SUPREME COURT OF VICTORIA

Re ALEXANDRA

MENHENNITT, J.

26-28 February, 1, 2, 5 March 1979

Real property — Restrictive covenant — Application for discharge or modification — Restriction impeding reasonable use of land — Restriction not securing practical benefits to other persons — Property Law Act 1958 (No. 6344), s. 84.

Section 84(1) of the Property Law Act gives the Court power to discharge or modify any restriction arising by covenant as to the user of land upon being satisfied —

(*a*) that by reason of changes in the character of the property or the neighbourhood or other circumstances . . . which the Court deems material, the restriction ought to be deemed obsolete; or that the continued existence thereof would impede the reasonable user of the land without securing practical benefits to other persons . . . ;

(*b*) . . .

(*c*) that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction.

Held: (1) Paragraph (*a*) contains two independent limbs, and the opening reference to changes or circumstances governs only the first limb which relates to the restriction being obsolete.

Re Robinson, [1972] V.R. 278 at p. 282, not followed.

(2) To establish that the continued existence of a restrictive covenant would impede the reasonable user of the land under the second limb of s. 84(1)(*a*), it must be shown that the covenant hinders to a real and sensible degree the reasonable use of the land having due regard to its situation, the surrounding property, and the purpose of the covenant.

Re Chey and Galton's Application, [1957] 2 Q.B. 650 at p. 663; [1957] 3 All E.R. 164 at p. 171; *Re Stani,* unreported, Full Court, 7 December 1976, applied.

(3) To establish that the continued existence of the restrictive covenant would not secure practical benefits to other persons, there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the persons who are enjoying the benefit of it.

Re Henderson's Conveyance, [1940] Ch. 835 at p. 846; *Re Stani, supra,* applied.

(4) To establish under s. 84(1)(*c*) that the proposed modification of a restrictive covenant will not substantially injure the persons entitled to the benefit of the restriction; the test to be applied is similiar to the test applicable in determining whether, under s. 84(1)(*a*), the continued existence of the restriction would secure practical benefits to other persons.

Re Stani, supra, applied.

(5) The relaxation of a restrictive covenant in relation to one lot on a plan of subdivision does not guarantee that similar relaxations will be granted in respect of other loss on the same plan of subdivision.

Re Stani, supra, discussed.

(6) The fact that the intention of the subdivider in imposing the restrictive covenant would be interfered with, in circumstances where that intention remained capable of being carried into effect, does not necessarily mean that practical benefits do accrue from the covenant, or that its discharge would injure those entitled to its benefit, under s. 84(1)(*a*) second limb, or s. 84(1)(*c*), respectively.

Re Stani, supra; Re Cook, [1964] V.R. 808; *Re Robinson,* [1972] V.R. 278; *Re Parimax (S.A.) Pty. Ltd.,* [1956] S.R. (N.S.W.) 130 at p. 133; *Heaton v. Loblay,* [1960] S.R. (N.S.W.) 332 at p. 335; *Perth Construction Pty. Ltd. v. Mount Lawley Pty. Ltd.* (1955), 57 W.A.L.R. 41 at p. 47; applied.

Application

This was an application under s. 84 of the *Property Law Act* 1958 for discharge or modification of a restrictive covenant. The relevant facts appear in the headnote and in the judgment.

B. F. Monotti, for the applicants.

J. G. Larkins, for the objectors.

Cur. adv. vult.

Menhennitt, J.: This is an application pursuant to s. 84 of the *Property Law Act* 1958 for modification of a restrictive covenant. The application is made in respect of Lot 203 on registered Plan of Subdivision No. 8402.

The restrictive covenant over that land was imposed initially by a transfer dated 29 April 1927. The transfer in question happened to cover two lots of land: Lots 203 and 204. I am concerned solely with the covenant in so far as it applies to Lot 203. The covenant is in these terms — that the registered proprietors for the time being of Lot 203 covenant that the land: —

