IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

S CI 2015 02973

RUSSELL MAYNARD CLARE & ORS
(according to the Schedule attached) — Plaintiff

v

EVA BEDELIS — Defendant

JUDGE:	Derham AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	26 October 2015
DATE OF JUDGMENT:	7 July 2016
CASE MAY BE CITED AS:	Clare & Ors v Bedelis
MEDIUM NEUTRAL CITATION:	*Clare & Ors v Bedelis* [2016] VSC 381

PROPERTY LAW – Restrictive covenant – Principles of construction - Not to erect any dwelling house other than one having walls of brick or stone – Not to be more than one storey in height – Determination of preliminary question – Does the building that is being constructed on the defendant's property breach the covenant – No breach established – *Jacobs v Greig* [1956] VLR 597; *Ferella v Otvosi* (2005) 64 NSWLR 101; *Westfield Management Limited v Perpetual Trustee Company Limited* (2007) 233 CLR 528; *Big River Paradise Ltd v Congreve* [2008] NZCA 78; *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64; *Prowse v Johnston & Ors* [2012] VSC 4.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr N J Tweedie SC with Mr B J Murphy	Best Hooper
For the Defendant	Mr P Solomon QC with Mr M Townsend	Bedelis Lawyers

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HIS HONOUR:

Introduction

1 These reasons for decision address the answer to a preliminary question ordered to be separately determined.

2 The plaintiffs are the owners of 18 parcels of land in Wheelers Hill, Victoria and claim to have the benefit of a covenant burdening the land owned by the defendant at 8 Yvonne Court, Wheelers Hill, being Lot 46 on plan of subdivision 26647 and the land more particularly described in Certificate of Title Volume 8131 Folio 781, ('the Land').

3 The covenant restricts the owner of the Land from erecting any dwelling house other than one having walls of brick or stone and being not more than one storey in height.

4 The plaintiffs commenced this proceeding by writ claiming that the defendant has breached the covenant and seek:[1]

(a) a permanent injunction restraining the defendant from breaching the covenant;

(b) orders requiring the defendant to demolish an existing house which was allegedly erected in breach of the covenant; and

(c) damages either in addition to or in substitution for an injunction.

5 The defendant denies any breach of the covenant and maintains that the house erected on the Land has walls of brick and is not more than one storey in height.[2]

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1 The writ was filed on 10 June 2015 and amended on 20 August to remove the 20th and 21st plaintiffs.

2 The defendant's defence was filed on 13 July 2015. By order made on 20 October 2015, the defendant was granted leave to file, and subsequently filed, an amended defence raising claims that the plaintiffs are estopped and precluded from contending that the dwelling house erected on the Land should be demolished, and other matters of defence to the claim that there should be an order that the house be demolished.

The Preliminary Question

6 By summons filed 28 July 2015, the plaintiffs applied pursuant to r 47.04 of the *Supreme Court (General Civil Procedure) Rules 2015* ('the Rules') for the separate trial of a preliminary question before trial of the proceeding and for directions for discovery and the filing of evidence relevant to the trial of the preliminary question.

7 By orders made 18 August 2015 and 20 October 2015, Associate Justice Daly ordered pursuant to r 47.04 of the Rules that the following question be separately determined:

> Does the building that is being constructed on the defendant's property breach the covenant?

8 For the avoidance of doubt as to the jurisdiction of an Associate Judge to hear and determine the preliminary question, the hearing and determination of the proceeding has been referred to me pursuant to r 77.05 of the *Supreme Court (General Civil Procedure) Rules 2015*.

Summary of Conclusions

9 I have concluded that:

(a) in respect of the element of the covenant that the defendant will not erect or cause to be erected on the Land any dwelling house not to be more than one storey in height, that the house under construction is not more than one storey in height; and

(b) in respect of the building materials element of the covenant, I am not satisfied that the house under construction is a dwelling house other than one having walls of brick or stone.

Affidavits and Evidence

10 The plaintiffs rely upon the affidavits and exhibits of:

(a) Tania Louise Cincotta sworn 24 July 2015 ('Cincotta Affidavit'); and

(b) an expert, Gary Charles George Cross, sworn 25 September 2015, including his Report ('Cross Report') exhibited to the affidavit.

11 Mr Cross's report was produced to assist the Court in understanding the design plans and method and manner of construction of the dwelling under construction on the Land. Mr Cross gives evidence that the house under construction employs the method of construction known as 'brick veneer', and that there are two levels in the house under construction (one at the ground level comprising a garage, cellar, workshop and utility rooms, including a toilet.) Mr Cross also observes that in order to build the dwelling, the site has been excavated so as to accommodate these lower level spaces. At the time that he prepared his report, no filling had taken place and most of the excavations around the west side of the building remained open immediately adjacent to the external walls. The plans showed that these open excavations would be backfilled up to the pre-existing ground level. Mr Cross was asked to identify whether any part of the dwelling rises in the vertical plane above the natural ground level for a distance of more than one storey. He opined that the dwelling under construction did so. In so doing, he trespassed upon the role of the Court and his opinion that the house is more than one storey in height is not admissible.

12 The defendants rely upon the affidavits and exhibits of:

(a) Nickolas Pateras sworn 17 August 2015 and 25 September 2015 ('Pateras Affidavit'); and

(b) an expert, Robert Easton, sworn 15 August 2015 and his report dated 15 August 2015 exhibited to that affidavit ('Easton Report').

13 Objection was taken to the admissibility of a number of paragraphs of the second Pateras Affidavit sworn on 25 September 2015. In the course of the hearing, I ruled that paragraphs 13, 15, 16, 17, 18 and 19 of that affidavit were not admissible as comprising matters of opinion, where Mr Pateras had not been established to be an expert capable of expressing the opinions.

14 The Easton Report did not express any opinions as to the matters in dispute. It analyses the parent title, the subdivisions derived from the parent title, the covenants burdening the various lots in the subdivisions derived from the parent title, the properties having the benefit of the covenant burdening the Land and the nature and character of houses that have been built in the neighbourhood. As a part of the analysis undertaken by him, all of the covenants burdening the lots derived from the parent title were identified and the result of that analysis was set out in a table tendered by the plaintiffs without objection.

15 The factual background set out below is derived from the evidence in the affidavits and Reports. Apart from disputes as to the admissibility of parts of the second Pateras Affidavit sworn on 25 September 2015, there were no disputes of fact between the parties.

Background

16 The covenant was created on 28 March 1956 when the Land was transferred out of the parent title (Certificate of Title Volume 7964 Folio 012) by Charles Eric Tobias.[3]

17 The Land is subject to the following covenant contained in Instrument of Transfer A133970 ('the Covenant'):[4]

> AND the said Keith Leslie Ross for himself his heirs executors and administrators and transferees and the registered proprietor or registered proprietors of the land hereby transferred, hereby covenants that with the said Charles Eric Tobias his heirs executors administrators and transferees the registered proprietor or proprietors for the time being for the land remaining untransferred in Certificate of Title Volume 7964 Folio 012 or any part or part thereof that he the said Keith Leslie Ross his heirs executors administrators and transferees *will not erect or cause to be erected on the said land hereby transferred any dwelling house other than one having walls of brick or stone and such house not to be more than one storey in height and all out buildings to be of similar construction* AND it is intended that the foregoing covenant shall appear as an encumbrance on the Certificate of Title to be issued in respect of this transfer and all subsequent transfers of the said lot and shall run with such lot. [emphasis added]

3 Easton Report pp 6-8 and A4.
4 Cincotta Affidavit [6], exhibit TLC-1.

18 Yvonne Court runs in an easterly direction off View Mount Road in an area south of Waverly Road. The Land is on the South side of Yvonne Court facing north. Viewed from the north (that is, facing the Land from Yvonne Court) the Land slopes from the right (west) to the left (east). The Land is rectangular in shape. The slope across the frontage (to Yvonne Court) from the west corner of the land to the east corner is about 2.5 metres.[5] The land has a frontage of 23.7 metres and a depth of 48.77 metres, giving it an area of 1,159 square metres.[6] The Land also slopes upward towards the rear about 63 centimetres along the western boundary and 1.39 metres along the eastern boundary. At the rear of the Land, there is a slope from west to east of 1.84 metres. The result is that the steepest slope on the Land is from the south west corner to the north east corner of about 3.25 metres.[7]

19 The wording of the Covenant has the effect that only those lots transferred out of the parent title after the transfer of the Land have the benefit of the Covenant. The analysis undertaken by Mr Easton and set out in his Report shows that there are 35 Lots in PL 26647 and PL 26845 that have the benefit of the Covenant. Two of those lots have been further subdivided with the result that there are 37 properties having the benefit of the Covenant.[8]

20 None of the properties to the east or west of the Land in Yvonne Court have the benefit of the Covenant. The only property in Yvonne Court that has the benefit is the property on the north west corner of Yvonne Court and View Mount Road.[9] There are three properties immediately to the south of the Land that also have the benefit of the Covenant, being the properties at 1, 2 and 3 Annetta Court. Most of the properties with the benefit of the Covenant are well south of the Land, 5 properties on the south side of Annetta Court, and the balance in Henley Court, Eric

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5 The Cross Report, [20].
6 Easton Report, [3.3].
7 Pateras Affidavit 25 September, [10].
8 Easton Report, [4.3]-[4.4].
9 There is a plan in the Schedule to these reasons showing the layout of the immediate neighbourhood and the properties subject to covenant similar to the Covenant in this case.

Court and Mackintosh Road.[10]

21 There are covenants burdening other properties in PL 26647 and PL 26845 which are broadly similar, although in many cases differently worded. The table tendered by the plaintiffs (and referred to above) was derived from the Easton Report and set out the wording of the restriction in each covenant burdening other properties in the neighbourhood. It was tendered without objection.

22 The plaintiffs are local owners of properties in the area having, or claiming to have, the benefit of the Covenant.[11] They claim that the defendant had on or about 16 April 2015 commenced to erect a dwelling house on the Land that:

(a) does not have walls of brick or stone; and

(b) is more than one storey in height-

they claim the relief to which I have referred above.

23 The defendant denies that the dwelling under construction on the Land is in breach of the Covenant and pleads that on a proper construction of the Covenant, the dwelling is not more than one storey in height and has walls of brick.

24 In order to answer the preliminary question, the issues for determination are whether the dwelling under construction on the Land is more than one storey in height and whether it has walls of brick or stone.

25 The first plaintiff discovered in early April 2015 that a house with what is alleged to be two storeys above the natural ground level was being constructed on the Land and that the upper level was framed in a way that indicated it was to be constructed of brick veneer, or other veneered material.

