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IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

S CI 2011 5483

IN THE MATTER of the *Property Law Act 1958* (Vic), Section 84

- and –

IN THE MATTER of an application by Ameer Hermez for the discharge and/or modification of the restrictive covenant contained in Instrument of Transfer No. V353101R registered in the Land Titles Office in the Register Book and imposed upon the land more particularly described in Certificate of Title Volume 10353 Folio 589

AMEER HERMEZ — Plaintiff

v

ERHAN KARAHAN — Defendant

JUDGE:	DALY AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	25 July 2012
DATE OF JUDGMENT:	1 November 2012
CASE MAY BE CITED AS:	Hermez v Karahan
MEDIUM NEUTRAL CITATION:	*Hermez v Karahan* [2012] VSC 443

RESTRICTIVE COVENANTS – Application to remove single dwelling covenant under s 84 *Property Law Act 1958* (Vic) – whether single dwelling restriction obsolete – whether removal or modification would "substantially injure" those entitled to the benefit of the restriction

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APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mrs L.L. Harrison	Robyn Calder
For the Defendant	In person	

HER HONOUR:

1 Mr Hermez owns a vacant block of land on the corner of Paringa Boulevard and Golden Ash Court, Meadow Heights, in Melbourne's northern suburbs. Paringa Boulevard is a reasonably significant thoroughfare, upon which a primary school and a substantial shopping centre are located, while Golden Ash Court is a residential street, save for a kindergarten/childcare centre located immediately opposite Mr Hermez's land (known as 40B Paringa Boulevard).

2 40B Paringa Boulevard[1] ("land') has an area of 342 square metres with a width of 11.5 metres and a depth of 30.8 metres. It is burdened by a restrictive covenant ("covenant") which is expressed as follows:[2]

> *AND the said Transferees for ourselves, our respective heirs, executors administrators and transferees and registered proprietor or proprietors for the time being of the lot hereby transferred and of each and every part thereof DO HEREBY and as separate covenants COVENANT with the said CENTRAL PROPERTIES NO. 1 PTY. LIMITED and other the registered proprietor or properties (sic) for the time being of the land comprised in the said plan of subdivision and each and every party thereof (other than the lot hereby transferred) that we will not:*
>
> *(a) erect or cause or permit to be erected or remain erected on the land hereby transferred or any part thereof any building other than:*
>
> *(i) one dwellinghouse having not less than 75% of all external walls (save for provisions for windows, doors fascias and gables) of brick or stone; and*
>
> *(ii) usual outbuildings having front external walls facing a road or street of brick or stone; and*
>
> *(iii) within the building envelope on Building Envelope Plan Stage 1 Ref. No: 5401/BE1 Version 1 prepared by Breese Pitt Dixon Pty. Ltd. and in accordance with the Victorian Code for Residential Development if the lot contains an area of less than 450 sq. metres.*
>
> *(b) without the prior consent in writing of the Transferor subdivide the land hereby transferred or any part thereof.*

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1 Described in Certificate of Title Volume 10353 Folio 589, and being Lot 29 on Plan of Subdivision PS40323M.

2 Contained in an Instrument of Transfer which was registered in dealing No. V353101R on 6 April 1999.

> *AND it is hereby agreed that the benefit of each of the foregoing covenants shall be annexed to and run at law and in equity with each lot comprised on the said Plan of Subdivision (other than the lot hereby transferred) and that the burden thereof shall be attached to and run at law and in equity with the lot hereby transferred and every part thereof AND IT IS REQUESTED that the foregoing covenants shall appear on the Certificate of Title to issue for the land hereby transferred.*

3 Mr Hermez has applied to the Court to modify or discharge the covenant to permit the construction of two dwellings on the land, with one to face Paringa Boulevard, and the other to face Golden Ash Court. Previous orders of this Court provided for notification of the application and supporting material upon the registered proprietors and mortgagees of nine lots within the immediate vicinity of the land.