"shall not any any time be used except for private residential purposes only and that no shop laundry factory business establishment school almshouse charitable institution or Church nor any hall or building of any kind for use wholly or partly for any religious or educational or business or charitable purpose or for public entertainment of any kind whatsoever nor any hoarding for advertisement or display shall at any time be erected or suffered on the land hereby transferred and that no such premises hall or building shall at any time be used or suffered to be used for any purposes (except private residential purposes only) hereinbefore indicated or mentioned and that no quarrying operations shall at any time be carried on in or upon or suffered to be carried on in or upon the land hereby transferred and that no marl stone earth clay gravel or sand shall at any time be dug carried away or removed or suffered to be dug carried away or removed from the land hereby transferred and that not more than one dwelling house and that roofed with tiles or slates and not otherwise shall at any time be erected or suffered on each of the lots hereby transferred and that such dwelling house shall (exclusive of all Architect's fees and the cost of erecting any fences) cost for erection not less than the sum of Five hundred pounds and that no paling or close iron fences shall at any time be erected or suffered on the land hereby transferred."

The modification which is sought is as follows, namely, by substituting for the words: "that not more than one dwelling house and that roofed with tiles or slates and not otherwise shall at any time be erected or suffered on each of the lots hereby transferred" the following words: "that not more than two dwelling houses and those roofed with tiles or slates and not otherwise shall at any time be erected or suffered on Lot 203 on Plan of Subdivision number 8402 provided that one of such dwelling houses erected or suffered on the said Lot 203 shall be erected upon a separate allotment created within the said Lot 203 by a registered Plan of Subdivision which allotment shall have a frontage to The Boulevard of not less than 14.48 metres and an area of not less than 929 square metres and

that no portion of such dwelling house erected upon such allotment shall be nearer to the boundary dividing Lot 203 from the adjacent Lot 202 than 15.24 metres and that no portion of the roof of such dwelling house shall exceed a height of 28.8 metres according to the Melbourne and Metropolitan Board of Works datum level".

The Plan of Subdivision to which I have referred (No. 8402) contains 206 lots. I conclude from the affidavit of Julie Tootell sworn 14 August 1975, and the exhibit thereto, that all the lots on that Plan of Subdivision, numbering 206 in number, are, unless in one case modified by court order, subject to a restrictive covenant in identical terms to that governing Lot 203 or terms which are substantially identical thereto.

It is convenient to state at the outset some facts to which I shall refer in more detail subsequently. A fact which dominates the whole of this application is the fact that Lot 203, the subject of the present application, is by far the largest lot on the whole subdivision. It has an area of 46,886 square feet. The next largest lot on the subdivision, Lot 204, contains, by comparison, only 31,000 square feet. In all these instances, I refer to the sizes of the lots on the original Plan of Subdivision. Thirty-one thousand square feet is somewhat slightly less than two-thirds of the size of Lot 203. Of the 206 lots in the Plan of Subdivision — and again I refer in all instances to the areas as shown on the original Plan of Subdivision — 24 were less than 10,000 square feet in area; 31 were 10,000 square feet in area or less; 53 were in area more than 10,000 square feet but up to and including 11,000 square feet; and 58 were up to 12,000 square feet but more than 11,000 square feet.

What I have just said reveals that of the 206 lots on the original Plan of Subdivision, 142, which is 66.9 per cent (that is slightly more than two-thirds) were in area 12,000 square feet or less. Nine only of the 206 lots on the Plan of Subdivision exceeded 20,000 square feet. I have already referred to Lot 203 and Lot 204 which was 31,000 square feet; no other lots exceeded 30,000 square feet. So that there were seven more than 20,000 square feet and under 30,000 square feet. I reiterate that I shall refer to those facts subsequently.

The application is made pursuant to s. 84(1)(*a*) and (*c*) of the *Property Law Act* 1958, and I read those sections: —

"84. (1) The Court shall have power from time to time on the application of any person interested in any land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) upon being satisfied —

(*a*) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Court deems material the restriction ought to be deemed obsolete or that the continued existence thereof would impede the reasonable user of the land without securing practical benefits to other persons or (as the case may be) would unless modified so impede such user; or

. . .

(*c*) that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction:

. . ."

Those provisions contain three bases for the Court as a matter of discretion modifying a restrictive covenant. It appears to me that para. (*a*) contains two independent sets of provisions and that the first four lines of

cl. (*a*) (down to "obsolete") stand on their own, and that the remaining portion of cl. (*a*) stands on its own. Putting it another way, it appears to me that the words "by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Court deems material" govern only the first four lines of cl. (*a*) and do not govern the second part of cl. (*a*) commencing with the words "or that the continued existence thereof . . . ", etc. I reach that conclusion by reason of the presence of the word "that" after the word "or" in the fifth line of the clause. If it were intended that the words which I have quoted from the first part of cl. (*a*) should govern the second part of cl. (*a*), the word "that" would be quite inappropriate and, on the contrary, grammatically those words would govern the second part of cl. (*a*) only if the word "that" were not present.

