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

Not Restricted

S ECI 2022 00007

IN THE MATTER of an application pursuant to section 84 of the *Property Law Act 1958* (Vic) for the modification of a restrictive covenant imposed by Instrument of Transfer AK036535Y registered in the Register Book at the Office of Titles and on Certificate of Title Volume 11384 Folio 290

BETWEEN:

ROJ PROPERTY GROUP PTY LTD & ANOR (according to the attached Schedule) — Plaintiffs

v

EVENTPOWER PROPERTY PTY LTD — Defendant

JUDGE:	Derham AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	18 May 2023
DATE OF JUDGMENT:	25 May 2023
CASE MAY BE CITED AS:	ROJ Property Group Pty Ltd & Anor v Eventpower Property Pty Ltd (Costs)
MEDIUM NEUTRAL CITATION:	[2023] VSC 268

COSTS – Application for modification of restrictive covenant – Application granted – Whether the defendant should pay plaintiffs' costs – Whether defendant's conduct of the case irresponsible – Whether defendant made groundless objections to the application – *Property Law Act 1958* (Vic), s 84 – *Re Withers* [1970] VR 319; *Stanhill Pty Ltd v Jackson* [2005] VSC 355; *Walker v Bridgewood (No 2)* [2006] NSWSC 284; *Mamfredas Investment Group Pty Ltd v PropertyIT and Consulting Pty Limited* [2013] NSWSC 929; *Wong v McConville (No 2)* [2014] VSC 282; *Jiang v Monaygon Pty Ltd (Costs)* [2017] VSC 655 – *Calderbank* offer made by plaintiffs – Applicable legal principles – Whether unreasonable of defendant to reject *Calderbank* offer – *Lahanis v Livesay* (2021) 63 VR 197.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr M Townsend of Counsel	S & K Planning Lawyers
For the Defendant	Mr A Kirby of Counsel	Planning & Property Partners Pty Ltd

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HIS HONOUR:

Introduction

1 These reasons deal with the costs of an application for modification of a restrictive covenant burdening the plaintiffs' land.

2 On 5 May 2023, I delivered reasons for judgment in this proceeding, published as *ROJ Property Group Pty Ltd & Anor v Eventpower Property Pty Ltd* [2023] VSC 239 ('**Reasons**') granting the plaintiffs' application to modify a restrictive covenant ('**Covenant**') burdening their land at 26 Cook Street, Port Melbourne, Victoria ('**Subject Land**' or '**Land**')[1] on the basis that the plaintiffs had established that the proposed modification would not substantially injure the persons entitled to the benefit of the Covenant. In these reasons I will use the terms defined in the Reasons.

3 The plaintiffs' application was made pursuant to s 84(1)(c) of the *Property Law Act 1958* (Vic) ('**Act**') to modify a Signage Restriction in the Covenant in one respect. The restriction in the Covenant prohibits signage on the Land which does not directly relate to the business activities being carried out by the transferee on the Subject Land and the plaintiffs wished to modify it to prohibit signage which does not directly relate to the business activities being carried out by the transferee on the Land *or by a tenant or occupier of the Land*.

4 In the Reasons, I concluded that the plaintiffs had established that the modification sought will not substantially injure the owners of the lands having the benefit of the Covenant in their enjoyment of their respective lands. I indicated I would make an order that the Covenant be modified as sought by the plaintiffs.

5 The defendant is the registered proprietor of Lots 4 and 5 on the relevant Plan of Subdivision, and is a beneficiary of the Covenant. The defendant's land at 28–30 Cook Street, Port Melbourne, Victoria adjoins the Subject Land.[2] It opposed the modification sought.

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1 Lot 6 on Plan of Subdivision 641054A ('**relevant Plan of Subdivision**'), being the land more particularly described in Certificate of Title Volume 11384 Folio 290.

2 The land more particularly described in Certificate of Title Volume 11516 Folio 059.

Costs principles

6 In *Wong v McConville (No 2)* (‘***Wong***’),[3] I considered the principles and authorities relevant to costs in applications of this kind. I will not repeat all I there said, but note the wide discretion conferred by s 24 of the *Supreme Court Act 1986* (Vic) and the earlier cases that accord with the views I there expressed, in particular in Victoria — *Re Withers*,[4] *Re Markin*,[5] *Re Shelford Church of England Girls’ Grammar School*,[6] *Re Ulman*,[7] *Stanhill Pty Ltd v Jackson* (‘***Stanhill***’),[8] *Suhr v Michelmore*;[9] and in New South Wales — *Walker v Bridgewood (No 2)*.[10]

7 I said in *Wong* that although costs are a matter of discretion and each case stands on its particular facts, the general rule that costs follow the event ordinarily does not apply in these applications because:[11]

(a) under the legislation, the plaintiffs must apply to the Court to modify or remove the restrictive covenant. Even where the owners of the land with the benefit of the covenant agree to the modification, for the registered title to be free of the restriction, or for the restriction to be modified, the owner of the burdened land must come to Court and the Court must be satisfied that the conditions for the exercise of the jurisdiction conferred by s 84 of the Act are satisfied;

(b) the plaintiffs seek to change an existing burden over the servient tenement (the plaintiffs’ land) which benefits the dominant tenement (the defendant’s land). They therefore seek to modify an existing legal right available to the defendant;

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3 [2014] VSC 282, [9]–[19] (‘***Wong***’); see also *Jiang v Monaygon Pty Ltd (Costs)* [2017] VSC 655, [5]–[7] (‘***Jiang***’).

4 [1970] VR 319 (‘***Re Withers***’).

5 [1966] VR 494.

6 *Re Shelford Church of England Girls’ Grammar School* (Supreme Court of Victoria, Lush J, 6 June 1967).

7 (1985) VConVR 54-178.

8 [2005] VSC 355 (‘***Stanhill***’).

9 *Suhr v Michelmore* (Supreme Court of Victoria, Pagone J, 3 June 2013) after judgment in *Suhr v Michelmore* [2013] VSC 284.