26 The plaintiff's solicitors wrote to the solicitors for the defendant on 27 April 2015

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10 Easton Report, figure 4, p 9.

11 At the commencement of the hearing, Counsel for the plaintiffs announced that he no longer had instructions to act on behalf of the 19th plaintiff.

pointing out this observation and, after referring to several precedents on the meaning of a 'storey' and 'brick', as those terms appear in the Covenant, alleged that the completion of the construction of the house on the Land would cause substantial detriment to the amenity of the first plaintiff's land. Demand was made that the building under construction be brought into compliance with the Covenant.

27 The defendant's solicitors responded that the house under construction was designed and constructed consistently with the house that it replaced and that the defendant did not consider there was any breach of the Covenant.[12] Further letters were exchanged dealing with the identity of other beneficiaries of the Covenant for whom the solicitors acted, a request that the defendant cease work on the house and requests for plans of the house.[13]

28 The former house erected on the Land was demolished in August 2014. The house in dispute commenced to be built in September 2014. At the time of the Pateras Affidavit in August 2015 the house was at lock up stage, with the brick work and roof complete, the windows installed and the internal frame ready for plaster installation.[14]

29 The house is constructed on a slope with an upper level or ground floor which is about 0.8 - 0.9 metres above the ground on its western side and about 3.3 metres on its eastern side and a lower level or sub-floor, as follows:

(a) sub-floor: the outer walls of the sub-floor are constructed of double brick.[15] The floor is a concrete slab. There is a double garage (at the eastern side), a workshop, three store rooms, a powder room (toilet), a cellar and a lower foyer area serving a lift and stairwell. The floor area is about 269m².[16]

(b) ground floor: the outer walls are rendered brick veneer over a timber frame.

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12 Various questions were also raised to which it is not necessary to refer.
13 Cincotta Affidavit, [15]-[16].
14 Pateras Affidavit, [4]-[7].
15 Which may in fact refer to cavity brick; i.e. two walls of brick with a cavity between them.
16 Cross Report, [9].

The floor is timber. There is a master bedroom with en-suite bathroom and walk in robe, three other bedrooms and two bathrooms, kitchen, meals area, family room, lounge, study, laundry and utility area, and an atrium and entrance area. The floor area is about 471m²;[17] and

(c) the roof is in 'French provincial' or 'French mansard bell' style.[18]

30 The living areas of the house are all on the ground floor. Both the ground floor and the sub-floor are each level. There are no rooms intended for habitation on the sub-floor.

The Construction of Restrictive Covenants

31 A review of the authorities reveals the following principles of interpretation are applicable to restrictive covenants:

(a) subject to the qualifications mentioned below, the ordinary principles of interpretation of written documents apply.[19] The object of interpretation is to discover the intention of the parties as revealed by the language of the document in question;[20]

(b) the words of a restrictive covenant:

(i) should generally be given their ordinary and everyday meaning and not be interpreted using a technical or legal approach.[21] Evidence may be admitted, however, as to the meaning of technical engineering, building or surveying terms and abbreviations;[22]

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17 Cross Report, [9].

18 Cross Report, [8].

19 Bradbrook and Neave's *Easements and Restrictive Covenants,* AJ Bradbrook and SV MacCallum, 3rd Ed, ('**Bradbrook & Neave***'),* [15.3].

20 Bradbrook & Neave; But see *Prowse v Johnston & Ors* [2012] VSC 4 at [55]–[58] ('***Prowse***').

21 *Re Marshall and Scott's Contract* [1938] VLR 98, 99; *Ferella v Otvosi* (2005) 64 NSWLR 101 at 107 ('***Ferella***'); *Ex parte High Standard Constructions Limited* (1928) 29 SR (NSW) 274 at 278 ('***High Standard***'); *Prowse* at [52].

22 *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64 at [157]-[158]*('**Phoenix**')*; *Westfield Management Limited v Perpetual Trustee Company Limited,* (2007) 233 CLR 528 at [44] (*'**Westfield**').*

(ii) must always be construed in their context, upon a reading of the whole of the instrument,[23] and having regard to the purpose or object of the restriction;[24]

(c) importantly, the words of a restrictive covenant should be given the meaning that a reasonable reader would attribute to them.[25] The reasonable reader may have knowledge of such of the surrounding circumstances as are available.[26] These circumstances may be limited to the most obvious circumstances having regard to the operation of the Torrens system and the fact that the covenant is recorded in the register kept by the Registrar of Titles.[27] As the High Court held in *Westfield:*

> The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee…[28]

(d) the words of the covenant should be construed not in the abstract but by reference to the location and the physical characteristics of the properties which are affected by it,[29] and having regard to the plan of subdivision and, depending on the evidence, possibly having regard to corresponding covenants affecting other lots in the estate;[30]

(e) because the meaning of particular words depend upon their context

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23 *Ferella* at 107; *High Standard* at 278; *Prowse* at [52].

24 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22], 462 per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Phoenix* at [148]-[149].

25 *Phoenix* at [157]-[158].

26 These are limited by the decision in *Westfield* and subsequent decisions: see *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324; *Berryman v Sonnenschein* [2008] NSWSC 213; *Shelbina Pty Ltd v Richards* [2009] NSWSC 1449; *Neighbourhood Association DP No 285220 v Moffat* [2008] NSWSC 54; *Fermora Pty Ltd v Kelvedon Pty Ltd* [2011] WASC 281 at [33]-[34]; *Prowse* at [58].

27 *Westfield* at [37]-[42]*; Sertari* at [15]; *Phoenix* at [148]-[158].

28 *Westfield* at [39].

29 *Richard van Brugge v Hare* [2011] NSWSC 1364 at [36]; *Big River Paradise Ltd v Congreve* [2008] NZCA 78 at [23].

30 *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324 at [16]; See *Fermora Pty Ltd v Kelvedon Pty Ltd* [2011] WASC 281 at [33]; *Prowse* at [58].

(including the purpose or object of the restriction in a covenant) cases that consider similar words provide no more than persuasive authority as to the meaning of words in a different document.[31] Further, the decisions upon an expression in one instrument are of very dubious utility in relation to another;[32]

(f) the rules of evidence assisting the construction of contracts *inter partes*, of the nature explained by *Codelfa Constructions Pty Ltd v State Rail Authority of New South* Wales,[33] do not apply to the construction of easements and covenants;[34]

(g) if the meaning remains in doubt after other rules of interpretation have been applied, as a last resort or 'very late resort,' the covenant should be construed *contra proferentem,* that is, against the covenantor;[35]

(h) whether a covenant has been breached or not is a question of fact to be determined according to the facts of the case and in the light of the actual language in which the restrictive covenant is framed;[36] and

(i) generally speaking, the proper construction of an instrument intended to have legal effect is a question of law, not fact.[37] On the other hand, the meaning of a particular word or expression in such an instrument may be a question of fact, particularly where the Court has already determined as a matter of construction that the word or expression is used in its ordinary and natural meaning.[38]

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31 *Bradbrook & Neave* at [15.4] citing *Christie & Purdon v Dalco Holdings Pty Ltd* [1964] Tas SR 34 at 41.

32 *Ferella* at [17]; *In Re Marshall and Scott's Contract* [1938] VLR 98, at 100 where Mann CJ observed that small differences of language can be of great importance and that the decision often turns on them; *Prowse* at [54].

33 (1982) 149 CLR 337.

34 *Westfield*; *Ryan v Sutherland* [2011] NSWSC 1397 at [10]; *Prowse* at [57].

35 *Ferella* at [21]; Bradbrook & Neave's at [15.6].

36 Per Herring CJ in *In Re Bishop and Lynch's Contract* [1957] VLR 179 at 181; *Prowse* at [53].

37 See, in relation to statutes, *S v Crimes Compensation Tribunal* [1998] 1 VR 83 at 88 (J D Phillips JA). See, in relation to written contracts, *FAI Insurance Co Ltd v Savoy Pty Ltd* [1993] 2 VR 343 at 351 (Brooking J); *O'Neill v Vero Insurance Ltd* [2008] VSC 364 [10] (Beach J); *Prowse* at [53].

38 See *S v Crimes Compensation Tribunal* [1998] 1 VR 83 at 88; cf *Phoenix* at [158]; *Prowse* at [53].

Submissions – in General

32 The plaintiffs made some general submissions about the approach to be taken in answering the preliminary question, as follows:

(a) the determination of the preliminary question must be made by reference to the building under construction on the Land;

(b) the consequences of finding the covenant has been breached are not relevant to the determination of the preliminary question;

(c) it is also not relevant to the determination of the preliminary question to have evidence concerning:

(iii) whether the previous building on the Land breached the Covenant;

(iv) whether any of the plaintiffs' properties, or any other properties in the neighbourhood, have been developed in breach of the Covenant;

(v) the impact on other properties, including the properties owned by beneficiaries of the Covenant;

(vi) the reasons why the Land has been developed in the way it has;

(vii) whether or not the Land could have been developed in any other way; and

(d) the evidence contained in the Cincotta affidavit and in the Cross Report establish that the house under construction on the Land breaches the restrictive Covenant because it is more than one storey in height and its walls are not made of brick or stone.

33 The defendant made general submissions as follows:

(a) the nature of the surface of the Land at the time the instrument was executed

might be material to the interpretation of the Covenant;[39]

(b) the parties can refer to the plan of subdivision and corresponding covenants affecting other lots in the estate;[40]

(c) the Court can have regard to the material in the folio identifiers, the registered instrument, the deposited plans and the physical characteristics of the land;[41]

(d) it is difficult to give content to the rights under an easement unless some account is taken of the physical characteristics of the tenements. Otherwise, the parties are engaged in empty debate about the meaning of words in an instrument without reference to what is happening on the ground;[42]

(e) a restrictive covenant should be construed not in the abstract, but at the very least, by reference to the location of the properties which are affected by it;[43]

(f) doctrine continues to develop in the circumstances in which extrinsic evidence may permissibly be deployed to construe an easement or covenant;[44]

(g) in determining whether information or a document can be used to aid the construction of a covenant, one considers whether it was and remains publicly available to third parties without unreasonable effort, expense or delay;[45] and

(h) in the present case, the Covenant must be construed in the context of the surrounding topography, the pattern or scheme of covenants transferred out of the parent title and the location of the beneficiaries.[46]

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39 *Ferella* at [17].
40 *Prowse* at [58].
41 *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324 at [16]; *Prowse* at [58].
42 *Richard van Brugge v Hare* [2011] NSWSC 1364 at [36].
43 *Big River Paradise Ltd v Congreve* at [23].
44 *Phoenix* at [157].
45 *Currumbin Investments Pty Ltd v Body Corp Mitchell Parkwood* [2012] QCA 9, at [38], [53] per Fryberg J.
46 Defendants' submissions, 26 October 2015 at [31].

