IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

No. 6334 of 2003

STANHILL PTY LTD (ACN 075 266 312) — Plaintiff

v

JACKSON AND OTHERS — Defendants

JUDGE:	MORRIS J
WHERE HELD:	Melbourne
DATE OF HEARING:	19 May 2005
DATE OF JUDGMENT:	2 September 2005
CASE MAY BE CITED AS:	Stanhill Pty Ltd v Jackson
MEDIUM NEUTRAL CITATION:	[2005] VSC 355

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr RB Phillips	No appearance
For the Defendants	Mr AJ Finanzio	No appearance

HIS HONOUR:

1 On 19 May 2005 I delivered a judgment in this matter and indicated that I proposed to order that the restrictive covenant contained in Instrument of Transfer No 1421721 in the Register Book at the Office of Titles be modified by substituting the expression "not more than two dwelling houses" for the expression "not more than one dwelling house" in paragraph (c) therein. The defendants, who had objected to any modification of the covenant, sought costs, relying upon the decision in *Re Withers*.[1] As the parties had not had time to read the reasons for judgment I provided an opportunity for the plaintiff and the defendant to make written submissions.

2 In their submission the defendants have pointed out that the original application sought a modification to the covenant so as to allow the plaintiff to erect five dwellings. Hence, they said, the outcome was well short of what the plaintiff applied for; and justified the defendant's participation in resisting the original claim. In my opinion, this contention has merit.

3 The defendants also relied upon the decision in *Re Withers*. In that case Anderson J commented:

> "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 principle set out in *Re Withers* is consistent with other decisions of the Court, such as that by Gillard J in *Re Markin*[2], Lush J in *Re Shelford Church of England Girls' Grammar School*[3] and McGarvie J in *Re Ulman*.[4] In my opinion, it is a sound principle.

4 The plaintiff submitted that it is rare for a successful plaintiff to be deprived of a

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1 [1970] VR 319.
2 [1966] VR 494.
3 Unreported, 6 June 1967.
4 (1985) VConVR 54-178.

costs order in his or her favour. However that general principle is not applicable where a plaintiff seeks some indulgence from the court or (as is the present case) seeks to change an existing right. This is especially so where the remedy sought by the plaintiff is discretionary. I agree with the plaintiff's submission that section 84 of the *Property Law Act* should not be seen as a section in which an applicant obtains an indulgence or concession. There is a right to make such an application and any such application must be considered on its merits. However it remains true that the court has a discretion as to whether or not to grant a remedy. It is this element, rather than some notion of a concession or indulgence, which underpins the principle articulated in *Re Withers*.

5 The plaintiff also submitted that costs will always remain in the discretion of the court; and there is no universal rule to be applied in cases of this type. This may be so, but cases such as *Re Withers*, will provide guidance. It is striking that the facts of this case are not only quite similar to those in *Re Withers*, but also support a conclusion that the defendants played a proper role in defending the claim.

6 It is also relevant that the defendants conducted the proceeding responsibly. If a defendant, resisting an application to modify a covenant, acts irresponsibly then it would not be entitled to costs in relation to that irresponsible conduct; indeed, it might be in a position where it would have to pay the plaintiff's costs.

7 If the plaintiff had been wholly successful and had obtained a modification to the covenant so as to permit four or five dwellings, then I would have been inclined to make no order as to costs. But in the present circumstances the appropriate order is that the plaintiff pay the defendants' costs, to be assessed on a party and party basis.

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