[¶54-178] In the matter of Re: Ulman & Anor.
Supreme Court of Victoria.
Judgment delivered 27 September 1985.
Full text judgment below.

Conveyancing — Restrictive covenant — Single-storey residences only — Neighbours proposed extensions to upper part of house — Whether extensions breached covenant — Whether modification of covenant injured persons entitled to benefit — Property Law Act 1958, sec. 84.

The appellants ("the Cohens") and the respondents ("the Ulmans") were neighbours. The Ulmans decided to extend the upper part of their house. The Cohens were entitled to the benefit of a restrictive covenant which bound the Ulmans to a single-storeyed residence. The Ulmans considered the extensions to be an extension of an attic and not a second storey. The Ulmans applied to the court for an order modifying the covenant to expressly permit the making of the extensions. In an unopposed hearing the Master ordered that the covenant be modified to permit the planned extensions. The Cohens appealed. They argued that the extensions constituted a second storey because parts of the upper rooms projected out from the roof slope in the form of a dormer. The Ulmans contended that the extensions were merely attic rooms.

The Ulmans argued that if the extensions breached the covenant the court should modify the covenant to allow the extensions to be made and that the proposed modification would not substantially injure the Cohens.

***Held:* appeal dismissed.**

1. Part of the proposed extensions were second-storey rooms and would be in breach of the covenant.

2. The proposed modification to the covenant would not substantially injure the appellants.

3. The test of whether the modification would substantially injure the persons entitled to the benefit of the covenant was to compare the benefit intended to be conferred and actually conferred by the covenant with the resultant benefits remaining if the covenant was modified.

[*Headnote by the CCH CONVEYANCING EDITORS*]

Before: McGarvie J.

Editorial Comment: Variation of the terms of a covenant pursuant to sec. 84(1) of the *Property Law Act 1958* is a matter which is not often before the courts. The decision highlights the nature of the evidence which must be obtained in order that such an application might be successful. The criterion for the subjective assessment by the court must take, as its reference point, the extent to which the foreshadowed breach affects the property — not the totality of the proposed action.

McGarvie J.: The appellants, Mr and Mrs Cohen, appeal against an order made by Senior Master Mahoney under sec. 84 of the *Property Law Act 1958* on the application of the present respondents, Dr and Mrs Ulman.

[Facts]

The Cohens' house property, No. 1A on the western side of Kooyong Road, Caulfield, is immediately to the north of the Ulmans' property, No. 3 Kooyong Road. The Cohens are entitled to the benefit of a restrictive convenant created in 1926 which binds the Ulmans and provides "that only one single-storeyed brick or concrete residence (if with attic rooms the windows of the same not to face the balance of the land in the said certificate of title) shall be erected upon" the Ulmans' land. The balance of land referred to in the covenant was land to the north of the

Ulmans' land. The covenant also provided that the land which is now the Ulmans' land should not be subdivided into a lesser frontage than 50 feet to Kooyong Road.

The Ulmans desired to build some extensions to the upper part of their house in accordance with a plan shown on Drawing 6/1000 which had been prepared for them by A.V. Jennings Home Improvements. The Ulmans considered the extensions to amount to an extension of an attic. To place beyond doubt their right to make the extensions, they applied to the Court for an order modifying the covenant so that it expressly permitted the making of the extensions. In an unopposed hearing the Senior Master ordered that the covenant be modified by adding a proviso that nothing in the covenant should preclude the modification of the dwelling house in accordance with the plan which was annexed to the order. The annexed plan is a copy of the Drawing 6/1000, one sheet of which shows the floor plan of the original upper rooms and that of the proposed upper rooms; the other sheet shows elevations which would result from the proposed extensions.

The affidavits before me deal in some detail with the circumstances in which the extension work was commenced early last August and the order of the Master was later made on 22 August. At various stages a number of issues were canvassed before me, but eventually counsel agreed that there are only three issues before me:

(1) Are the extensions attic rooms?

(2) If not, would the construction of the extensions substantially injure the Cohens?

(3) If not, is the proper exercise of discretion to make an order such as was made by the Senior Master?

On the extensions there are to be no windows which would face north to the Cohens' land. There will therefore be no breach of the covenant if, when the extensions are completed, the Ulmans' house remains a single storey residence with attic rooms.

Attic Rooms or Second Storey

Mr J. Santamaria, for the appellants, submits that the extensions constitute a second storey. Mr Chernov Q.C., who appears with Mr Watts for the respondents, submits that the extensions consist of attic rooms.