More than One Storey in Height?

Plaintiffs' Submissions

34 In relation to the height restriction, a summary of the plaintiffs' submissions is as follows:

(a) the restriction that the dwelling be not be more than one storey should be taken to mean that no part of the building shall rise from the ground in the vertical plane for a distance of more than one storey;[47]

(b) in *Ferella v Otvosi,* Hamilton J stated 'the ground referred to is the ground where the building stands, whether it be at the highest or lowest point of the land;'[48]

(c) a storey can be best defined as 'each of the stages or portions one above the other of which a building consists;'[49]

(d) by applying the reasoning of the New South Wales Court of Appeal in *Leichardt,* it is not necessary that there be two story's on top of another for a dwelling to be more than one storey in height;[50]

(e) to determine height expressed in the number of storeys rather than metres requires observations of the external built form in a practical and common sense manner and should not be assessed by simply counting every possible level and reaching the conclusion by addition;[51]

(f) the building under construction on the land consists of more than one storey, with another storey situated directly on top of the other;

(g) a view of the Land and an examination of the photographs in evidence, and

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47 Plaintiffs' Submissions 7 October 2015, [8].

48 *Ferella* at [30]; Plaintiffs' Submissions 7 October 2015, [9].

49 Shorter Oxford Dictionary; *Leichhardt Municipal Council v Daniel Callaghan Pty Ltd* (1981) 46 LGRA 29 ('***Leichhardt***'); Plaintiffs' Submissions 7 October 2015, [10].

50 Plaintiffs' Submissions 7 October 2015, [12].

51 *Poci Brothers Pty Ltd v Bayside City Council* [2003] VCAT 1884 per Morris J at [13] ('***Poci***'); Plaintiffs' Submissions 7 October 2015, [12].

the various plans for construction of the house, compel the conclusion that the dwelling under construction is more than one storey in height. That contention is supported by the expert opinions contained in the Cross Report. Mr Cross opines that having assessed the external built form of the house it presents as two stories in height.[52] The building permit describes the nature of the building work as a detached two storey dwelling and garage.[53] Mr Cross gives the opinion that as a matter of fact the dwelling under construction contains two storeys and does so by reference to the plans.[54] Mr Cross states that the east wall of the building rises two storeys above natural ground level and all portions of the lower storey rise more than one storey above natural ground level.[55] He also is of the opinion that in order to achieve a building construction of not more than one storey in height it would be necessary to provide a split level house that stepped down along the north-south access of the allotment;[56] and

(h) it was clear that the house being constructed was more than one storey.

35 In order to assess the height of a building, one should form a conclusion by 'being armed with all relevant information about the building.'[57] This common sense approach is to be taken rather than counting every possible storey within a building.[58] In that way, the approach to determine whether the height of a building exceeds one storey is one that gives effect to the clear purpose of the control.[59]

Defendant's Submissions

36 A summary of the defendant's submissions is as follows:

(a) the use of a single floor of habitable space above a sub-floor which includes a

52 Cross Report, [48].
53 Cross Report at pg 32.
54 Cross Report, [36].
55 Cross Report, [39].
56 Cross Report, [50].
57 *Poci* at [13].
58 Ibid.
59 Ibid.

garage is a common form of construction across the lots transferred out of the parent title. The defendant identifies 14 lots which are subjected to a covenant in similar form to the covenant in question in this case which include a sub-floor containing a garage, and perhaps more than just a garage.[60] Each property in Yvonne Court, where the land is sloping, has a house with some form of sub-floor construction. In Annetta Court to the immediate south of the Land, each of the houses has the same characteristic so that where the construction starts on the higher part of the land a sub-floor is created as the land slopes away;

(b) amongst the lots transferred out of the parent title, the lots on the highest parts of the subdivision do not contain a covenant limiting the height. These covenants are reserved for land in the mid and lower levels of the escarpment;

(c) the Easton Report shows that there are only three beneficiaries of the Covenant who could be affected by the height of the dwelling house, those to the immediate south of the Land in Annetta Court, being lots 40, 41 and 42 on LP26647, being numbers 1, 2 and 3 Annetta Court;[61]

(d) the house under construction on the Land, and the house it replaced, has only a single level in that part of the house to the rear, on the southern side, of the lot. Thus, whether or not there is a sub-floor at the front of the lot facing Yvonne Court will not have any impact on the properties to the south. Because of the way the Land slopes, whether or not there is a sub-floor containing a garage, a single level dwelling with no sub-floor would occupy almost the identical footprint and height as the house under construction;[62]

(e) the height of the building is to be assessed by being armed with all relevant

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60 Defendant's Submissions, 26 October 2015, [12]. The lots in question are lots 12 (1 Eric Court), 30 (3 Henley Drive), 32 (4 Henley Drive), 34 (6 Annetta Court), 35 (8 Annetta Court), 40 (1 Annetta Court), 45 (7 Yvonne Court), 52 (2 Yvonne Court), 53 (3 Yvonne Court), 54 (5 Yvonne Court), 56 (878 Waverley Road), 57 (876 Waverly Road), 59 (872 Waverly Road).

61 Easton Report, p 39.

62 Easton Report, p 39.

information and then reaching a conclusion as to whether the building offends the purpose of the Covenant;

(f) the height of the building should not be assessed by counting every possible level within the building and then reaching the conclusion by addition;

(g) the purpose of the Covenant is to protect the views of beneficiaries of the Covenant. The Covenant does not regulate the height of the walls, the form or height of the roof, the point at which construction can commence, the extent of the site coverage or whether voids beneath a floor may be used for non-habitable purposes;

(h) in support of the purpose, the defendant points to:

(viii) the topography of the Land, which slopes from the west to the east and from the northwest to the southeast;

(ix) the absence of single storey covenants on the most elevated properties transferred out of the parent title;

(x) the limited number of beneficiaries in close proximity to the burdened land; and

(xi) each of those beneficiaries is to the south of the Land, or to the southwest-

means that the purpose of the Covenant is to facilitate views generally towards the Dandenong Ranges to the east;

(i) because the rear section of the house under construction on the Land is undoubtedly single storey (or not more than one storey), from the prospective of the properties with the benefit of the covenant to the south and southwest of the Land, the dwelling house under construction is not more than one storey;

(j) the correct focus of the Covenant is that the restriction is on 'any dwelling house'. This necessarily requires consideration of what is and what is not a dwelling house. The definitions in the Macquarie Dictionary and in the Oxford English Dictionary make clear that a dwelling house is a place of residence or habitation. The dwelling house in this case consists of only one level. The sub-floor is not a dwelling house because it contains no spaces designed for habitation; and

(k) a reasonable balance of the text of the Covenant, its context and purpose, and noticing the features of the surrounding area, has the result that, given the fall across the Land, any structure with a level floor will create a space underneath with a consequential need for support.

37 The plaintiffs responded to the defendant's submissions as follows:

(a) the 'not more than one storey' restriction cannot be compared to other restrictions in covenants in the subdivision - which vary. Some are 'of single storey construction' or 'single storeyed';

(b) there is no evidence to support the submission that the purpose of the 'not more than one storey' restriction is to preserve the views generally to the east towards the Dandenong Ranges;

(c) the submission that the non-habitable rooms are not a part of the dwelling house should be rejected. The entire building should be regarded as a single dwelling house. The terms 'habitable' and 'non-habitable' rooms are defined technical terms used in the Building Regulations and Planning Schemes. Those definitions include as 'non-habitable' rooms such spaces as bathrooms, laundries, toilets, pantries, corridors and walk-in wardrobes. If the contention is that those spaces do not comprise a part of a dwelling house, then it is without merit;

(d) it is artificial to describe the lower level of the building as a 'sub-floor' or

'under croft'. It does not alter the reality. The rooms on the lower level form a part of the building. They have floors, ceilings and are intended to be occupied and used as a part of the building. They are not a mere plinth or structural support for the upper level. They represent an identifiable 'storey' of the building and one that sits below the level above, with the consequence that the building has more than one storey in height so that the Covenant is breached; and

(e) whether or not another hypothetical building would or would not breach the Covenant is irrelevant.

Cases Relied on by the Plaintiffs

38 The cases relied on heavily by the plaintiffs are the decision of the New South Wales Court of Appeal in *Leichhardt Municipal Council v Daniel Callaghan Pty Ltd,*[63] the decision of Hamilton J in *Ferella v Otvosi* and the decision of Bryson J in *Kirby v Esplin*[64]. It is necessary to consider those cases in more detail.

The Leichhardt Decision

39 The decision of the New South Wales Court of Appeal in *Leichhardt*, concerned an appeal on a question of law from the Land and Environment Court. It involved the construction of an interim development order within the Municipality of Leichhardt which was governed by the Leichhardt Draft Planning Scheme Ordinance('the Ordinance'). Clause 51 of the Ordinance prohibited the erection of a building either containing more than four floors or more than three storeys. A 'storey' was defined in the Ordinance as:

> A floor other than a floor
> (a) used principally for storage; or
> (b) used wholly or partly for parking.

40 The respondent sought consent to the erection of a building comprising of seven

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63 *Leichardt*.

64 Unreported, New South Wales Supreme Court, Equity Division, 26 May 1989, BC8902131 ('***Kirby v Esplin***').

levels at the southern end and five levels at the northern end. The proposed building was stepped back against a cliff face so that there was no part of the building which rose from the ground in a vertical plane for a distance of more than three storeys. The Council refused the application. The respondent appealed to the Land and Environment Court. That Court held that it was proper to count the number of storeys in any particular vertical plane and that, so counted, the building was a three storey building only. The development order was granted. The Council appealed to the Court of Appeal who held that the question whether the building was prohibited by clause 51 of the Ordinance involved two steps. First, the Court had to determine the proper construction of the clause and, in particular, the meaning to be assigned to the word 'storey'. Second, whether the proposed development fell within the Ordinance description, properly interpreted, of prohibited buildings. The first question was a question of law. The second question was a question of fact.

41 The following are some matters decided by the Court that are material to the current question:

(a) the construction of an ordinary word such as 'storey' is not a matter of expert evidence. The word is not a technical one, except to the extent that it is defined in the Ordinance itself; that definition does not bring any technical term into play, the word 'floor' itself being an ordinary English word;[65]

(b) it is important not to allow the two questions, the construction of the prohibition in the Ordinance and the factual question whether the proposed development fell within the prohibition as properly interpreted to be run together or telescoped into one. The question of fact cannot be determined until it is decided what meaning the prohibition has;[66]

(c) the word 'storey' is always used to denote a structural feature of a building.