10 [2006] NSWSC 284, [9]–[12].

11 *Wong* [2014] VSC 282, [13]–[19].

(c) the plaintiff will usually obtain an advantage, often a great advantage commercially, by the modification or removal sought;[12]

(d) although the owner of the burdened land has a statutory right to apply for the modification or removal of the covenant, they must give notice to those having the benefit (as determined by the Court) and those having the benefit (whether given notice or not) are entitled to object and to maintain the status quo and hold the plaintiff to the covenant which binds them;[13] and

(e) the decision of the Court to modify or discharge a restrictive covenant involves the exercise of a discretion,[14] and I add that the Court retains a discretion to adjust the cost orders to the circumstances of the proceedings.[15]

8 The standard approach to applications of this kind is that the objector (defendant) should have its costs of the proceeding, provided they conduct the proceeding responsibly and do not make frivolous objections. 'Frivolous' in this context means 'of little or no weight, worth or importance; not worthy of serious notice: *a frivolous objection.*'[16] It is usually used in combination with 'vexatious' to describe a wide variety of circumstances in which a claim or defence is found to be groundless, or lacking a legal basis or merit,[17] and takes its colour from its context.[18] The use of the word in the present context means, in my view, that the objections taken to the application to modify the Covenant in question lacked a legal or factual basis or merit.

9 The standard approach was taken in *Re Withers,* and is consistent with a wide range of cases decided in Victoria, New South Wales and the United Kingdom.[19] Needless to

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12 For example see the observations of Anderson J in *Re Withers* [1970] VR 319, 319–320.
13 Ibid 320.
14 See *Stanhill* [2005] VSC 355, [4].
15 *Re Withers* [1970] VR 319, 319.
16 *Macquarie Dictionary* (6th ed, 2013) 'frivolous' (def 1).
17 *Vo v Nguyen* [2013] VSC 304, [35]; *Hoh v Frosthollow Pty Ltd* [2014] VSC 77, [12].
18 See, for example, *Muto v Faul* [1980] VR 26, 30, where the inherent power to dismiss a proceeding on the grounds that it is frivolous, vexatious or an abuse of process extends to dismissing proceedings that are not reasonably prosecuted.
19 *Re Markin* [1966] VR 494; *Re Shelford Church of England Girls' Grammar School* (Supreme Court of Victoria, Lush J, 6 June 1967); *Re Ulman* (1985) VConVR 54-178; *Stanhill* [2005] VSC 355, [3]; *Walker v Bridgewood (No 2)* [2006] NSWSC 284, [9]–[12]; *Re Rose Bay Bowling and Recreation Club Ltd* (1935) 52 WN (NSW) 77; *Mamfredas Investment Group Pty Ltd v PropertyIT and Consulting Pty Limited* [2013] NSWSC 929 ('***Mamfredas***'); *Dean v Freeborn,* [2017] UKUT 0203.

say, costs are a matter of discretion and each case stands on its particular facts, so there are various departures from the standard approach, as referred to below.

10 In *Stanhill*,[20] Morris J noted:

> The plaintiff also submitted that costs will always remain in the discretion of the court; and there is no universal rule to be applied in cases of this type. This may be so, but cases such as *Re Withers*, will provide guidance. It is striking that the facts of this case are not only quite similar to those in *Re Withers*, but also support a conclusion that the defendants played a proper role in defending the claim.
>
> It is also relevant that the defendants conducted the proceeding responsibly. If a defendant, resisting an application to modify a covenant, acts irresponsibly then it would not be entitled to costs in relation to that irresponsible conduct; indeed, it might be in a position where it would have to pay the plaintiff's costs.

11 In *Jiang v Monaygon Pty Ltd (Costs)* (***Jiang***')[21], I noted the observations of Slattery J in *Mamfredas Investment Group Pty Ltd v PropertyIT and Consulting Pty Limited*,[22] where he referred to the authorities dealing with costs in applications of this nature. He noted the cases that supported the proposition that the applicant should pay all costs reasonably or necessarily incurred by reason of the application, including the proper costs of the objectors, but asked — when are costs reasonably or necessarily incurred by reason of such an application?[23] He answered that question by referring to a number of authorities and saying:

> But the applicant will not be required to pay the objectors' costs of putting their views before the Court in all circumstances. The Court retains a discretion to adjust the cost orders to the circumstances of the proceedings: *Withers* at 319.
>
> In exercising its discretion the Court may make no order as to costs: *Brown* at [18] and *Walker* at [13]. It may require the objectors to pay the applicant's costs, for example, if: the objectors' conduct in defending their rights was 'frivolous' (*Withers* at 319) or 'irresponsible' (*Stanhill* at [6]); the applicant's case was 'overwhelming' (*Brown* at [16]–[21])); or, the objectors run fully adversary proceedings and failed (*Rose Bay* at 78–79).[24]
>
> Distinguishing between simple assertion of a threatened right by the objector and running adversary litigation is a value judgment and may be difficult:

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20 [2005] VSC 355, [5]–[6].

21 [2017] VSC 655, [11].

22 [2013] NSWSC 929.

23 Ibid [87].

24 The cases referred to are: *Brown v STA of NSW* [2000] NSWSC 802 ('*Brown*'); *Re Rose Bay Bowling & Recreation Club Ltd* (1935) 52 WN (NSW) 77 ('*Rose Bay*'); *Walker v Bridgewood (No 2)* [2006] NSWSC 284 ('*Walker*'); *Re Withers* [1970] VR 319 ('*Withers*'); *Stanhill Pty Ltd v Jackson* [2005] VSC 355 ('*Stanhill*').