The Ulmans' house before the extensions were commenced had four rooms above the level of the ground floor ceiling. These rooms were two bedrooms, a bathroom and a store room. In the main, the roof over these upper rooms follows the contours which that type of roof would be expected to follow if there were no rooms above the ground floor ceiling. Parts of the upper rooms project beyond the normal contours of the roof. In the front of the house the upper portion of the eastern end of one of the bedrooms projects out from the surrounding roof which slopes towards the front of the house. It projects in the form of a dormer, which is a projecting structure built out from a sloping roof with a vertical window or windows at the end. The meaning of the word is given and there is an illustration of a dormer in *The Macquarie Dictionary*, p. 542. The dormer at the front of the house is shown in the photographs, Ex. GNL 1 and GNL 7. Before the commencement of the extensions there was a similar dormer at the west end of the other bedroom facing the back of the house. It is shown in the photographs, Ex. GNL 2 and GNL 6. It seems likely that there was a similar structure facing south from the upper bathroom and stairwell, but the evidence does not make that clear.

The planned extensions at the upper level are quite considerable. The perimeter of the floor plan of the original upper rooms was broadly in the shape of a rectangle with one bedroom at the front, another bedroom at the rear, and the bathroom and store room in between them. The broad effect of the planned extension would be to substitute for the rear bedroom a complex of three bedrooms, a shower room and a toilet. The extension would go further to the rear of the house and would be two rooms in width instead of one room wide. Bedrooms 3 and 4, the two rooms at the west end of the extension, would be almost entirely located to the west of the previous western limit of the upper rooms.

Elevations A, B and C on the plan show that around bedrooms 3 and 4 the roof of the house will rise at an angle from the level of the rainwater guttering on the north, west and south edges of the roof and meet the vertical walls of those bedrooms at heights which vary but are always more than half way up the wall. Thus the outer aspect of those walls of bedrooms 3 and 4 will be seen to extend vertically down from the eaves for less than half the wall

height, where they will meet the sloping roof which will obscure the lower part of the walls.

The essential question to be decided is whether bedrooms 3 and 4 are, within the meaning of the covenant, attic rooms or rooms of a second storey.

Mrs Leigh, a design consultant employed by A.V. Jennings Home Improvements, who was the person who arranged with the Ulmans to have the plan for the extensions prepared, swore an affidavit. She says that the plan is for the existing attic structure to be extended towards the rear of the house and widened. She stated that the plan calls "for the alterations to be built with the dormer (attic) type construction which currently exists at the front of the house". On the basis of her five years' experience in the building industry, she gives her opinion that the alterations amount to no more than an extension to an existing attic structure.

The Cohens rely on the affidavit of Mr Fitch, an experienced architect. Having inspected the premises, he gives his opinion that the additional rooms are not properly described as attic rooms because there is no profile of the roof within them. He says that because of the lifting of the existing line of roof and the fact that the walls of the rooms are not broken between the ceiling and the floor, they are properly described as a second storey.

The words of the covenant forbid a second storey but permit rooms which are attic rooms. My concern is not to decide what, in common general meaning, is an attic and what is a second storey. My concern is to decide what is an attic room and what is a second storey room within the meaning of this particular convenant. The covenant makes it clear that within its meaning the two concepts are to be treated as mutually exclusive. A room above the ground floor ceiling is to be treated as one or the other. This follows from the covenant proceeding on the basis that while the house may not have a second storey, it may have an attic. If a room is an attic room, it is not, within this covenant, a second storey room.

In other contexts the upper portion of a house could be called both an attic and a second storey. This is seen in some of the dictionary meanings mentioned later. In *Ward v. Paterson* (1929) 2 Ch. 396 at pp. 398-399 what both parties in this case describe as an attic was called a second storey.

Although the concepts of an attic and a second storey have a particular meaning in the covenant, it is useful to commence by examining the various general meanings of the word "attic".

On this question, the only expert opinions before me in evidence are those mentioned above. I have not been referred to any works of authority upon the meanings. In the case mentioned above, *Romer* J. had to decide the meaning of the word "bungalow" in a covenant. He held it was not an English word but a word of Indian derivation. He referred to it as a word of art and said that he must find its meaning from the evidence of persons acquainted with that art. He therefore looked to the evidence of architects rather than to dictionaries.