4 Three people, Mr Erhan Karahan (the defendant in this proceeding), Salman Bodagh and Jamila Odicha gave notice of their objections to the application. Mr Bodagh and Ms Odicha are the registered proprietors of the land at 4 Golden Ash Court, which is adjacent to the northern boundary of the land. Neither of the two letters (which were in the exact same terms) specified any grounds of objection. Ultimately, only Mr Karahan appeared in Court to oppose the application.

5 Mr Karahan is the registered proprietor of the land on the eastern boundary of 40B Paringa Boulevard. 40A Paringa Boulevard is a block of similar dimensions to the land, upon which a substantial two-storey dwelling is located, and its footprint covers a large proportion of the site. A letter from a real estate agent exhibited to Mr Karahan's affidavit in opposition to the application[3] describes the dwelling on 40A Paringa Boulevard as being a double storey residence with three to four bedrooms, along with a double garage which has been converted into a "studio apartment", and three living areas.

6 Mr Karahan, who appeared at the hearing of the application in person, opposes the application upon the following grounds:

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3 Affirmed on 14 March 2012.

(a) he was aware of the existence of the covenant, and he would not have purchased 40A Paringa Boulevard save for the existence of a restrictive covenant preventing multi-unit development on the land;

(b) the proposed development and subdivision of the land will reduce the value of his property;

(c) by reason of the relevant planning and building regulations regarding setbacks and private open space, in particular those applicable to corner blocks, the proposed development could not actually be built on the land;

(d) the proposed development, once built, would overshadow and block sunlight to the habitable rooms and private open space of his property; and

(e) removal of the restrictive covenant and subdivision of the land would set an undesirable precedent in the neighbourhood.

7 In making the application, Mr Hermez relies upon both s 84(1)(a) and (c) of the *Property Law Act 1958* (Vic) ("Act").

8 Section 84(1) of the Act provides as follows:

> **84 Power for Court to modify etc. restrictive covenants affecting land**
>
> (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.

9 Mr Hermez relied upon the following evidence in support of his application:

(a) two affidavits sworn by his solicitor, Ms Robyn Calder, on 23 September 2011 and 7 May 2012; and

(b) an affidavit sworn by Mr Robert Easton on 22 September 2011, annexing a copy of his expert report dated August 2011.

10 Mr Karahan relied upon three affidavits affirmed by him: one on 14 March 2012, and two affidavits on 15 May 2012. None of the deponents were cross-examined. However, counsel on behalf of Mr Hermez objected to Mr Karahan's reliance upon two letters exhibited to his affidavit of 14 March 2012, being a letter from a real estate agent, and a letter from a registered builder.

11 Ms Calder's first affidavit uncontroversially details the ownership and subdivisional history of the land and the surrounding neighbourhood, the proposed notification of lot holders in the vicinity of the land, and summarises the key points made in Mr Easton's report, as follows:[4]

8. … the covenant ought to be deemed obsolete and that the proposed discharge or modification of the covenant will not substantially injure the persons entitled to the benefit of the restriction as:

(a) it requires compliance with an out of date development code (report of Robert Easton, at paragraph 5.7) and permission to subdivide from the original Transferor who is a deregistered company.

(b) the present character of the neighbourhood is diverse and includes simple single storey dwellings, large double storey

4 Paragraph 8 of the affidavit sworn on 23 September 2011, omitting references to exhibits.

dwellings, a dual occupancy on Lot 64 and a substantial child care centre and associated car parking on the corner of Paringa Boulevard (report of Robert Easton, paragraphs 6.7, 6.8 and 6.9);

(c) the streetscape will be unchanged as it is proposed to construct one dwelling facing Paringa Boulevard utilizing the existing driveway and the other facing Golden Ash Court;

(d) the combined size of the proposed dwellings are less than the dwelling on the lot abutting the western boundary of the subject land (report of Robert Easton, at paragraph 7.24);

(e) the proposed dwellings are modest in size and are consistent with the range of dwellings in the neighbourhood (report of Robert Easton, paragraph 7.24);

