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

Not Restricted

S ECI 2019 02049

IN THE MATTER of an application pursuant to s 84 of the *Property Law Act 1958*

- and -

IN THE MATTER of an application by City of Stonnington to discharge, or in the alternative modify, the restrictive covenants affecting the land as 32A Chadstone Road, Malvern East, otherwise known as Percy Treyvaud Memorial Park, being the land more particularly described in Schedule A of the Originating Motion, filed 9 May 2019

BETWEEN

CITY OF STONNINGTON — Plaintiff

v

ADAM LINCOLN WALLISH & ORS — Defendant
(according to the attached Schedule)

JUDGE:	Ierodiaconou AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	30 November, 1 and 3 December 2020
DATE OF JUDGMENT:	1 March 2021
CASE MAY BE CITED AS:	City of Stonnington v Wallish & Ors
MEDIUM NEUTRAL CITATION:	*City of Stonnington v Wallish & Ors* [2021] VSC 84

PROPERTY LAW – Restrictive covenants – Public park – Covenants restricting excavation – Plaintiff's application to discharge the covenants, alternatively for a declaration, alternatively for modification to the covenants – How the restrictive covenants ought be interpreted – Whether plaintiff proved that modification will not cause substantial injury to the beneficiaries of the covenants – Whether the restrictive covenants are obsolete – Covenants to be discharged – Declaration unnecessary – *Vrakas v Registrar of Titles* [2008] VSC 281 – *Clare v Bedelis* [2016] VSC 381 – *Hivance Pty Ltd v Moscatiello* [2020] VSC 183 – *Property Law Act 1958* s 84(1)(a), (c) – Application successful.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr M D Townsend with Ms N Blok	Maddocks
For the Defendant	Mr T S Pikusa	Harris Carlson Lawyers

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HER HONOUR:

1 City of Stonnington, the plaintiff, seeks to discharge or modify restrictive covenants which affect the land known as Percy Treyvaud Memorial Park, 32A Chadstone Road, Malvern East.

2 The application is made pursuant to ss 84(1)(a) and (c) of the *Property Law Act 1958* ('the Act'). The plaintiff intends to construct basketball and netball stadiums, a new lawn bowls rink, an underground carpark and social facilities on the subject land ('the proposal').

3 A sample covenant follows:

> … HEREBY COVENANTS with the said Company and its [transferees] registered proprietor or proprietors for the time being of the untransferred land comprised in the said Certificate of Title and every part thereof that he his heirs executors administrators or transferees will not excavate carry away or remove or permit to be excavated carried away or removed any earth marl stone clay gravel or sand from the said lots or any parts thereof…[1]

4 The plaintiff seeks:

(a) discharge of the covenants on the basis the covenants are either obsolete or their discharge will not occasion substantial injury on the beneficiaries to the covenant;

(b) alternatively, a declaration that the covenants 'do not prevent the carrying out of excavation and carrying away of earth for the purposes of developing or constructing buildings on the land including the excavation of land for the creation of basements and other incidental works'; or

(c) further alternatively, the covenants be modified as 'but it shall not be a contravention of the covenant to excavate and carry away earth for the purposes of developing or constructing buildings on the land including the excavation of land for the creation of basements and other incidental works'.

5 The defendants object to the plaintiff's application.

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1 Covenant IT1304757.

Summary

6 I will make orders discharging the covenants on the basis that their discharge will not occasion substantial injury on the beneficiaries to the covenant.

The restrictive covenants

7 The land known as 32A Chadstone Road, Malvern East ('the subject land') originally formed part of certificate of title volume 4883 folio 573 ('the parent title'). The subject land is lots 39–45, 49–78, 83–5 and 173–91 on plan of subdivision LP10246 ('plan of subdivision'). The covenants apply to all bar 14 of the 70 lots which make up the subject land.

8 The covenants are contained in Schedule A to the originating motion filed on 9 May 2019 (collectively 'the covenants').[2]

9 On 22 July 2019, the Court ordered notice of the application to be erected at key entrances and exits to the land and be sent by pre-paid priority post to all registered proprietors of the properties in close proximity of the subject land.

10 On 18 September 2019, the Court made orders confirming compliance with the 22 July 2019.

11 The Court conducted a view of the subject land and surrounding land on 10 November 2020.

12 The land surrounding the subject land is chiefly used for residential purposes. It is a leafy neighbourhood characterised by detached single and double storey residences on parcels of land with gardens and the park. Some, but not all, residences have backyards adjacent to the park and some have views into the park. In the near distance, but not part of the subdivision, is the enormous Chadstone Shopping Centre. It is clearly visible from the park.

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2 The originating motion was amended on 30 September 2019 pursuant to Court orders.

13 The Percy Treyvaud Memorial Park itself currently contains: two ovals; a wetlands; two outdoor bowling greens with cricket and bowls club rooms; outdoor tennis courts and tennis club room; a playground and car parking.

Figure 1: Percy Treyvaud Memorial Park Existing Site Use[3]

Evidence

14 In support of its application, the plaintiff relies on the oral evidence and affidavits of:

(a) Richard John Kwasek, director of environment at the plaintiff, sworn on 1 May 2019, 15 October 2019, 28 February 2020 and 19 November 2020;

(b) Robert Milner, town planning expert, affirmed on 18 March 2019, 16 October 2019 and 6 February 2020;

(c) Bryce Raworth, architectural historian expert, affirmed on 19 March 2019; and

(d) Deborah Donald, traffic engineer expert, affirmed on 18 February 2020.

15 The plaintiff relies on written submissions filed on 23 March and 30 November 2020.

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[3] 'Existing Site Use' contained in exhibit 'RJK-5' entitled 'Second Draft Masterplan for Percy Treyvaud Memorial Park dated January 2019 issue 19 March 2019' to the affidavit of Richard John Kwasek sworn on 1 May 2019 ('first Kwasek affidavit').

16 In support of their objection to the application, the defendants rely on the affidavits of:

(a) Matthew Chapman, town planning expert, sworn on 6 December 2019;

(b) Brett James Young, traffic engineer expert, sworn on 13 March 2020;

(c) Dean Andrew Hurlston, third defendant, sworn on 13 March 2020 and 22 October 2020;

(d) Joseph Gianfriddo, fourth defendant, sworn on 18 November 2019 and 22 October 2020;

(e) Denise Maree Wallish, second defendant, sworn on 18 November 2019 and 21 October 2020;

(f) Michael Anthony Beggs, fifth defendant, affirmed on 29 October 2020;

(g) Roger Julian James Clark, fourteenth defendant, sworn on 22 November 2019 and 13 March 2020;

(h) Michael Peter Pryor, twenty-fifth defendant, sworn on 21 November 2019; and

(i) William Clive Durham, eighth defendant, sworn on 25 November 2019.

17 The defendants rely on written submissions filed on 30 October and supplemented on 3 December 2020.

18 The following expert witnesses gave oral evidence during the proceeding: Mr Milner, Mr Raworth, Ms Donald, Mr Chapman and Mr Young. They were all credible witnesses. The evidence given by the expert witnesses was of assistance to the Court.

19 The following lay witnesses gave oral evidence during the proceeding: Mr Kwasek, Ms Wallish, Mr Hurlston, Mr Gianfriddo, Mr Beggs, Mr Durham, Mr Clark and

Mr Pryor. They, too, were credible witnesses.

20 It is unnecessary to reiterate all of the evidence here. Where necessary and relevant to the issues in dispute, I have referred to it below.

Section 84 of the *Property Law Act*

21 The plaintiff's application is made pursuant to s 84 of the Act. It provides:

> **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:
>
> Provided that no compensation shall be payable in respect of the discharge or modification of a restriction by reason of any advantage thereby accruing to the owner of the land affected by the restriction unless the person entitled to the benefit of the restriction also suffers loss in consequence of the discharger or modification nor shall any compensation by payable in excess of such loss; but this provision shall not affect any right to compensation where the person claiming the compensation proves that by reason of the imposition of the restriction the amount of consideration paid for the acquisition of the land was reduced.
>
> (2) The Court shall have power on the application of any person interested –
>
> (a) to declare whether or not in any particular case any land is affected by a restriction imposed by any instrument; or
>
> (b) to declare what upon the true construction of any instrument purporting to impose a restriction is the nature and extent of the restriction thereby imposed and whether the same is enforceable and if so by whom.

…

22 Turning now to the analysis.

How ought the restriction in the covenants be interpreted?

23 Both parties agree that the object of interpretation was to discover the intention of the parties at the time the covenants were made, and that the words of the covenants should be given their ordinary meaning.