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65 Per Hutley JA at [31].

66 Per Glass JA at [34].

Floor, on the other hand, is sometimes used in that sense, but at other times denotes merely a feature of an enclosed space. It is clear that the Ordinance uses 'floor' in the former sense. So the problem in point of construction is to decide what meaning the terms floor and storey bear in a clause which says that a building may not contain more than a certain number of them;

(d) the prohibition is not directed simply to the number of horizontal levels in the building. It is directed to those levels in the building which form part of its structural unity as a building. A house which to an external viewer has one storey only may be so designed that in some rooms on the ground floor the floor level is higher than in others. It would not accord with ordinary linguistic usage to describe it as a two storey house;[67]

(e) this means that the number of floors or storeys in a building is not calculated by counting the number of different levels in it, but by counting the number of levels of approximately similar floor area ranged above the ground floor in a vertical plane and incorporated in its structure, and then adding one;[68]

(f) there is no reason why a building containing two floor levels, one superimposed vertically on top of the other, would cease to be a two storey building because those horizontal levels do not coincide in the vertical plane;[69]

(g) the prohibition in the Ordinance should be construed as if it read 'no building shall be erected which contains more than three levels which form part of its structural unity and are vertically superimposed upon each other in whole or in part';[70] and

(h) architectural ingenuity can produce a numberless variety of designs for buildings occupying different levels, particularly when applied to rising

67 Per Glass JA at [35].
68 Ibid.
69 Ibid.
70 Ibid.

ground. It is not possible to give a construction to clause 51 of the Ordinance which will supply an answer to the question arising in these multifarious circumstances whether the number of storeys in the building does or does not exceed three.[71]

42 The plaintiffs' relied especially on the views of Samuels JA in *Leichhardt* where he said:

> In the context of cl. 51 'floor', in its ordinary sense, means level, layer or stratum, rather than 'the under surface of the interior of a room' … or 'the lower surface of an enclosed space' … . Although cl. 3(1) of the ordinance defines 'storey' in terms of 'floor', and not the other way about, I think that 'floor' in cl. 51 bears the meaning attributed to 'storey' by the *Shorter Oxford English Dictionary*, namely, 'each of the stages or portions one above the other of which a building consists'. I would add 'levels' as a current and relevant synonym for 'stages' or 'portions'. But the phrase 'one above the other' does not mean 'one directly above the other', because 'above' does not ordinarily mean 'directly above' i.e. in precisely the same vertical plane, but only 'higher than'. Usually it is true, the floors, storeys or levels of a building are found directly one above the other or others; but this circumstance cannot determine the meaning ordinarily given to those words. The idea of multiple or comparative levels involves differences in the horizontal plane. Hence a difference in level is established whenever one object assuming a common datum point, is higher or lower than another. In that event there are two levels, even though the higher is not superimposed directly above the lower. Assume a building, stepped back into a rising slope with ten 'steps' incorporated in the structure, none of which is directly above the 'step' below, in the fashion of the treads and rises of an ordinary staircase. I do not see how it would be possible to conclude otherwise and that this was a building which contained ten levels or floors; the alternative being to say that it contained only one.[72]

43 Samuels JA also noted that the control over the height of buildings is not its sole or predominant purpose. There is another purpose for the restriction in height other than to provide height control, namely to limit the size of buildings and to control the density of population in the area.[73]

The Ferella Decision

44 In *Ferella,* Hamilton J set out many of the principles of construction of covenants to

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71 Ibid.

72 Ibid, [37].

73 Ibid per Samuels JA at [38].

which I have earlier referred. So far as relevant to the question in this case, the decision concerned the construction and application of a restriction in a covenant that:

> not more than one main building shall be erected upon the said land and that such building shall not be more than two storeys in height.

45 The questions for Hamilton J included whether:

(a) the restriction contained in the covenant is ambiguous and therefore unenforceable;

(b) the restriction that the building shall not be more than two storeys in height means that the building shall not be more than two storeys in height above natural ground level; and

(c) whether the proposed development would breach of the covenant as so construed.

46 His Honour determined that the covenant was not ambiguous, and that the limitation is to two storeys and the covenant operates according to its terms, saying:[74]

> The lack of definition of a particular height does not render it uncertain. The sloping nature of the site may make the determination of fact as to whether a building is more than two storeys in height a more difficult one (the judgment will have to be made in respect of a particular building), but it does not render it impossible. I bear in mind the Court's duty to endeavour to uphold the provision.

47 In relation to the meaning of the restriction, he said:

> In my view the restriction means that no part of the building shall rise from the ground in the vertical plane for a distance of more than two storeys, in the words of Glass JA cited at 107 [20] supra.[75] The ground referred to is the ground where the building stands, whether it be at the highest or lowest point of the land. This was the meaning attributed to the similar restriction by Bryson J in *Kirby v Esplin*. See also the US authority of *Clark v Wodehouse* 669 P 2d 170 (1983). In my view it is the meaning to be attributed to the

74 (2005) 64 NSWLR 101 [29].

75 A reference to the decision of Glass JA in *Leichhardt*.

> restriction in the context of this case. The Ferellas have contended that the ground means the ground at the highest point of the property. They say that the expression is ambiguous and that the rule of construction that they have espoused, that in case of doubt the construction should be in favour of the burdened landowner, means that the restriction should be construed in this way. In my view, there is no ambiguity. The meaning that I have stated is clear. The meaning that the base point of measurement should be the highest point of the property is fanciful and not open on the ordinary meaning of the words in the context of the restriction, the nature of the properties the subject of the building scheme and the obvious purpose of the restriction to limit height to preserve views. There is no need to turn to the rule of last resort. If there were such a need, the applicable rule is not as propounded by the Ferellas, but as I have stated in par [21] (at 108 supra). The application of that rule would, if there were an ambiguity, resolve the matter in favour of the meaning that I have stated.[76]

48 Whether the proposed development would breach the covenant, he said:

> In view of my construction of the covenant and the nature of the development as stated at 106 [12] supra, in my view it is clear that the development is in breach of the covenant. The building is more than two storeys in height. It contains four storeys superimposed on each other. The portion of the building which contains four storeys rises from the ground at that point in the vertical plane for four storeys, or certainly for more than three storeys, which is undoubtedly more than two storeys. The construction of this development would be in breach of the covenant.

49 The plaintiffs' submitted that in this case I should adopt and apply the reasoning and findings of Hamilton J and determine the height of the house from the lowest point of the ground to determine whether it is more than one storey in height when measured from that lowest point.

50 In the course of argument, I raised a hypothetical situation in which instead of there being a garage and utility rooms fully enclosed underneath the main living floor, there were merely brick piers from which the main floor was suspended and within those piers there was a carport at the eastern end of the house, open to the elements on three sides (north, south and east). The plaintiffs' contended that even then there were good grounds to conclude that the dwelling house was more than one storey in height. They relied, again, on what Hamilton J said in *Ferella.*

51 In *Ferella,* Hamilton J dealt with an alternate application for modification of the

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[76] (2005) 64 NSWLR 101 [30].

covenant and, for that purpose, an argument that the lower storeys could be suppressed and replaced by either a void within the external walls which contain those storeys or the filling of the space behind those walls. He observed:

> …[I]t is put that the proposed modification will not substantially injure the Otvosis. This is on the basis that the Ferellas could erect a building in the form of the development, but with the rooms that constitute the first and second storeys of the development deleted. This, they say, could be done by their seeking a variation of the development consent to permit them to erect a building with the same envelope, but with the first and second floors suppressed and replaced by either a void within the external walls which contain those storeys or the filling of the space behind those walls. Alternatively, the top two storeys in their present form could be suspended in the air supported upon piers or columns of the appropriate height. The height of those piers or columns would be the same as the height of the two suppressed storeys, so that the proposed building would be of the same height as the present undoubtedly four storey building.[77]

52 Hamilton J rejected this submission for a number of reasons, including:

> Even if the Council were prepared to consent to it, the question would arise, in respect of such a building, as to whether it exceeded two storeys in height and therefore breached the covenant. There would be a substantial case that it was a building that "contained" only two storeys. However, as I have already observed, the piers or other structure on which the two storeys would need to be supported would themselves be of the height of approximately two storeys of the proposed building. In my view the building would retain the characterisation of being about four storeys in height, which is the correct characterisation of the development. In other words, such a building might contain only two storeys, but would be more than two storeys in height.

53 The plaintiffs' submitted that this analysis supports the proposition that artificial characterisations of the use of the lower levels of house under construction on the Land are not really of any assistance in determining whether or not there is a breach of the covenant.[78]

54 The plaintiffs' also submitted that these authorities provide guidance for this case and establish that the building under construction on the Land has two storeys. The upper storey is situated above the lower storey and, regardless of whether it is directly superimposed on the lower storey, results in a building that is more than

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77 Ibid at [33].

78 Transcript, 28 October 2015, p. 63.

one storey in height, when viewed from the starting point which is the datum of the lowest point of the land.[79]

55 The plaintiffs' also relied on the decision of Bryson J in *Kirby v Esplin* where a covenant contained the restriction:

> …that no trees shall be allowed to grow on the land hereby transferred so that they will be an obstruction to the view of the harbour waters and Balmoral and Edwards Beaches from the verandahs or balconies of any building at present or at any future time erected on the land edged blue in plan hereon and *that no building shall be erected on the land … of more than one storey (excluding basement rooms) high.*[80]

56 It was an application to modify the covenant under the New South Wales equivalent of s 84(1)(c) of the Victorian *Property Law Act 1958*('the PLA'). That is, to modify the covenant on the basis that the proposed modification will not substantially injure the persons entitled to the benefit of the restriction. The modification sought arose from three proposed developments on the Kirby land and incidentally involved the construction of the covenant in relation to the proposed developments. The decisions in the case turned on the facts.[81]

57 His Honour observed in relation to the second and italicised part of the restriction quoted above that:

> In the geographical situation the second part of the covenant is obviously intended to protect views, but the views are not directly referred to and they are protected only in an indirect manner and to a limited extent. … The protection is limited by the nature of the restrictions; any view lost to a building one storey high is unprotected, and there is no restriction on the part of the Kirby land on which buildings are to stand.
>
> Obviously enough there would, both in 1921 and at present, be reasons why a building on the Kirby land could be sited relatively higher to take advantage of the view, and there is no restriction on choosing the highest point of the Kirby land for a one-storey building. There is no restriction on the nature of the building, and it is not specified that it is to be a house. However, I do not think that exercises of destructive criticism intended to show what a range of buildings and of what size could be fitted within the covenant are very useful. In reality from the point of view of 1921 and of any later time until the present, any building would almost certainly be a dwelling or some structure

