



M P W L A W Y E R S  
A D V I S E & R E S O L V E

Mr Robert Easton  
Easton Consulting  
PO Box 26  
DONCASTER VIC 3108

*And by email eastplan@bigpond.com*

6 June 2017

Dear Robert,

**Modification or Discharge of Restrictive Covenant**

1. We act for Peter & Kelli Speranza (**Clients**), registered proprietors of the land located at 389 Moreland Road, Coburg, Victoria (**Land**). The Land is subject to the restrictive covenant described in Instrument of Transfer 1229318, dated 16 July 1925 (**Covenant**).
2. The Covenant provides, relevantly:

*... THAT they the said Henry Earl Bryant and Caroline May Bryant their heirs executors administrators and transferees registered proprietor or proprietors of the land hereby transferred will not erect or place on such land more than one private dwelling house no such house to be other than a new Double-fronted weatherboard brick stone concrete or other similar approved building and to have the front thereof facing Moreland Road shewn on the said Plan of Subdivision ...*

**Background**

3. Our Clients propose to develop the Land with three (3) dwellings. A basic sketch of the proposed development is enclosed.
4. The Covenant restricts our clients from proceeding with the Proposal. Accordingly, we are instructed to seek the modification of the Covenant pursuant to section 84(1)(c) of the *Property Law Act* (Vic) 1958, by order of the Supreme Court of Victoria (**Application**) (the **Proceeding**).
5. The Originating Motion is anticipated to include the following proposed modifications to the Covenant:

*...THAT they the said Henry Earl Bryant and Caroline May Bryant their heirs executors administrators and transferees registered proprietor or proprietors of the land hereby transferred will not erect or place on such land more than one three private dwelling houses ~~no such house to be other than a new Double-fronted weatherboard brick stone concrete or other similar approved~~*

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*building and to have the front of one dwelling thereof facing Moreland Road shewn on the said Plan of Subdivision...*

**Retainer**

6. We are instructed to retain your services on behalf of the Clients to provide an expert opinion to be used in support of the Application.
7. You are retained to:
  - a) provide a written opinion (**Expert Report**); and
  - b) if required, give expert evidence as to your opinion in Court.

**Expert Witness Code of Conduct, the Civil Procedure Act and your duties as an expert witness**

8. The preparation of your Expert Report and the giving of expert evidence in the Supreme Court of Victoria are governed by Order 44 of the *Supreme Court (General Civil Procedure) Rules 2005 (Vic)* and the *Expert Witness Code of Conduct (Form 44A)*. Copies of each are enclosed. If you have any queries regarding the requirements set out in Order 44 or Form 44A, please contact us before the preparation of your Expert Report.
9. The *Civil Procedure Act 2010 (Vic)* also imposes certain obligations on you as an expert witness. In summary, in your capacity as an expert witness, you are subject to the following "overarching obligations":
  - a) the overarching obligation to act honestly (s 17);
  - b) the overarching obligation to cooperate in the conduct of the Proceedings with the parties and the Court (s 20);
  - c) the overarching obligation not to engage in conduct which is misleading or deceptive or which is likely to mislead or deceive (s 21);
  - d) the overarching obligation to resolve by agreement any issues in dispute which can be resolved in that way and to narrow the scope of the remaining issues in dispute (s 23);
  - e) the overarching obligation to use your reasonable endeavours to ensure that legal costs and other costs incurred in connection with the Proceedings are reasonable and proportionate to the complexity or importance of the issues in dispute and the amount in dispute (s 24);
  - f) the overarching obligation to use your reasonable endeavours to act promptly and minimise delay for the purpose of the prompt conduct of the Proceedings (s 25); and
  - g) photos of the Land, its context and parts of the relevant subdivision.
10. In addition, s16 of the *Civil Procedure Act 2010 (Vic)* provides that each person (such as an expert witness) to whom the overarching obligations apply has a paramount duty to the Court to further the administration of justice in relation to the Proceedings.