The word "attic", though apparently Greek in origin, has been in use in ordinary English language for several centuries: see *A New English Dictionary*, Murray ed. (1888) Vol. 1; pp. 551-552. It is described there as the top storey of a building under the beams of the roof, or a garret. The same dictionary shows that the word "storey" has been in use in English for centuries. The words are to be construed as part of ordinary English language in the context in which they are used: *Attorney-General (ex relatione Jackman) v. Griffith* (1934) V.L.R. 338; *Ex parte High Standard Constructions Ltd.* (1928) 29 S.R. (N.S.W.) 274 at pp. 278; *In re Marshall and Scott's Contract* (1938) V.L.R. 98 at p. 99. It is appropriate in this process to consult dictionaries.

I look at other dictionaries. In the *Concise Oxford Dictionary* the most relevant meaning of "attic" is "highest storey of a house; room in this". In *The Macquarie Dictionary* the first two meanings are "(1) That part of a building, especially a house, directly under a roof; a garret. (2) A room or rooms in that part, frequently used for storage".

The *New English Dictionary* (Murray ed.) describes a garret as "a room on the uppermost floor of a house; an apartment formed either partially or wholly within the roof; an attic". The *Concise Oxford Dictionary* gives the meaning of "garret" as "room (usually squalid) on top floor or partly or entirely in

roof; attic''. The meaning given the word ''garret'' in *The Macquarie Dictionary* is unhelpful for present purposes.

In the context in which the words are used in the covenant it is my opinion that an attic room is an upper room which is within the roof, and a second storey room is one above the ground floor ceiling which cannot be described as being within the roof of the house.

In reaching that conclusion I take into account the intention, purpose or object of the covenant. Clearly the intention was to confer benefits. One identifies the benefits intended to be conferred by looking at the covenant on the background of all the circumstances, and particularly the relationship between the land bound by and the land having the benefit of the covenant. One asks what practical aspects of the enjoyment of the land which has its benefit does it appear that the covenant was intended to protect and preserve? The restriction of buildings to one single-storeyed residence was obviously designed to limit the height of the building. The height was to be limited to the height of a single storey with a roof on top of it. A second storey was prohibited. If the second storey had been permitted, the building could have reached a height of two storeys with a roof on top. As an attic is to be permitted, it must be an attic of a type which enables a distinction to be drawn in a practical way between it and a second storey.

The benefits intended to be conferred on the occupiers of the Cohens' land were such practical benefits of enjoyment as result from the residence of the adjoining land being limited to the height of one storey and a roof.

For the covenant to achieve the intention of limiting the height of the residence to that of one storey and a roof, the word ''attic'' must mean the portion of the house within the roof. That is one of the common general meanings of the word. Thus the dichotomy is between an attic which is within the roof of the single storey and a second storey which is not within that roof.

In considering whether a room is within the roof of the ground floor storey, a distinction is to be drawn between a roof which follows the ordinary planes of a house roof and a roof, such as that over a dormer, which follows its own lines.

If a room is entirely within the roof of the single storey it is beyond argument an attic room within the meaning of the covenant. However, a room which is not entirely built within the roof will not necessarily be precluded from being categorised as an attic room. Often the decision whether a room is within the roof will involve questions of substance and degree. The approach will be similar to that adopted in deciding whether a business is one of a particular description although it has some features which do not fall within that description. The test is to ask whether an ordinary person using ordinary language would say that the business was that of the particular description: *A. Lewis & Co. (Westminster) Ltd. v. Bell Property Trust Ltd.* (1940) Ch. 345; *Labone v. Litherland Urban District Council* (1956) 1 W.L.R. 522; *South Island Motor Union Mutual Insurance Association v. Fire Service Council* (1952) N.Z.L.R. 163.

The test in the present case is to ask whether an ordinary person using ordinary language would say that an upper room is within the roof. As always when questions of degree are involved, borderline cases will arise in which opinions will differ: see *Woollahra Municipal Council v. Banool Developments Pty. Ltd.* (1973) 129 C.L.R. 138 at p. 140.

Under this covenant a dormer structure used for the windows of an upper room will not necessarily deprive a room otherwise built within the roof from being an attic room.

It is a question of degree. It was accepted by the parties before me that the dormer construction at the front of the house at the east end of the most eastern bedroom did not deprive that bedroom of the character of an attic room.

I regard as correct Miss Leigh's description of the extensions towards the back of the house as of a dormer type construction. She treated a dormer type of construction as equivalent to an attic type of construction. I take the view that an upper room substantially built within the roof, which has a relatively small part of it jutting through the roof as a dormer, remains an attic room. However, if all or a relatively large part of an upper room consists of a dormer structure it is not an attic room within the meaning of the covenant.