(f) a dual occupancy already exists on Lot 64 and the subject land is the last lot to be developed and therefore the Plaintiff's proposal will not create a precedent (report of Robert Easton, at paragraphs 6.7 and 7.24);

(g) the Plaintiff's proposal would be subject to assessment as to any amenity impacts under the provisions of the Hume Planning Scheme which are not provided for in the covenant (report of Robert Easton, at paragraph 7.8);

(h) the Plaintiff's proposal is consistent with the provisions of the Hume Planning Scheme (report of Robert Easton, at paragraph 7.7);

(i) the Plaintiff's proposal is designed with the second dwelling fronting Golden Ash Court and any additional traffic impact will be minimal (report of Robert Easton, at paragraph 7.10);

(j) it would be a reasonable and proper use of the land to enable it to be developed with two dwellings as the subject land is zoned Residential 1 under the Hume Planning Scheme. The purpose of the zone among other things is – "*To provide for residential development at a range of densities with a variety of dwellings to meet*

the housing needs of all households. To encourage residential development that respects the neighbourhood character". The Plaintiff's proposal to construct two dwellings and associated outbuildings will add to the variety of dwellings. As stated by Mr Easton in his report at paragraph 7.5 and 7.8 notwithstanding the discharge or modification of the covenant, the Plaintiff's proposal would still be subject to further assessment as to any amenity impacts under the provisions of clauses 54 and 55 of the Hume Planning Scheme;

(k) current building regulations and the Hume Planning Scheme contain strict provisions regarding open space, site coverage and setback requirements which are not provided for in the covenant (report of Robert Easton, paragraphs 7.8 and 7.14 – 7.23).

12 In his first affidavit, affirmed on 14 March 2012, Mr Karahan deposed, in summary, as follows:

(a) that prior to purchasing 40A Paringa Boulevard, he made enquiries to the Land Titles Office and learned that the land was burdened by the covenant;

(b) he would not have proceeded with the purchase of 40A Paringa Boulevard in the absence of the covenant;

(c) the removal or modification of the covenant will reduce the number of potential purchasers and therefore reduce the value of his property. In making this statement he repeated the conclusion expressed in a letter to him from Mr Eddy Chmalisee of YPA Estate Agents, which was exhibited to his affidavit;

(d) the sketch plans provided by Mr Hermez were not to scale, and as such were misleading;

(e) the proposed development could not be built in compliance with the building and planning regulations governing setbacks,

or without building over an easement on the northern boundary of the land;

(f) the subdivision said by Mr Easton in his report to amount to a comparable development was not in fact a comparable development, as the relevant allotment was 533m^2 in size, some 191m^2 greater than the land;

(g) the construction of two dwellings on the land would overshadow and block out natural sunlight to habitable rooms (loungeroom, study, bedroom) of 40A Paringa Boulevard;

(h) the construction of two dwellings on the land will cause overlooking into habitable rooms and private open space (front balcony and rear yard) of 40A Paringa Boulevard; and

(i) Mr Karahan exhibited a letter to him from Mr Ibrahim Kisa, a Registered Building Practitioner, which stated, as follows:[5]

> It is in my professional opinion that it is not possible to design a Multi-Unit (2 Units) Development on Lot 29/#40B Paringa Boulevard, Meadow Heights, Victoria 3048, that conforms to the Requirements stipulated in Clause 55 of the Hume Planning Scheme and ResCode.
>
> My conclusion is based on the following factors and constraints:
>
> - The actual size of the Allotment (342 m2),
> - 3 metre wide Easement on the Northern Boundary of the subject Allotment,
> - 5 metre Setback to Southern Boundary (based on adjoining building setback),
> - 2 metre Setback Requirement at the Western Boundary (corner Golden Ash Court),
> - An additional Vehicular Crossover requirement,
> - The mandatory Requirements for vehicular accommodation Garage(s)/Carport(s),
> - The Minimum Court Yard / Secluded Private Open Space Requirements,

[5] Exhibit "D".