Brown at [9]. This distinction has been described by Young J in *Hardie v Cuthbert (No 2)* (unreported, Supreme Court of NSW, 31 May 1988, Young J) in the context of neighbourhood disputes generally as follows:

> The defendant's conduct of the case was not merely one of seeking a neighbourly resolution to a problem that had been caused by predecessors in title but rather one of resisting to the best of her counsel and solicitor's ability. Indicative of this attitude was that although a view was held, the defendant's counsel insisted that the view only be used to explain the evidence and not as most commonly happens in this class of case, that it be used to supplement the evidence. It was the defendant's right to do this, but where a person insists that the case be tried in accordance with their strict legal rights, the Court will do so but will classify the proceedings as adversary proceedings in the strict sense rather than a statutory summons to adjust rights.

In exercising its discretion in relation to the costs of *Conveyancing Act* s 89 applications the Court may take into account any offers of compromise made by the successful applicant to the objectors. But such offers are not necessarily decisive: *Walker* at [14]–[15].[25]

12 In *Wong*,[26] I also dealt with *Calderbank* offers, as follows:

> 20. In *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)*,[27] the Victorian Court of Appeal said, in relation to *Calderbank* offers, that the critical question was whether the rejection of the offer was unreasonable in the circumstances. Deciding whether conduct is unreasonable involves matters of judgment and impression. The Court in *Hazeldene* held that, when considering whether the rejection of a *Calderbank* offer was unreasonable, a court should ordinarily have regard at least to the following matters:
>
> (a) The stage of the proceeding at which the offer was received;
>
> (b) The time allowed to the offeree to consider the offer;
>
> (c) The extent of the compromiser offered;
>
> (d) The offeree's prospects of success, assessed at the date of the offer;
>
> (e) The clarity with which the terms of the offer were expressed; and
>
> (f) Whether the offer foreshadowed an application for indemnity costs in the event of the offeree's rejecting it.
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> 21. In *Luxmore Pty Ltd v Hydedale Pty Ltd*[28] Maxwell P and Kellam JA noted that what was said by the Court of Appeal in *Hazeldene* was meant to be of assistance to judges in approaching an application for costs consequent upon the service of a *Calderbank letter*. The Court of Appeal was not there engaging in a kind of judicial legislative process; they were simply giving

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25 *Mamfredas* [2013] NSWSC 929, [89]–[92].

26 [2014] VSC 282 [20]–[22]; see also *Jiang* [2017] VSC 655, [5]– [7].

27 (2005) 13 VR 435, 441–2 ('***Hazeldene***').

28 (2008) 20 VR 481; [2008] VSCA 212, [11].

a direction that these are the matters which the trial judge should ordinarily have regard to, in addition to such other matters as the judge might consider relevant.[29] They remarked that it would be wrong to regard the decision as having prescribed a list of matters which must be taken into account in every case, such that a party failing to get a special order for costs could complain on appeal if one of the matters mentioned by the Court had not been specifically adverted to. Like every question of costs, it is in the discretion of the trial judge and is to be decided according to the circumstances of the particular case.

22. There are some aspects of the matters mentioned in *Hazeldene* relevant to this application that deserve further elucidation, as follows:

    (a) There is no presumption that where such an offer is rejected, the offeree should pay indemnity costs where it receives a less favourable result;

    (b) The onus always lies upon the offeror to demonstrate unreasonableness in the offeree;[30]

    (c) The policy objectives underlying the principle in *Calderbank v Calderbank* include:[31]

        (i) That it is in the interests of the administration of justice that litigation should be compromised as soon as possible and so save both private and public costs.[32]

        (ii) To indemnify an offeror whose offer is later found to have been reasonable against the costs thereafter incurred. This is considered reasonable because from the time of rejection of the offer the real cause of the litigation is the offeree's rejection of the offer;

        (iii) To this end, a party in receipt of an offer of compromise should have some incentive to consider the offer seriously. That incentive is the prospect of a special order as to costs;[33]

        (iv) It is nevertheless important not to discourage potential litigants from bringing their disputes to the Court;[34]

    (d) It is undesirable that *Calderbank* letters be burdened with technicality;[35]

    (e) Where the offer is made by a plaintiff, the requirement that the non-acceptance be unreasonable takes on a particular significance. A plaintiff may be supposed to be aware of the claim which it makes, including, even in a general way, its magnitude and its

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29 *Foster v Galea (No 2)* [2008] VSC 331, [9].

30 Ibid; *Hazeldene* (2005) 13 VR 435, [19].

31 The policy objectives are more fully set out in *Hazeldene* at [21].

32 *Hazeldene* (2005) 13 VR 435, [21]; *MT Associates Pty Ltd v Aqua-Max Pty Ltd* [2000] VSC 163, [72].

33 *Fletcher Insulation (Vic) Pty Ltd v Renold Australia Pty Ltd (No 2)* [2006] VSC 293, [13]–[17] (Byrne J).

34 *Oversea-Chinese Banking Corporation v Richfield Investments Pty Ltd* [2004] VSC 351, [60]; *Hazeldene* (2005) 13 VR 435, [22].

35 *BMD Major Projects Pty Ltd v Victorian Urban Development Authority* [2007] VSC 441, [5].

prospects of success. A defendant, however, faced with an offer of compromise may not have this awareness. If it appears that this lack of awareness is not due to its own default, it is difficult to conclude that its rejection of the offer was unreasonable;

(f) A decision to accept or refuse a *Calderbank* offer will ordinarily be based upon the offeree's prediction as to the likely outcome of the trial. An erroneous prediction may not be an unreasonable if at the time the offeree was, for good reason, in possession of insufficient information to make an proper assessment or if the circumstances upon which it was based later changed;[36]

(g) It does not follow necessarily from an adverse outcome for the offeree that rejection of the offer was relevantly unreasonable. Reliance on the outcome to show that rejection of the offer was unreasonable is a hindsight analysis;[37]

(h) The offer must be one capable of acceptance, such that an offer that is subject to approval by a third party will not constitute a *Calderbank* offer, but rather an offer to negotiate;[38] and

(i) The reasonableness of an offer, and the assessment of the reasonableness or unreasonableness of a rejection of an offer, will generally be assisted if the maker gives reasons why the offeror should succeed and/or the offeree should fail to do better than the offer. As Sundberg and Emmett JJ said in *Dukemaster Pty Ltd v Bluehive Pty Ltd*,[39] 'a *Calderbank* offer… is unlikely to serve its purpose of attracting an indemnity award of costs if the rejecting applicant fails to recover more than what is offered, unless the offer is a reasonable one and contains a statement of the reasons the offeror maintains that the application will fail'.