Plaintiff's submissions

24 The word 'excavation' should not be taken out of context but read within the context of the each of the covenants as a whole. Ambiguous or unclear words need to be determined by considering the words with which they are associated in context. The covenants are not a broad-based control on construction. They are a control on the winning of earth-based resources. That this is the ordinary meaning of the covenants is evidenced by the fact that they have never been invoked to prevent excavation in the area.

> During my involvement with this project, I became aware that the Land was comprised of a total of 70 lots contained within 51 separate certificates of title and that a number of the titles were affected by a restrictive covenant which, although not all in the same terms, restrict the excavation and carrying away or removal of earth, marl, stone, clay, gravel or sand from the Land.
>
> Notwithstanding the restrictions contained in the covenants, previous works on the Land have proceeded, to my knowledge, without challenge including the construction of the tennis courts and the bowling greens and associated club facilities.[4]

25 The Victorian and Civil Administrative Tribunal, to the extent it has been involved in granting permits, has not dealt with the covenants to prevent the construction of buildings or basement car parks. The council, as the responsible authority, has not refused planning permits for building works on the basis that they would involve excavation and therefore breach s 61(4) of the *Planning and Environment Act 1987*.

26 The evidence of Mr Milner is that all development would have been inhibited had the covenants been interpreted to control excavation for building. Some defendants

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4 First Kwasek affidavit [19]–[20].

gave evidence that they did not consider the covenants to wholly prohibit excavation of burdened land.

27 The Court cannot consider evidence that purports to reveal the subjective intention of the covenanting parties. However, it may have regard to generally available historic material which may be accessed by any potential purchaser of the land in the subdivision and the locality at the time when the covenants were created. It may have regard to such materials to understand the historical context at the time when the covenants were made.

28 The soil of the locality, namely Malvern East, contains clay which is ideally suited to the making of bricks or tiles and indeed was commonly used for this purpose. This led to abandoned quarries and watercourses needing to be addressed by the local council or developers. A contextual interpretation of the covenants is that they prevent continuation of the practice of removing clay for the purpose of making bricks or tiles and protecting property values rather than preventing the development of the land. Mr Milner's evidence is consistent with that.

29 If excavation is defined as the disturbance of soil or digging, then very little construction, if any, could occur on the burdened land. The defendants do not explain how construction of houses could be undertaken but say that the plaintiff's proposed basement car park could not be undertaken consistently with the covenants.

30 It is of no evidentiary or forensic benefit that other covenants referred to quarrying and not excavation. The test is to construe the covenants here. The words of other covenants are of limited benefit. At any rate, the authorities interpreting 'excavation covenants' overwhelmingly find that they are designed or intended to control quarrying rather than construction activities.

31 Although the defendants say the purpose of the covenants is to control excavation, there is no unifying theory to explain the control on removing earth for the sake of removing a dangerous tree, for example. The covenants only makes sense if they are

construed having regard to the purpose, being a primitive control on the extract of earth-based resources. The evidence given by Mr Milner and Mr Raworth supports this. On the other hand, Mr Chapman, for the defendants, has looked at the words in the covenants without considering the underlying purpose. The purpose he identifies is not consistent with how the covenants have been construed for years. Mr Chapman has simply taken the words at face value. His evidence refers to the effect of the covenants rather than suggesting a purpose for them. It is very clear in reading the covenants that they control earth-based resources. It is only when the words are broken down that confusion arises. The word 'passing' is important. The canon of construction is to see how words are grouped together and it is clear that they are earth-based resources. A clear indication that this is correct, is that no one has come up with the construction contended by the defendants. There is no evidence of this construction ever being adopted before.

Defendants' submissions

32 The language of the covenants reveals that the intentions of the covenanting parties were:

(a) earth cannot excavated on the park; and

(b) earth cannot be removed or carried away from the park.

33 In relation to these prohibitions:

> (a) the words "carry away" and "remove" in the Covenants have the same or very similar meanings;
>
> (b) the prohibitions in relation to earth also apply to any marl, stone, clay, gravel or sand that may be found in the earth;
>
> (c) the use of the word "any" in the Covenants fortifies the operation of the prohibitions by applying to all or some of the earth, marl, stone, clay, gravel or sand that may be found on affected lots;
>
> (d) the prohibitions in relation to the Park only relate to those lots that are burdened by the Covenants. That is to say, those lots marked red (and without a red dot) in the plan reproduced in the Plaintiff's submissions at paragraph [13]…[5]

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5 Defendants' written submissions filed on 30 October 2020 [29(a)–(d)], citing figure 2 of Mr Milner's

34 Firstly, the words of the covenants are broad. They mean what they say. The covenants refer to excavation. There is no exclusion to the restriction on excavation. For instance, there is no exclusion for building to occur. This is unusual and may be compared with other covenants made at the time. Further, in comparison to other such covenants, here the restriction is not simply on quarrying but broadens to include all excavation. The effect of the covenants is that there should be no excavation or removal of the earth from the land. The covenants prevent excavation in any form being undertaken on the land.

35 Extrinsic material should not be relied upon to interpret the covenants. It is therefore impermissible to have regard to generally available historic material to interpret the covenants.

36 There is no evidentiary basis for Mr Raworth's evidence that the failure to include an exclusion for excavation and construction of building foundations was an 'unintended consequence' of the covenants. Mr Raworth conceded this was an attempt to explain away the fact that there is no such exclusion in the covenants and that he did not know what was in the grantee's mind in the 1920s, only what he believed common practices to be at the time. Mr Milner's reliance on Mr Raworth's opinions is therefore misconceived and the Court should not rely on it. Moreover, interpretation of the covenants is a legal matter, not a factual one. No weight should be given to the opinions of Mr Raworth and Mr Milner who are not legally qualified.

37 Mr Milner again relied upon Mr Raworth's opinion in relation to the existence of clay pits when forming his opinions that the meaning of the covenants were limited to quarrying and that it was an unintended consequence of the covenants for there to be no exception for the construction of footings.

38 The plaintiff's submission that the covenants are limited to a restriction of quarrying and the winning of earth-based resources is rejected. The verb 'to excavate' does not mean 'to quarry'. The plaintiff's own definition of 'excavate' does not mean

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expert report dated March 2019 ('Milner Report') exhibited as 'RM-1' to his affidavit sworn on 18 March 2019 ('first Milner affidavit').

'quarrying'. There is no evidence of clay pits used for quarrying in or on the land at the time the covenants were created. Mr Raworth conceded that his evidence referring to newspaper references to clay pits, at the time the covenants were created, did not refer to clay pits being on the subject land but rather in the area more generally. Mr Milner reliance on Mr Raworth's opinion that the meaning of the covenants should be limited to quarrying is therefore misconceived and the Court should not rely on it.

39 Secondly, the design of the covenants was to achieve a certain amenity for the neighbourhood. It is agreed that the covenants were not necessarily to foster the development of a park. Rather, they were to achieve good amenity for the neighbourhood. In this case, a clear purpose was to prevent excavation, including quarrying. The intent of the covenants was ably described by Mr Raworth, namely to prevent excavation and to create an attractive setting for a residential development. Mr Raworth provides the best evidence available about eliciting the purpose or intention of the parties at the time the covenants were created. Mr Raworth agreed that the council had a policy of purchasing land for parks extending back to around 1914 'to achieve the desire that Malvern should be a garden city'. The covenants were not designed as a response to quarrying occurring.

40 Thirdly, the location and physical characteristics of the subject land are relevant. These matters are readily ascertained from a site inspection of the subject land and locality. The development of the neighbourhood and park has been informed by the existence of the covenants. The predominant use of the park is for public recreation. The sporting activities in the park are incidental to that.

Analysis

41 I adopt the following principles given by Derham AsJ in *Clare v Bedelis*.[6]

> A review of the authorities reveals the following principles of interpretation are applicable to restrictive covenants:
>
> (a) subject to the qualifications mentioned below, the ordinary principles of interpretation of written documents apply.[7] The object of

[6] [2016] VSC 381 ('*Clare v Bedelis*').

interpretation is to discover the intention of the parties as revealed by the language of the document in question;[8]

(b) the words of a restrictive covenant:

(i) should generally be given their ordinary and everyday meaning and not be interpreted using a technical or legal approach.[9] Evidence may be admitted, however, as to the meaning of technical engineering, building or surveying terms and abbreviations;[10]

(ii) must always be construed in their context, upon a reading of the whole of the instrument,[11] and having regard to the purpose or object of the restriction;[12]

(c) importantly, the words of a restrictive covenant should be given the meaning that a reasonable reader would attribute to them.[13] The reasonable reader may have knowledge of such of the surrounding circumstances as are available.[14] These circumstances may be limited to the most obvious circumstances having regard to the operation of the Torrens system and the fact that the covenant is recorded in the register kept by the Registrar of Titles.[15] As the High Court held in *Westfield*:

> The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee…[16]

(d) the words of the covenant should be construed not in the abstract but by reference to the location and the physical characteristics of the properties which are affected by it,[17] and having regard to the plan of

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7 Bradbrook and Neave's *Easements and Restrictive Covenants,* AJ Bradbrook and SV MacCallum, 3rd Ed, ('**Bradbrook & Neave***'),* [15.3].