- Orientation of the subject Allotment for Solar Access Requirements.
- Shadowing Effects on Neighbouring Allotments based on town house(s) / two storey proposals.
- Overlooking Issues into Neighbouring Properties.

My opinion is based on 19 Years Architectural Design experience and many Town Planning Endorsements, particularly with the Hume City Council Planning Department."

13 In her affidavit in reply sworn on 7 May 2012, Ms Calder deposed, in summary, as follows:

(a) the wording of the restrictive covenant unequivocally contemplates modification by reason of the inclusion of the following words in the covenant

"without the prior consent of the Transferor subdivide the land."

(b) the letter of the real estate agent referred to in paragraph 12(c) above does not comply with order 44 of the Rules regarding the admissibility of expert evidence;

(c) the footprint of the proposed development on the land is comparable in area to Mr Karahan's two storey dwelling on 40A Paringa Boulevard;

(d) Mr Hermez has entered into an agreement with the Hume City Council under section 173 of the *Planning and Environment Act* 1987 that permits him to construct a garage within the area of the easement on the northern boundary of the land;

(e) the letter of the registered building practitioner referred to in paragraph 12(i) above does not refer to the plaintiff's indicative plan of development and otherwise does not comply with order 44 of the Rules; and

(f) issues such as overshadowing and overlooking will be addressed in any planning application.

14 In a further affidavit affirmed on 15 May 2012, Mr Karahan deposed to certain matters in response to an affidavit sworn by a law clerk employed by the plaintiff's solicitors, which deposed as to a conversation between her and Mr Karahan's father. However, my view is that the occurrence and content of this conversation is irrelevant to the determination of any of the issues currently before the Court, and I see no need to refer to it further.

15 On the same day, Mr Karahan affirmed a further affidavit in reply to the evidence advanced in support of the application, which primarily took issue with the matters raised in Ms Calder's affidavit in reply, and repeated Mr Karahan's grounds of objection to the application.

16 In her submissions, counsel for Mr Hermez relied upon both s 84(1) and 84(1)(c) of the Act. She submitted that a number of restrictions in the restrictive covenant were obsolete, including:

(a) the reference to the Victorian Code for Residential Development, which is no longer in force;

(b) the reference to a "Building Envelope Plan" which, despite being available (it is part of the Court Book) is not attached to the covenant and was not made available by the original subdivider to be found on the public record by title search; and

(c) the transferor company was deregistered on 30 September 2002.

17 Counsel for Mr Hermez also submitted that the continuing existence of the covenant will impede the reasonable user of the land without securing practical benefits to Mr Karahan or any other beneficiary of the restriction contained in the covenant. In her submissions, counsel outlined a number of factors that should satisfy the Court that the single dwelling restriction does not confer practical benefits to those entitled

to the benefit of the restriction. In particular, it was submitted that:

(a) the building envelope plan specified in the covenant has no height restrictions or set backs from boundaries, and encourages large building footprints;

(b) the covenant does not disclose any intention to create a low density neighbourhood and/or dwellings with large areas of open space or landscaping;

(c) the wording of the restriction does not regulate the type, form or orientation of any building, and the covenant would permit a dwelling large enough to accommodate a large number of residents;

(d) the covenant does not protect the amenity of beneficiaries by regulating overlooking and overshadowing, the quantity and quality of open space and landscaping, or the number of residents and vehicles;

(e) the proposed development of the land is comparable in bulk, form and area to a number of large single dwellings in the neighbourhood, including the dwelling at 40A Paringa Boulevard;

(f) the location of the land on a corner lot enables the land to be developed with each dwelling having a separate street frontage, which will enhance the amenity of Golden Ash Court, by providing for a house frontage on that street rather than a long side fence; and

(g) the proposal for a two unit development will require planning approval (unlike the construction of a single dwelling), and as such, will be subject to greater protection and scrutiny.

18 I agree that the restrictions referred to in paragraph 16 above are, by reason of changing circumstances, obsolete. However, it is going too far to say that the single dwelling restriction ought to be deemed "obsolete" by reason of changes in the neighbourhood since 1998, or that its existence will "impede the reasonable user of the land".