On the aspect I respectfully disagree with what Adam J. thought was the meaning of the clause in the case of *Re Robinson,* [1972] V.R. 278 at p. 282. I do not understand what his Honour there said to be a concluded view but, in any event, with great respect, for the reasons I have given, I cannot agree with it.

It is convenient to deal with other aspects of the law before proceeding to the facts of the present case. I am in the happy position of having a judgment of the Full Court on the application of Anton Stani (delivered 7 December 1976) which decides the manner in which the provisions to which I have referred should be construed and applied. For the purposes of my decision, apart from what I have just said as to the meaning of the two parts of cl. (*a*), I propose to refer only to the second part of cl. (*a*) and to cl. (*c*), viz. in (*a*) "that the continued existence thereof would impede the reasonable user of the land without securing practical benefits to other persons or (as the case may be) would unless modified so impede such user"; and I do not repeat (*c*).

It appears to me that as to the issue whether the continued existence of the restrictive covenant would impede the reasonable user of the land, the Full Court has adopted and applied the concepts applicable thereto stated by Lord Evershed, M.R. in *Re Ghey and Galton's Application,* [1957] 2 Q.B. 650, especially at p. 663; [1957] 3 All E.R. 164 of p. 171; where Lord Evershed, M.R., said: "But I think it must be shown, in order to satisfy this requirement, that the continuance of the unmodified covenants hinders, to a real, sensible degree, the land being reasonably used, having due regard to the situation it occupies, to the surrounding property, and to the purpose of the covenants."

The Full Court continued: "See also *Re Miscamble's Application,* [1966] V.R. 596 at p. 603. Cf. *Re Robinson, supra,* at p. 283."

It is true that the Full Court introduced its reference to that passage by the words: "In considering whether the restriction would, unless modified, impede the reasonable user of the land, the learned Judge was in our opinion correct in having regard to the purpose of the covenant:", but having quoted the passage from Lord Evershed, which I have quoted, the Full Court, I think, intended the whole passage to be applicable because it continued: "We are by no means convinced that the learned Judge was in error in so far as he concluded that the continued existence of the restriction would not impede the reasonable user of Lot 94."

In that passage, in my respectful view, the Full Court was adopting the whole of the considerations stated by Lord Evershed as to the meaning of, "impeding the reasonable user of land"; and the passage I have quoted from the Full Court judgment makes it manifest that that is essentially a question of fact.

As to the concepts in para. (*a*) and (*c*), viz. in (*a*) "without securing practical benefits to other persons" and the concept in para. (*c*) of "substantially injuring the persons entitled to the benefit of the restriction", the Full Court said at p. 10: "In the long run the test to be applied" — that is as to (*c*) — "is similar to that to be applied in determining under para. (*a*) whether the continued existence of the restriction would secure practical benefit to other persons: see *Re Ghey and Galton's Application,* [1957] 2 Q.B. at pp. 659-60, and *Re Robinson, supra,* at p. 284."

As to the former of those concepts, that is, "without securing practical benefits to other persons" the Full Court quoted with approval what is described as the final sentence from a well-known passage in the judgment of Farwell, J., in *Re Henderson's Conveyance,* [1940] Ch. 835 at p. 846, viz.: —

"If a case is to be made out under this section, there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the person who is enjoying the benefit of it, or that by reason of a change in the character of the property or the neighbourhood, the restriction is one which is no longer to be enforceable or has become of no value."

That passage from the judgment of Farwell, J., is, in my respectful view, intended as a paraphrase of both portions of cl. (*a*) of s. 84(1) because, for the reasons I have given, the reference to changes "in the character of the property or the neighbourhood" or other circumstances, are relevant only to the first half of cl. (*a*), and I do not understand the Full Court to be deciding to the contrary. Accordingly, the relevant part of Farwell, J.'s judgment which states the test applicable to the concept of, "without securing practical benefits to other persons" is this —

"If a case is to be made out under this section, there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the person who is enjoying the benefit of it . . . "

I emphasize the presence of the word "reasonable" both in the section itself and in the restatement by Farwell, J. The Full Court made it clear that this is essentially a question of fact because, having quoted from Farwell, J., it continued: "There was no such evidence in this case."

