Plaintiffs

Outline of argument

CONTENTS

CONTENTS.....	1
APPLICATION	2
EVIDENCE.....	3
LAND	3
ORDERS MADE TO DATE	3
AFFIDAVIT OF COMPLIANCE WITH THE ADVERTISING	4
SUBMISSIONS IN SUPPORT OF THE MODIFICATION	4
There have been no objections to the application.....	4
The adjacent properties do not enjoy the benefit of the covenant	4
Traffic access will be via a lane at the rear of the Land	5
The Proposal will present as a two-storey dwelling to Walker Street	5
The Land is Zoned Activity Centre	6
CONCLUSION.....	6

APPLICATION

1. This is an application to modify a restrictive covenant on the Land to allow a development of five residential apartments. Presently, the Land is developed with a single dwelling and is constrained by a restrictive covenant limiting:
 - a) development to one dwelling; and
 - b) the use of the Land for residential purposes.

2. The Covenant is contained in [Instrument of Transfer 912964](#) dated 21 November 1919 and provides:

And the said Clemence William Angwin doth hereby for himself his heirs executors and administrators and transferees registered proprietor or proprietors for the time being of the land untransferred in the said certificate of title that no more than one dwelling house shall be erected or left standing on the land hereby transferred and that such dwelling house shall be used for residential purposes only...¹

3. It is not proposed to amend the use requirement, but the maximum number of dwellings is proposed to be increased from one to five.

4. The [Originating Motion](#) dated 28 September 2016 seeks the following relief:

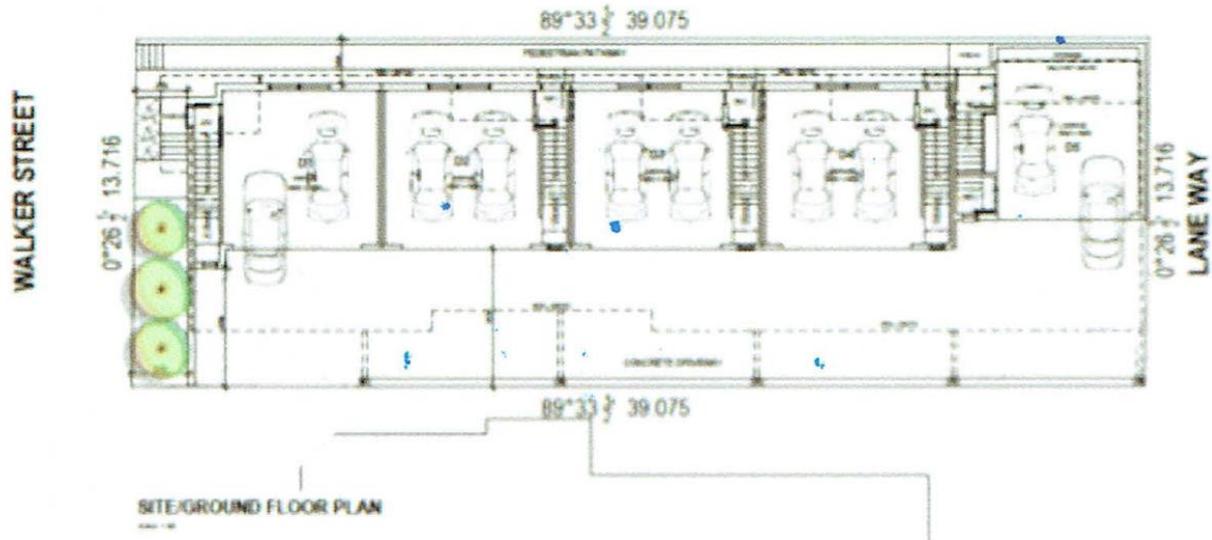
An Order pursuant to section 84(1)(c) of the Property Law Act 1958 that the Restrictive Covenant contained in Instrument of Transfer No 912964 affection Lot 1 on Title Plan 752771M, being the land described in Certificate of Title Volume 05289 Folio 682, be discharged, or alternatively modified as follows to allow the construction of six dwellings on the land:

[That the Transferees etc.] ... "that no more than ~~one~~ six dwelling houses_s shall be erected or left standing on the land hereby transferred and that such dwelling houses_s shall be used for residential purposes only ... "

5. The figure of six dwellings arose from the possibility that one of the five dwellings may ultimately be split into two. The Applicant is no longer pursuing this outcome and so the Application is for five dwellings.
6. I am instructed that the proposed development will adopt the format shown in the report of Mr Easton, as follows:²

¹ Report of Robert Easton dated 11 November 2016 at pages 5 and 6. Emphasis added.

² Report of Robert Easton dated 11 November 2016 at page 11



EVIDENCE

7. The Plaintiffs rely on the evidence of:
 - a) [Joseph Romeo dated 27 September 2016](#);
 - b) [Mazen Fahd dated 10 October 2016](#);
 - c) [Robert Easton dated 11 November 2016](#); and
 - d) [Joseph Romeo dated 3 February 2017](#).