19 In order to determine whether the single dwelling restriction in the covenant is rendered obsolete by reason of changes in the neighbourhood over a relevant period, it is necessary to define the neighbourhood, the relevant starting date, and any relevant changes. In his report, Mr Easton defined the neighbourhood as all of the land contained within the plan of subdivision 403230M, and the relevant date as 1998, the date upon which the covenant was first registered. I see no reason to adopt a different view.

20 In his report,[6] Mr Easton summarised developments and changes in the neighbourhood since 1998 which he contends are material in nature, being:

(a) the creation of an additional 39 lots on 28 January 1998;

(b) the creation of an additional 25 residential lots on 17 June 1998;

(c) the development and subsequent subdivision on 23 January 2004 of Lot 64 (30 Paringa Boulevard) with a dual occupancy development with a similar configuration to the proposed development on the land, being also located on a corner block; and

(d) the development of a substantial childcare centre with carparking access at 42 Paringa Boulevard, directly opposite the land.

21 At paragraph 6.9 of his report, Mr Easton stated:

> The present character of the neighbourhood is diverse containing both simple single storey dwellings as well as large double storey dwellings. In

6 See pages 8-9 of his report dated August 2011.

> particular [sic], a large double storey dwelling is located immediately east of the subject land while several other large double storey dwellings are located along Paringa Boulevard as seen in the attached photos. Elsewhere in Golden Ash Court there is evidence of much smaller dwellings at no's 16 to 22 Golden Ash Court. Each of these dwellings have a frontage of 11.58 metres which presents to the street as a smaller frontage than will exist when the subject land is developed and subdivided."

22 In my view, the changes referred to above have not materially altered the character of the neighbourhood such as to make the single dwelling restriction in the covenant obsolete. The development of the two tranches of further residential lots is consistent with a staged development of the subdivision (over a number of months rather than years), and in any event, the lots are reasonably, if not completely, uniform in size. The development of 30 Paringa Boulevard in a manner consistent with the proposed development is, like the proposed development, a one-off dual occupancy development at the southern fringe of the neighbourhood, and does not, in my view, substantially alter the character of the neighbourhood, and, I note, is on a larger lot (533m^2). Finally, while the development of a childcare centre at 42 Paringa Boulevard is a different land use from that of other lots within the neighbourhood, the existence of the centre complements and services the neighbourhood. It does not fundamentally change its character.

23 Further, viewing the neighbourhood by referring to Google maps[7] during the course of the hearing and in the course of preparation of these reasons, confirmed my opinion that development of the neighbourhood, with the exception of usual community facilities such as a school, a childcare centre, and a shopping centre, is characterised by large, detached dwellings on blocks of equivalent or larger size to the land. The further subdivisions referred to above have not substantially altered the character of the neighbourhood such as to render the single dwelling restriction in the covenant obsolete.

24 In any event, while the existence of the single dwelling covenant may impede a reasonable user of the land, it does not impede any reasonable use of the land.

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7 See T2, 15-16 and T11, 28. Sections 53 and 54 of the *Evidence Act* 2008 (Vic) allows the Court to draw any reasonable inference from an inspection. There seems to be no good reason why an "inspection" cannot be conducted using an electronic device.

Development of a single residence in compliance with the covenant, remains, in the context of the neighbourhood, a reasonable use of the land.

25 Traditionally, courts have been reluctant to interpret the phrase "the reasonable use of the land" as meaning "any reasonable use of the land".[8] Further, the courts have been reluctant to disregard what has often been assumed to be the purpose of such covenants: namely, the creation and preservation of a relatively low density, tranquil and well vegetated residential environment.

