SUPREME COURT OF VICTORIA

Re WITHERS

ANDERSON, J.

5, 6 and 7 November, 5, 15 December 1969

Real property—Restrictive covenant—Applicant seeking to modify restriction which prevented any subdivision of land for residential purposes—Applicant partially successful—Objections by objectors unsuccessful but not frivolous—Costs—Discretion of court—*Property Law Act* 1958 (No. 6344), s. 84.

Unless objections taken to the removal or modification of a restrictive covenant are frivolous, an unsuccessful objector may, in the discretion of the Court, be entitled to his costs.

Re Markin, [1966] V.R. 494, and *Re Shelford Church of England Girls' Grammar School* (unreported, 6 June 1967, Lush, J.), referred to.

Application

Application was made by the applicant for modification of a restrictive covenant, which application was opposed by the objectors. The judgment on the question of costs only is reported.

H. C. Berkeley, for the applicant.

J. L. Dwyer, for the objectors.

Cur. adv. vult.

Anderson, J., delivered the following written judgment: What I am about to say relates to the question of costs. I have had the advantage of reading written submissions by counsel for both the applicant and the objectors. Counsel for the appellant submitted that in all the circumstances there should be no order for costs. Counsel for the objectors submitted that the objectors should have their costs.

The applicant, Withers, made application for a modification of a restrictive covenant on certain land which he owned at Flinders, being lot 45 of the Rest estate on plan of subdivision No. 30518. The Rest estate was a subdivisional estate comprising 96 lots and one of the features of the estate was that the lots were all substantially larger than what is customary in a subdivision, being in almost all cases at least a half acre or more in area, and some of the lots were of substantially greater size. Lot 45 had an area of a little over five acres and in common with almost every other lot on the Rest estate there was a restrictive covenant on it restricting its use to one dwelling-house with outhouses and garage. The applicant desired to have the covenant modified to enable lot 45 to be divided into eight building blocks. The application was opposed by 16 owners of various lots in the Rest estate, who, though not successful in their objections for reasons which I have already given, were instrumental in reducing the number of lots into which lot 45 may be divided from eight to five, thereby preserving a rough parity with the existing blocks on the Rest estate. The applicant was thus only partially successful. Mr. Dwyer, who appeared for the objectors, has asked for an order that the successful applicant pay the objectors' costs.

A modification of the covenant in the manner ultimately allowed is obviously a great advantage to the applicant as he has five attractive

building lots whereas formerly he had only one. The restrictive covenant was for the benefit of at least the majority of the objectors who were entitled to object, for they were entitled to seek to maintain the restriction subject to which the applicant and his predecessor in title and they themselves had bought. Indeed, because notices had been served upon them, they were in effect invited to object. Their objections, though unsuccessful, were not frivolous for they entertained genuine fears that their choice and highly desirable locality would be despoiled by intense subdivision and they were, as already indicated, sufficiently effective in their objections, to limit the number of lots to five instead of the eight which was the initial objective of the applicant. Furthermore, it was not until the final stages of the hearing before me that the applicant indicated that he would be satisfied with only six lots, and in the ultimate result he has had to be content with five. As Mr. Dwyer pointed out, proceedings of this nature are not ordinary proceedings where spoils go to the victor. The successful applicant has sought and obtained a very substantial concession or benefit, when all the objectors have done has been to seek to preserve the *status quo* and to hold the applicant to the covenant which bound him. In *Re Markin*, [1966] V.R. 494, Gillard, J., awarded costs to an unsuccessful objector to the modification of a restrictive covenant. Similarly, in *Re Shelford Church of England Girls' Grammar School* (unreported, 6 June 1967) Lush, J., as well as ordering the successful applicant to pay $500 compensation, also ordered the applicant to pay the objector's costs. Though costs are a matter of discretion and each case stands on its particular facts, such cases as these indicate that, unless the objections taken are frivolous, an unsuccessful objector in a proper case should not have to bear the bitter burden of his own costs when all he has been doing is seeking to maintain the continuance of a privilege which by law is his. The present case is, in my opinion, a case in which I should order the applicant to pay the objectors' cost in these proceedings, and, accordingly, I so order.

Order accordingly.

Solicitors for the applicant: *Cook & McCallum.*

Solicitors for the respondents: *Haines, Blakie & Polites.*

ANTHONY E. RADFORD
BARRISTER-AT-LAW