8 Bradbrook & Neave; But see *Prowse v Johnston & Ors* [2012] VSC 4 at [55]–[58] ('***Prowse***').

9 *Re Marshall and Scott's Contract* [1938] VLR 98, 99; *Ferella v Otvosi* (2005) 64 NSWLR 101 at 107 ('***Ferella***'); *Ex parte High Standard Constructions Limited* (1928) 29 SR (NSW) 274 at 278 ('***High Standard***'); *Prowse* at [52].

10 *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64 at [157]-[158]*('**Phoenix**')*; *Westfield Management Limited v Perpetual Trustee Company Limited,* (2007) 233 CLR 528 at [44] (*'**Westfield**').*

11 *Ferella* at 107; *High Standard* at 278; *Prowse* at [52].

12 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22], 462 per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Phoenix* at [148]-[149].

13 *Phoenix* at [157]-[158].

14 These are limited by the decision in *Westfield* and subsequent decisions: see *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324; *Berryman v Sonnenschein* [2008] NSWSC 213; *Shelbina Pty Ltd v Richards* [2009] NSWSC 1449; *Neighbourhood Association DP No 285220 v Moffat* [2008] NSWSC 54; *Fermora Pty Ltd v Kelvedon Pty Ltd* [2011] WASC 281 at [33]-[34]; *Prowse* at [58].

15 *Westfield* at [37]-[42]*; Sertari* at [15]; *Phoenix* at [148]-[158].

16 *Westfield* at [39].

17 *Richard van Brugge v Hare* [2011] NSWSC 1364 at [36]; *Big River Paradise Ltd v Congreve* [2008] NZCA 78 at [23].

subdivision and, depending on the evidence, possibly having regard to corresponding covenants affecting other lots in the estate;[18]

(e) because the meaning of particular words depend upon their context (including the purpose or object of the restriction in a covenant) cases that consider similar words provide no more than persuasive authority as to the meaning of words in a different document.[19] Further, the decisions upon an expression in one instrument are of very dubious utility in relation to another;[20]

(f) the rules of evidence assisting the construction of contracts *inter partes*, of the nature explained by *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales*,[21] do not apply to the construction of easements and covenants;[22]

(g) if the meaning remains in doubt after other rules of interpretation have been applied, as a last resort or 'very late resort,' the covenant should be construed *contra proferentem*, that is, against the covenantor;[23]

(h) whether a covenant has been breached or not is a question of fact to be determined according to the facts of the case and in the light of the actual language in which the restrictive covenant is framed;[24] and

(i) generally speaking, the proper construction of an instrument intended to have legal effect is a question of law, not fact.[25] On the other hand, the meaning of a particular word or expression in such an instrument may be a question of fact, particularly where the Court has already determined as a matter of construction that the word or expression is used in its ordinary and natural meaning.[26]

42 An examination of the wording of the covenants reveals that the *subjects* of the covenants are the transferees and registered proprietors, amongst others. The first part of the restriction prohibits activities captured by the *verbs*: 'excavate', 'permit to be excavated', 'carry away', 'permit to be carried away and remove' and 'permit to be removed'. The second part of the restriction describes the *objects*. That is, what

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18 *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324 at [16]; See *Fermora Pty Ltd v Kelvedon Pty Ltd* [2011] WASC 281 at [33]; *Prowse* at [58].

19 *Bradbrook & Neave* at [15.4] citing *Christie & Purdon v Dalco Holdings Pty Ltd* [1964] Tas SR 34 at 41.

20 *Ferella* at [17]; *In Re Marshall and Scott's Contract* [1938] VLR 98, at 100 where Mann CJ observed that small differences of language can be of great importance and that the decision often turns on them; *Prowse* at [54].

21 (1982) 149 CLR 337.

22 *Westfield*; *Ryan v Sutherland* [2011] NSWSC 1397 at [10]; *Prowse* at [57].

23 *Ferella* at [21]; Bradbrook & Neave's at [15.6].

24 Per Herring CJ in *In Re Bishop and Lynch's Contract* [1957] VLR 179 at 181; *Prowse* at [53].

25 See, in relation to statutes, *S v Crimes Compensation Tribunal* [1998] 1 VR 83 at 88 (J D Phillips JA). See, in relation to written contracts, *FAI Insurance Co Ltd v Savoy Pty Ltd* [1993] 2 VR 343 at 351 (Brooking J); *O'Neill v Vero Insurance Ltd* [2008] VSC 364 [10] (Beach J); *Prowse* at [53].

26 See *S v Crimes Compensation Tribunal* [1998] 1 VR 83 at 88; cf *Phoenix* at [158]; *Prowse* at [53], cited in *Clare v Bedelis*, [31].

may not be excavated, carried away or removed. This is 'any earth marl stone clay gravel or sand'. The third part of the restriction states where the activities are prohibited, that is, 'from the said lots or any parts thereof'.

43 Excavation and excavate may be defined as:

> ***excavation***
>
> 1. the act of excavating.
> 2. a hole or cavity made by excavating.[27]
>
> ***excavate***
>
> 1. to make hollow by removing the inner part; make a hole or cavity in; form into a hollow, as by digging.
> 2. to make (a hole, tunnel, etc.) by removing material.
> 3. to dig or scoop out (earth, etc.).
> 4. to expose or lay bare by digging; unearth; *to excavate an ancient city*.[28]

44 On the broad interpretation of the covenants propounded by the defendants, reference to 'excavate' would prevent any digging on the lots whatsoever. Thus, the covenants would prevent any digging necessary for the foundations of dwellings or other buildings. Indeed, counsel for the defendants acknowledged that such a broad construction would prevent any digging or excavation necessary for landscaping gardens or even the removal of a dangerous tree.

45 However, while, the verbs 'excavate', 'carry away' and 'remove' are expressed as alternatives through the use of the word 'or', the restriction applies by reference to 'any earth marl stone clay gravel or sand *from* the said lots or any parts thereof' (emphasis added). This suggests that the verbs are intended to be read together with the restriction focused on the removal of the objects of the restriction rather than on any excavation or digging *on* the lots whatsoever.

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27 *Macquarie Dictionary* (online at 22 February 2021) 'excavation' (defs 1–2).

28 Ibid 'excavate' (defs 1–4).

46 In closing submissions, counsel for the defendants acknowledged that it can be inferred from the fact that words like 'sand' and 'marl' and 'stone' and 'clay' are used that the purpose for which those resources may be removed from the ground is because of some quarrying activities that occurs. However, it was submitted that excavation of earth is not necessarily quarrying.

47 The nouns 'earth marl stone clay gravel or sand' must be considered in context rather than separately. Construed broadly, 'earth' would cover them all. Earth may be defined as:

> ***earth***
>
> …
>
> 4. the surface of this planet.
>
> 5. the solid matter of this plant; the dry land; the ground.
>
> 6. the softer part of the land, as distinguished from rock; soil.[29]

48 In its context 'earth' should be understood as referring to the soil on the relevant lots rather than the ground or the surface of the lots in their entirety. This accords with a reading of the word 'earth' as being a word of the same kind of words as: 'marl, 'stone', 'clay', 'gravel' and 'sand'. While these are all objects which may be dug and removed from the lots in order to, for example, construct buildings or install garden beds, they are also valuable commodities which may be excavated and removed from the land for commercial purposes.

49 I do not accept that the word 'excavate' should be read literally such that it would apply to any digging on the relevant lots whatsoever. Instead, read in context, the restriction on 'excavat[ing] carry[ing] away or remov[ing] … earth marl stone clay gravel or sand' is directed towards the quarrying of the lots for those resources.

50 While the defendants submitted that 'excavate' does not mean 'quarrying' or 'to quarry', I note that the dictionary definition of 'quarry' includes:

> ***quarry***

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29 Ibid 'earth' (defs 4–6).

1. an excavation or pit, usually open to the air, from which building stone, slate or the like is obtained by cutting, blasting, etc.[30]

51 Here the transfers containing the covenants make reference to the parent title and plan of subdivision LP10246. For example, IT1304757 commences:

> ALL its estate and interest in ALL those pieced land being Lots 169, 170, 171 and 172 on Plan of Subdivision No. 10246 lodged in the office of Titles … and being part of the land comprised in Certificate of Title Volume 4883 Folio 976573 …

52 The plan of subdivision suggests an intention to create a residential neighbourhood. The lots in the subdivision, including those which make up the subject land, are generally of a regular shape and of a conventional residential density. The plan also contains road reserves providing access to the lots.