Submissions – plaintiffs

13 The plaintiffs submitted this is a case where the ordinary rule that costs should follow the event should apply and the line of cases since *Re Withers* should not be followed. They contend that the defendant's opposition to the application for modification of the Signage Restriction in the Covenant was irresponsible, fanciful and/or frivolous, if not made in bad faith, because:

(a) the defendant is itself in breach of the restriction, suggesting the defendant lacks clean hands;

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36 *Premier Building & Consulting Pty Ltd v Spotless Group Ltd (No 13)* [2007] VSC 516, [13] (Byrne J).

37 *Rickard Constructions v Rickard Hails Moretti* [2005] NSWSC 481, [17] (McDougall J).

38 *Apostolidis v Kalenik (No 2)* [2011] VSCA 329, [61]–[64] (the offer was subject to approval by the Australian Taxation Office, in effect).

39 [2003] FCAFC 1, [8].

(b) this inconsistency in the defendant's position underscores the plaintiffs' contention that the defendant is using the s 84 process (and its expectation of being reimbursed its costs) to frustrate the plaintiffs' legitimate advertising requirements, pending the expiry of the comparable covenant on the defendant's land in or about November 2027;

(c) there is a significant history of disputation between the parties about signage on the Land both before the Melbourne City Council and VCAT; and

(d) in the Reasons, the Court concluded that the defendant's principal ground of opposition to the modification was fanciful (that ground of opposition was that the extension of the exception for business signage to tenants and occupiers would facilitate artificial short-term leases and/or licences of small areas within the Land to occupiers whose real purpose is to erect commercial advertising, such as billboards, on the Land). The Court also rejected the defendant's contention that the modification sought would have a precedential effect which would, if established, amount to a substantial injury.

14 It was submitted that the circumstances showed that the defendant's conduct of the defence to the application fell within the circumstances described by Morris J in *Stanhill*[40] in that in its resistance to the application to modify the Covenant the defendant acted irresponsibly, so that, not only is it not entitled to costs in relation to that irresponsible conduct, it should pay the plaintiffs' costs.

15 It was also submitted that the modification sought was simple, minimalist in its reach and effects, and easily assessed by the defendant as not giving rise to substantial injury to the beneficiaries of the Signage Restriction, as the Court has found. The defendant had been the objector in VCAT when member Whitney interpreted the Signage Restriction and concluded it stood in the way of granting a permit to the plaintiffs to display a sign that did not directly relate to the business activities being carried out on the Land by the registered proprietors. The defendant was therefore able to assess at

[40] [2005] VSC 355, [6].

a very early stage the prospects of successfully resisting the modification sought by the plaintiffs.

16 The plaintiffs served four *Calderbank* letters[41] between 11 November 2022 and 14 April 2023. Each letter set out short reasons why the modification sought will not cause the beneficiaries of the Signage Restriction to suffer substantial injury. Further, each letter warned the defendant that if it did not accept the offer and did not gain an outcome more favourable than the offer at trial, the letter may be produced in support of an application for the defendant to pay the plaintiffs' costs from the date of the letter, in accordance with the principles in *Calderbank v Calderbank*[42] and *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* ('***Hazeldene***').[43] The offers were substantially as follows:

(a) the first offer on 11 November 2022 offered to pay $7,500.00 compensation plus standard costs to date if the defendant consented to the proposed modification of the Signage Restriction. It was open for 14 days;

(b) the second offer on 27 January 2023 offered to pay $5,000.00 towards the defendant's costs of the proceeding. It was open for seven days and noted that there had been no response to the first offer;

(c) the third offer on 11 April 2023 offered $5,000.00 compensation plus the defendant's standard costs. The offer was open until the close of business on 17 April 2023 and noted that there had been no response to the second offer. It added that a permit had been granted to the plaintiffs to display business identification signage on the Land and quoted from the Tribunal's (VCAT) reasons and stated that the plaintiffs will contend at trial that the defendant's case is 'irresponsible, fanciful and/or frivolous and that [it] should not benefit from any presumption that it is entitled to its standard costs in the Proceedings generally'; and

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41 *Calderbank v Calderbank* [1976] Fam 93; (1975) 3 ALL ER 333.
42 Ibid.
43 (2005) 13 VR 435.

(d) the fourth offer on 14 April 2023 (the trial was fixed to be held, and was held, on 19 April 2023) offered to pay $15,000.00 compensation and the defendant's standard costs. It was open until the close of business on Monday 17 April 2023. It noted that the third offer was not accepted but on 12 April 2023 the defendant put a counter-offer that the plaintiffs withdraw their application for variation of the Covenant and pay the defendant's legal costs fixed at $40,000.00.

17 Alternatively to the defendant paying the plaintiffs' costs of the proceeding, it was submitted that the defendant should pay the plaintiffs' costs from the date of the first *Calderbank* letter on 11 November 2022. It was submitted that the offer was reasonable and:

(a) the defendant did not gain an outcome more favourable at trial;

(b) the offer was made at a time when the defendant would or should have known the proposed modification would not result in any injury to it;

(c) the offer was open for a reasonable period;

(d) the offer included the basis on which the Court would and did grant the relief sought; and

(e) the offer was expressed in clear terms and foreshadowed an application for costs in the event of its rejection.