79 Transcript, 28 October 2015, p. 67-8.
80 *Kirby v Esplin,* at [4].
81 *Kirby v Esplin* at [16].

> ancillary to a dwelling, and I refrain from theoretical exercises examining whether Westminster Abbey or an Aircraft Hanger is a building of more than one storey high because the nature of the terrain and surroundings restrict the kind of buildings that are likely to be erected and hence the kinds of obstructions likely for the views from the Esplin land.
>
> The restrictive covenant works to protect views in a curious and roundabout way by limiting buildings to no more than one storey high. It leaves no room for complaint about the construction of a one-storey building, with a pitched roof, at the highest point of the Kirby land but it places on an owner of the Kirby land who does that the disadvantage of not being able to build lower storeys further east down the slope where they can have no adverse implications for the view. The means chosen to protect the view only indirectly tend to achieve that purpose and they restrict buildings in ways which achieve nothing. The restraint tends to protect views by imposing burdens of design inconvenience on buildings or extensions, and the Esplins are entitled to the benefit which those burdens of inconvenience bring. Debate before me had the curiously inverted appearance of a debate about whether the Kirbys are entitled or should be allowed to build a building undoubtedly no more than one storey high, only about a metre from the rear line of their land. There could I think be no doubt that the restrictive covenant does not prevent them doing that; but only if they do not incorporate it into a building with one or more other storeys at lower levels.

58 The plaintiffs' submitted, based on the reasoning of Bryson J in *Kirby v Esplin*, that it is beside the point and unhelpful whether this covenant imposes design restrictions or inconveniences upon the person whose land is burdened by the covenant. It is also beside the point whether or not those inconveniences have no utility or purpose consistent with the purpose of the covenant. Regardless, as the beneficiaries of the covenant, the plaintiffs are entitled to the benefits that those burdens bring.[82]

Consideration

59 In *Leichhardt,* the Court started with an abstract interpretation of the interim development order. That is not easily adopted in the construction of the height restriction in this covenant. In particular, the meaning to be assigned to the word 'storey'.

60 It is impossible to construe this, or any, covenant, in a completely abstract way. It can only be construed in relation to a particular set of circumstances. In considering

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82 Transcript, 28 October 2015, p. 67.

an application under s 84(2) of the PLA[83] the Court cannot entertain a claim for a declaration as to the nature and extent of a restriction imposed by a covenant without 'a specific factual context' and 'in the abstract or theoretically'.[84] The same position applies to the determination of the meaning of the covenant in this case in order to answer the preliminary question. It cannot be done in the abstract.

61 I agree with the submissions of the plaintiffs that:

(a) it is not relevant to the determination of the preliminary question to have evidence concerning the previous building on the Land and whether it breached the Covenant. That is, obviously, because the previous house on the Land, which was substantially the same as the house under construction, says nothing about the proper construction of the Covenant. It may, however, be relevant to issues of waiver or acquiescence by those having the benefit of the Covenant and to an application to modify the restriction;

(b) the determination of the preliminary question must be made by reference to the building under construction on the Land. This is because, as I have said, the restriction in the Covenant can only be construed in relation to a particular set of circumstances; and

(c) the consequences of finding the Covenant has been breached are not relevant to the determination of the preliminary question.

62 I also agree with the submissions of the defendant that:

(a) the purpose of the Covenant is to protect the views of beneficiaries of the Covenant. This purpose is evident from the topography of the Land and the absence of single storey covenants on the most elevated properties transferred

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83 Under s 84(2) of the PLA, the Court has power, on the application of any person interested, to declare whether or not in any particular case any land is affected by a restriction imposed by any instrument or to declare what upon the true construction of any instrument purporting to impose a restriction is the nature and extent of the restriction thereby imposed and whether the same is enforceable and if so by whom.

84 *Stoops v Lefas & Ors* [2016] VSC 350 [26]; *Longo Investments Pty Ltd* [2003] VSC 37 at [16]; *Prowse* at [26]-[31]; *Blue Concept Pty Ltd v Farnan* [2015] VSC 125 at [19]-[24] per McDonald J.

out of the parent title. It is not, however, to be inferred from the limited number of beneficiaries in close proximity to the burdened land or that each of those beneficiaries is to the south of the Land, or to the southwest. That is because the identity of the properties with the benefit of the Covenant is as likely to have been accidental as deliberate because it turns on the order of transfer of the property out of the parent title; and

(b) the Covenant does not regulate the height of the walls, the form or height of the roof, the point at which construction can commence, the extent of the site coverage or whether voids beneath a floor may be used for non-habitable purposes.

63 The restriction is that the covenantor:

> …will not erect or cause to be erected on the said land hereby transferred any dwelling house other than one having walls of brick or stone and such house not to be more than one storey in height and all out buildings to be of similar construction.

64 The Oxford English Dictionary defines

(a) 'dwelling' (so far as relevant) as:

> 3. a place of residence; a dwelling place, habitation, house.[85]

(b) 'house' as:

> 1. A building for human habitation, esp. a building that is the ordinary dwelling-place of a family.[86]

(c) 'dwelling-house' as:

> A house occupied as a place of residence, as distinguished from a house of business, warehouse, office, etc.[87]

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85 The (Greater) Oxford English Dictionary, 1933, volume III; The Macquarie Dictionary (3rd Ed) meaning is similar.

86 2nd edition, 1989; *Prowse* at [60]; The same definition appears in the (Greater) Oxford English Dictionary, 1933, volume V. The Macquarie Dictionary (3rd Ed) meaning is the same.

87 The (Greater) Oxford English Dictionary, 1933, volume III; The Macquarie Dictionary (3rd Ed) meaning is similar, save that it includes a house intended to be occupied as a residence.

(d) 'story' or 'storey' as:

> 1. Each of the stages or portions one above the other of which a building consists; a room or set of rooms on one floor or level.[88]

65 In *Downie v Lockwood*,[89] Smith J observed that the expression 'dwelling house' is capable of a wide meaning in which it extends to any building or part of a building used as a place of abode of one or more persons. He was considering the construction of the term in a lease of premises. He considered a range of authorities where the term is used and commented:

> In popular speech the term is commonly used in a narrower sense derived, perhaps, from an abbreviating of the expression "private dwelling house". In this narrower sense it covers, I think, only those places of abode which are either separate structures or else divided from other buildings by vertical walls, and which, in addition, are occupied, or adapted for occupation, by persons living in one household.

66 In my view, the primary meaning to be given to 'dwelling house' in the Covenant is that it is to be a building or part of a building adapted for human habitation. This follows from the ordinary meaning of the words according to the definitions and authorities referred to above.

67 In the construction of this height restriction it is permissible to take into account the purposive or object of the restriction. The meaning of 'storey' must be assessed having regard to the purpose of the restriction, and what it does not protect or restrict, by being armed with all relevant information, and then reaching a conclusion as to whether the building offends the purpose of the Covenant.

68 The purpose of the Covenant is to preserve views for those owners of properties further up the ridge who have the benefit of the Covenant. This follows from:

(a) the reference to 'height' in the restriction; and

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88 The (Greater) Oxford English Dictionary, 1933, volume X; The Macquarie Dictionary (3rd Ed) meaning is similar.

89 [1965] VR 257 at 262.

(b) the nature of the location of the Land on the side of a ridge with an easterly orientation towards the Dandenong Ranges in a residential neighbourhood; and

(c) the absence of height restrictions on properties further up the ridge.

69 The reasonable reader of this restriction would know, or should find out, the 'lie of the land'. That is, the topography or terrain of the Land and the surrounding neighbourhood as well as the nature and physical characteristics of the housing in the area. In this regard, the Land slopes significantly across its frontage to Yvonne Court from west to east and there is a greater slope from the south west corner to the north east corner of the Land. Those differences in height affect the layout and method of construction of any dwelling house that can, sensibly, be built on the Land.

70 The ordinary meaning of 'storey' is 'each of the stages or portions one above the other of which a building consists'. To apply this literally to any structure without regards to the physical circumstances and the purpose of the Covenant may result in the purpose of the Covenant not being given its intended effect. The Covenant does not regulate the height of the walls, the form or height of the roof, the point at which construction can commence, the extent of the site coverage or whether voids beneath a floor may be used for non-habitable purposes.

71 It is correct, I think, that in determining 'height' when the restriction is expressed in the number of storeys rather than metres requires observations of the external built form in a practical and common sense manner. It is not an appropriate method of construing this restriction merely count every possible level in a building and reach a conclusion by addition.[90]

72 In the interpretation of the height restriction, the decisions upon similar expressions in other instruments are of very dubious utility.[91] That is especially relevant in this

90 *Poci* at [13]; Plaintiffs' Submissions 7 October 2015, [12].

91 *Ferella* at [17]; *In Re Marshall and Scott's Contract* [1938] VLR 98, at 100 where Mann CJ observed that

case. Some general matters considered by Courts in other decisions will be applicable, but because the construction of a restriction must always be undertaken by reference to a particular development on land in a particular locality, great care must be taken not to slavishly apply the reasoning on the construction and application of a covenant in one case to another.

73 The observation by Hamilton J in *Ferella* that the sloping nature of a site may make the determination of fact as to whether a building is more than two storeys in height a more difficult one is a general observation, that in my view, is applicable in this case. It means that a judgment has to be made in respect of the particular building in this case.

74 In *Ferella,* Hamilton J considered the meaning of the restriction having regard to the particular circumstances of the site and the uphill neighbour for whose benefit the restriction was imposed. The covenant provided that 'not more than one main *building* shall be erected upon the said land and that such *building* shall not be more than two storeys in height'(emphasis added).

75 First, I note that the restriction in *Ferella* was as to a 'building' and not a 'dwelling house'. This is significant in my view. On the interpretation favoured by the plaintiffs, a building that incorporates a garage and other utility rooms on a floor beneath the main living floor (containing the bedrooms, living rooms and associated facilities), is properly described in its totality as a 'house' or 'dwelling house'.