[Extensions breach covenant]

I consider that the upper portion of bedrooms 3 and 4 is all, or almost all, a dormer structure. This can be seen from an examination of elevations A, B and C in the plan.

The upper parts of the north, west and south walls and the roof of these bedrooms will project above the planes of the roof of the ground floor storey.

I hold that within the meaning of the covenant, bedrooms 3 and 4 are not attic rooms but second-storey rooms.

It follows that the making of the extensions would be in breach of the covenant in its original form.

Whether ground for modification established

Mr Chernov, for the Ulmans, relied on the following part of sec. 84(1) of the *Property Law Act 1958*.

> "The Court shall have power ... on the application of any person interested in any land affected by any restriction arising under covenant ... as to ... the building thereon by order ... to ... 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 —
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> ...
>
> (c) that the proposed ... modification will not substantially injure the persons entitled to the benefit of the restriction."

It is established in respect of that part of the subsection that:

> "From the nature of the proprietary right arising from the restrictive covenant clearly the injury must occur in relation to the person's enjoyment of his property. Such injury can only be properly assessed by a comparison between the benefits intended to be conferred and actually conferred by the covenant initially on the persons entitled thereto, and the resultant benefits, if any, remaining to such persons after the covenant has been modified. If from the evidence, it appears that the difference between the two will not be substantial, then the applicant will have established a case for the exercise of the Court's discretion under paragraph (c)."

Re Cook (1964) V.R. 808 at pp. 810-811 per *Gillard* J.

Mr Santamaria relied primarily on two benefits of enjoyment of the Cohens' land conferred by the covenant which he submitted would be diminished by the proposed modification. The Cohens' house has a second storey and the benefits which it is claimed would be diminished flow from the view to be had from the windows facing south in their sunroom and dining room. The sunroom is on the south-west corner and the dining room is next to the sunroom on the south side of the house. The sunroom window can be seen through the branches of the tree in the photograph, Ex. HA.

It is claimed, first, that the proposed extensions will decrease the view and, second, that the increased bulk of the Ulmans' house will present an oppressive and unattractive appearance when seen from the windows. It is further claimed that as a result of these detriments flowing from the consequences of the extensions, the value of the Cohens' property will be reduced.

I should mention that the issues which I have stated as arising before me do not include all the issues raised in the affidavits. The parties, knowing that whatever happens to this application they will remain neighbours, adopted the mature position of limiting the issues which were argued so as to eliminate from the contest those which would have been productive of ill-will and hostility between them.

Mr Cohen, by leave, gave oral evidence on two subjects, and was shortly cross-examined. This was the only cross-examination. Apart from that evidence, the other evidence is all in affidavits. I had a view of the properties to enable me better to understand the evidence.

I have stated the detriments which the Cohens claim will result to them if the extensions are made. On the application for modification of the covenant, the Ulmans bear the onus of establishing on the evidence that the proposed modification will not substantially injure the Cohens, or the other persons entitled to the benefit of the restriction in the covenant. In a contested application, in considering whether the evidence establishes this, one naturally directs attention to the areas of the detriments suggested by the opposing parties.

I accept the submissions of Mr Chernov based on *Re Cook (supra)*, that the test in this

case is not to compare the view available to the Cohens before the extensions with that which would exist after the extensions were made. The issue of whether the modification will substantially injure the Cohens is to be tested by comparing the benefits intended to be conferred and actually conferred by the covenant initially, with the resultant benefits remaining to them if the covenant is modified. The proper approach is to compare what the covenant before modification permits to be done on the land which it binds with what it would permit to be done after modification. A similar approach on a comparable issue was adopted by *Jacobs* J. in *Re Mason and the Conveyancing Act* (1960) 78 W.N. (N.S.W.) 925 at pp. 927-928.

The test is not to compare what has, in fact, been done before modification with what will be permitted to be done after modification. I give an example. Assume that the restriction in a covenant for the benefit of adjacent land prevents the erection of any building which exceeds six metres in height but before any building has been erected the person bound by the covenant seeks to have it modified so that it will instead prevent the erection of any building which exceeds seven metres in height. To decide whether the proposed modification will substantially injure those entitled to its benefit, one does not compare the enjoyment of their land as it is with vacant land next door, with the enjoyment which would result if a building seven metres in height were built on the subject land. One compares the enjoyment of their land as it would be if a building six metres in height were erected, with their enjoyment if the building erected had a height of seven metres.