LAND

8. The land is known as:
 - a) 6 Walker Street, Moonee Ponds;
 - b) Lot 1 on Title Plan 752771M; or more particularly described in
 - c) [Certificate of Title Volume 05289 Folio 682](#)—
(Land).³

ORDERS MADE TO DATE

9. On [22 November 2016, the Court made orders](#) requiring notice of this application to be given to landowners with the benefit of the covenant, including the following:

³ Report of Robert Easton dated 11 November 2016 on pages 4 and 5.

- 1 *By 28 November 2016 the plaintiffs shall give notice of this application and a copy of this order to each person who is a registered proprietor and registered mortgagee and identified in Schedule A to this order, by pre-paid Priority post to the last recorded address of the person appearing on the 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.*

AFFIDAVIT OF COMPLIANCE WITH THE ADVERTISING

10. Compliance with these orders is explained in the [evidence of Mr Joseph Romeo dated 3 February 2017](#).
11. [Mr Romeo's evidence](#) is that after fulfilling all requirements of the orders, he received numerous inquiries, but no objections.

SUBMISSIONS IN SUPPORT OF THE MODIFICATION

There have been no objections to the application

12. Although an absence of objections to an application does not automatically warrant an exercise of the Court's discretion in favour of the application, it is nonetheless prima evidence in support of the application.
13. This is particularly so, when every beneficiary has received direct notice of it and there is nonetheless no opposition to its terms.

The adjacent properties do not enjoy the benefit of the covenant

14. A plan showing the beneficiaries of the Covenant is set out in the [report of Mr Robert Easton](#) on page 10.
15. Significantly, none of the properties on the east side of Walker Street, between Alexandra Ave to the south, and Coats Street to the north, enjoy the benefit of the Covenant.
16. This means that direct amenity impacts such as overlooking, overshadowing and visual bulk to private open spaces do not arise.
17. Similarly, the property to the east at 1 Macpherson Street⁴ is a development known as the Quest apartments, a complex of short stay residential accommodation where one might expect that visitors are relatively uninterested in the subtleties of surrounding development.

⁴ Misdescribed as 38 Macpherson Street at paragraph [6.7] of report of Robert Easton dated 11 November 2016.

18. Robert Easton also notes that the Quest property “does not rely on laneway for access.”⁵

Traffic access will be via a lane at the rear of the Land

19. Traffic impacts to Walker Street will be limited with access being granted via the rear laneway to the east of the Land. As [Robert Easton explains](#):

6.4 The use of the rear laneway to access the garages will concentrate traffic away from any residential properties remaining in Walker Street.

The Proposal will present as a two-storey dwelling to Walker Street

20. The absence of impacts on immediate neighbours limits tangible examples of injury to a change in neighbourhood character.
21. Yet the building will present as a single, double storey dwelling, unless one is standing out the front of the property, looking directly down the driveway.
22. As Robert Easton explains:

The property directly opposite the subject land at No. 5 Walker Street does not have the benefit of the subject covenant. The other properties diagonally opposite the subject land at No.3 and No. 7 Walker Street do have the benefit of the subject covenant. There will be minimal impact on these properties as the appearance from Walker Street will primarily be to only one of the new dwellings.

23. The effect of this can be seen at 10 Walker Street, shown on page 23 of Mr Easton’s evidence and from my own photo, below:



24. As Mr Easton’s evidence explains, 10 Walker Street adopts a similar development approach to the proposal, consisting of four, double dwelling dwellings on a lot of similar proportions to the Land.
25. The Court’s attention is drawn to the proposed landscaping at the Walker Street interface on the indicative plan, where three canopy trees are proposed.

⁵ Report of Robert Easton dated 11 November 2016 at [6.7]

The Land is Zoned Activity Centre

26. The Land is zoned Activity Centre in the Moonee Valley Planning Scheme.⁶ Within the relevant part of that zone, the preferred building height is 14 metres.⁷
27. Although the zoning of the land is of limited relevance in an application to modify a covenant, in the present case it becomes of significance because surrounding beneficiaries have a view to the development of their own potential of their own land. This is suggested by:
- a) the four lot development at 10 Walker Street;⁸
 - b) the proposal for a five lot variation at 8 Walker Street;⁹
 - c) the three storey apartment complex at 2 Walker Street (this can be seen on page 25 of the report of Robert Easton, or in the photo above at the right hand side of the frame)—

among others.

CONCLUSION

28. In conclusion, it is submitted that the modification proposed will result in no substantial injury to beneficiaries of the Covenant and is an appropriate matter in which the Court should exercise its discretion in favour of the modification.

Matthew Townsend
Owen Dixon Chambers

Instructed by
De Marco Lawyers

⁶ Report of Robert Easton dated 11 November 2016 at page 14.

⁷ Report of Robert Easton dated 11 November 2016 at page 15.

⁸ Report of Robert Easton dated 11 November 2016 at page 23.

⁹ Report of Robert Easton dated 11 November 2016 at page 12 and 24.