76 In this case, however, to do so has the effect of defeating the overall interpretation by reference to the purpose of the restriction, the lie of the land and the surrounding circumstances. To prevent a house to have a level floor containing the main living area that starts at the high point on the Land and proceeds on one level over the low point of the Land, so that there is an area beneath that floor that can be used for a garage and other utility rooms, is to employ a construction of this Covenant, in the

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small differences of language can be of great importance and that the decision often turns on them; *Prowse* at [54].

circumstances, that is against that which the reasonable reader, with knowledge of the surrounding circumstances, would attribute to it. The erection of a house with a single floor of habitable space above a sub-floor which includes a garage is a mode of construction that is almost compelled by the slope of the land, at least at the front of the house as it faces Yvonne Court. The parties to the Covenant must be taken to know of the lie of the land and to take it into account in their understanding of the meaning of the restriction.

77 It is also a regular form of construction across the lots transferred out of the parent title. The defendant identifies 14 lots which are subjected to a covenant in similar form to the Covenant in question in this case which include a sub-floor containing a garage, at least.[92] In Yvonne Court, each house upon sloping land has some form of sub-floor construction. In Annetta Court, to the immediate south of the Land, each of the houses has the same characteristic so that where the construction starts on the higher part of the land a sub-floor is created as the land slopes away.

78 Second, in *Ferella,* Hamilton J was faced with a proposed development that started with two storeys on the uphill side and increased to four storeys on the downhill part of the land in question. The reference in the quoted passage from the reasons of Hamilton J above at paragraph 46 to 'the ground referred to is the ground where the building stands, whether it be at the highest or lowest point of the land' was a reference to the reasoning of Glass JA in *Leichhardt* to a building 'no part of... which rose from the ground in the vertical plane for a distance of more than three storeys'. The introduction of a reference point, being the ground, is understandable because the height in storeys must be a height measured from some point. But to say that the starting point is the ground where the building stands, 'whether it be at the highest or lowest point of the land' does not take account of the purpose of the Covenant in this case as protecting views. Nor does it take account of the absence of any

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92 Defendant's Submissions, 26 October 2015, [12]. The lots in question are lots 12 (1 Eric Court), 30 (3 Henley Drive), 32 (4 Henley Drive), 34 (6 Annetta Court), 35 (8 Annetta Court), 40 (1 Annetta Court), 45 (7 Yvonne Court), 52 (2 Yvonne Court), 53 (3 Yvonne Court), 54 (5 Yvonne Court), 56 (878 Waverley Road), 57 (876 Waverly Road), 59 (872 Waverly Road).

restriction as to the height of the walls, the form or height of the roof, the point at which construction can commence or the extent of the site coverage.

79 For these reasons, it seems to me that the reasoning and decision in *Ferella* is of only limited use in the construction of the Covenant in this case.

80 The decision in *Leichhardt* is of even less assistance in the construction of the Covenant and the application of that construction in this case. It adds little to the ordinary meaning of the word 'storey' as contained in any of the dictionaries consulted. The contrast of a stepped construction in the fashion of the treads and rises of an ordinary staircase and the conclusion that such a construction would still breach the restriction in this case, as it did in that case, demonstrates how unreal the approach of the plaintiffs is in this case. That is, the proposition that follows from the reasoning in *Leichhardt* is that the construction of a house on the Land in this case which stepped down the slope of the Land at the Yvonne Court frontage would itself be a breach of this Covenant. Assuming for a moment that that proposition is correct, it demonstrates, in my view, that the method of construction in fact adopted in this case, and on many other properties in the neighbourhood, is one that does not result in a dwelling house of more than one storey in height.

81 The relevance of the decision in *Kirby v Esplin* lies principally in that part of the extract from the reasons of Bryson J extracted above which make observations about the covenant working to protect views in a curious and roundabout way by limiting buildings to no more than one storey high. The restriction chosen to protect the view only indirectly tend to achieve that purpose because it:

(a) left no room for complaint about the construction of a one storey building, with a pitched roof, at the highest point of the Kirby land;

(b) placed on an owner of the Kirby land who does build at the highest point of the land the disadvantage of not being able to build lower storeys further east down the slope where they can have no adverse implications for the view; and

(c) tends to protect views by imposing burdens of design inconvenience on buildings or extensions, but the Esplins were entitled to the benefit which those burdens of inconvenience bring.

82 It is difficult to translate the circumstances of the land and neighbourhood in *Kirby v Esplin* case to the circumstances of this case. Only one of the proposed developments on the land failed to gain approval by way of modification. The operative decisions in the case concerned questions of fact. The real distinguishing feature between this case and *Kirby v Esplin* is, however, that in the case before me there is no construction of a dwelling house that will be more than one storey in height having regard to the purpose of the restriction, the characteristics of the Land and of the neighbourhood.

83 I undertook an unaccompanied view of the Land, the exterior of the house under construction on it, and the lay of the land generally in the neighbourhood. I did so with the express consent of the parties.

84 An image of a subject often conveys a meaning more effectively than a description. The picture below was taken by me on Friday 17 June 2016. The house depicted is, in my view, not more than one story in height:

Walls of Brick or Stone

Plaintiff's Submissions

85 The plaintiff submitted that:

(a) the facts in this case are analogous to those considered in *Jacobs v Greig*.[93] The walls of the building are brick veneer, being an outer skin of brick constructed against an inner timber structure;

(b) an examination of the photographs in evidence reveals the internal walls of the upper level of the building are predominantly timber. The plans and structural drawings confirm that the walls are best described as 'brick veneer';

(c) the object of interpreting the covenant is to discover the intention of the parties revealed by the language used in it. The Court is not entitled to approach the task of construction by reference to evidence as to what the parties originally intended, nor what the present proprietor, or anyone else, thinks the covenant means. The intention of the parties must be determined as at the date the covenant was created and not at some later time. It is purely a question of construction approached against the background of the facts that existed at the time of the creation of the covenant;[94]

(d) at the time the covenant was entered into, there was an accepted and known distinction between brick veneer walls and brick walls. The decision in *Jacobs v Greig* makes this clear as do the other covenants dating from the same era which distinguish between these two types of construction; and

(e) the Court should therefore conclude that the walls of the building under construction are not made of brick or stone and are therefore constructed in breach of the covenant.

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93 *Jacobs v Greig* [1956] VLR 597 ('***Jacobs v Greig***').

94 *Tonks v Tonks* [2003] VSC 195 at [8].

Defendant's Submissions

86 The defendants submitted that there are two features of the Covenant in relation to the materials of which it is to be constructed that need to be noted. First, it speaks of a 'dwelling house', and second the feature of that house – its walls. The focus is on the presentation of the house and not the manner of its building. Construed in that context, the Covenant's purpose with reference to the building materials was plainly to ensure that the construction of a house of substance with a quality finish.

87 The covenant in *Jacobs v Greig* is different from the Covenant in this case. It concerned a restriction that 'any such building shall not be erected of any material other than brick or stone.' In this case, the Covenant is not to erect any dwelling house other than one having walls of brick or stone. It is narrower in scope.

88 Further, *Jacobs v Greig* should not be deployed to establish a normal meaning of a covenant that restricts building materials to brick or stone. No evidence has been adduced by the plaintiffs as to the accepted or known use of terminology at the time of the Covenant's creation.

89 The defendant also referred to *Gardencity Altona v Grech and Ors*,[95] where Lansdowne AsJ noted that:

> I consider the particular outcome in *Jacobs v Greig* to be limited to its particular facts and time. On the principle identified in that case, I find that an ordinary resident of Victoria would consider the covenants here in question do not now exclude brick veneer. Accordingly, I find that for this case at least, brick veneer is "brick" for the purposes of the covenants, and like covenants in the area.[96]

90 The defendant submitted that her Honour obviously did not mean, contrary to 50 years of very well settled authority, that you read a 1956 covenant in 2015. What her Honour almost certainly meant is that the satisfaction of the purpose might vary over time. As the purpose in that case was dual; to avoid buildings of low quality, and to require the external appearance of brick or stone, that purpose could be met by the use of brick veneer.

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95 [2015] VSC 538.

96 *Gardencity Altona v Grech and Ors* [2015] VSC 538 at [133] ('***Grech***').

91 There are other covenants burdening lots transferred out of the parent title which contain a building materials restriction that identifies 'brick veneer'. Some use 'brick' and others use 'brick veneer' without any apparent pattern or strategy. Of the 47 lots burdened by such a restriction in the table tendered by the plaintiffs, 27 specifically allow for the construction of a dwelling with brick veneer walls.

92 The plaintiff submitted in response to the defendant's submissions that:

(a) it is wrong to construe the purpose of this part of the Covenant as focused on the presentation of the house rather than the manner of its construction. The walls are indeed a visible feature of the house. But they are also a structural feature;

(b) this part of the Covenant is clearly directed to the manner of construction as well as to the aesthetic presentation; and

(c) the Lansdowne AsJ's findings in *Grech* that the purpose of such a covenant is both to avoid buildings of low quality and to require the external appearance of brick or stone should be adopted. But the *obiter* comments of her Honour quoted above should not be followed because they represent a misunderstanding of *Jacobs v Greig*. This is because it is wrong in law to interpret what is meant by the words in the covenant by reference to contemporary views of the words used rather than by ascertaining the intention of the parties at the time the Covenant was created in March 1956.

Consideration – Walls of Brick

93 The Oxford English Dictionary defines

(a) 'brick' as:

> 1. A substance formed of clay, kneaded, moulded, and hardened by baking with fire, or in warm countries and in ancient times by drying in the sun; used instead of stone as a building

material.[97]

(b) 'wall' as:

4. An enclosing structure composed of bricks, stones, or similar materials laid in courses.

a. each of the sides and vertical divisions of a building.[98]

94 *Jacobs v Greig* dealt with an application by the plaintiffs for an interlocutory injunction restraining the defendants from erecting a brick veneer building on land burdened by a restrictive covenant that was in the following terms:

> …The registered proprietor or proprietors of the land hereby transferred, will not at any time hereafter erect or build on any lot sold other than one detached private dwelling house or one detached building not exceeding two storeys in height comprising two residential maisonettes or two residential flats one above the other, and any such building shall not be erected of any material other than brick or stone with tiled or slate roof…. [99]

95 It was common ground in that case that a building scheme had been established in the subdivision in which the plaintiffs' and defendants' properties formed part that enabled, prima facie, any registered proprietor of a lot in the subdivision to enforce the covenant in respect of any other lot in the subdivision.[100] The same covenant applied to all lots in the subdivision.

96 In *Jacobs v Greig,* Sholl J noted:

> The method of "brick veneer" is I believe tolerably well known in this country at the present time. It was explained in the affidavits, and additional details were given by Mr Rivett during cross-examination in the witness box. It is sufficient for present purposes to say that the defendants' house, if completed according to the plans as now modified, would be a structure having the inner framework of its external walls constructed of timber, with a brick veneer, or "skin" of brick outside them. The thickness of the brick skin would be 4½ inches, the width of a single brick. The inner surface of the external walls would be of plaster sheets or wood affixed to the wooden framework. The whole of the internal walls would be of wood and plaster or similar material. The weight of the roof (except in the case of the garage) would be carried on the timber framework, though by modifying the plans

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97 The (Greater) Oxford English Dictionary, 1933, volume I; The Macquarie Dictionary (3rd Ed) meaning is similar.