53 The covenants do not apply to all of the lots on the subject land, nor all of the lots in the surrounding neighbourhood. However, the covenants were applied to lots transferred to private individuals. The covenants were not imposed for the purpose of creating public parkland. Nor was that contended by the parties. Their existence on land transferred to private individuals with the intention of creating a residential neighbourhood, is at odds with a broad reading of the covenants such that they prohibit any digging whatsoever. Rather, it is consistent with the more limited textual construction of the covenants, namely that the prohibition of 'excavat[ing] carry[ing] away or remov[ing] … earth marl stone clay gravel or sand from the said lots…' should be read as prohibiting the quarrying of the relevant lots for those resources.

54 In their submissions, the defendants referred to cases considering similar covenants which expressly refer to 'quarrying' in addition to 'excavation',[31] or which expressly

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30 Ibid 'quarry' (def 1).

31 *Re Alexandra* [1980] VR 55; *Isles v Glen Eira CC* [2003] VCAT 2039 ('*Isles*'); *Wong v McConville* [2014] VSC 148 ('*Wong*'); *Re Zhang* [2018] VSC 721 ('*Re Zhang*').

provide that it is not a breach of the covenant to excavate for the footings or foundations of a building or buildings.[32]

55 For example, the defendants identify the case of *Jiang v Monaygon Pty Ltd*.[33] There Derham AsJ considered a covenant the substance of which was that:

> [T]he registered proprietor for the time being will not, and will not permit, any earth, clay, stone, gravel or sand to be excavated, carried away or removed from the land 'except for the purpose of excavating for the foundations of any building to be erected thereon' …[34]

The plaintiff sought modification of the exception in that covenant such that instead of the words 'except for the purpose of excavating for the foundations of any building to be erected thereon' there was inserted 'except in connection with the residential development or use of the land.'

56 Despite the absence of the word 'quarrying' in the covenant, Derham AsJ described that covenant as 'the quarrying restriction'. Considering the plaintiff's modification application, his Honour observed:

> The covenant prohibiting the excavation and removal of soil, sand, stone, gravel and other similar materials is to prohibit quarrying or the extraction of minerals on the subject land. In the present case, it was not part of the purpose of the covenant to prevent building works for the foundation of any building on the subject land.[35]

57 In considering that case, and the other examples provided by the parties, it is important to remember that, as noted by Derham AsJ in *Clare v Bedelis*:

> because the meaning of particular words depend upon their context (including the purpose or object of the restriction in a covenant) cases that consider similar words provide no more than persuasive authority as to the meaning of words in a different document. Further, the decisions upon an expression in one instrument are of very dubious utility in relation to another…[36]

58 It may be that the additional wording in the covenants in those cases suggest that the

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32 *Isles*; *Wong*; *Re Zhang*; *Prowse v Johnstone* [2015] VSC 621; *Re RJ and RG Bakery Pty Ltd* [2017] VSC 669; *Jiang v Monaygon Pty Ltd* [2017] VSC 591 ('*Jiang*').

33 *Jiang*.

34 Ibid [3].

35 Ibid [68].

36 [2016] VSC 381, [31(e)].

restriction in those covenants was intended to apply more broadly than the present covenants. Ultimately, I must construe the present covenants on the basis of the words used. The absence of the word 'quarrying', or of an exception suggesting a broader intention, does not require the adoption of a broad construction extending to any excavation or digging of the ground whatsoever. Instead the covenants are to be read as operating in a more limited manner – to prevent the quarrying or commercial extraction of 'earth marl stone clay gravel or sand' from the land.

59 Thus, on the construction of the covenants I have preferred, the plaintiffs would be entitled to a declaration that the covenants 'do not prevent the carrying out of excavation and carrying away of earth for the purposes of developing or constructing buildings on the land including the excavation of land for the creation of basements and other incidental works'. It is, however, unnecessary for me to make the declaration sought by the plaintiffs given the ultimate outcome is in favour of discharging the covenants.

60 Pausing here, there was some evidence adduced as to the historical background of the subject land and its intended use, primarily historical newspaper articles, but also historical files and books referred to in Mr Raworth's report. I do not rely upon that evidence in order to construe the covenants. It ought not be given any weight in that regard given it is extrinsic to the register kept by the Registrar of Titles. Out of deference to the parties' submissions, I will refer to some of it in the discussion below. I observe that it ultimately supports the construction of the covenants which I have preferred.

61 The evidence reveals that the parent title was purchased by East Malvern Estates Pty Ltd on 4 August 1924. It was known as the Malvern Gardens Estate. The estate was divided into over 600 residential building allotments.[37] The parcels of land created by the subdivision were offered for sale. Many were purchased in the 1920s. The council sought to acquire a number of allotments with a view to provide adequate

[37] Subdivision Plan of the Malvern Garden Estate, c1923, State Library of Victoria Maps Collection MAPEF 912.945 AU2A, cited in Mr Raworth's expert report dated 9 January 2019 exhibited as 'BR-1' to his affidavit affirmed on 19 March 2019, 10 [23] ('Raworth Report').

park space for future residential development.[38] Further, it is suggested that the council at the time anticipated that residential development would follow the extension of the Burnley-Darling train line to Glen Waverley, which was electrified in 1920 and opened in 1930.[39]

62 The purpose of the covenants on the subject land was not to create or maintain the Percy Treyvaud Memorial Park. Over the course of approximately 30 years, until 1955, the network of covenants was created with the subdivision of the parent title. The park was not in existence at the time the covenants were first created. The local council gradually acquired the land that formed part of the park between 1924 and 1951. The council's policy of purchasing the private land was thought to reflect a broader interest in the locality adopting the 'Garden City movement', an urban design characterised by open spaces and public parks.[40] The ground was graded in 1936 to facilitate it for treatment as Chadstone Park. The Percy Treyvaud Memorial Park itself came into existence in 1973 when Chadstone Park was officially renamed.

63 Before the time of subdivision, quarrying occurred on land near the subject land. To the south of the subject land was once the Convent of the Good Shepherd and Girls' Reformatory. (That site now hosts Chadstone Shopping Centre.) Notably, the Convent was built in 1883 'with bricks made from clay quarried on the site and rendered with roughcast cement'.[41] This was consistent with the area's geological formation.[42] Such that:

> Abandoned waterholes, from which clay for brick-making had been taken, and also disused watercourses, were a source of expense to the Council, when it became necessary to fill them in. They were some of the legacies from the first settlement.[43]

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38 'Buying Park Lands: Council and Owners at Variance', *The Age*, 23 Feb 1928, 7, cited in the Raworth Report, 10 [23].

39 Ibid.

40 'Making a Garden City: Civic Pride of Malvern', *The Age*, 22 July 1936, 15; Miles Lewis, *Melbourne: the City's History and Development* 93, cited in the Raworth Report, 10–2 [23]–[25].

41 Oakleigh Covent and Church, File held at Stonnington History Centre, Reference No. MP6990, quoted in the Raworth Report, 8 [19]–[20].

42 John Butler Cooper, *The History of Malvern: From its First Settlement to a City*, Melbourne: Speciality Press Pty Ltd, 1935, p. 134, cited in the Raworth Report, 8–9 [21].

43 Ibid 166, cited in Raworth Report, 9 [22].

There is, however, no cogent evidence of quarrying occurring on the subject land.

64 I accept that the subdivision was intended to create a residential neighbourhood characterised by open spaces, including gardens, and public parkland. The prohibition on quarrying imposed by the covenants sought to facilitate that object by ensuring the land was used to create a residential neighbourhood rather than for the exploitation of any resources it may contain. I agree with Mr Milner's assessment that the covenants sought to protect the amenity of the neighbourhood by avoiding issues which may be associated with a quarry like noise, dust and traffic. I therefore accept the parties' submissions that an intention of the covenant was to create good amenity for the neighbourhood.

Will modification or discharge of the covenants cause no substantial injury to beneficiaries in accordance with s 84(1)(c) of the Act?

Plaintiff's submissions

65 The plaintiff submits that discharge of the covenants is desirable even if its declaration application is successful as discharge will provide a clean title for each parcel that comprises the subject land, avoiding any future confusion or difficulties such as those illustrated by the present proceeding.

