IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

S CI 2012 05066

IN THE MATTER of the *Property Law Act 1958*, section 84

IN THE MATTER of a restrictive covenant contained in instrument of transfer No. C706812 registered in the Land Titles Office in the register book and imposed upon the land more particularly described in certificate of title volume 9725 folio 572

IN THE MATTER of an application for the discharge or modification of the restrictive covenant by:

TONY PETER JENSEN and
CLARE EVETT JENSEN — Plaintiffs

JUDGE:	MUKHTAR AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	10 December 2012
DATE OF JUDGMENT:	21 December 2012
CASE MAY BE CITED AS:	Re Jensen
MEDIUM NEUTRAL CITATION:	[2012] VSC 638

REAL PROPERTY — Restrictive covenant — Prohibition of more than one dwelling — Same covenant covering larger area of land subdivision — Absence of any dual occupancy or multi unit development in subdivision — No change in character of neighbourhood since inception of covenant — Enlargement of applicants' land since covenant given — Desire to construct additional dwelling — Whether restriction obsolete or an impediment to reasonable user — Whether discharge or modification will not substantially injure covenantees — Application refused — Property Law Act 1958, s 84

Appearances	Counsel	Solicitors
For the Plaintiffs	Ms L Harrison	Aughtersons Solicitors

HIS HONOUR:

1 Tony Peter Jensen and Clare Evett Jensen are the registered proprietors of land at 7 Enfield Drive in Bayswater. They became owners in 2002. It is a residential area, and their land has on it a single storey brick veneer dwelling with a tiled roof. A single car port is attached to the side of their house. There are some small outbuildings in the rear yard. The land area originally was not, but now is, of an "L" shape and is about 886 square metres. This approximates the "quarter acre block" that was so symbolic in the past of suburban Australian residential development to satisfy the aspiration of home ownership.

2 The Jensens have had drafted for them some sketch designs for a proposed dual occupancy on their land. The plans show a new double garage for the existing dwelling, and a new two storey dwelling with garage at the rear of the site. There is proposed to be a single driveway for both dwellings. It is said that as viewed from the street frontage, the existence of a second dwelling at the rear will be shielded by the existing dwelling. An application for a planning permit for a two lot subdivision will be required from the City of Knox.

3 But the Jensens face a substantial hurdle, and it is not from land owners in the immediate vicinity. The title is encumbered "as to part" by a registered covenant No. C706812. Most of the land (I shall explain later "most") was originally Lot 41 on Plan of Subdivision LP71907, which created 65 conventional residential lots. The covenant was created in a first transfer of Lot 41 in February 1967, and was made by the transferee to the transferor "and its transferees and other the [sic] registered proprietor or proprietors for the time being of the land on the aforesaid Plan of Subdivision". The Jensens as subsequent transferees are therefore bound by the covenant under which they:

> … shall not at any time erect construct or build or cause to be erected constructed or built on the land … or any part … any building other than one dwelling house in brick or brick veneer (apart from any necessary outhouses and garages) …

The second dwelling the Jensens have in mind may be constructed using modern building materials other than brick or brick veneer.

4 The land was subsequently enlarged by the addition of a narrow rectangular section along the rear eastern boundary, which is longer than the pre-existing boundary and extends about halfway along the rear boundary of the land next door, hence the "L" shaped configuration as now exists. A plan of consolidation CP163991W was approved by the Titles Office in 1987 to create the present single title. Although the restrictive covenant is registered over that solidary title, the legal situation is that, by provenance, the restrictive covenant does not touch and concern the "added", now consolidated, strip of land at the rear. According to the measurements on the title plan, the added strip is 6.10m by 26.38m, but within that strip is a drainage and sewerage easement of two metres which is a non buildable area. Thus, it appears that out of a consolidated area of 886 square metres, the added strip comprises 161square metres or 18 per cent. But, allowing for the easement, the added area comprises 108 square metres or 11 per cent. The sketch plan shows that part of the proposed second dwelling (but not a great part to the eye) will be built on the pre-existing strip of land not affected by the covenant. For convenience, attached to this judgment is a copy of the title plan depicting the joinder of the strip of the land. This gives an appreciation of the relative spatial significance or insignificance of the added strip for present purposes. I have also attached the plan of subdivision.