98 The (Greater) Oxford English Dictionary, 1933, volume XII; The Macquarie Dictionary (3rd Ed) meaning is similar.

99 Ibid at 598-9.

100 Ibid at 599.

still further it could, apparently be transferred to the external brick walls.[101]

97 In the course of his judgment, Sholl J referred to the submissions of Dr Coppel that since the defendants' house would have the external surface of its external walls entirely composed of brick it was immaterial that otherwise the substantial vertical construction of the house would be of timber or other material not being brick or stone. It was obvious that the Covenant could not be read so literally that everything in the house – including the floors, windows, doors, plumbing, staircases and fixtures – must be of brick or stone. Because the Covenant must be read down, it should be construed as narrowly as possible as referring only to the external visible materials used in the construction of the buildings as being required to be of brick or stone. This gave effect to the purpose of the clause as being to preserve the aesthetic amenities of the estate.

98 On the other hand, Mr Voumard argued for the plaintiffs that the Covenant as to building materials was to be understood as probably designed to protect purchasers with regard to the appearance, strength, durability, cost and fireproof qualities of the buildings to be erected on the estate, it being a case where the parties agreed there was a building scheme. The weight to be attached to any one or more of these factors might vary in different minds. Mr Voumard submitted that so far as the restriction referred to brick or stone it meant that the vertical construction of any building must be substantially wholly of one or the other or both of those materials.[102]

99 The plaintiffs were successful in persuading the Court at a prima facie level that the dwelling under construction on the defendants' land was in breach of the restrictive covenant. Sholl J said:

> In my judgment, the covenant should be read according to the construction contended for by the plaintiffs. It is not satisfied, I consider, unless the vertical construction of a building – and this applies to internal as well as to external walls – is substantially wholly of brick or stone, in the sense above stated. Of course, all such covenants, including this covenant, must be read

101 *Jacobs v Greig* at 600.
102 *Jacobs v Greig* at 603.

> 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 with 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 practice of using glass windows, metal or porcelain plumbing materials, or concrete or terrazzo flooring, or cement or plaster rendering over brick walls.
>
> The outer walls are partly, indeed largely – but not substantially or wholly – of brick; a substantial portion of their structure is also of wood. The internal walls are not of brick at all. If the timber elements were removed from the outer and the inner walls, and a mere single brick construction were still employed in both cases, the building would, I think, comply with the covenant so far as the walls were concerned…[103]

100 Later, Sholl J noted that he had taken time to consider his decision principally because there was no modern authority upon the construction of such a covenant. He found that surprising especially since covenants in a similar form have, in his experience, been quite commonly used in Victoria for many years. He speculated that the absence of authority may indicate that until the brick veneer method of construction was introduced, the question of infringement or non-infringement seemed too clear for argument.[104] He went on:

> I should add that I do not find myself in agreement with Dr Coppel's contention that the covenant does not apply at all to outbuildings or other structures separate from the main structure. It is impossible to read the covenant as prohibiting altogether the erection of such structures; therefore they must be comprehended within the expression "one detached private dwelling house or one detached building", etc. Those expressions must then be read as if they contain the words "including all usual and proper outbuildings or other structures". It does not of course follow from that that the requirement as to brick or stone construction is intended to be applied to every such outbuilding or other structure. It is a matter of construing the covenant according to common sense in the light of current usage and custom. A dog-kennel or a pergola need not be of brick or stone; a garage I should think, must be. In the case of a summer-house, the answer might depend on its size and position.[105]

101 There is no evidence in this case as to the meaning of 'walls of brick or stone' in this Covenant, apart from the dictionary meanings of the words and the decision in *Jacobs v Greig*. The plaintiffs rely entirely upon the finding made by Sholl J in *Jacobs v*

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103 *Jacobs v Greig* at 603.
104 *Jacobs v Greig* at 604.
105 Ibid.

Greig, and therefore upon the evidence that was before him as to the meaning to be attributed to the expression 'such building shall not be erected of any material other than brick or stone'.

102 It is important in considering the authority of the judgment in *Jacobs v Greig* to understand:

(a) that it was an interlocutory injunction application and not the final determination of the proceeding; and

(b) that small differences of language between covenants can be of great importance and that decisions often turn on those differences.[106]

103 There is a certain logic in the plaintiff's submission that because the decision in *Jacobs v Greig* was made in March 1956, and because the Covenant in this case was granted in 1956, indeed in March 1956, that the meaning ascribed by the Court in that case must be applicable in this case. There is, however, a real danger in construing the Covenant by reference to evidence given in another case in relation to a covenant which is differently worded.

104 In this case, the restriction relates to the walls of the dwelling house. According to the ordinary meaning of 'wall' as I have set it out above, it is an enclosing structure composed of bricks, stones, or similar materials. That informs, in my view, those parts of the building to be constructed of brick or stone, as well as effecting the interpretation of the purpose of the Covenant. It tends to indicate that the presentation of the dwelling to the outside world is the principal purpose of the restriction. It is also indicates a purpose of avoiding houses of low quality, as is the case with most, if not all, building material restrictions that specify brick. The reference to 'walls of brick or stone' reveals a difference of significance between the words of the covenant in *Jacobs v Greig* and this case.

105 True it is that a subsidiary meaning of 'wall' may have been intended in this case, so

106 *In Re Marshall and Scott's Contract* [1938] VLR 98 at 100.

that each of the vertical divisions of the dwelling house was to be constructed of brick or stone. But apart from the authority of *Jacobs v Greig,* there is no support for that meaning nor any persuasive argument. The Covenant in this case is narrower in its scope than the covenant considered in *Jacobs v Greig* and the existence of a building scheme in the locality (the premium suburb of Toorak) may also have been an influence. It seems to me that, as the defendant submitted, *Jacobs v Greig* does not settle, as a matter of fact, the natural and ordinary meaning of the phrase 'walls of brick or stone' as it is used in this Covenant. Nor, I should add, does it settle the meaning of 'brick' as a matter of fact at the time in question as that turned on the particular evidence and course of that proceeding. There is no equivalent evidence in this case. Indeed, apart from submission and assertion, there is little evident in the reasons in *Jacobs v Greig* to justify the conclusion apart from the conclusion that the brick veneer method construction did not result in the walls being substantially of brick. In the extract referred to above at paragraph 99, the learned Judge said the outer walls are partly, indeed largely – but not substantially or wholly of brick; a substantial portion of their structure is also of wood and that the internal walls are not of brick at all.[107]

106 It should be recalled that generally speaking:[108]

(a) the proper construction of an instrument intended to have legal effect is a question of law, not fact;

(b) the meaning of a particular word or expression in such an instrument may be a question of fact, particularly where the Court has already determined as a matter of construction that the word or expression is used in its ordinary and natural meaning; and

(c) whether there has been a breach of a restriction in a covenant, or not, is a question of fact to be determined according to the facts of the case and in the

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107 *Jacobs v Greig* at 603.

108 *Prowse* at [53].

light of the actual language in which the restrictive covenant is framed.

107 In *Jacobs v Greig*, Sholl J observed that the covenant must be read as it would be understood by an ordinary person, accustomed to the ordinary current use of the English language in the relevant locality, and acquainted with current social habits and usages.[109] In this case, the meaning of 'walls of brick or stone' is a question of fact turning on the ordinary meaning of the words in the context of the instrument and the circumstances permitted to be taken into account. Nothing in the ordinary dictionary meaning indicates that walls constructed out of bricks on the outer layer, with timber and plaster board on the inner layer, does not satisfy the description 'walls of brick'. It is only by reading 'walls of brick' as meaning 'walls wholly or substantially of brick' that one comes to the result that the method of construction in this case is in breach of the restriction.

108 In this case, there is an enclosing structure composed of brick to the outside world. Must the walls be made wholly or a substantially of brick? The commonsense that was applied by Sholl J in *Jacobs v Greig* when applied here leads me to the opposite conclusion to the one he reached. Given that the purpose of the restriction is to require the external appearance to be of brick or stone and to avoid low quality construction materials, there is no reason why walls of brick veneer do not meet the purposes. There was no complaint that the brick is rendered.

109 The plaintiffs pointed to the many other covenants (27 in total) which specifically refer to the building materials element of the Covenant as extending to brick or brick veneer, or in some cases to stone or stone veneer, as well. It is, in my view, a very dangerous course to take to compare a covenant entered into between two parties pursuant to a contract of sale of land with a covenant entered into between two different parties in relation to a different parcel of land under a different contract.[110] In forming that conclusion, I am doing no more than giving effect to the notion that

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109 *Jacobs v Greig* at 603.

110 As a general rule, there is a contractual stipulation requiring the purchaser of the land to grant the covenant at the time of transfer of the land: see for example *Jacobs v Greig* at 598.

the object of the construction is to arrive at the intention of the parties to the covenant. Unless there is some admissible evidence[111] that all the covenants were imposed by the same vendor according to some scheme, or that the parties to the covenant applicable in this case were aware of the covenants made previously in respect of other properties in the neighbourhood, there is no proper basis to have regard to the manner of expression of the building materials element of the covenants in other cases.

110 The evidence before Sholl J in *Jacobs v Greig* did not appear to provide a factual basis for the conclusion that the building materials part of the covenant was to be understood as designed to protect purchasers with regard to the appearance, strength, durability, cost and fireproof qualities of the building.

111 It may be that I could take judicial notice of the view that was once held that solid brick, or cavity brick, was considered to be a better, stronger, more durable and more expensive method of construction and thus was considered to indicate a higher quality, and a better investment. No one, however, suggested that I should take judicial notice of any such thing. In the absence of argument regarding the taking of judicial notice of such a matter, it would be inappropriate to do so.

112 The construction of the covenant in *Jacobs v Greig* which Sholl J adopted may reflect common sense, as he mentioned. But it involves a 'reading down' of the covenant in some respects and a 'reading up' of the covenant in others, as follows:

(a) His Honour said '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 practice of using glass windows, metal or porcelain plumbing materials…' etc. It may equally be said that in this case, no one would read this covenant as requiring the internal walls to be constructed of brick or stone. That is because it is the walls, by which is meant the external walls, of the house that must be 'erected' of brick or stone.

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111 In light of the decision on *Westfield* the admissibility of such evidence is very unlikely.