66 There are few amenity impacts that are referrable to the proposed modification itself. Section 84(1)(c) of the Act requires a comparison between the benefits initially intended to be conferred and actually conferred by the covenants, and which will remain after the covenants have been discharged or modified. If the benefit of the covenants is to prevent excavation for the purpose of quarrying, no diminution of this purpose would follow the proposed amendment. No substantial injury will be occasioned by the proposed amendment to the covenants. The difference between a local park and future park is not a substantial injury. The plaintiff has at each step of the way consulted with the community. Mr Chapman fairly conceded that one would not expect to get this type of consultation process in a planning permit application.

67 The authorities show that the Court should assess what might occur on the

burdened land prior to the modification compared with what might occur on the burdened land after modification. If the difference does not result in substantial injury to beneficiaries, then the Court can consider whether to exercise its discretion in favour of the proposed modification or discharge.

68 There are examples of what might occur on the burdened land without modification or discharge of the covenants. An upgrade of the sporting facilities might occur with no underground car parking, so with little or no excavation. In this scenario, on-site parking might be significantly reduced, leading to greater on-street parking pressure. Alternatively, the council would not be prevented from constructing an above ground car park to support similar upgrades to the facilities as presently proposed. Mr Kwasek gave evidence that if the council cannot excavate to build the underground car park to a height of 7 metres (similar to nearby residences), then there is an option to elevate the plans by 7 to 11 metres. This is made as a comparative point. The council does not want to build a multi-storey car park.

69 The proposed modification of the covenants will not occasion substantial injury on beneficiaries, for any injury complained of might occur without the proposed changes to the covenants. If anything, the proposal to modify the covenants, by facilitating the construction of a 216-car space underground car park, will result in less pressure for on-street car-parking and thereby improve neighbourhood amenity. As Mr Milner stated:

> …the effects on amenity, including from overlooking, noise, overshadowing or increases in visual bulk, would be no greater than a multipurpose sporting facility or alternate public or private land use and development established on the Land in compliance with the Covenant, which are not addressed or managed by the restriction.[44]

70 The existing excavation has not given rise to injury. No beneficiary or defendant to this proceeding has given notice of any injury suffered as a result of existing excavation. All affidavits of or on behalf of the defendants provide objections to future potential injury with no mention of ongoing injury resulting from the existing

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44 Milner Report, [77].

excavation.

71 The excavation is not immediately proximate to beneficiaries. An excavation plan details that the excavation is not expected to occur at any closer than 15 metres from the title boundary of any beneficiary.

72 The construction will be comprehensively managed. A construction management plan will be required to consider and describe the management of the construction phase and the mitigation of any impacts on the surrounding area. The plan will contain strategies to manage: operating hours in accordance with the Environmental Protection Authority's best practice framework for Major Projects, their guidelines and policies, and minimise impact on nearby residents; air and dust; noise and vibration control; waste minimisation; silt and erosion control; vehicle and pedestrian traffic on and around the construction site; and public safety. Traffic and parking impacts have been comprehensively assessed with various traffic and parking reports carried out by the plaintiff. Ms Donald opined that if excavation remains prohibited then an above ground car park could be constructed. Mr Kwasek notes the proposal is to prevent access through Quentin Road and encourage access through Chadstone Road to minimise impact on the local traffic network. He continued, that there is no access from Rob Roy Road apart from the current pedestrian access. When detailing the plans to the Court, Mr Kwasek also pointed out that most trees will be retained under the vegetation buffer. Mr Young conceded that the existence of the retaining wall is inconsistent with making access in the future by Rob Roy Road or Sherbrooke Road to the car park.

73 This application is not a de facto planning appeal. Remedies exist for dust or noise nuisances and vibration damage. A planning permit is not required in the Public Park and Recreation Zone in the Stonnington Planning Scheme. There are purpose built legislative controls that address matters of construction impacts, noise, dust and the like such as the *Public Health and Wellbeing Act 2008* and there are also common law remedies. Here, this application is not an at-large assessment of the amenity impacts of any proposed buildings and works. At its highest, it might be

relevant for the purpose of the Court in exercising its residual discretion.

74 The precedent has been well-established. It is difficult to imagine a precedent will be created by modifying the covenants in the proposed manner as the covenanted area has been previously extensively developed. Residences nearby the park, at Chadstone Road, Midlothian Street and Abbotsford Avenue, have obtained permits for construction with basement car parking, an in-ground pool or garages. The mischief complained by the defendants has already occurred throughout the neighbourhood.

75 Notably, in response to the defendants' submissions of the loss of *their* neighbourhood park, the park is not an extension of their backyard. It is owned by the whole of the municipality. It is certainly, in council's view, the more residents that can share in the park and benefit from it, the better. It is not about making it a wide regional facility, it is about making it available to the broader municipality.

76 Lastly, in response to the defendants' belief that their property values will be impacted, that is not borne out by evidence. A defendant referred to a letter from a real estate agent.

Defendants' submissions

77 The test for substantial injury outlined in *Vrakas v Registrar of Titles* ('*Vrakas*')[45] should be applied. The Court should not exercise its residual discretion in favour of the plaintiff. The covenants were designed to achieve a certain amenity for the neighbourhood and not necessarily to foster the development of a park. The defendants agree that the plaintiff has undertaken excavation in the park in the past to create the existing sports facilities. Those actions did not diminish the park as it remained a neighbourhood park for the benefit of the local community. What is now being proposed is a transformation of the park into a regional sporting venue. It will dramatically change the defendants' appreciation of the park. The extent of the transformation is unknown. There is a distinct possibility that the final extent of

45 [2008] VSC 281 ('*Vrakas*').

the proposal will see greater injury and detriment to the defendants than is currently proposed.

78 The covenants were designed to prevent any excavation activities. Such activities are detrimental to the development of the park and neighbourhood as a residential area. The covenants have been successful in preventing excavation activity from occurring in the park and neighbourhood. They have prevented substantial excavation of the park that would result in a significant and detrimental change to the nature and use of the open and green spaces. When the plaintiff purchased the lots to create the park, it intended to create a park that serviced the local community and to create a garden suburb. This is evident in Mr Raworth's report.

79 If the covenants were discharged, the plaintiff will not be fettered in its ability to develop the park further, to the detriment of the defendants.

80 Under the existing planning laws applicable to the park, the plaintiff does not require a planning permit for the proposal and accordingly, the defendants are not entitled to object to the proposal.

> The redeveloped site and upgraded facilities appear to be designed to meet regional rather than local community sporting and recreational needs, the principal focus being a large stadium rather than the existing balance between sports and recreation and a place of resort amongst the passive open space provided by a well vegetated site with large native trees, wetlands and a proliferation of flora and fauna.
>
> …
>
> Unfortunately, in my opinion, the Masterplan lacks sufficient detail for informed comment and assessment of impact on local residents and beneficiaries in particular. It is fundamentally a schematic representation of what may be envisaged, with limited assessment as to how the proposal will impact local amenity.
>
> …
>
> The park is currently a reasonably quiet, green oasis presenting a pleasant, leafy contrast to the intensity of activity and built form within the nearby Chadstone Major Activity centre precinct. The redevelopment of the site will result in the loss of passive open space and an unspecified number of substantial native trees that provide the distinctive landscape character of the

site and contribute to the flora and fauna habitat.[46]

81 X The level of traffic in the area and parking issues will increase as a result of the proposal, to the detriment of the defendants. This is despite the increase in parking capacity to be provided by the underground car park with proposed traffic access from Chadstone Road. Mr Young reviewed the plaintiff's traffic evidence and opined there is: (a) sufficient spare capacity available in Rob Roy Road and Quentin Road to cater for the level of traffic estimated to be generated by the proposal and (b) no reason why vehicle access could not be sought from those roads to supplement the proposed underground car park access from Chadstone Road.[47] The defendants are concerned that traffic access to the underground car park is likely to be provided by Rob Roy Road and Quentin Road. The planning scheme does not address the concern. It says the proposal will only have access from Chadstone Road. Traffic impacts may be greater once the proposal has been finalised.

82 It was put to the defendants in their cross-examination that a car park could be constructed above ground. That is something of a change to the proposal. The Court should therefore infer that the proposal is not in its final form. The absence of an above ground car park in the plans says it is impossible for the plaintiff to make findings about what is proposed. It cannot say there will be no substantial injury to the defendants using the test in *Vrakas*. Mr Chapman gave evidence that an above-ground car park will be a larger development than the current proposed one and there will be an amenity impact on car parking. The council would still need to excavate to construct an above-ground carpark so that would breach the covenant.

83 The plaintiff does not need to obtain a planning permit for any use, or any building or works associated with the proposal. The defendants have no right to object. The plaintiff admitted that the proposal was only a concept plan and does not represent the final proposal. In the future, the defendants will have no right under planning law to object to a wide variety of uses for the park where undertaken by

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46 Mr Chapman's expert report dated 6 December 2019 exhibited as 'MC-2' to his affidavit sworn on 6 December 2019 ('Chapman affidavit'), [93], [96], [99] ('Chapman Report').