11. We also draw your attention to s29(1) of the *Civil Procedure Act 2010 (Vic)*, which provides that if a court is satisfied that, on the balance of probabilities, a person has contravened any overarching obligation, the court may make any order it considers appropriate in the interests of justice including, but not limited to, those referred to in that provision. A photocopy of s29(1) of the *Civil Procedure Act 2010 (Vic)* is enclosed.
12. Should you have any queries regarding the requirements set out in the *Civil Procedure Act 2010 (Vic)* or the consequences of a failure to comply with those requirements, please contact us before preparation of the Expert Report.

**Form of the expert report**

13. The Expert Report should be in the form of a narrative and divided into paragraphs numbered consecutively, each paragraph being as far as possible confined to a distinct portion of the subject. Marker phrases such as "In my opinion" or "In my view" usefully differentiate from other aspects of an expert report. While you are retained by parties to an intended proceeding, in preparing the Expert Report, you are required to be non-partisan and reflect the objectivity and independence you have brought to the task pursuant to your retainer as expert.
14. For your assistance, we suggest that your Expert Report should include the following:
  - a) your name and address;
  - b) a copy of your detailed curriculum vitae together with details of any specific experience you possess, which is not referred to in your curriculum vitae, and which is relevant to the formulation of your opinion;
  - c) an acknowledgement that you have received, read and agree to be bound by, the Expert Witness Code of Conduct;
  - d) the facts, matters or assumptions on which your opinion is based (you may attach a copy of this letter of instruction);
  - e) the reasons for your opinion including any document, literature or other material used by you in support of your Expert Report;
  - f) a summary of your opinion;
  - g) if applicable, an acknowledgement that a particular question or issue falls outside your area of expertise; and
  - h) a declaration that you have made all enquiries that you believe are desirable and appropriate and that no matter of significance has been withheld from the Court.
15. The Expert Report must be signed by you and dated. It should be accompanied by clear copies of any documents, literature or other material to which your Expert Report refers.



**Your role as an expert witness**

16. You are at all times to remain independent and unbiased in the discharge of your duties as expert witness. Accordingly, please do not discuss any of the enclosed material (or the proceeding when commenced) with any person except the writer or counsel retained.
17. Should it become necessary for you to make use of the services of another person in order to assist you in the preparation of any aspect of the expert report, please let us know before doing so. In any event, should you use the services of another person, you are at liberty to discuss with that person the content of this letter, the documents provided with this letter, and any further documents requested by you, provided that you do so on a strictly confidential basis. However in doing so it must be understood that the opinion expressed in the Expert Report is yours, and you as the author of the Expert Report may be required to give evidence concerning that opinion.
18. All communications in the first instance are to be through this office. Should you require further documents or information, you should seek this through this firm. Please note that all our written communication with you can be required to be produced to the Court if your Expert Report is relied on in evidence. Similarly, the substance of any oral discussions you have with any person in the course of performing your retainer may be the subject of cross-examination if your Expert Report is relied on in evidence.
19. Please provide our office with an unsigned, draft report before finalising your evidence. We may suggest changes to improve the clarity and relevance of your work.

**Documents provided**

20. We understand that you will undertake your own searches of the relevant title documents. The following additional documents are provided for your assistance:
  - a) sketch of proposed building envelope for 3 units;
  - b) Certificate of Title describing the Land;
  - c) Instrument of Transfer 1229318;
  - d) Certificate of Title Volume 2962 Folio 274;
  - e) Plan of Subdivision LP 9925; and
  - f) the advice from Easton Consulting, dated 4 April 2017.

**Your opinion**

21. Based on the documents we have provided, any further documents we provide to you, any title or documentary research undertaken by you, the additional instructions contained in this letter and your qualifications and experience, we seek your expert opinion on the following:
  - a) what you believe the purpose of the Covenant to be;



- b) whether there will be substantial injury to the beneficiaries of the Covenant if the Covenant is expressly discharged or modified to allow three (3) dwellings on the Land, having regard to matters including:
  - (i) impacts on amenity, from overlooking, overshadowing or increases in visual bulk, etc; and
  - (ii) whether the proposed modification of the Covenant would likely create a precedent having regard to the existing and potential built form and materials of other buildings in the neighbourhood.

We would appreciate receiving the expert report in the manner set out above as soon as is convenient.

Should you have any queries in relation to any of the above matters, please do not hesitate to contact the writer.

Yours faithfully,

**Myles Watson**  
Principal solicitor



Enc.