5 The Jensens have applied under s 84 of the *Property Law Act* for a discharge or modification of the restrictive covenant, so as to allow the erection of the second dwelling using material other than brick or brick veneer. They have relied exclusively on a planning report prepared by Robert Walter Easton, a town planning consultant. His opinion seeks to attract the Court's satisfaction under s 84(1)(a) that the continued existence of the covenant "would impede the reasonable user of the land without securing practical benefits to other persons" or, under s 84(1)(c) that "the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction … ". Counsel for the applicants, Ms Harrison,

went further and contended under s 84(1)(a) that the covenant "ought to be deemed obsolete" by reason of changes in the character of the property, that is, its enlargement.

6 There is a feature of this application which has aroused in the Court a real sense of caution. Unlike many such applications that come before the Court, this is the first land owner in this enclave (as I would describe it) to seek relief from the restriction and there is no doubt, if granted, it could have a precedential effect — the so-called "thin end of the wedge". In many applications, be it inner or outer suburban Melbourne, evidence of pre-existing multi-unit or dual occupancy within a locality or some commercial or retail development usually strongly demonstrates a change in the character of the neighbourhood, and in turn, to show that another dual occupancy will not substantially alter the amenity or conditions of the area or injure the beneficiaries of the covenant. In many cases, it may be supposed that covenentees have not objected because they might have the same development idea in mind. Usually though, where there is a locality or enclave with a strong sense of a communal desire to preserve the single dwelling covenants, objectors would be expected to appear. In my experience, it depends on the area.

7 In this case, on 20 September 2012 an Associate Judge made typical procedural orders requiring the applicants to notify covenentees that would appear to be most likely to be adversely affected by a discharge or modification of the covenant. There are 65 residential lots on the plan of subdivision. The order identified 23 land owners in Enfield Drive as well as requiring advertising of the application in two newspapers and the placement of an enlarged notice in a weatherproof cover at the Jensens' premises in a conspicuous location. There has been compliance with that order. An affidavit from the applicants' solicitor, Glen Andrew Egerton,[1] states that he did not receive any contact from any recipients of the notice or anyone else in the locality stating an objection or asking to see documentation. One resident made an enquiry about the proposed materials to be used. A mortgagee of another property

1 Sworn 30 October 2012. See especially paras 32-34.

enquired whether a multistorey complex was proposed. A property manager of another property made contact stating that the application "should not be a problem [because] the blocks are so big in that area that everyone will ultimately make a similar Application."

8 I should say for completeness, after those orders were made, correspondence was sent from the Acting Managing – Planning and Building of the Knox City Council directly to the Associate Judge. The letter is dated 17 October 2012 and requested the Judge to direct that all beneficiaries of the covenant be given notice of the proceeding. The letter also remarked "council also requests that the Court take into consideration the planning policy affecting the site prior to any determination being made." The letter states that the site is not a preferred location for increased densities, preferring new housing to be closer to Activity Centres where there is said to be good access to public transport, retail, entertainment and community facilities.

9 I will not dwell on this letter. It has been this Court's practice in general to not require applicants to give notice of the application to every covenantee. That is in recognition of two matters. First, when it comes to considering whether a proposed discharge of modification would inflict "substantial injury" the Court looks to see which of the covenentees appears to be most likely to be vulnerable to the infliction of substantial injury. Properties that are not proximate to the applicant's property are less likely to have grounds for asserting substantial injury. Secondly, that attitude is connected I think to the wider principle that under equitable principles concerning the validity and enforceability of a restrictive covenant, a covenant may not be considered to be validly annexed and therefore enforceable if the benefitted land is not reasonably proximate to the servient land. In other words, land that is far away may not be said to be actually benefitted by the covenant.

10 In each case, judgements are made about the extent of notification. In this case I see no reason to disturb the previous orders made. If those beneficiaries that are in the same street as the Jensens have seen fit not to object to the application, then it is difficult to see how those further out would have grounds. As for the request that

the Court take into account planning considerations, it will be better, I would respectfully suggest, if councils are concerned about such matters, for them to assist the Court by becoming respondents to the proceedings and putting before the Court any matters concerning planning policy. The legislation does not require the Court to take into account the relationship between covenants and public planning control. The traditional view has been that the Court concerns itself only with the question whether an applicant comes within the heads stated in s 84 of the Act.[2] Recent decisions of this Court have it that town planning principles and considerations are not relevant to the Court's consideration of whether an applicant has established a ground under s 84: see *Vrakas v Registrar of Titles*[3] and *Prowse v Johnstone*.[4] None of that is to suggest that planning laws or requirements will be compromised or sidelined. As is always acknowledged in these applications, the Jensens will require a planning permit for a two lot subdivision from the City of Knox which as responsible authority will apply the many detailed standards contained within the Knox Planning Scheme.