47 Mr Young's expert report dated 13 March 2020 exhibited as 'BJY-2' to his affidavit sworn on 13 March 2020, [5.1].

the plaintiff in its capacity as the public land manager under the *Local Government Act 1989*. Mr Chapman expressed 'it is [his] strong opinion that the planning permit exemption is a very important factor in the context of this application'.[48]

84 In response to the plaintiff's submission on remedies for nuisance, if the defendants make a nuisance complaint under the *Public Health and Wellbeing Act*, the plaintiff will be required to investigate itself. It will most likely defend against any nuisance proceeding the defendants issue by: claiming that the proposal was lawfully authorised by a planning permit or zoning control and relying on the matters raised here that it was a proper exercise of its statutory powers under the *Planning and Environment Act* and, or the *Local Government Act*. Without the covenants, the defendants are unlikely to have any remedy in nuisance in respect of the proposal or any future development of the park.

85 If the covenants are modified or discharged, the proposal will proceed and become a precedent for future development in the park and neighbourhood by the owners of Chadstone Shopping Centre who own six lots in the subdivision near the shopping centre.

86 The defendants are concerned their property values will diminish and will no longer be located proximate to a neighbourhood park but instead be affected by the nuisances associated with a regional sporting facility. That is not disputed by the plaintiff other than to say that there is no evidence of a likely diminution in land values from the modifications sought. The plaintiff has not provided any evidence to the Court to establish that the property values of the defendants will not be negatively impacted.

Analysis

87 The relevant principles are well-established. Macaulay J in *Hivance Pty Ltd v Moscatiello*[49] summarised:

> Section 84(1)(c) of the *Property Law Act* provides that the court has power to

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48 Chapman Report, 19.

49 [2020] VSC 183 ('*Hivance*').

modify a restrictive covenant if satisfied, amongst other things, that "the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction".

Although the parties may adduce expert evidence as to the likelihood or otherwise of substantial injury, ultimately it is a matter to be decided by the court upon applicable legal principles.[50] As earlier stated, Hivance bears the onus of proving, as a negative proposition, the absence of substantial injury.

In *Randell v Uhl*, after an extensive review of the authorities, Derham AsJ distilled the following principles, which I gratefully adopt:[51]

(a) a substantial injury must be a detriment to the benefitted land that is real and not fanciful.[52] The requirement that the injury must be substantial is intended 'to preclude vexatious opposition cases where there is no genuineness or sincerity or bona fide opposition on any reasonable grounds'.[53] That does not mean, however, that s 84(1)(c) of the *PLA* is restricted to dealing with vexatious or frivolous objections. Although the restriction of s 84(1)(c) of the *PLA* to 'substantial' injury would enable the weeding out of vexatious objections to the modification or removal of a covenant, the dichotomy in the section is not between vexatious and non-vexatious claims but is between cases involving some genuinely felt but insubstantial injury, on the one hand, and cases where the injury may truly be described as substantial, on the other;[54]

(b) the substantial injury relates to practical benefits, being any real benefits to the person entitled to the benefit of the covenant.[55] It is not sufficient for a plaintiff to merely prove that there will be no appreciable decrease in the value of the property that has the benefit of the covenant;[56]

(c) substantial injury may arise from the order for modification of the covenant being 'used to support further applications resulting in further encroachment and in the long run the object sought when the covenant was imposed [being] completely defeated'.[57] This consideration is referred to as the 'precedent value';[58] and

(d) whether there will be substantial injury is to be assessed by comparing:

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50 *Re-Young* [2019] VSC 755 [4].

51 *Randell v Uhl* [2019] VSC 668 [85].

52 Ibid, [36].

53 *Ridley v Taylor* (1965) 1 WLR 611, 622 (Russell LJ); referred to with approval in *Re Stani* (Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 10.

54 *Greenwood v Burrows* (1992) V ConvR 54-444, 65, 199 (Eames J) ('*Greenwood*'); *MacLurkin v Searle* [2015] VSC 750, [54]-[56] ('*MacLurkin*'); *Jiang v Monaygon Pty Ltd* [2017] VSC 591, [37].

55 *Vrakas* [2008] VSC 281, [30], [34] and the cases cited.

56 *Re Parimax (SA) Pty Ltd* (1956) SR (NSW) 130, 133 (Myers J).

57 *Re Stani* (Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 11.

58 *Vrakas* [2008] VSC 281, [39] and the cases cited.

(i) the benefits initially intended to be conferred and actually conferred by the covenant; and

(ii) the benefits, if any, which would remain after the covenant has been discharged or modified;[59]

(e) if the evidence establishes that the difference between the two will not be substantial, the plaintiff has established a case for the exercise of the Court's discretion under s 84(1)(c) of the *PLA*;[60]

(f) it is relevant to consider evidence of statutory planning provisions to the extent they show what realistically will be the result of the removal or modification of the covenant because 'it would be artificial and wrong to pay no heed at all to the reality of the situation';[61]

(g) in considering whether the plaintiff has satisfied the Court that there will not be substantial injury:

(i) town planning principles and considerations are not relevant;[62]

(ii) the absence of objectors to the discharge or modification of a covenant will not necessarily satisfy the onus of proof;[63] and

(iii) each case must be decided on its own facts,[64] and each covenant should be construed on its own terms and having regard to the particular context in which it was created;[65]

(h) if the plaintiff satisfies the Court that there will be no substantial injury to the relevant persons, the Court has a residual discretion to refuse the application.[66] The Court in exercising its discretion, may consider town planning principles and the precedent value.[67]

88 The defendants submit that they will suffer substantial injury if the covenants were modified or discharged because:

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59 *Prowse v Johnstone* [2012] VSC 4, [104] ('*Prowse*').

60 *Re Cook* [1964] VR 808, 810-11 (Gillard J) ('*Cook*'); approved in *Freilich v Wharton* [2013] VSC 533, [25] (Bell J).

61 *Prowse* [2012] VSC 4, [104].

62 *Vrakas* [2008] VSC 281, [41] and the cases cited.

63 Ibid, [43].

64 Ibid, [44].

65 *Prowse* [2012] VSC 4, [52].

66 *Cook* [1964] VR 808, 810; *Re Robinson* [1972] VR 278, 285-6; *Re Stani* (Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 7; *Greenwood* (1992) V ConvR 54-444, 65, 192, 65, 200; *Stanhill Pty Ltd v Jackson* (2005) 12 VR 224, 239 ('*Stanhill*').

67 *Vrakas* [2008] VSC 281, [45]–[46], cited in *Hivance*, [10]–[12].

(a) the proposal will transform the subject land from a neighbourhood park into a regional sporting facility;

(b) the defendants will suffer during the construction of the proposal due to noise, dust, vibrations and restrictions on movement in the park;

(c) the defendants will suffer ongoing traffic and parking impacts as a result of the proposal;

(d) the defendants have no rights under current planning laws (or in nuisance) in respect of the proposal or for any future proposal for the use or development of the park by the plaintiff;

(e) the proposal will become the precedent for future development of the park and the neighbourhood; and

(f) the proposal is not final and may be modified or replaced with alternative proposals that may cause similar or additional injury to the defendants.

89 On the construction of the covenants I have adopted, none of the potential injuries of which the defendants complain, would be referrable to the modification or discharge of the covenants and the restriction they impose. The covenants do not prevent excavation of the kind contemplated by the proposal. Instead the covenants have the effect of prohibiting excavation for the purpose of quarrying.

90 The subject land is zoned as Public Park and Recreation Zone in the Stonnington Planning Scheme. In his expert report Mr Chapman stated:

> The purpose of the Public Park and Recreation Zone is as follows:
>
> - To implement the Municipal Planning Strategy and the Planning Policy Framework.
> - To recognise areas for public recreation and open space.
> - To protect and conserve areas of significant where appropriate.
> - To provide for commercial uses where appropriate.
>
> I consider that the primary use of the subject property should currently be

> categorised as an Open Sports Ground" as defined at Clause 73.03 Land Use Terms of the Stonnington Planning Scheme as "Land used for organised games of sport, but which is available for informal outdoor leisure or Open sports ground recreation when not being used or prepared for an organised game. It may include lights, change rooms, pavilions, and shelter."
>
> Under this zone no permit is required for the proposed uses or for building works carried out by or on behalf of the Stonnington City Council, acting in its role as the public land manager under the *Local Government Act 1989*.[68]

91 However, Mr Milner stated in his report:

> Regardless of whether there might be clay on the Subject Site the zoning of the land in the Public Park and Recreation Zone regulates mineral, stone and soil extraction.
>
> Such activities would require a planning permit. There is a high probability that a permit would not issue because of:
>
> – The urban setting of the site;
>
> – The proximity of residential neighbours.[69]

In his oral evidence Mr Milner also stated that an application for a permit by a third party to undertake quarrying on the subject land would be rejected.

