SUPREME COURT OF VICTORIA

Re MARKIN; Re ROBERTS

GILLARD, J.

19, 20, 28 April, 3 May 1966

Real property—Restrictive covenant—Applicant seeking to modify restriction which limits minimum size into which his land can be subdivided—Changed nature of area—Court's discretion—Applicant as original covenantor—Original covenantee still living and resident in area—*Property Law Act* 1958 (No. 6344), s. 84.

Section 84 of the *Property Law Act* 1958 gives the Court power to wholly or partially discharge or modify a restrictive covenant notwithstanding that the applicant is the original covenantor and the original covenantee is still living and still owning part of the land subdivided to which the covenant was appurtenant.

Application under s. 84 of the *Property Law Act* 1958

The applicants, Alan and Margaret Markin and William Donald Roberts, applied pursuant to s. 84 of the *Property Law Act* 1958 to modify restrictive covenants which provided in effect that they could not subdivide their lands into lots smaller than three-quarters of an acre and one acre respectively. The applicants were the original covenantors.

P. A. Liddell, for the applicants.

N. S. T. Murdoch, for the original covenantee.

Cur. adv. vult.

Gillard, J., delivered the following written judgment: These are applications to modify or discharge restrictive covenants pursuant to the provisions of s. 84 (1) of the *Property Law Act* 1958 and, in particular, under the provisions of paragraphs (*a*) and (*c*) of sub-section (1). I reserved judgment in these applications because the applicants were the original covenantors and the original covenantee is still alive, still owning quite a large portion of the land originally subdivided by her to which the covenants were appurtenant. In *Preston and Newsom, Restrictive Covenants Affecting Freehold Land,* 3rd ed., at pp. 155 and 156, there appears the following: "Further, it is at least very doubtful whether the jurisdiction of the Lands Tribunal extends to granting relief to an applicant who is himself the original covenantor. Its power is 'on the application of any person interested in any . . . land affected by any restriction . . . as to the user thereof or the building thereon . . . wholly or partially to discharge or modify any such restriction'. These words do not refer aptly to the personal obligation *ex contractu* of the original covenantor: more naturally they would refer to the obligation affecting the land itself in the hands of his successors arising under the rule in *Tulk* v. *Moxhay* (1848), 2 Ph. 774; [1843-60] All E.R. Rep. 9. In a sense, no doubt, the land is affected in the hands of the original covenantor; but the more significant obligation at that stage is his obligation in contract. Until the burdened land has changed hands it is no part of the cause of action on the covenant to show that the land is bound.

"The Tribunal appears never to have made an order discharging or modifying restrictions on the application of the original covenantor"

In the latest supplement of the work the authors do refer to four applications, one in each of the years 1959 to 1962 inclusive, by original covenantors. Two of the applications were refused by the Lands Tribunal without passing on the point that the applicant was the original covenantor. But in the other two the applications were granted. In one the law point was taken that the applicant was the original covenantor. Other than adverting to the argument, the tribunal appeared to give no opinion on the point. It should also be observed that in this Court the former Chief Justice, Sir Edmund Herring, modified the covenant imposed on lot 63 in the subdivision with which I am concerned. The covenant was entered into by Walter Edwin Coleman on 1 February 1950, on transfer from the sole covenantee, as in these applications. On 17 May 1962 the former Chief Justice modified as to part of the land the covenant entered into by Coleman who, in the meantime, had died, and the application was brought by his executrix. It seemed to me, therefore, that having regard to the above text I was forced to consider carefully the position in law of an original covenantor seeking to obtain an order from the Court to modify or discharge the covenant which now appears as a registered encumbrance on his certificate of title. This fact alone might make the above comments of the learned authors of no real value in this State. Before dealing with this problem, however, I should advert to some of the facts of the application.

I am satisfied that by the recent development and extension of the metropolitan area of Melbourne the character of the land has altered considerably since 1947, when the covenant was entered into by the applicant Roberts, and also since 1950, when the covenant was entered into by the applicants Markin. At that period, I am satisfied, the land was bush land.

[His Honour then discussed the developments which had taken place in the locality, and continued:—]

What was formerly bush land, I now accept has developed into an outer suburban residential area.