26 In the current case, despite the preponderance of detached single dwelling houses in the neighbourhood, it is not quite as easy to discern such an objective behind the imposition of the single dwelling restriction in the covenant as it might be in other neighbourhoods that have been the subject of applications to remove or modify single dwelling covenants. The reference to further subdivision and the size of the allowable building footprint is contrary to such an objective. The location of the property on a busy road, and proximity of the property to a school, a childcare centre and a substantial retail and commercial centre, makes it difficult to achieve the objective of a quiet, tranquil environment. Finally, looking at the surrounding neighbourhood, the combination of relatively large building footprints and small to medium lot sizes does not give the impression of a low density, well vegetated neighbourhood.

27 Nevertheless, when one views the pattern of residential development within the neighbourhood, if the objective of the covenant was simply to provide for a consistent pattern of single dwelling lots, it appears to have substantially achieved that purpose. Accordingly, I do not find that the single dwelling restriction in the covenant is, for the purpose of obtaining relief under s 84(1)(a), obsolete.

28 However, the matters relied upon by counsel for Mr Hermez in her submissions are relevant to the question of whether the proposed modification or discharge of the covenant would substantially injure the persons entitled to the benefit of the

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8 See *Vrakas v Registrar of Titles* [2008] VSC 281, at [29], and the authorities referred to in that paragraph (cf. *Stanhill Pty Ltd v Jackson* (2005) 12 VR 224.)

restriction. It is accepted by the authorities that if the restriction imposed by a covenant confers no practical benefits upon the beneficiaries of a restriction, then modification or removal of the covenant is unlikely to cause substantial injury to the beneficiaries of the restrictions.

29 I agree that the removal of the single dwelling restriction will not substantially injure the beneficiaries of the restriction in the covenant, including, notwithstanding his submissions and protestations, Mr Karahan and his family. The proposed development does not, in size or bulk, appear to exceed that of buildings developed on lots within close proximity, including 40A Paringa Boulevard. I accept the evidence of Mr Easton that there is unlikely to be any adverse impact in terms of traffic, particularly given the proximity of a school, a childcare centre, and a substantial shopping centre. The proposed development is unlikely to significantly add to the population density of the area.

30 The determination of whether there will be a substantial injury involves "a comparison between the benefits initially intended to be conferred and actually conferred by the covenant, and the benefits, if any, which would remain after the covenant has been discharged or modified."[9] In *Prowse v Johnstone*, Cavanough J asked the following question: what situation should be compared with the situation that will result from the discharge or modification of the covenant?

31 In *Prowse v Johnstone*, the applicant seeking the removal of a single dwelling covenant on a substantial block in Malvern argued that, theoretically, given the planning and building regulations applicable to that block, a single dwelling could be constructed on the block of a similar size and bulk of the 18 unit apartment development proposed by the applicant. Cavanough J, while accepting this proposition as a theoretical possibility, stated that:[10]

> … it seems to me that it would be artificial and wrong to pay no heed at all to the reality of the situation. So, even though the plaintiff is entitled to ask the Court to take into account the "worst" that could be done under the

9 *Prowse v Johnstone and Ors* [2012] VSC 4 at [35].
10 Ibid, at [104].

> existing covenant, the defendant is also entitled to invite the Court to consider the realistic probabilities of the plaintiff actually bringing about the "worst" that could be done under the existing covenant.

32 Further, in respect of the relevance of town planning principles in determining whether an applicant has established a ground for removal or modification of a restrictive covenant, Cavanough J agreed with the general principle laid down by the authorities that the desirability or otherwise of a proposed development, taking into account such considerations was not part of the Court's function. However, his Honour was prepared to assume, without finally deciding the matter, that the existence of statutory planning provisions aimed at protecting the amenity of neighbours might be relevant for assessing substantial injury.[11] For the purposes of this application, I am also prepared to assume that planning and building regulations governing building size and height, set backs, and allowable overshadowing and overlooking are relevant to assessing whether modifying the covenant would cause substantial injury.

