

**IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION**

S CI 2013 02552

**IN THE MATTER** of Section 84 of the *Property Law Act 1958*

**IN THE MATTER** of an application by Rebecca Yokehoong Wong for the discharge or modification of the restriction imposed by Instrument of Transfer No. 2389018 encumbering the land more particularly described in Certificate of Title Volume 08024 Folio 024.

**BETWEEN:**

REBECCA YOKEHOONG WONG

Plaintiff

- and -

DANIEL PATRICK MCCONVILLE and Others  
(according to the attached Schedule)

First Defendant

**GENERAL FORM OF ORDER**

JUDGE: The Honourable Associate Justice Derham

DATE MADE: 7 April 2014

ORIGINATING PROCESS: Originating Motion.

HOW OBTAINED: On the Court's own motion

ATTENDANCE: Mr M. Townsend of Counsel for the Plaintiff.  
Mr R. Miller of Counsel for the Defendants

**OTHER MATTERS:**

- A. On 29 May 2013 the Court made Orders requiring notice of this application to be given to certain landowners in the immediate vicinity of the subject land, who have the benefit of the covenant. The Court also required the plaintiff to display an enlarged copy of the notice on the property at 453 Pascoe Vale Road, Strathmore. Pursuant to Rule 52.09(3) of the *Supreme Court (General Civil Procedure) Rules 2005*, the Court

is satisfied that the notices were given in accordance with the Order of 29 May 2013.

- B. The Court has regard to the affidavit evidence contained in the affidavits of: Rebecca Yokehoong Wong sworn on 16 May 2013 and 22 July 2013; Michael Anthony Fleming, solicitor, sworn on 8 May 2013 and 25 July 2013; Robert Walter Easton, an expert town planning consultant, sworn 10 May 2013, 11 October 2013 and 15 October 2013 and reports and documents exhibited to those affidavits; the first defendant, Daniel Patrick McConville, sworn on 26 September 2013; the third defendant, Xin Zhang, sworn on 26 September 2013; the fourth defendant, Darren Peter Smallacombe; and the affidavit and an Expert Witness Report of Giovanni Gattini, an expert town planning consultant, sworn on 20 September 2013.
- C. The covenant prevents, inter alia, the erection of more than one single dwelling house on the land . The Court is satisfied that the continued existence of the restriction of the single dwelling house on the land will impede the reasonable user of the land without securing practical benefits to other persons and, in addition, the proposed modification of the restrictive covenant will not substantially injure the persons entitled to the benefit of the restriction.
- D. For the reasons published this day as *Wong v McConville & Ors* [2014] VSC 148, the following Order modifying the covenant affecting the Land in Certificate of Title Volume 08024 Folio 024 is made.
- E. This Order is signed by the Judge pursuant to rule 60.02(1)(b) of the *Supreme Court (General Civil Procedure) Rules 2005*.

**THE COURT ORDERS THAT:**

1. Pursuant to section 84(1)(c) of the *Property Law Act 1958* the restrictive covenant contained in Instrument of Transfer No. 2389018 registered in the Land Registry be modified to the extent that it affects the land described in Certificate of Title Volume 08024 Folio 024, being the land situate at and known as 453 Pascoe Vale Road, Strathmore by deletion of the words struck through in the Covenant extracted below, so that the covenant reads –

*“And the said Una Lillian Barrett doth hereby for herself her heirs executors administrators and transferees registered proprietor or proprietors for the time being of the land hereby transferred covenant with the said Glenview Proprietary Limited and its transferees registered proprietor or proprietors for the time being of the land remaining untransferred in the said Certificate of Title and every part thereof that the said Una Lillian Barrett her heirs executors administrators and transferees registered proprietor or proprietors for the time being of the land hereby transferred will not at any time hereafter carry on quarrying operations on the said land or dig carry away or remove any marl stone earth clay gravel or sand therefrom except for the purpose of laying the foundation of any building to be erected on such land and will not erect build or construct or allow to be erected built or constructed on the said land hereby transferred any shop factory warehouse or any other premises for use or suitable for use for the purpose of manufacturing vending or exhibiting for sale goods or merchandise of any description nor will she or they erect or allow to be erected or leave standing more than ~~one~~ two dwelling ~~house~~ houses on each of the said lots Lot 493 on LP 9986 hereby transferred and such dwelling house including fences and outbuildings shall not cost less than Four hundred pounds ~~and shall have its front elevation to be the road to which the Lot upon which such dwelling house shall be erected is shown to have a frontage on the said plan and be set back at a distance of at least thirty feet therefrom~~ and any building erected upon the said land hereby transferred ~~and~~ shall not be used for any other purpose than that of a residence and no trade or other sign shall be displayed or caused or allowed to be displayed on the said land ~~and no building (including outbuilding) erected on each of the said Lots as aforesaid shall have its roof or any of its exterior walls of iron or metal or any description or any material which shall be an imitation thereof or substitute therefor~~ and the foregoing covenants shall be noted on and appear on the Certificate of Title to be issued for the said land hereby transferred and on every other Certificate of Title therefor of for any part thereof as an encumbrance affecting the same.”*

2. As soon as practicable after the authentication of this Order, the Plaintiff shall lodge with the Registrar of Titles an authenticated copy of it.
3. The plaintiff has liberty to apply to the Court for any further working out of this Order.
4. [Costs]

**DATE AUTHENTICATED:** April 2014

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THE HON. ASSOCIATE JUSTICE DERHAM

**SCHEDULE**

DANIEL PATRICK MCCONVILLE

Firstnamed Defendant

DIANA MCCONVILLE

Secondnamed Defendant

XIN ZHANG

Thirdnamed Defendant

DARREN PETER SMALLACOMBE  
Defendant

Fourthnamed

BARBARA JOAN HAVERFIELD

Fifthnamed Defendant

AVRAAM MARKOPOULOS

Sixthnamed Defendant