

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



No. SCI 2016 03948

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

– and –

**IN THE MATTER** of an application for the discharge or modification of a restriction arising under a covenant in a transfer of land registered no. 786906 affecting the land at 923 Dandenong Road, East Malvern, being the land in certificate of title volume 3927 folio 373 by:

- wherein -

**MARTIN JOHN AMBRENS**

**is Plaintiff**

**ORDERS**

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| ASSOCIATE JUDGE:     | The Hon. Associate Justice Lansdowne   |
| DATE MADE:           | 4 May 2017   |
| ORIGINATING PROCESS: | Originating Motion filed 8 December 2016   |
| HOW OBTAINED:        | At the hearing of the motion.  |
| ATTENDANCE:          | Mr M. Townsend as counsel for the Plaintiff.<br>No appearance by any objector on being called at 9:30am. |

**OTHER MATTERS:**

- A. On 2 March 2017 the Court ordered the Plaintiff to give notice of this application to certain landowners in the immediate vicinity of the subject land, and their mortgagees, who have the benefit of the Covenant. The Court also required the Plaintiff to display publicly an enlarged copy of the notice on the subject property.
- B. Compliance with the orders concerning the giving and displaying of notices has been established by the affidavit of the Plaintiff's solicitor, Myles Patrick Watson, sworn 28 April 2017. Pursuant to rule 52.09(3) of the *Supreme Court (General Civil Procedure) Rules 2015 (the Rules)* the Court declares the Plaintiff has given the notices as required.
- C. The Court has taken into account the written objection received by the solicitors for the Plaintiff from Mr Adam Wilson of Unit 12, 919 Dandenong Road ('the Objector'). Notwithstanding this objection the Court is satisfied on the basis of the evidence and submissions before it, principally being the report prepared by Easton Consulting dated

October 2016 and the written submissions handed up in Court today, that no substantial injury will be occasioned to the beneficiaries of the Covenant from its discharge, and that discharge is more appropriate than modification. Detailed reasons for this conclusion were given orally, and may be transcribed on request to an authorised transcription service. A summary follows.

- D. Substantial development has already taken place in the immediate vicinity of the subject land along Dandenong Road, including on 919 Dandenong Road which consists of a three storey block of apartments, and the Monash University Caulfield Campus on the opposite side of Dandenong Road. Further, some covenants similar in nature to the subject Covenant have already been modified or discharged to enable development on proximate land, and so the modification or discharge of this covenant will not set a precedent.
- E. Further, the local Council is seeking to remove similar covenants over proximate land known as 909-913 Dandenong Road to facilitate development in accordance with the Residential Growth zoning of that land. The Court is informed that no objections were received by the Council to that proposal.
- F. Only one objection was received in relation to this application, and the Objector has not attended today to pursue his objection by becoming a party in a contested hearing.
- G. The objection made by the Objector is that removal or modification of the covenant may adversely affect the value of his land. There is no evidence advanced to support that contention. Further, the Court accepts the submission of the Plaintiff that to the extent the retention of property value could have been said to have been an original purpose of the Covenant, that purpose has already been sufficiently affected by the development to date.
- H. In relation to potential amenity impacts on the Objector, the Court accepts the submission of the Plaintiff that the position of the subject land to the south of the land of the Objector means that overshadowing of his land from development of the subject land is unlikely. The Court further notes that the local planning scheme provides protections against overlooking and other amenity interests of the Objector.
- I. In many cases, modification of a restrictive covenant to allow an intended development will be more appropriate than discharge of the covenant. In this case, however, the Court considers that discharge of the Covenant is more appropriate than modification. The Court considers that the proposed form of modification, to allow the construction of 'one residential building', could be unclear and so introduce confusion, and is not necessary given the nature of existing development proximate to the subject land and its zoning as residential.

#### **THE COURT ORDERS:**

1. Pursuant to section 84(1)(c) of the *Property Law Act 1958* the restrictive covenant contained in Instrument of Transfer No. Instrument of Transfer 786906 recorded in the Register Book at the Office of Titles affecting the land at 923 Dandenong Road, Malvern



East, being the land described in Certificate of Title Volume 3927 Folio 373, be discharged.

2. As soon as practicable after the authentication of this order, the Plaintiff shall lodge an authenticated copy with the Registrar of Titles.
3. The Plaintiff has liberty to apply to the Court for any further or other orders necessary or incidental for the effectuation of this order.

**DATE AUTHENTICATED: 4 May 2017**

  
The Honourable Associate Justice Lansdowne