18 It was said that the second defendant withdrew from the proceeding on 17 October 2022, not long before the offer was made, although the formal order 'removing' the second defendant was not made until 24 November 2022.[44]

19 The plaintiffs also submitted there is no warrant to give any dispensation to the defendant by reason of the additional affidavit of Jessica Kaczmarek made on 27 January 2023, as that evidence was overwhelmingly comprised of publicly available documents and photographs of the land and surrounding properties. It essentially

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44 The order gave leave to the second defendant to withdraw from the proceeding with no order as to costs. It was a consent order and thus the result of agreement.

allowed the plaintiffs to walk the Court through the network of covenants, legally and contextually. Any suggestion that the defendant might have altered its view of the proceedings in response to that material is unrealistic. The title searches that showed the disparity between the names of the registered proprietors and the names of the businesses on the signage on the buildings erected on the various lots in the Subdivision is evident from the exhibits to the affidavit of Jessica Kaczmarek made on 5 January 2022.

Submissions – defendant

20 The defendant contends that the appropriate costs order, following *Re Withers* and *Jiang* and other authorities, should be that the plaintiffs pay the defendant's costs of the proceeding. In the alternative, if the Court considers that an order for costs is warranted against the defendant, it should be reckoned from the third *Calderbank* offer (at the earliest), with costs on a standard basis ordered in the defendant's favour up to that date, consistent with the Court's orders in *Jiang*.

21 The defendant reminds the Court that the first orders involving the defendants were made on 19 May 2022 when the matter was set down for hearing on 21 February 2023. The orders were extended on 11 August 2022 and affidavits in reply from the plaintiffs were due by 3 November 2022. But without leave and out of time, on 27 January 2023 the plaintiffs filed further affidavits from Jessica Kaczmarek and Mustafa Yorenc. These affidavits included evidence relevant to the history of the Subdivision and the other covenants burdening the various lots in it, referred to in the Reasons at [16]–[18] and [73]–[83] as well as to the issue of short-term leases and the proposed signage, which evidence is referred to at paragraphs [70]–[72] and [79]–[83] of the Reasons.

22 The plaintiffs also filed reply submissions on 29 January 2023 without leave and out of time. These late affidavits and submissions led to the directions hearing on 9 February 2023 when orders were made adjourning the trial, with further consequential directions, and costs against the plaintiffs for the costs of and incidental to that day. The defendant filed a further affidavit from Mr Tyrone Rath on 31 March 2023 and further submissions on 5 April 2023.

23 In these types of applications, the general costs rule that costs follow the event usually does *not* apply for the reasons summarised in *Jiang*.[45] All of the factors listed in paragraph [5] of *Jiang* are relevant to this application. Provided the objector conducts the proceeding responsibly and does not make frivolous or groundless objections, it should have its costs of the proceeding.[46]

24 In this case, the defendant conducted the case responsibly and advanced relevant and helpful submissions. The hearing included a day of extensive submissions and legal argument. The Court did not accept the plaintiffs' construction of the Covenant and the reference to 'by the transferee', nor their criticism of VCAT's construction of the Covenant.[47] In their submissions in reply, the plaintiffs had referred to the defendant's and VCAT's construction as 'nonsensical', 'artificial' and 'absurd'.[48] The consequence of this was that the Court then had to go on to consider the detriment (that is, injury) to the benefitted land. Whilst it found that there was not a substantial detriment (injury), it is artificial to 'cherry pick' the reasoning, as urged by the plaintiffs.

25 The Court referred at paragraphs [73]–[83] of the Reasons to the Signage Restrictions across the estate which was included in the plaintiffs' materials filed on 27 January 2023. Whilst the Court did not accept the defendant's contentions regarding the issue of future short-term leases and licences, this followed the plaintiffs' late January materials, the arguments and cross-examination at the hearing and the planning considerations referred to at paragraphs [81]–[83] of the Reasons.

26 In relation to the *Calderbank* offers, for the reasons referred to in *Jiang,* the application of the principles derived from *Hazeldene*[49] regarding the unreasonable rejection of *Calderbank* offers is problematic because these types of cases usually involve a single issue: *Lahanis v Livesay* ('***Lahanis***').[50]

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45 [2017] VSC 655, [5], citing *Wong* [2014] VSC 282, [9]–[19].
46 *Jiang* [2017] VSC 655, [6]; *Re Withers* [1970] VR 319.
47 *ROJ Property Group Pty Ltd & Anor v Eventpower Property Pty Ltd* [2023] VSC 239, [64]–[68] ('**Reasons**').
48 Plaintiffs' submissions in reply dated 29 January 2023, [11]–[17].
49 (2005) 13 VR 435.
50 (2021) 63 VR 197, [9]–[10].

27 In any event, the first offer was ineffective because:

(a) it was made some months before the plaintiffs had particularised their case by the filing of all of their evidence and submissions. Therefore, it could not be unreasonable for the defendant to refuse to accept it at that early stage; and

(b) there was no reason, at the time of the first offer, to conclude that the Court would not follow the principles of *Re Withers* in respect of the defendant's costs and no reason to suppose that the defendant's case was unreasonable or vexatious.[51] Therefore, the first offer did not offer a real element of compromise.[52] Rather, it amounted to an invitation to capitulate.

28 The second offer was also ineffective because:

(a) it was served at the time of the two further affidavits for the plaintiffs which were not at that stage admissible, and before further submissions from the plaintiffs; and

(b) the costs offered were capped at $5,000.00, which was a regression from the first offer and not a meaningful compromise.

29 The third offer was served on Tuesday 11 April 2023 — the eve of trial (19 April 2023) — and was open only until close of business on Monday 17 April 2023. By that time the trial preparation had been completed with counsel briefed. Similarly, the fourth offer was served on the Friday before trial and was open only over the weekend until Monday 17 April 2023.

Consideration

Costs generally

30 The standard approach I have referred to in my summary of the law, that the plaintiff pay the defendant's costs, although consistent with a wide range of cases decided in Victoria, New South Wales and the United Kingdom, is subject to the exercise by the

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51 Ibid [45].

52 Ibid [9], [45]–[52].

Court of its discretion and each case stands on its particular facts, so there are various departures from the standard approach.