11 As I understand it, the council may be moved by the requirement under the *Planning and Environment Act* for all covenentees to be notified of any application under that legislation to modify or discharge a restrictive covenant. But that is a separate regime, and the test is entirely different. Speaking loosely, under that regime, there only has to be a perception of detriment. Those considerations are not present under the *Property Law Act*. The question is whether the Court can be satisfied the covenant is obsolete; or whether it impedes reasonable user of the land; and if it will substantially injure the beneficiaries.

12 There are a number of elements to Mr Easton's opinion in support of this application which I shall summarise and deal with each in turn.

13 First, he makes a valid point about the content or effect of this covenant. He says that this covenant is not concerned with the size of the building, its placement on the

2 See generally *Bradbrook and Neave's Easements and Restrictive Covenants* (3rd ed.) at 19.79.
3 [2008] VSC 281.
4 [2012] VSC 4.

site, or the nature or design of the dwelling. That is, the covenant imposes no control at all about the size or aesthetic imposition of a dwelling within this area. Thus, he remarks, the covenant truly is not concerned with amenity with its many facets, but just with the desire to preserve one dwelling. Thus, one could have an imposing and aesthetically unappealing demi-mansion with as many rooms and garages and occupants as a dual occupancy or multi-unit development. So, the argument would go, there is no harm or substantial injury to the amenity of the neighbourhood in allowing more than one dwelling. There was no evidence of a widespread erection of what I will call imposing housing in this subdivision. There was one instance of a two storey dwelling at 53 Sasse Avenue which I would not see as being very close to the Jensens.

14 This sort of covenant has been the subject of remark in other cases: see *Koller v Rice*,[5] and *Djurovic*.[6] I can accept that assessment of the nature of this covenant. I can accept that the apparent purpose of the covenant is to ensure that the land be used for residential purposes in the form of a dwelling house. But I do not think any of that dilutes the plain fact that the covenant reveals a purpose to confine each allotment to one dwelling, no matter its size or aesthetic feature.

15 Secondly, Mr Easton states that in 1967, each of these lots was the minimum lot size allowed in this area and that only one dwelling per lot was allowed under the relevant building regulations at that time. Further, as reticulated sewerage was not then available in the area, the necessity for the installation of septic tanks made it simply not feasible to contemplate a second dwelling on the site. Again, I can accept that may be so but I cannot therefore conclude that that dilutes or diminishes the significance of the covenant. What prevails, I would say, is the desire back then to control housing density in this area or at least in this subdivision.

16 Thirdly, he states that in 1967 the subject land was part of a suburb that was on the outskirts of metropolitan Melbourne and was undergoing rapid change from rural

---

5 [2011] VSC 346.
6 [2010] VSC 348.

land to urban land. At the time, the area was considered to be outside the defined metropolitan area. Thus, it may be supposed, that originally the subdivision was designed to have generous lots to be more compatible with the erstwhile rural surroundings. Now, it is said that Bayswater is very much part of metropolitan Melbourne if not, as some would say, part of the urban sprawl. Again, I can accept this general comment about this and other areas to the east and south-east of Melbourne. But of itself, I would not accept that it renders the covenant obsolete or that it necessarily undermines the utility of a single dwelling covenant.

17 Fourthly, there are two lots in the subdivision, namely Lot 40 and Lot 2 both of which are on Enfield Drive and very close to the subject land which are not burdened by the same restrictive covenant, although they have the benefit of it. That is the fact but out of 65 lots I would not say that those two instances therefore suggest that there is no definite plan for the area to confine itself to one dwelling per lot. In the same vein, it is a fact that Lot 30 and 31 are now the location for a primary school, which is suggestive of an evolution of a neighbourhood since 1967. But I do not see that "non-dwelling" use therefore alone or in combination with the above therefore means there is a change in the neighbourhood to the degree that renders the covenant obsolete, or now makes it reasonable to have more than one dwelling.

18 Overall, as I would assess it, Mr Easton's points all tend towards an obsolescence argument. The argument is that the Court should look at the covenant at the time it was made and ask whether it is still serving the same purpose. Now, the area is sewered; there are planning schemes in operation which consider all sorts of amenities issues for which this covenant makes no provision; and unlike 1967, the minimum house lots have decreased from the classic "quarter acre" to now a requirement that the minimum house size is 300 square metres. Ms Harrison counsel for the Jensens postulates this comparison: compare the effect of the existing covenant which means that an owner can have one house of any size with a multitude of rooms with many occupants and without the need for any planning permit; and yet, compare that with allowing more than one dwelling on a site which

will not be permitted under the planning laws unless it passes stringent planning constraints and applies assessments that are not covered by the covenant such as building height, building setbacks, building envelope, overshadowing and other such matters.