92 Similarly, Mr Chapman stated that there was 'virtually no prospect of quarrying occurring in [the] area.'[70] I accept that, in the absence of the covenants, there is no real prospect of quarrying occurring on the subject land.

93 The covenants do not operate to ensure the continued use of the subject land as a neighbourhood park nor to maintain open space. Previous excavation has occurred on the subject land, for example, to create facilities for the lawn bowls club and the tennis club. Excavation for residential construction has also occurred on other lots in the neighbourhood burdened by the covenants. Such excavation was not in breach of the covenants.

94 The defendants have genuinely held concerns in relation to the proposal. However, these issues arise as a result of the proposal itself and would not be changed by the removal of the covenants. I accept the plaintiff's submission that this application is

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68 Chapman Report, [41]-[43]. See also Milner Report, [28]–[30].
69 Milner Report, [57]–[58].
70 Chapman Report, [67].

not a de facto planning appeal.

95 For example, the covenants do not operate to limit development so that existing residents do not suffer ongoing traffic and parking impacts. In any event, expert evidence was given by two traffic engineers, Ms Donald and Mr Young, as to the potential traffic and parking impacts of the proposal. Neither Ms Donald nor Mr Young identified any parking or traffic engineering related issues which would have an unacceptable impact on the defendants.

96 Similarly, the defendants expressed concerns related to dust, noise and vibration generated by excavation and construction associated with the proposal. While I have accepted that an intention of the covenants was to create good amenity for the neighbourhood, the covenants do not operate to prevent any excavation or construction on the subject land. Instead, the defendants' concerns of dust, noise and vibration created by activities other than quarrying, such as construction on the subject land, are left to be dealt with by other mechanisms. In relation to the present proposal, Mr Kwasek gave evidence that a construction management plan would be adopted.

97 The zoning of the subject land as a Public Park and Recreation Zone means that no planning permits are required in order for the proposal. However, the defendants' rights or lack thereof under current planning laws would remain the same whether the covenants remained in place or not. In any event, Mr Milner's evidence, quoted above, was that a planning permit would be required in order for quarrying to occur on the subject land.

98 Similarly the defendants' complaint of the potential precedential effects of the proposal for future development in the neighbourhood does not relate to the removal of the covenants. I have accepted that there is no realistic possibility of quarrying occurring in the neighbourhood, therefore the removal of the covenants would simply provide the plaintiff with clean titles in order to avoid any further confusion or disputes regarding the covenants' meaning.

99 While the plaintiff has not provided any evidence establishing that the property values of the defendants will not be negatively impacted by the proposal, there was no cogent evidence suggesting that property values would be impacted. The letter from a real estate agent exhibited to a defendant's affidavit is speculative.[71] I have not taken it into account. In any event, as the proposal may be implemented notwithstanding the covenants, any impact the proposal may have on property prices would not be referrable to the removal of the covenants.

100 Finally, the defendants complain that the proposal is not final and may be modified and replaced with alternative proposals which may cause similar or additional injury to the defendants. Mr Kwasek gave evidence that there was very little change likely to be made to the proposal's design. The plaintiff posited, and it was put to the defendants, that if the covenants prevented any digging or excavation, the proposal could be built above ground with fill brought onto the park. I do not accept the defendants' submission that it is clear from this cross-examination that the proposal is not in final form and that therefore the plaintiff is not in a position to say that there will be no substantial injury caused to the defendants.

101 When considering whether substantial injury would result from modification or discharge of a covenant pursuant to s 84(1)(c) of the Act, the Court assesses what might occur on the burdened land prior to modification or removal and then compares what might occur on the burdened land after modification or removal. In *Prowse v Johnstone*,[72] Cavanough J explained:

> [E]ven though the plaintiff is entitled to ask the court to take into account the "worst" that could be done under the 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.[73]

102 The possibility of the proposal being built above ground, for example through fill being brought in, was raised by the plaintiff as an example of what may occur on the

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71 Exhibit 'DMW-1' to the affidavit of Denise Maree Wallish sworn on 18 November 2019.
72 *Prowse* [2012] VSC 4.
73 Ibid [104].

subject land prior to modification or removal, if the effect of the covenants was that they prohibited any digging or excavation of earth on the subject land.

103 Mr Kwasek gave evidence that if the covenants prohibited the proposal, the facilities would probably need to be elevated creating a visual impact of around 11 to 12 metres from Quentin Road, whereas the proposal currently has a visual impact of 7 metres. It was not suggested by the defendants that such a proposal would be unrealistic.

104 The possibility of construction occurring above the ground in order to avoid the need for excavation was put to a number of the defendants in cross-examination. Their evidence was generally to the effect that the impacts of such a proposal would be the same as those from the current proposal, if not worse because of the increased visual impact.

105 However, it is ultimately unnecessary to consider this issue in detail. On the construction of the covenants I have adopted, the proposal can proceed without the removal or modification of the covenants. The defendants would only suffer substantial injury from the removal of the covenants if quarrying were to occur on the subject land following removal. It is not suggested that this is a realistic possibility.

106 I am therefore satisfied that the discharge of the covenants would not substantially injure the persons entitled to the benefit of the restriction.

107 However, the defendants submitted that even if I were satisfied that there was no substantial injury, I should exercise my residual discretion in their favour and refuse the plaintiff's application. The defendants' submissions on this issue focused on the defendants' loss of amenity caused by the proposal, their lack of recourse under current planning laws, and the suggestion that the proposal is not in its final form.

108 Given the limited scope of the restrictions imposed by the covenants and for substantially the same reasons outlined above, I do not consider that my residual

discretion should be exercised in the defendants' favour. I accept that it is desirable for the covenants to be discharged in order for there to be clean titles on the subject land. Such a course will avoid any future confusion or disputes and will not cause the defendants substantial injury.

Ought the covenants be deemed obsolete pursuant to s 84(1)(a) of the Act?

109 It is common ground that the principles enunciated in *Vrakas* are applicable to the question of whether obsolescence ought be deemed.

> Section 84(1)(a) has two limbs. In essence, the first limb is that, due to changes in the character of the property or neighbourhood or other circumstances, the covenant is obsolete, and the second limb is that the covenant's continued existence would impede the reasonable user of the land without practical benefits to other persons.[74] An applicant need only establish one of these limbs in order to have a right to a remedy under s 84(1)(a), subject to the court's residual discretion (see below).
>
> In relation to the first limb of s 84(1)(a), what is the "neighbourhood" must be determined as at the date of the hearing, rather than the date of the covenant.[75] What is the "neighbourhood" is a question of fact.[76]
>
> 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".[77] A covenant is not obsolete if it is still capable of fulfilling any of its original purposes, even if only to a diminished extent.[78] The test is whether, as a result of changes in the character of the property or the neighbourhood, or other material circumstances, the restriction is no longer enforceable or has become of no value.[79] 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.[80] A covenant could be held to be not obsolete even if the purpose for which it was designed had become wholly obsolete, provided that it conferred a continuing benefit on persons by maintaining a restriction on the user of land.[81]

Plaintiff's submissions

110 There is no controversy about the extent of the neighbourhood. The parties agree on

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74 *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 7; *Re Alexandra* [1979] VR 55, 57-8; *Greenwood v Burrows* (1992) V ConvR 54-444, 65 192 ("*Greenwood*").

75 *Re Miscamble's application* [1965] VR 596, 597, 601 ("*Miscamble*"); *Re Pivotel Pty Ltd* (2001) V ConvR 54-635; [2000] VSC 264, [29] ("*Pivotel*").

76 *Miscamble* [1965] VR 596, 602; *Greenwood* (1992) V ConvR 54-444, 65 196.

77 *Miscamble* [1965] VR 596, 597, 601; *Re Markin* [1966] VR 494, 496; *Re Robinson* [1971] VR 278, 281; *Greenwood* (1992) V ConvR 54-444, 65 196 - 65 197; *Pivotel* (2001) V ConvR 54-635; [2000] VSC 264, [31]-[33].

78 *Miscamble* [1965] VR 596, 597; *Greenwood* (1992) V ConvR 54-444, 65 197.

79 *Greenwood* (1992) V ConvR 54-444, 65 196. See also *Miscamble* [1965] VR 596, 601.

80 *Re Robinson* [1971] VR 278, 282; *Greenwood* (1992) V ConvR 54-444, 65 197.