31 The particular facts of this case are quite distinct from the more common application, usually involving the modification of a single dwelling covenant, such as was the case in *Wong*,[53] *Jiang*,[54] and *Lahanis*.[55] The point of distinction between those kinds of cases and the modification in this case is the degree to which the single dwelling cases involve a detailed consideration of the neighbourhood, the extent of the benefited lands, whether the objective of the Covenant has been effected and maintained, other developments in the neighbourhood, some involving similar modifications of single dwelling covenants, the impact of the modification on the objectors and other beneficiaries, and other considerations. It is often difficult to forecast the outcome with any degree of certainty.

32 Nevertheless, the factors identified in *Wong*[56] and repeated in *Jiang* and *Lahanis*[57] apply to both types of applications. The distinction between the facts and relevant considerations of this case and the facts and relevant considerations applicable in most single dwelling covenant cases is this case is far simpler to analyse and come to a decision as to whether the modification sought will cause substantial injury to the proprietors of the benefited lands in their enjoyment of them. That brings into play the proviso to the standard approach, that the defendant conducts the proceeding responsibly and does not make frivolous objections to the application.

33 It seems to me that the plaintiffs are right when they submit that the defendant's opposition to the modification was irresponsible and its objections were frivolous or groundless. The fact that the defendant ignored its own breach of the Signage Restriction is significant. Although the defendant's signage facing the West Gate Freeway is 'Eventpower Solutions', and thus includes a part of the name of the defendant, that entity is not the registered proprietor. The evidence shows there is

53 [2014] VSC 148.
54 [2017] VSC 591.
55 [2021] VSC 29.
56 [2014] VSC 282, [13].
57 (2021) 63 VR 197, [6].

another company with a common director and secretary, namely Eventpower Solutions Pty Ltd.[58] The name of that company (without the Pty Ltd) also appears on another side of the building on the land owned by the defendant, which further illustrates the observation by the VCAT member in the most recent decision which resulted in the grant of a permit to the second plaintiff — that it is a case of the 'pot calling the kettle black'.[59] It is also significant that there is no land in the Subdivision subject to the Signage Restriction that displays a sign identifying the current 'transferee' or registered proprietor.

34 It is not so much the hypocrisy of the defendant's position that is significant, although it is, but that its conduct and that of the other land owners in relation to signage illustrates the lack of any injury to the owners of the benefited lands in their enjoyment of those lands. As I said in my Reasons, there is precious little difference between signage directly related to business conducted by tenants or occupiers of the Land and such signage directly related to business conducted by the transferee or current registered proprietor. I fail to see any difference of substance at all.[60] I also fail to see how this was not obvious to the defendant from early in the proceeding.

35 The history of disputes between the plaintiffs and defendant show that the parties have been feuding over the plaintiffs' desire to place signage facing the west bound traffic on the West Gate Freeway. There is existing signage on the plaintiffs' building facing the West Gate Freeway and also Cook Street that has not, so far as the evidence shows, been the subject of complaint by the defendant. It is signage utterly unrelated to the identity of the plaintiffs as transferees or registered proprietors and identify '1 Homes', 'Symmetric' and 'AMK Owners Corp'.

36 The conclusion to which I am forced is that there is some other reason for animosity between the parties that underpins the inconsistent and intransigent attitude of the defendant to the signage proposed by the plaintiffs. This has all the appearance of a

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58 Affidavit of Jessica Kaczmarek made 27 January 2023, exhibit JLK-7 to 11, contained within the Court Book, 957–966 ('**[CB]**').

59 *K & M Property Investments Group Pty Ltd v Melbourne CC* [2023] VCAT 317, [34].

60 Reasons [80].

desire to frustrate the plaintiffs' signage display intended to advertise its home building business in the western suburbs. This attitude is reinforced by the evidence of the response to the fourth *Calderbank* offer, which was a rejection of the offer with a counter-offer that the plaintiffs withdraw their application for modification of the Covenant and pay the defendant's legal costs fixed at $40,000.00 (see above [16(d)]). Given the nature of the restriction and the defendant's and other landowners' contravention of it, and the obvious, might I say, lack of injury arising from the proposed change, this counter-offer reveals a cavalier approach to the application in the proceeding and one that cannot have been rationally based on the prospects of the application being successful.

37 Having regard to my finding that the defendant's principal ground of opposition to the modification was fanciful, I am compelled to conclude that the opposition to the application to make a very simple modification to the Signage Restriction was irresponsible. It resulted in the defendant running a fully adversarial proceeding. It was the defendant's right to do this, but where, as here, that defendant presses its strict legal rights, the Court must decide the dispute, but will characterise the proceeding as adversarial rather than one necessitated by the requirement that any modification be considered by the Court. That is what Young J described in *Hardie v Cuthbert (No 2)*[61] as 'a statutory summons to adjust rights'. An objective adviser would and should have come to the same conclusion as I reached. *When* that ought to have happened is another question. It is understandable that the authorities recognise that an objector should have time to consider the application and get advice on the substance of the application and what defences may be open to it.[62]

38 A matter which was not referred to by either party in argument is that neither the initial originating motion ('**OM**') nor the amended OM identified the particular ground under s 84 of the Act relied on by the plaintiffs. However, the notice served

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61 *Hardie v Cuthbert (No 2)* (Supreme Court of NSW, Young J, 31 May 1988); cited in *Mamfredas* [2013] NSWSC 929, [92].