19 I think these are interesting arguments but for my part I think they do not go far enough to demonstrating "obsolescence". In *Djurovic*,[7] I took the view that "obsolete" is a strong word with a good modern usage. In this Court's decision in *Stanhill v Jackson*,[8] Morris J took the view that obsolete meant outmoded or out of date, and not the meaning that the obsolete thing is no longer suitable for its original purpose. But there is not unanimous support for that robust view, and I would align myself with the decision of Kyrou J in *Vrakas*[9] and Cavanough J in *Prowse*[10] to say that in accordance with the traditional view a covenant is "obsolete" if it can no longer achieve or fulfil any of its original objects or purposes or has become futile or useless. See also Bradbrook and MacCallum, *Easements and Restrictive Covenants*.[11]

20 The test is whether, as a result of changes in the character of the property or the neighbourhood or other circumstances, the restriction is no longer enforceable or has become of no value. If a covenant continues to have any value for the persons entitled to the benefit of it, then it will rarely, if ever, be obsolete. Whatever changes may have occurred in the availability of the services to land in Bayswater and the onset of planning controls since subdivision of these outlying areas, I am not willing to conclude that the original object of confining land owners in this enclave to one dwelling has become useless or futile. That is especially so where there are simply no instances yet of any dual occupancy or multi unit development in this subdivided area. If anything, the absence of such development is a reflection of the preservation of the amenity as intended by the covenant.

21 Nor do I accept the submission that the enlargement of the Jensen's land was a

---

7 [2010] VSC 348.
8 [2005] VSC 169.
9 [2008] VSC 281.
10 [2012] VSC 4.
11 Third ed, at [19.54].

change in character of the property that rendered the covenant obsolete. The land retains its character as integral to a residential area which has been conventionally subdivided to create homogeneous residential conditions. It is a question of fact and degree whether consolidation of the Jensens land renders the restriction obsolete. The additional land consolidated with Lots 37, 38, 43 and 1 is also of a similar size. A situation could arise where the enlargement was so great as to make it unreasonable for a landowner to be limited to one dwelling. In all cases, after allowing for the easements, I do not regard them as radically altering the features of the land or the character of the land so as to excuse them from the single dwelling covenant which, as I wish to emphasise, is the scheme of the covenant covering the larger area. The enlargement may make the land more amenable to multi unit development or may make it more reasonable, but that is not the test for obsolescence.

22 Likewise, I cannot see a sound basis for concluding that under s 84(1)(a) the continued existence of the covenant would impede the reasonable user of the land. I can accept that the sketch plan shows as a matter of impression at least that the additional building is not imposing, and given the undulations in the land it may not be visible from the street, and that the single driveway will "soften" the presence of two dwellings on the land. But that is not the test. Both *Vrakas* and *Prowse* affirm the cardinal proposition as I see it that it is not sufficient merely to show that the continued existence of the covenant would impede a particular reasonable use which is proposed by the applicant. Rather, the applicant must show that the restriction will impede all reasonable uses. Here, there is no evidence that the covenant is impeding all reasonable use. The covenant is a hurdle to the proposed development of the land. But that does not make it unreasonable or prevent reasonable use. It might if there was evidence of other such developments in the area or a change in the neighbourhood which lessens or dilutes the apparent widespread desire to confine each lot to one dwelling. There is no such evidence. Instead, the applicants' case seems to go back to the origins of the covenant to demonstrate that in modern conditions it ought be put to one side, and to allow the planning laws to decide the suitability of dual occupancy.

23 I think the pertinent question in this case is whether under s 84(1)(c) the proposed discharge of modification "will not substantially injure the persons entitled to the benefit of the restriction." In that regard, Ms Harrison submitted I should place great weight on the fact that there are no objectors; not even probing enquiries have been made. But, in my view, unless there is express or implied consent under s 84(1)(b), the absence of any objections does not some how relieve or lessen the onus on the applicants to meet the requirements of the statute, nor derogate from the need of the Court to consider the interests of the beneficiaries. Both *Vrakas* and *Prowse* affirm that the absence of objectors will not, in itself, necessarily satisfy the onus of proof.[12] Allied to this is the significance of the precedential value of allowing the application. The test of "no substantial injury" has been described as somewhat nebulous.[13] What has to be applied is really a differential test. The Court compares the benefits intended to be conferred under the covenant and actually conferred, and the benefits, if any, which would remain after the covenant is discharged or modified. If the evidence establishes that the difference between the two will not be substantial, then the ground in s 84(1)(c) is made out: see *Prowse*.[14] Bradbrook and MacCallum put it this way:[15]