The covenant entered into by the applicant Roberts limits the use of his lot to subdivision into one acre allotments for housing purposes. There is also provision that any building to be erected on any such allotment shall not cost less than $2400, exclusive of outbuildings, and each building should be erected under the substantial supervision of a registered architect and the plans and specifications of which must have been submitted to the vendor or his architect. The covenant entered into by the Markins is similar, save the minimum area specified is three-quarters of an acre. It can be readily seen that the minimum value of the buildings as specified is well outmoded. I think I can take judicial notice of the fact that no reasonable dwelling-house fit for a gracious residential area of large allotments could be erected for a sum of $2400 at the present time. For all intents and purposes the imposition of such a covenant to preserve a particular character of residential area as it was intended in 1947 or 1950 has become practically valueless today. Inflation has defeated any purpose for which such restriction was imposed. Again, because of the extraordinary growth of Melbourne, the character of the region to the north-east of the metropolitan area has considerably altered. At the period when these covenants were entered into this portion was sparsely populated and was generally given over to orchards and grazing areas. There was considerable bush land throughout. Again, I think I can take judicial notice of the development of the city and the creation of new suburbs out towards that area. The zone in which these lots are situated is now classified under the provisions of the Local

Government law and Town Planning law as residential. I am satisfied that the nature and character of the neighbourhood has changed. Although I was not particularly impressed by the evidence given in the affidavit of Aubrey Wesley Dickson, I can well imagine and accept that it would be very difficult at the present time, in order to develop this area to plan successfully, a subdivision of the lots owned by the applicants into acre or into three-quarter acre allotments. The demand at present in outer suburban residential areas, I accept, is for smaller allotments.

Looking then at the requirements specified in s. 84 (1) (*a*) of the *Property Law Act* 1958, the applicants must prove that the original purpose in imposing the covenant can no longer be achieved because of changes in the character of the property or the neighbourhood: see *Re Truman, Hanbury, Buxton & Co. Ltd.'s Application,* [1956] 1 Q.B. 261; [1955] 3 All E.R. 559; *Driscoll* v. *Church Commissioners for England,* [1957] 1 Q.B. 330; [1956] 3 All E.R. 802; *Re Mason and the Conveyancing Act* (1960), 78 W.N. (N.S.W.) 925.

Now it is no light task to sustain this burden. In many cases, the real purpose is not easily discovered and, accordingly, it is difficult to discover whether the restriction has become obsolete. But I believe there has been an express or tacit waiver of the requirements of the minimum area both by the original covenantee and other persons entitled to the benefit of the covenant, whereby what might have been regarded formerly as being a prerequisite to the creation of what in modern parlance is called "a green belt" has now become a relatively populated residential zone in which the concept of a green belt has been lost.

Equally, I am prepared to accept that the applicants by their evidence have also sustained the burden specified in paragraph (*c*). It is defined by me in *Re Cook,* [1964] V.R. 808. I am the more ready to come to this conclusion because the original covenantee appeared before me through counsel and did not object to any modification of the covenant to allow the applicants to subdivide in accordance with their proposed plan. Counsel informed me that the lady felt she had a moral duty to other lot owners who purchased from her, and, accordingly, she could not consent to the modification. At the same time I was informed by counsel that she did feel that sufficient publicity had not been given to the application and many of the purchasers of lots from her were ignorant of the proceedings. Be that as it may, I felt that since she herself had quite close to the subject land subdivided two original lots of about one acre into nine smaller lots with a service road and, secondly, did not object to the application herself, there was some foundation for the conclusion that no great disservice would be done to the lot holders if a modification were granted and that the persons entitled to the covenant would not be substantially injured on the tests laid down by me in *Re Cook.*

The only remaining question, then, is whether I should exercise my discretion in favour of the applicants: see *Driscoll's Case* and *Re Cook.* This brings me back to the reason for my reserving judgment. Should I refuse these applications because they were made by the original covenantors? When all is said and done, very little time has passed since the covenants were entered into. Despite the provisions of s. 84 (4), I am of opinion that I cannot relieve the applicants from the contractual obligations entered into by them arising at common law. This could only be done by the covenantee entering into a novation with the covenantors for good and valuable consideration, or giving each of them a release under seal cf *Mulcahy* v *Hoyne* (1925), 36 C L R 41, at

p. 58; 31 A.L.R. 230. Equally, I cannot relieve the applicants from their contractual obligations arising under the principles of equity. But, in my view, I can take into consideration on this application what remedies the covenantee may obtain in a court of law or a court of equity and in particular whether I believe a court of equity would grant an injunction to the covenantee to prevent a breach of such contractual obligations. From the applicants' point of view this is the more important remedy to be feared. The test for my guidance has been laid down by Farwell, J., in *Chatsworth Estates Co.* v. *Fewell,* [1931] 1 Ch. 224, at p. 229; [1930] All E.R. Rep. 142, in these terms: "The defendant's first ground of defence is that there has been such a complete change in the character of the neighbourhood, apart from the plaintiff's acts or omissions, that the covenants are now unenforceable. But to succeed on that ground the defendant must show that there has been so complete a change in the character of the neighbourhood that there is no longer any value left in the covenants at all." In a current issue of the *Melbourne University Law Review,* vol. 5, at p. 205, Mr. Mendes da Costa discusses this subject very fully. I find it unnecessary to enter into a debate on the matters to which he refers. From what appears hereunder it will become patent why I believe that I can accept the test laid down by Farwell, J., as sufficiently accurate to deal with this application and why I should refrain from entering into the discussion which Mr. Mendes da Costa has initiated.