62 *Castagna v Great Wall Resources Pty Ltd* [2005] NSWSC 942; *Mamfredas* [2013] NSWSC 929, [86]–[90].

on the defendant pursuant to the orders of the Court made on 10 March 2022 clearly set out that the application is made under s 84(1)(c) of the Act.[63]

39 The evidence discloses that on 20 April 2022, after receipt of the notice ordered to be served by the Court, the defendant's solicitors contacted the plaintiffs' solicitors and requested copies of the OM, orders made and all affidavits filed.[64] These solicitors are the same solicitors who represented the defendant in the two VCAT proceedings.[65] On 20 April 2022, the defendant's solicitors were sent copies of the OM, all affidavits then filed and the orders of the Court.[66] It took the defendant no time at all to decide to oppose the application, for on 26 April 2022 the defendant's solicitor advised the plaintiffs' solicitor that the defendant opposed the variation of the Covenant, and 'will seek to be joined as a Defendant to the proceeding at the further hearing on 19 May 2022'.[67] At about the same time, the owners of 32–34 and 36–38 Cook Street, Hex Properties Pty Ltd, objected to the modification.[68] Hex Properties Pty Ltd did not go ahead with its objection, but the defendant and Cook Street Pty Ltd, the proprietor of 20 and 22 Cook Street, Port Melbourne, Victoria, were both given the opportunity to be added, and were added, as defendants, although Cook Street Pty Ltd later withdrew (see above [18]). That amended OM was filed on 3 June 2022 and it named both defendants. The defendants filed their appearance on 21 July 2022.

40 Notwithstanding that the notice served on the defendant by order of the Court made on 10 March 2022 set out that the application was made under s 84(1)(c) of the Act, the precise basis of the application was the subject of an exchange of letters between solicitors acting for the parties on 26 July 2022 and 2 and 5 August 2022. The defendants' solicitor requested 'further and better particulars' of the basis on which the plaintiffs sought to modify the restrictive covenant in order to brief their expert. By their letter of 2 August 2022, the plaintiffs' solicitors informed the

63 Order of Matthews AsJ made 10 March 2022, Schedule 2.
64 Affidavit of Jessica Kaczmarek made 28 April 2022, [17].
65 *Eventpower Property Pty Ltd v Melbourne CC* [2021] VCAT 1002; *K & M Property Investments Group Pty Ltd v Melbourne CC* [2023] VCAT 317.
66 Affidavit of Jessica Kaczmarek made 28 April 2022, [17].
67 Ibid [19], exhibit JLK-4 [CB 147, 162].
68 Ibid [21], exhibit JLK-5 [CB 147, 164].

defendants' solicitors that reliance was placed on s 84(1)(c) of the Act alone and set out in short form their argument in support of the application, as follows:[69]

> Our application to vary the Covenant is made pursuant to section 84(1)(c) of the *Property Law Act 1958* (Vic).
>
> You also state that this information is required to enable your client to provide instructions to its intended expert witness(es).
>
> We believe that there is no proper basis upon which this application might be a matter for expert evidence.
>
> As you are aware, the proper way to consider an application under section 84(1)(c) is to consider what can be done prior to the modification, with what can be done after the modification. This was set out by Derham J (sic) in *Randell v Uhl* [2019] VSC 668:
>
> 85 The following guiding principles apply to determine whether those entitled to the benefit of the covenant will not be substantially injured:
>
> …
>
> (d) whether there will be substantial injury is to be assessed by comparing:
>
> (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;
>
> (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.
>
> In *Re Ulman* (1985) V Conv R 54-178 at 63-420, McGarvie J observed that when it comes to paragraph 84(1)(c):
>
> > The proper approach is to compare what the covenant before modification permits to be done on the land which it binds with what it would permit to be done after modification.
>
> The Covenant presently does not restrict the erection and display of any signage (including advertising signage) on the Land, provided it directly relates to business conducted on the Land by the transferee/covenantor.
>
> Further, in *Vrakas v Registrar of Titles* [2008] VSC 281, the Court held that when assessing the potential injury arising from a proposed modification, the benefits intended by the initial covenanting parties and the benefit that has actually been conferred must be measured against the benefit that would remain after the modification of the covenant:
>
> 35 Section 84(1)(c) requires a comparison between the benefits initially intended to be conferred and actually conferred by the covenant, and the benefits, if any, which would remain after the covenant has been discharged or modified – if the evidence establishes that the difference between the two (that is, the injury, if any) will not be substantial, the ground in s 84(1)(c) is made out.

[69] Affidavit of Jessica Kaczmarek made 27 January 2023, exhibit JLK-7 to 11 [CB 1039–1040].

> Given that there will be no substantive difference between what is presently possible, and what will be possible after the proposed modification, we believe that there will be no difference in benefit conferred by the Covenant before and after the modification of the Covenant.
>
> In circumstances where the proposed modification is particularly discrete, we believe that the briefing of expert witness(es) would put the Court and the parties to unwarranted inconvenience and/or expense.
>
> Our client therefore puts your client on notice that it will object to reimbursing any costs associated with engaging expert evidence.

41 The solicitor for the defendants responded thanking the plaintiffs' solicitor and 'respectfully' disagreeing with the argument which set out why the modification should be allowed and no expert was needed.[70] That exchange is odd given the notice initially served on the defendant which identified that the application was made under s 84(1)(c) of the Act. But it shows that the defendant was alive to the plaintiffs' contentions and disagreed with them, for whatever reason. It is noteworthy that no expert evidence was tendered at trial by either party.

42 The precise basis for the application was also set out earlier in preliminary submissions filed on 8 March 2022 for the purposes of the Court making orders for service of the application on the beneficiaries of the Covenant. It is not known whether these were served on, or obtained by, the defendant. These preliminary submissions identified the fact that the application was made under s 84(1)(c) of the Act and set out the argument in support of the modification. Later, on 24 November 2022, the plaintiffs filed written submissions for the trial which laid out their case at considerable length. The defendant filed its submissions for trial on 22 December 2022 which set out the substance of its case as run at trial.

43 I note for completeness that the defendant complained that the evidence on which I placed considerable weight was not filed until 27 January 2023, being the affidavit of Jessica Kaczmarek of the date which catalogued the disparity between the signage displayed in the Subdivision and the signage that was permitted by the Signage Restriction, with photographic evidence of the signage. In response, the plaintiffs' counsel pointed out that the affidavit of Ms Kaczmarek made on 5 January 2022 also

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70 Ibid [CB 1038–1041].

did that, but without the tables that catalogued and readily revealed the disparity and the photographs. That affidavit exhibited the title searches for each of the 10 lots in the Subdivision, enabling the identification of the non-compliance with the Signage Restriction.