> However, in the context of restrictive covenants there may also be cases where, although the particular development proposed may not cause substantial injury, the extinguishment or modification of the covenants burdening a particular piece of land may encourage further applications in respect of similar covenants imposed on other pieces of land in the same area. It is in this context that the Court must face the argument that the granting of the application would threaten the integrity of the scheme of covenants covering the larger area and would thus substantially injure the persons benefitted by those covenants. This 'thin edge of the wedge' argument was accepted by the Lands Tribunal in *Re Teagle's and Sparkes' application* and would also have been applied by Jacobs J in *Re Gross and the Conveyancing Act* [1965] NSWR 886 at 889 if the case had not been decided on other grounds. It has been accepted as a relevant factor in several recent cases. [Citation omitted].

24 Likewise, in *Vrakas*, Kyrou J said:

---

12 *Prowse* at [43].

13 See Mark Bender "Triple Treat: Legal Options for the Removal or Modification of Restrictive Covenants on Land in Victoria", (2006) 13 Australian Property Law Journal 179.

14 At [35].

15 At [19.130].

> The prospect that, if the application for the discharge or modification of a covenant were granted, that might be used to support further applications in a similar vein, may be irrelevant. Such "precedent value" may, in an appropriate case, of itself be a factor demonstrating that an applicant fails to establish the requirements in s 84(1)(c).

25 Ms Harrison acknowledges, as she must, that this will be the first instance in this subdivision of a multi unit development. But, she says, it has to start somewhere. And, she urges the absence of any objectors. Weighing up all factors, I have to keep steadily in mind that benefits from covenants on land are significant property rights and solid grounds need to be present before discarding them. I have come to the view that the absence of any objectors is not of sufficient strength to justify a removal or modification of this covenant. This is, as I said at the outset, an enclave in Bayswater. I am not concerned with remarks that Bayswater may now be regarded as part of the urban sprawl. What shapes my thinking is that there is no solid ground on the evidence to demonstrate why it is there should now be an alteration to the manifest intention that the land in this subdivision should have the amenity of a density of housing that does not exceed one dwelling per lot. The passage of time since 1967 has seen that amenity undisturbed except for the local state school which is not in my mind sufficient to alter the paramount purpose. The injury as I perceive it is the threat to the integrity of the scheme of the covenants covering this plan of subdivision. The plan was to have one dwelling per allotment. It is not for the Court to assess these applications by having regard to trends in land occupation as may occur elsewhere or the need to provide for greater housing in metropolitan Melbourne. These are all matters outside the legal parameters of s 84. Nor is it enough to relax the statutory requirements, alter property rights, all in the expectation that the planning process will take care of any possible injury to other landowners if the proposed development is allowed to go ahead.

26 For those reasons, I would refuse this application.

Delivered by LANDATA®. Land Victoria timestamp 15/03/2012 10:30 Page 1 of 1

TITLE PLAN		EDITION 1	TP 258574U

Location of Land

Parish: SCORESBY
Township:
Section:
Crown Allotment:
Crown Portion:

Last Plan Reference: CP163991W
Derived From: VOL 9725 FOL 572
Depth Limitation: NIL

Notations

ANY REFERENCE TO MAP IN THE TEXT MEANS THE DIAGRAM SHOWN ON THIS TITLE PLAN

Description of Land / Easement Information

all that piece of land in the Parish of Scoresby County of Mornington being the land in Plan of Consolidation No.163991W .- - - - - - - - - - - - which land is shown enclosed by continuous lines on the map hereon - - - As to the land shown marked A and E-1 TOGETHER WITH a right of - - - - - carriage way over Edinburgh Road coloured brown on Lodged Plan 41107 - -- TOGETHER WITH: a right to use the said Edinburgh Road for drainage and - - sewerage purposes -

THIS PLAN HAS BEEN PREPARED FOR THE LAND REGISTRY, LAND VICTORIA, FOR TITLE DIAGRAM PURPOSES AS PART OF THE LAND TITLES AUTOMATION PROJECT
COMPILED: 20/06/2002
VERIFIED: BC

ENCUMBRANCES REFERRED TO:

AS TO THE LAND SHOWN MARKED E-1
THE EASEMENT TO CITY OF KNOX
CREATED BY INSTRUMENT J561309

LENGTHS ARE IN METRES	Metres = 0.3048 x Feet Metres = 0.201168 x Links		Sheet 1 of 1 sheets