I consider that the benefits intended to be conferred and actually conferred by the covenant on those entitled to the Cohens' land are benefits of enjoyment of the type identified by Mr Santamaria in his submission.

The comparison in this case is to be made between (a) the benefits conferred on the Cohens if the Ulmans' house is restricted to being a single-storeyed house with a roof and such projections from the roof as would be consistent with all upper rooms being attic rooms within the meaning of the covenant and (b) their benefits if the house takes the form which the proposed extensions would give it.

As was held by *Menhennitt* J. in *Re Alexandra* (1980) V.R. 55 and by the Full Court in the unreported decision which he applied, the test for determining within para. (c) of sec. 84(1) whether a proposed modification would substantially injure the persons entitled to the benefit of the restriction is similar to the test under para. (a) of whether the continued existence of the restriction would secure practical benefits to those persons. Whether the proposed modification would substantially injure the persons entitled to the benefit of the restrictions in the covenant is essentially a question of fact.

In this particular case it is of more than usual importance not to lose sight of the fact that the comparison is not between the existing house of the Ulmans and the house which would result from the extensions. It happens that the part of the Cohens' view to the south which will be obscured by the proposed extensions was over a portion of the Ulmans' house which had in part a flat roof and in part a low gable roof. The view is shown in the photographs, Ex. GNL 3 and GNL 4. Those exhibits, when compared with elevation A in the plan, give an indication of the effect of the proposed extensions on the Cohens' view. The extensions would extend back to about the level of the chimney shown in those photographs. The evidence shows that, quite apart from the projection above the main roofline of the upper walls and the roof of the most western part of the proposed extensions shown in elevation A, the main ridge of the roof to the east of that would be higher than it originally was.

I compare the benefits of the enjoyment of the Cohens' property if the Ulmans had high gable roofing on their house with such projections as are consistent with rooms which are attic rooms within the meaning of the covenant, with the enjoyment if the proposed extensions are made. A high gabled roof such as I mentioned would have obscured a portion of the view of the sky and trees beyond the Ulmans' house which could be seen from the Cohens' house before the extensions were commenced. Although the ridge of the main roof is to be higher when the extensions are made than it was before, it could have been in that higher position without breach of the restriction in the covenant.

The basic practical question here is whether the projection of the dormer construction at the western end of the extensions above the lines which a high gabled roof might have been

expected to follow, substantially diminishes the enjoyment of the Cohens' property. In deciding that, I bear in mind that dormer structures projecting above those lines were unlikely to have existed on the north side of a truly attic room because of the prohibition of attic windows facing north.

I consider that the reality of the situation is that the proposed projection of the dormer construction at the western end of the extensions would not significantly reduce the enjoyment of the Cohens' property.

Considering the total effect of the proposed extensions, both as to their diminution of the view from the Cohens' property and as to their bulk in proximity to the Cohens' property, I am satisfied that there is no significant injury to that enjoyment of the Cohens' property which was protected by the original covenant.

In practical terms the only part of the proposed extensions which could not have been erected under the original terms of the covenant is the dormer structure which protrudes above the roof line in the vicinity of proposed bedrooms 3 and 4. The nub of the question here is whether that protruding dormer structure as seen from the Cohens' property would significantly reduce their view and significantly present an appearance of nearby bulk. In my opinion, it would do neither of these things to any significant extent. In other words, I consider that the whole of the proposed extensions would not reduce the Cohens' view or present to them an appearance of nearby bulk to a significantly greater extent than if the Ulmans' house had nothing but high gabled roofing above its ground floor ceiling.

Mr Cohen's evidence is that at all times he and Mrs Cohen have informed the Ulmans that their principal concern has been to preserve the aspect to the south from their sunroom window. He says that they believe the view south from the sunroom window substantially will be spoilt by the proposed extensions. He adds that the extensions will be oppressive to them because of the increased bulk of the nearby house. He expresses the view that the extensions will constitute an "eyesore". He indicates that he and his wife will be disadvantaged by having to view from their windows and having close to their living and entertainment areas, a second level of accommodation in the Ulmans' house.

It is established that if the persons with the benefit of the covenant believe that the restrictions in the covenant secure practical benefits a court will regard the removal of the restrictions as a substantial injury unless the belief is clearly unreasonable. Bradbrook and Neave, *Easements and Restrictive Covenants*, pp. 406-407; *Re Callanan* (1970) 2 N.S.W.R. 127 at p. 133; *Re Robinson* (1972) V.R. 278 at pp. 284-285.