I consider that each proposition is equally open;

(b) There is no reference in the covenant in *Jacobs v Greig* to any outbuildings, such as a garage. What is restricted is the erection or building on the land of anything other than 'one detached private dwelling house' or 'one detached building not exceeding two storeys in height comprising two residential maisonettes or two residential flats one above the other'. It is an interesting, but unexplained, extension of the ambit or scope of the covenant to say that it applied to outbuildings or structures separate from the main structure. It is to my mind beyond the scope of the covenant, further embellished by the finding of an unexpressed restriction on some outbuildings but not all of them. The basis of that opinion is unclear and not plainly supported by the terms of the Covenant.[112]

113 In my unaccompanied view of the Land and neighbourhood, it became apparent that the bulk of the houses were constructed with an external appearance of brick. Some had upper levels that included timber. But the overall appearance of the neighbourhood was that the houses were substantial in size and built of brick, whether that was solid brick or brick veneer could not be seen. Apart from the decision in *Jacobs v Greig*, there is no warrant in this case for the conclusion that the requirement, in effect, that the dwelling house on the Land be constructed with walls of brick or stone has the purpose of anything more than the aesthetic appearance of the house and the avoidance of low quality materials. As I have said, I am not prepared to take judicial notice that strength, durability or any other matter forms a part of the purpose of the Covenant. The evidence before Sholl J in *Jacobs v Greig* is not before me. In any event, that decision was merely an interlocutory decision arrived at on the basis that there was a prima facie case that the construction of the covenant required solid or cavity brick and not brick veneer.

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112 The Supreme Court file was unearthed from the Court's archives (1956 No. 234) and confirms the terms of the covenant set out in the judgment. It also reveals no further steps in the proceeding after the interlocutory order.

114 The decision of Lansdowne AsJ in *Grech*[113] concerned an application to modify a building materials covenant under s 84(1)(a) and (c) of the PLA. The material wording of the covenant was 'nor will I or my heirs executors administrators or transferees use any material other than brick and or stone for the main walls of any such shop or dwelling'. The issues did not involve the distinction between brick and brick veneer. The expert who gave evidence for the plaintiff was concerned to establish that there was extensive use of materials other than brick or stone in the relevant neighbourhood. In doing so, he treated brick veneer as 'brick' for the purpose of the brick or stone restriction.[114] There was therefore no issue to determine that required a finding of whether brick veneer would satisfy the covenant in that case.

115 Interestingly, in that case, the plaintiff submitted that the application of the principle stated by Sholl J in *Jacobs v Greig* that 'all such covenants…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 with current social habits and usages', would now not exclude brick veneer because it is now acceptable that a high quality building may be constructed in brick veneer. Her Honour noted that the expert evidence before her:

> …is that brick veneer construction had replaced double brick construction in Australia by 1950, and so, on that evidence the acceptability of brick veneer had commenced by the time of *Jacobs v Greig*, but had possibly not filtered down to the general population. It is possible that the judgment in *Jacobs v Greig* was also influenced by the location of the subject property in Toorak.[115]

116 Just as I consider it inappropriate to take into account the evidence before Sholl J in *Jacobs v Greig,* it is also inappropriate to take into account the evidence before Lansdowne AsJ in *Gardencity Alton v Grech & Ors.* Had there been similar evidence in this case, it might have been open to the defendant to submit that the purposes of the building materials restriction was met by a brick veneer construction.

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113 [2015] VSC 538.
114 *Grech* at [132].
115 *Grech* at [133].

117 In that regard, whether it is open to construe the building materials restriction in the Covenant by reference the satisfaction of its purpose, so that what satisfies that purpose might vary over time, the observation of the High Court in *Westfield* may be relevant. The Court noted in that case:[116]

> To some degree the attraction of "the common law approach to the construction of grants of easement" has been to counter arguments that a right of way may be used only for the purposes for which the way was used at the time of the grant. But to accept the proposition that the user under a registered easement may change with the nature of the dominant tenement, so long as the terms of the grant are sufficiently broad,[38] does no violence to the principles of the Torrens system.

118 If it is right that the use of the easement by the owner of the dominant tenement may change over time, if the terms of the grant allow it, this may indicate that the satisfaction of the purpose of the covenant may change as the nature of building materials change over time. The absence of direct evidence about that subject makes it inappropriate to take that matter further.

119 The evidence in this case clearly shows that the house has walls of brick, albeit brick veneer. There is nothing in the covenant that requires the roof to be supported by the brick walls as distinct from the timber frame. There is no evidence produced by the plaintiffs to establish that the meaning of the expression 'walls of brick or stone' in 1956 or indeed at any other time, does not embrace brick veneer walls. I am therefore not satisfied that the house under construction is in breach of the covenant because it is constructed with walls of brick veneer.

Conclusion

120 The preliminary question for determination is 'does the building that is being constructed on the defendant's property breach the covenant.' I have concluded that:

(a) in respect of the element of the Covenant that the defendant will not erect or cause to be erected on the Land any dwelling house not to be more than one

116 *Westfield* at [42].

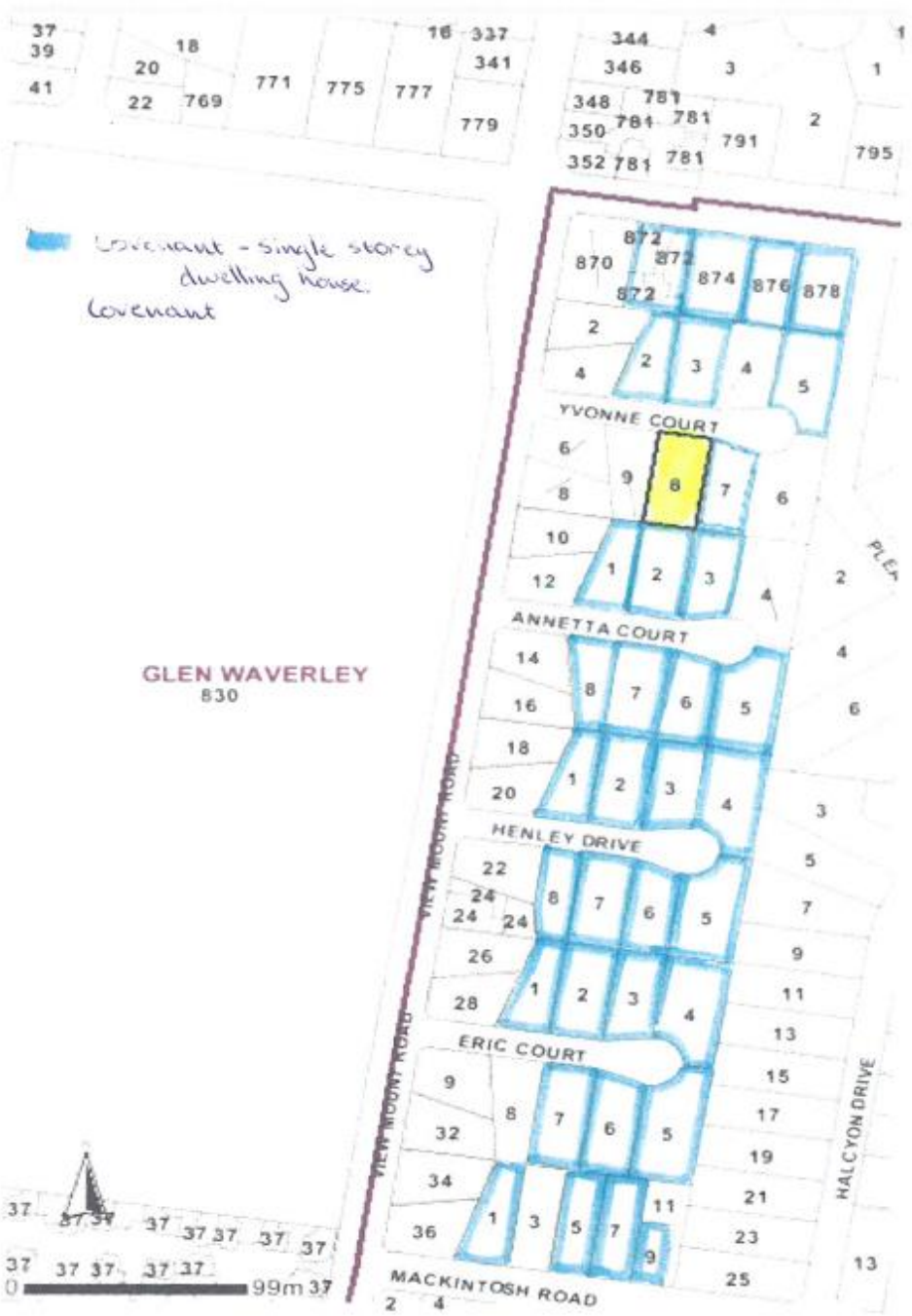
storey in height, that the house under construction is not more than one storey in height; and

(b) in respect of the building materials element of the Covenant, I am not satisfied that the house under construction is a dwelling house 'other than one having walls of brick or stone'.

121 I will hear the parties as to the appropriate orders to be made, including orders as to the costs of the application.

SCHEDULE

PLAN SHOWING LOTS SUBJECT TO SINGLE STORY COVENANTS



SCHEDULE OF PARTIES

S CI 2015 02973

RUSSELL MAYNARD CLARE	First Plaintiff
LOUISE McDONOUGH	Second Plaintiff
LAY CHENG KHOO	Third Plaintiff
KREITEL PTY LTD	Fourth Plaintiff
GEOFFREY ALBERT WELLER	Fifth Plaintiff
BERNICE LOUISE WELLER	Sixth Plaintiff
PETER ROBERT MURRAY	Seventh Plaintiff
JEAN ANNE MURRAY	Eighth Plaintiff
RAYMOND WILLIAM CAHILL	Ninth Plaintiff
RHONDA CAHILL	Tenth Plaintiff
MIN MA	Eleventh Plaintiff
LORENZ CORNELL MILLSOM	Twelfth Plaintiff
JULIANNE STEWARD MILLSOM	Thirteenth Plaintiff
MICHAEL JOHN RALPH	Fourteenth Plaintiff
MERRYN ELIZABETH RALPH	Fifteenth Plaintiff
GERALDINE MARY RICHARDSON	Sixteenth Plaintiff
MARK FRANCIS RICHARDSON	Seventeenth Plaintiff
MARIANNE JENNY PUCCINELLI	Eighteenth Plaintiff
ERRIL THERESE CAMPBELL	Nineteenth Plaintiff
and	
EVA BEDELIS	Defendant