The Full Court went on to say: "Moreover, we agree that any alteration to the design of the original subdivision would affect the quality of living in the area and in particular would affect those living in the immediate vicinity of Lot 2 in that any relaxation of the restriction imposed by the covenant would almost certainly lead to further applications of a similar nature, resulting in a detrimental change to the whole subdivision."

In my view that statement by the Full Court was a conclusion of fact drawn by the Full Court from the whole of the circumstances in that case, including in the nature of the subdivision. In my view it is not stated to be nor was it intended to be a statement of universal fact or a statement of law. In other words I do not understand the Full Court to have said that in every case it is inevitable that the relaxation of a restrictive covenant in respect of one lot will almost certainly lead to further applications. I understand the Full Court to be referring, in any event, only to successful applications, but I do not understand them to say that that must necessarily follow in the case of every subdivision containing a restrictive covenant. It appears to me that what the Full Court was there saying was a conclusion of the fact which it drew on all the evidence before it in relation to that particular subdivision. It did not lay it down as being a proposition of law of an invariable conclusion in every case.

As to the concept in (*c*) namely: "that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction", I repeat that the Full Court said at p. 10 in its reasons: "In the long run the test to be applied is similar to that to be applied in determining under para. (*a*) whether the continued existence of the restriction would secure practical benefit to other persons."

The Full Court made it quite clear that this again is essentially a question of fact because in the second paragraph following the one I have just read they say: "The function of an appellate court upon appeal from the decision of a judge sitting as a tribunal of fact has, of course, been the subject of much judicial consideration"; and that and the whole passage that follows make it quite clear that what the Full Court was doing was considering whether it had been demonstrated that the finding of fact made by the learned trial judge was erroneous. They said so quite expressly at p. 12 when they said: "Having reconsidered for ourselves the whole of the facts, we are of the opinion that the finding of the learned Judge cannot be shown to be erroneous."

In the course of their reasons and immediately before the passage which referred to the function of an appellate court upon appeal from the decision of a judge sitting as a tribunal of fact the Full Court said: "The learned trial Judge ultimately concluded that in the instant case the modification sought did involve a real and substantial injury because the residents in this subdivision had the benefit of a restriction which assured a limited density of population and protected them from the detrimental effect of increased density. This benefit would be eroded by the modification sought in this instance. We are disposed to agree that, if the covenant were modified as sought, this might well be used to support further applications resulting in further encroachment and in the long run the object sought when the covenant was imposed would be completely defeated. An examination of the plan of subdivision shows that there are a number of allotments in respect of which an application such as this could be made, supported by the same arguments as were used to justify this application."

That whole passage, in my view, makes it quite clear that what the Full Court was there doing was making a finding of fact or being disposed to agree with a finding of fact made by the learned trial Judge. It was, in my view, essentially an inference to be drawn from the facts in that case. The fact that the Full Court referred to an examination of the plan of subdivision shows that it was particular to that case, and I reiterate that I do not understand the Full Court there to be saying that it is an invariable conclusion in respect of all plans of subdivisions, or that it is a proposition of law. All the Full Court was saying, as I understand it, was that that was the conclusion the learned trial judge reached in that case, and a conclusion with which they were independently disposed to agree, having examined the evidence, the covenant, and the plan of subdivision.

It is convenient at this point to deal with a submission which was made on behalf of the objectors in this case, and I have so far not referred to the fact that counsel appeared for four objectors, namely the registered proprietors of Lots 189, 202, 187 and 117 on the plan of subdivision. In the course of his final address counsel for the objectors eventually came back to a proposition which he had reiterated throughout the hearing. At an earlier stage in his final address he had stated the test in relation to securing practical benefits and substantial injury in a way which was closer to the true test when he enunciated the test in this way, namely, would the proposal erode, in a significant way, the benefits intended by the

subdivider to those intended to have the benefits of the covenant? That is not an adequate restatement of the test which I have already enunciated as laid down by the Full Court but, having put the test in that way, he then came back to the contention which he time and again throughout the hearing was submitting was the correct interpretation of the provisions, and he put it in this way: his submission was that if the intention of the subdivider was interfered with at all in circumstances where that intention is still capable of being carried into effect, then that is a substantial injury to the person who is entitled to the benefit of the covenant. In my view that is an entirely erroneous statement of the relevant portions of the second half of cl. (*a*) and the relevant part of cl. (*c*) of s. 84(1) of the *Property Law Act* 1958. Stated in the way in which counsel for the objectors stated it, it is, in my view, manifestly erroneous because it reads out of the concluding half of cl. (*a*) the word "practical" and it reads out of cl. (*c*) the word "substantially".