44 There is no information to safely conclude that the second defendant's withdrawal of its objection from the proceeding was because it had concluded that its prospects of resisting the modification were slim. There could be many explanations for that company withdrawing. But the timing of its withdrawal is interesting. There had been an order varying the dates for the filing of the defendants' affidavits and submissions on 11 August 2022 so that the defendants had to file affidavits by 8 September 2022 and submissions by 22 December 2022. Thus there was a need to spend money on the lawyers to put the material before the Court in opposition to the application.

45 Ideally, the defendant should have been in a position to understand the plaintiffs' case by the time of the order of 19 May 2022 fixing the proceeding for trial. By that order, the objectors had to give notice to the plaintiffs by 27 May 2022 that they wish to be added as defendants and of their intention to defend this application. This procedure of giving objectors time to consider whether to be added as defendants is adopted to give objectors time to consider their position and whether they wish to be involved in what is inevitably expensive Supreme Court litigation. Then the plaintiffs were required to file an amended OM naming the defendants who gave such notice. The solicitors representing the defendant had given notice that the defendant objected to the modification sought as early as 26 April 2022. If considered advice had not been obtained by then, it ought to have been obtained before the matter was fixed for trial. But some leeway should be given in this case so as to be sure that the defendant understand the case to be made by the plaintiffs.

46 In my view, properly advised, the defendant should have seen that the application would be successful, and its opposition to the modification would fail, at the latest by a reasonable time after 2 August 2022 when they received the letter from the plaintiffs'

solicitor giving clear notice of the particular basis on which the plaintiffs sought the modification and the argument in support of it. The defendant's solicitors response to the letter of 2 August 2022 was given on 5 August 2022. In my view, 14 days after 2 August 2022 is sufficient time for the defendant to assess the plaintiffs' case and its own answer to it. Thus, in my view, the conduct of the case by the defendant after that date was irresponsible and lacked a legal or factual basis or merit, as is demonstrated by my finding that the main argument against modification involved a fanciful injury to its enjoyment of the benefited land. The defendant should pay the costs incurred by the plaintiffs from 16 August 2022, save for the costs the subject of the order of the Court made on 9 February 2023, by which the plaintiffs were ordered to pay the defendant's costs of and incidental to the hearing on that day.

***Calderbank* offers**

47 With respect to the *Calderbank* offers, the plaintiffs' contention that the costs should be paid by the defendant from the first offer was put in the alternative to its submission that the costs should be paid from an earlier date. None of the four *Calderbank* offers were put on the basis that the costs to be claimed would be indemnity costs, and nor was there any submission that indemnity costs should be ordered. Therefore it is strictly unnecessary to deal with those offers.

48 Nevertheless, the arguments put against the first offer being taken into account depend, first, on the submission that it was made some months before the plaintiffs had particularised their case by filing all of their evidence and submissions. It was thus said that was not unreasonable for the defendant to refuse to accept it at that early stage. In addition, and second, it was said that at that time there was no reason to conclude the Court would not follow the principles of *Re Withers* in respect of the defendant's costs and no reason to suppose that the defendant's case was unreasonable or vexatious. Therefore, the first offer did not offer a real element of compromise. Rather, it amounted to an invitation to capitulate.

49 The answer to the first point is that the essential elements of the plaintiffs' evidence had been filed at the commencement of the proceeding and its case was clearly

outlined at least by its letter of 2 August 2022. The second point ignores the fact that a proper assessment of the plaintiffs' case at an early stage is an important part of the duty of solicitors and counsel engaged to act for a defendant. At the hearing on 19 May 2022, the defendant, then an objector, was represented by its solicitor. Plainly, that solicitor had instructions to oppose the modification, but was given time by the order made to consider the position and notify the plaintiffs if it desired to be made a defendant.

50 In other cases, which do often depend on the detailed evidence and expert opinion about the neighbourhood and the environs of the subject land, it might well be too early for an objecting party to make a reasoned assessment of the prospects of the plaintiffs' application being successful. But in this case, that is not the situation for the reasons I have given. It ought to have been obvious to the defendant's advisers that there was no injury consequent upon the Signage Restriction being modified as sought.

51 For those reasons, in my view, the first offer did constitute a real element of compromise. It offered a cash sum plus all the defendant's costs on the standard basis up to the date of the offer. It explained why there would be no substantial injury to the defendant or the other beneficiaries by the modification. If I had not determined to order the defendant pay the plaintiffs' costs from an earlier date, I would have ordered costs on the basis of the first offer.

Conclusion

52 For the reasons I have given, I will make orders as to the costs of the proceeding as follows:

(a) The plaintiffs must pay the defendant's costs of and incidental to the proceeding up to 15 August 2022, on the standard basis.

(b) Subject to the costs order made on 9 February 2023 that the plaintiffs pay the defendant's costs of and incidental to the hearing that day, the defendant must

pay the plaintiffs' costs of and incidental to the proceeding from 16 August 2022 on the standard basis.

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

S ECI 2022 00007

BETWEEN:

ROJ PROPERTY GROUP PTY LTD	First Plaintiff
K & M PROPERTY INVESTMENTS GROUP PTY LTD	Second Plaintiff
- v -	
EVENTPOWER PROPERTY PTY LTD	First Defendant
~~COOK STREET PTY LTD~~	~~Second Defendant~~

CERTIFICATE

I certify that this and the 23 preceding pages are a true copy of the reasons for judgment of Derham AsJ of the Supreme Court of Victoria delivered on 25 May 2023.

DATED this twenty fifth day of May 2023.

SUPREME COURT OF VICTORIA
Associate to an Associate Judge

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Associate