In any action brought in a court of equity by the original covenantee against the covenantors, evidence might well be different from that laid before me by the applicants in what is really an *ex parte* application. On the evidence I have heard, the covenantee's acts or omissions might also afford a defence to a suit for injunction to restrain the breach of the covenant on the part of the covenantors: see *Chatsworth's Case,* at (Ch.) p. 230. To that should be added the evidence that has been tendered to me of a complete change in the character of the neighbourhood since 1950. This evidence could well establish the defence set out above in the dictum of Farwell, J. But above all, I am affected by the fact that the original covenantee through her counsel appeared before me and said that she did not object to a modification of the covenant. Having regard to the effect of this acquiescence I doubt whether hereafter she could ever be successful in a court of equity to restrain a breach of the contractual obligations by the covenantors. But, as I say, I cannot prophesy what evidence might be led by the covenantee if she were a plaintiff in an action for an injunction, and, accordingly, I do not give any concluded view of this matter. As at present advised on the evidence, however, I think the probabilities are that any such action would fail.

Looking at s. 84, which confers the jurisdiction on the Court, it is to be noticed that the power given to the Court is in relation to "any restriction arising under covenant or otherwise as to the user thereof or the building thereon". The emphasis is on the restriction, rather than the source of the restriction. Undoubtedly it would generally arise from contract. In this case the restriction arises from a covenant. The Court, therefore, clearly has jurisdiction to deal with that restriction. The restriction, as endorsed as an encumbrance on the certificate of title, fits the legislative description. There is no limitation in the statutory provisions as to the character of the applicant. The legislative provision enables "any person interested in any land affected by any restriction" to make an application. Again, the applicants fit the description. They are registered proprietors of land, the certificates of title of which are

endorsed with the restriction. Equally, there is no limitation as to when the application may be made. The section provides: "(1) The Court shall have power from time to time... to discharge or modify any restriction." Furthermore, the Court is empowered by the section to order payment of compensation by the applicant to any person suffering loss in consequence of the order. This would be parallel to any remedy the original covenantee may have at common law to recover damages for breach of contract. It therefore could deal justly on the application with any covenantee if it believed the modification or discharge of a covenant would cause the covenantee any loss.

Having regard to these considerations I believe there is clearly jurisdiction in the Court to modify or discharge these covenants, albeit the applicants are the original covenantors. On the other hand I believe a court should be slow to exercise its discretion in favour of such applicants. Just as it has been said in relation to applications under s. 5, *Arbitration Act* 1958, that in granting or refusing a stay the Court should commence with the primary consideration that persons should abide by their contracts. Therefore, the person applying for a stay may rely upon the important fact that the party who initiated proceedings had agreed that disputes should be referred to arbitration. Accordingly, it has been established by high authority that the party applying for a stay has a strong bias in his favour, since he is seeking to keep the other party to his contract. So in this type of application where it is made by an original covenantor, I believe the Court should approach the application in a similar fashion. It should entertain a strong bias against the original covenantor seeking to modify or discharge a restriction on his title brought about by his own voluntary act in entering into a contract with the covenantee thereon.

The peculiar circumstances of this case, however, and, in particular, the supine acquiescence of the original covenantee to the wholesale failure by covenantors to observe restrictive covenants imposed on lots sold by her in this subdivision lead me to the conclusion that the influence of such strong bias completely loses its effectiveness. She by her conduct shows that she placed or places little reliance on such contractual obligations or restrictions. Accordingly, in this case I believe I should exercise my discretion in the applicants' favour. I will be prepared to modify the covenant in such a fashion as to enable the applicants to erect one house on each of the allotments shown on their proposed subdivisions. I shall also make an order for costs in favour of Mrs. Syme, the original covenantee, as I foreshadowed when the matter was last before me.

Applications granted; order accordingly.

Solicitors for the applicants: *Oswald Burt & Co.*

Solicitors for the original covenantee: *Mills, Oakley & McKay.*

JEREMY DARVALL
BARRISTER AT LAW