The decision of the Full Court in *Stani's Case,* to which I have already referred, also, in my view, makes it quite clear that such a proposition is erroneous. It was submitted that it was a principle of universal application, and although it was not conceded that it was a proposition of law, it was enunciated as if it were and, in my view, the Full Court decision and reasons to which I have referred make it quite clear that the expression "without securing practical benefits" was essentially a question of fact and not a universal proposition and, likewise, that the concept of substantially injuring the persons entitled to the benefit of the restriction is essentially a question of fact and not a universal proposition, nor one of law. The proposition as enunciated by counsel for the objectors finds no support in any of the cases on which he relied, namely the decisions in *Re Cook,* [1964] V.R. 808 or in *Re Robinson,* [1972] V.R. 278, or the decision in the first instance in *Re Stani* by Gillard, J. It is also, as counsel for the applicants rightly pointed out, inconsistent with the decisions and reasoning in *Re Parimax (S.A.) Pty. Ltd.,* [1956] S.R. (N.S.W.) 130 at p. 133; *Heaton v. Loblay und Anor.,* [1960] S.R. (N.S.W.) 332 at pp. 335-6; and *Perth Construction Pty. Ltd. v. Mount Lawley Pty. Ltd.* (1955), 57 W.A.L.R. 41 at p. 47.

[With respect to the land the subject of the application his Honour then made various findings of fact relating to both the second limb of para. (*a*) and also para. (*c*) of s. 84(1) of the *Property Law Act* 1958 and, based upon those findings of fact and for various reasons which he gave, his Honour made the following ultimate findings:]

I find that the continued existence of the restrictive covenant, unless modified in the manner in which the applicants seek, would impede the reasonable user of their land without securing practical benefits to other persons, and also that the proposed modification will not substantially injure the persons entitled to the benefit of the restriction.

Accordingly, for all the reasons I have given, I order that the restrictive covenant contained in Instrument of Transfer No. 1316661 be modified in so far as it binds or restricts the user of Lot 203 on Plan of Subdivision No. 8402 and being the whole of the land described in Certificate of Title Volume 8197 Folio 033 by substituting for the words "that not more than one dwelling house and that roofed with tiles or slates and not otherwise shall at any time be erected or suffered on each of the lots hereby transferred" which are now contained therein, the words "that not more than two dwelling houses and those roofed with tiles or slates and not otherwise shall at any time be erected or suffered on Lot 203 on Plan of Subdivision number 8402 provided that one of such dwelling houses

erected or suffered on the said Lot 203 shall be erected upon a separate allotment created within the said Lot 203 by a registered Plan of Subdivision which allotment shall have a frontage to The Boulevard of not less than 14.48 metres and an area of not less than 929 square metres and that no portion of such dwelling house erected upon such allotment shall be nearer to the boundary dividing Lot 203 from the adjacent Lot 202 than 15.24 metres and that no portion of the roof of such dwelling house shall exceed a height of 28.8 metres according to the Melbourne and Metropolitan Board of Works datum level".

[Discussion ensued as to costs. His Honour said:]

In this matter both sides have asked for, in effect, an order for costs.

[His Honour then discussed and made findings about various aspects of the applications for costs by both the applicants and the objectors and continued:]

The order for costs which I make is as follows:

It is ordered that the costs of the objectors up to and including 29 May 1975 be taxed and paid by the applicants. It is ordered that the costs of the applicants since 29 May 1975, including reserved costs, be taxed and paid by each and all of the objectors, on the basis that the applicants are entitled to their costs from each objector — but, of course, not more than the total amount of costs. I will certify for counsel.

Orders accordingly.

Solicitors for the applicants: *Mallesons.*

Solicitors for the objectors: *Galbally & O'Bryan.*

RICHARD BOADEN
BARRISTER-AT-LAW