81 *Greenwood* (1992) V ConvR 54-444, 65 197 - 65 198, cited in *Vrakas* [24]–[26].

the extent of the subdivision. The parties agree on the principles including that the plaintiff has the onus of establishing the matters set out in s 84(1)(a) and (c) upon which it relies.[82]

111 The covenants no longer serve any purpose. They are obsolete. There has been an effluxion of time so the covenants have no work to do. It confuses people and creates difficulty. The covenants are from a bygone era and offer no tangible benefits which is an important part of the obsolescence test. There is a desirability to achieve a clean title for each parcel of land that comprises the subject land. The plaintiff could have applied to the Court to work out who has the benefit of which covenants as part of the subject land. It elected not to do so as it would have made the proceeding more complex and longer. It does not want to be bound by some lots with covenants and then have to apply to refashion any orders in the future. The merits of the case do not warrant it.

112 The Court should disaggregate the purposes of the covenants with the development. There is no tension between the modification or discharge of the covenants and the proposed works to warrant forensic analysis. It is clear that the Court can conclude the existence of the covenants will not justify their retention in any form.

113 The development of the surrounding land and planning controls mean that the subject land could not be lawfully used as a quarry, even if it were commercially viable to do so. Mr Chapman conceded that 'there is virtually no prospect of quarrying in this area'.[83] Mr Raworth stated clay quarrying 'is no longer an activity that is typically practised in East Malvern'.[84] Mr Milner noted that the zoning of the land as a Public Park and Recreation Zone regulates mineral, stone and soil extraction, regardless of whether there might be clay on the subject land.[85] Such activities would require a planning permit which has a high probability of not being issued because of the urban setting and proximity of residential neighbours.[86] The

82 *Vrakas* [31].
83 Chapman affidavit, [67].
84 Raworth Report, [34].
85 First Milner affidavit, [57].
86 Ibid [58].

restrictions have become an encumbrance on title that no longer serves any public or private utility.

114 The subject land has previously been extensively excavated to enable its development. Plans dated December 1960 show elevation for the then new bowling clubhouse involving excavation for the ground level and strip footing foundations.[87] Later, the council approved replacing the bowls clubhouse on 22 April 1968 where excavation for constructing foundations was carried out.[88] An extension to the clubhouse was approved in October 1969 and excavation was carried out for constructing foundations.[89] Plans dated 1970 depict a five feet deep concrete floor slab for the construction of a shelter shed. The clubhouse was extended again in 1975 to include bar facilities which required foundations below natural ground level.[90] Extensions and renovations in the 1980s carried out excavation for the purposes of foundations and footings.[91] A bridge was erected on the subject land with pilings and supports, in accordance with plans dated 1990.[92] Further extensions occurred in 1992–93, when excavation for the purpose of foundations was carried out.[93]

115 Excavation has taken place on the subject land to facilitate its football and cricket fields and a bowls pitch. Undated photographs thought to be taken in the 1980s depict extensive excavation to level the earth.[94] The plaintiff is unaware of any objections to excavation on the basis of the covenants.

Defendants' submissions

116 The covenants are not obsolete. The covenants prevent excavation and the removal of earth from the park. It has had the effect of maintaining the parkland and neighbourhood character of the area.

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87 Exhibit 'RJK-8' to the affidavit of Richard John Kwasek sworn on 28 February 2020.
88 Ibid 14–5.
89 Ibid 49.
90 Ibid 71–3.
91 Ibid 111–2.
92 Ibid 113.
93 Ibid 115–6.
94 Exhibit 'RM-6' to the affidavit of Robert Milner sworn on 6 February 2020.

117 Since its purchase by the plaintiff, the park has remained a park with changes documented by the plaintiff, namely the construction of the bowls club, tennis courts and playing fields. These activities required excavation and the removal of earth.

118 The neighbourhood around the park (forming the rest of the subdivision) has remained largely residential in nature, typified by single dwellings of single or double storey construction. There are only limited examples of higher density dwellings being constructed.

119 The proposal will intensify the sporting uses in the park which will impact detrimentally upon the defendants' enjoyment of the park by reason of its changed use. Mr Chapman opined:

> … the existence of the restrictive covenants precluding excavation or removal of excavated materials have played a role in protecting the relatively quiet residential amenity of the area by effectively limiting the scale of development that can occur without the need to excavate for a basement carpark (where sufficient spaces cannot be provided at grade) or for significant foundation work.[95]

120 The plaintiff identified many examples of excavation in the neighbourhood, including in every individual's house. It seems appealing to say there are more lots in breach of the covenants than observance and therefore they are obsolete. The covenants operate as a control of land. Until now, people have chosen not to activate their right available to them as beneficiaries to say they do not want the excavation.

Analysis

121 As I have found that the covenants should be discharged under s 84(1)(c), it is strictly unnecessary to consider the plaintiffs' application for discharge under s 84(1)(a). However, if it were necessary to do so, I would have found that the covenants, as construed, are obsolete.

122 The covenants impose a restriction on quarrying on the subject land. I have accepted that development of the surrounding land and planning controls mean that the subject land could not be realistically used as a quarry, even if it were commercially

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95 Chapman Report [69].

viable to do so. I would therefore find that due to the evolution of the character of the subject land and the neighbourhood, as well as the effluxion of time, the covenant is now obsolete.

123 The defendants made submissions in relation to the issue of obsolescence related to ancillary benefits said to arise from the covenant such as maintenance of the parkland and the character of the neighbourhood. It was suggested that such ancillary benefits provided a continuing benefit on persons by maintaining a restriction on the users of land notwithstanding that the purpose for which the covenant was designed – the prevention of quarrying – may have become wholly obsolete.

124 However, I do not accept the defendants' submissions that the covenants, properly construed, provide them with ancillary benefits such as the maintenance of the existing parkland and the character of the neighbourhood. While an intention of the imposition of covenants preventing quarrying on the land was to ensure good amenity for the neighbourhood, the covenants do not ensure the continued existence of the Percy Treyvaud Memorial Park in its present form. Instead, the covenants prohibit quarrying. Such use of the land would be antithetical to the creation and maintenance of a residential neighbourhood with good amenity. The covenants do not operate to prevent construction or development of the subject land. Indeed, construction and excavation has previously occurred on the land to create facilities for the bowling and tennis clubs.

125 As it is no longer realistic for quarrying to occur on the land, the covenants are now obsolete.

Conclusion

126 XFor the foregoing reasons I will allow the plaintiff's application for discharge of the covenants.

127 I find the plaintiff established that discharging the covenants will not occasion substantial injury to the beneficiaries pursuant to s 84(1)(c) of the Act. Because of

this finding, it was not strictly necessary for me to consider obsolescence pursuant to s 84(1)(a) of the Act. However, I would have found the covenants to be obsolete. Given that I will allow the discharge of the covenants, it is unnecessary for me to make the declaration that was alternatively sought by the plaintiff.

S C H E D U L E O F P A R T I E S

S ECI 2019 02049

BETWEEN:

CITY OF STONNINGTON	Plaintiff
- v -	
ADAM LINCOLN WALLISH	First Defendant
DENISE MAREE WALLISH	Second Defendant
DEAN ANDREW HURLSTON	Third Defendant
JOSEPH GIANFRIDDO	Fourth Defendant
MICHAEL ANTHONY BEGGS	Fifth Defendant
~~KATHRYN KIRKWOOD HEALEY~~	~~Sixth Defendant~~
~~PATRICIA WILAM GILLARD JONES~~	~~Seventh Defendant~~
WILLIAM CLIVE DURHAM	Eighth Defendant
DAWN THERESE DURHAM	Ninth Defendant
LUCY DE SUMMA	Tenth Defendant
FRANK DE SUMMA	Eleventh Defendant
JULIE ANNE SUTHERLAND	Twelfth Defendant
HELEN MADDISON LAKUSA	Thirteenth Defendant
ROGER JULIAN JAMES CLARK	Fourteenth Defendant
REBEKAH MARGARET CLARK	Fifteenth Defendant
JONATHON PAUL SCHOER	Sixteenth Defendant
LYNETTE LEW-SCHOER	Seventeenth Defendant
JOHN EDWARD STREETER	Eighteenth Defendant

ADA STREETER	Nineteenth Defendant
SIN KEAN LIM	Twentieth Defendant
DENISE HUI-LING CHIN	Twenty-first Defendant
LEESAN ELIZABETH MCLEISH	Twenty-second Defendant
RICKY JAMES GREEN	Twenty-third Defendant
~~LYNETTE ANN HUNT~~	~~Twenty-fourth Defendant~~
MICHAEL PETER PRYOR	Twenty-fifth Defendant
ANN ROBYN PRYOR	Twenty-sixth Defendant