33 In the current case, Mr Hermez is proposing to develop a vacant lot with two two-storey residences. The fact that the land is currently vacant, of itself, confers certain benefits upon adjacent landowners such as Mr Karahan and the residents at 4 Golden Ash Court. However, I consider that an undeveloped block of land is not a suitable comparator in the current case. Rather, having regard to the pattern of development in the neighbourhood, it is likely that any development on the land, even a single dwelling development, is likely to be consistent with a substantial proportion of properties in the neighbourhood (including 40A Paringa Boulevard), that is, the construction of a substantial, possibly double storey residence with a footprint which covers a major proportion of the area of the land. The construction of such a dwelling would raise the same amenity issues identified by Mr Karahan in his affidavits and submissions, and Mr Karahan and other nearby residents would not have the opportunity to raise these issues in a planning approval process if only one dwelling was to be built on the land.

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11 Ibid, at [105].

34 In relation to the specific grounds of objection raised by Mr Karahan, I make the following observations:

(a) in relation to Mr Karahan's evidence that he would not have purchased 40A Paringa Boulevard in the absence of the restriction upon multi-unit development on the land, while this is evidence of the subjective value that Mr Karahan places upon the covenant, the task of the Court is to determine, objectively and as a matter of fact, whether the removal of the restriction would cause substantial injury to Mr Karahan and other beneficiaries;

(b) the evidence about the reduction of the value of Mr Karahan's property is, apart from being technically inadmissible, too vague and imprecise for me to make a positive determination that the proposed development (or any development of the land) would reduce the value of Mr Karahan's property;

(c) in relation to Mr Karahan's evidence and submissions regarding the practical constraints of building the proposed development on the land, ultimately, the question of whether Mr Hermez can construct two dwellings of a size which is commercially viable will ultimately be determined in accordance with the local building and planning regulatory regime. Despite appearing to be knowledgeable regarding these matters, Mr Karahan is not an expert qualified to give an opinion on such matters. The other evidence relied upon by Mr Karahan in support of his contention that the proposed development would be practically impossible to build, being the letter from Mr Kisa, also does not comply with the requirements of Order 44 of the Rules. Further, I note that there is evidence that Mr Hermez has entered into an agreement with Hume City Council to enable him to construct a garage and driveway on that part of the land affected by the easement. The assertion by Mr Karahan that this agreement has

been rendered void by changes to the proposed development is mere speculation;

(d) as for the concerns that Mr Karahan has regarding potential overlooking and overshadowing of the habitable rooms of his property, it seems to me that these are matters which will and should be addressed in the planning process. Further, it is likely that, given the nature and pattern of residential development in the neighbourhood, these concerns may well arise with the construction of a single dwelling on the land, especially if it were, like Mr Karahan's home, a two storey dwelling with a substantial footprint; and

(e) in any event, while it is not possible or necessary for me to make definitive findings on these matters, based upon the evidence before the Court, I tend to agree with the observations made by counsel for Mr Hermez during the course of the hearing that:

(i) the number of rooms in the proposed two unit development is equivalent to the number of rooms (including the converted garage) at 45A Paringa Boulevard;

(ii) any overshadowing will be on the western side of 40A Paringa Boulevard, such that any detriment caused by overshadowing may well be compensated by protection from the harsh summer sun;

(iii) the photographs of 40A Paringa Boulevard in evidence[12] do not bear out the allegations that there will be substantial overlooking into private open space or habitable rooms; and

(iv) the photographs also bear out the contentions of counsel for Mr Hermez that issues such as overshadowing and

overlooking would also arise if a substantial single dwelling was constructed on the site; and

(f) as for the issue of whether the removal of the single dwelling restriction will create a precedent, I note that this is the last vacant lot within the neighbourhood, and in any event, the land is a corner block where multi unit development tenders to be less intrusive. Further, given the relatively recent development of the neighbourhood, it is unlikely that there will be a spate of applications to redevelop the neighbourhood within the next decade or so.

35 Accordingly, I will allow the application, and order that the covenant be modified as follows:

(a) to remove the references to obsolete matters, as discussed in paragraph 16 above; and

(b) to replace the reference to "one dwelling" to "two dwellings".

36 I will hear further from the parties regarding the precise form of order and the question of costs.

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12 See exhibit "F" to the affidavit of Mr Karahan affirmed 14 March 2012.