In the present case the effect of Mr Cohen's evidence is that the making of the proposed extensions would reduce their amenities from the amenities that they enjoyed when the Ulmans' house took the form it did before the construction of the extensions commenced. This evidence is of minimal assistance in the application of what I regard as the correct test. There is no direct evidence which compares the Cohens' benefits of enjoyment if the Ulmans built to the limit permitted by the covenant, with the benefits of enjoyment if the proposed extensions are made. There is the same deficiency in the evidence of the valuer, Mr Fowler. The effect of his evidence was that the alteration of the Ulmans' house from its original form will diminish the value of the Cohens' property. He gives no indication of the order of such diminution.

I am satisfied that the projecting dormer structure at the west end of the proposed extensions will not in ordinary parlance be an eyesore, and its presence will not to any significant extent reduce the value of the Cohens' property.

Thus, I am satisfied that the proposed modification will not substantially injure the Cohens. As their property is the one most immediately affected by the extensions which would be permitted by the proposed modification, it follows that none of the other persons entitled to the benefit of the restriction in the covenant will be injured substantially by the proposed modification.

Discretion

I have found that the modification will not substantially injure any of the persons entitled to the benefit of the restriction. Mr Cohen speaks in glowing terms of the view which can be seen from their windows. The photographs, Ex. GNL 3 and GNL 4, show that the portion of their view that will be lost if the extensions

are made is a view of portion of house roofs, sky and part of a tree.

It would appear that it is the view to the south west which is the more impressive view from the Cohens' window, and that view will remain. In a southerly direction in this area, except for a portion of the elevated view of the sky, the view equally could have been obscured by a roof built in accordance with the restrictions of the original covenant. I also bear in mind that when modified, the covenant will protect the Cohens against the building of a second storey on the Ulmans' house except to the extent to which a second storey would be authorised by the modification to the covenant.

[Conclusion]

Taking the various considerations into account, I consider the proper exercise of discretion is to order modification of the restriction in the manner sought. The appeal will be dismissed and the order of the Senior Master confirmed.

(Discussion ensued re costs.)

In this case applications have been made by both lots of parties for the costs of the proceedings, so I have those two options or the option of making no order as to costs.

I take the view that this is one of those exceptional cases in which the litigation has been precipitated by the conduct of the legal advisers to the Ulmans and by the Ulmans in commencing the extensions before the order had been made by the Master.

I make it clear that I think that the Ulmans commenced in a most tactful way to seek out the neighbours entitled to the benefit and to seek their consents, and initial consents were obtained. However, I do regard this area as a particularly sensitive area which needs to be handled most delicately if arrangements which have been made are not to be disrupted. I do not think it is a matter for a rational analysis of who reacted in what way at what time. It is a situation which gives rise to emotions, and the initial consent of the Cohens was on the basis that they would be supplied with all Court documents in relation to the application. In fact they were not supplied with copies of the documents. They did not know the date on which the matter came on for hearing and on which an order was made, and they saw the commencement of extensions being made and those extensions were in fact commenced before the Master made his order and in breach of the covenant.

In those circumstances, I propose to exercise my discretion in favour of the unsuccessful appellants, and I note that *Anderson* J. exercised a similar discretion in the case to which Mr Santamaria has referred me, the case of *Re Withers* (1970) V.R. 319.

There will be an order that the respondents pay the appellants' costs of the appeal. I certify for counsel.

The orders I make are these:

1. Appeal dismissed.
2. Order of the Senior Master confirmed.
3. Order that the respondents pay the appellants' costs of the appeal, such costs to be taxed.
4. I certify for counsel.

[¶54-179] Body Corporate — Cluster Plan No. 1186 & Ors v. Walsh & Ors.
Supreme Court of Victoria.
Judgment delivered 3 September 1985.
Full text judgment below.

Conveyancing — Cluster title development — Proprietors built sheds breaching by-law — By-law passed by resolution altering Scheme of Development — No notification of alteration to Registrar — Procedure for alteration of Scheme of Development — Whether by-law enforceable — Cluster Titles Act, sec. 21(3)(b)(ii) — Strata Titles Act, sec. 24.

The applicants were the chairman of the body corporate and proprietors of a cluster title residential development. The first respondents were the owners of lot 1. The second respondent was the owner of lot 35. The respondents each constructed a shed on their respective properties.

The applicants contended that the sheds were in breach of a by-law adopted by the body corporate on 9 April 1981. The by-law was passed by the subdivider when he, as the only