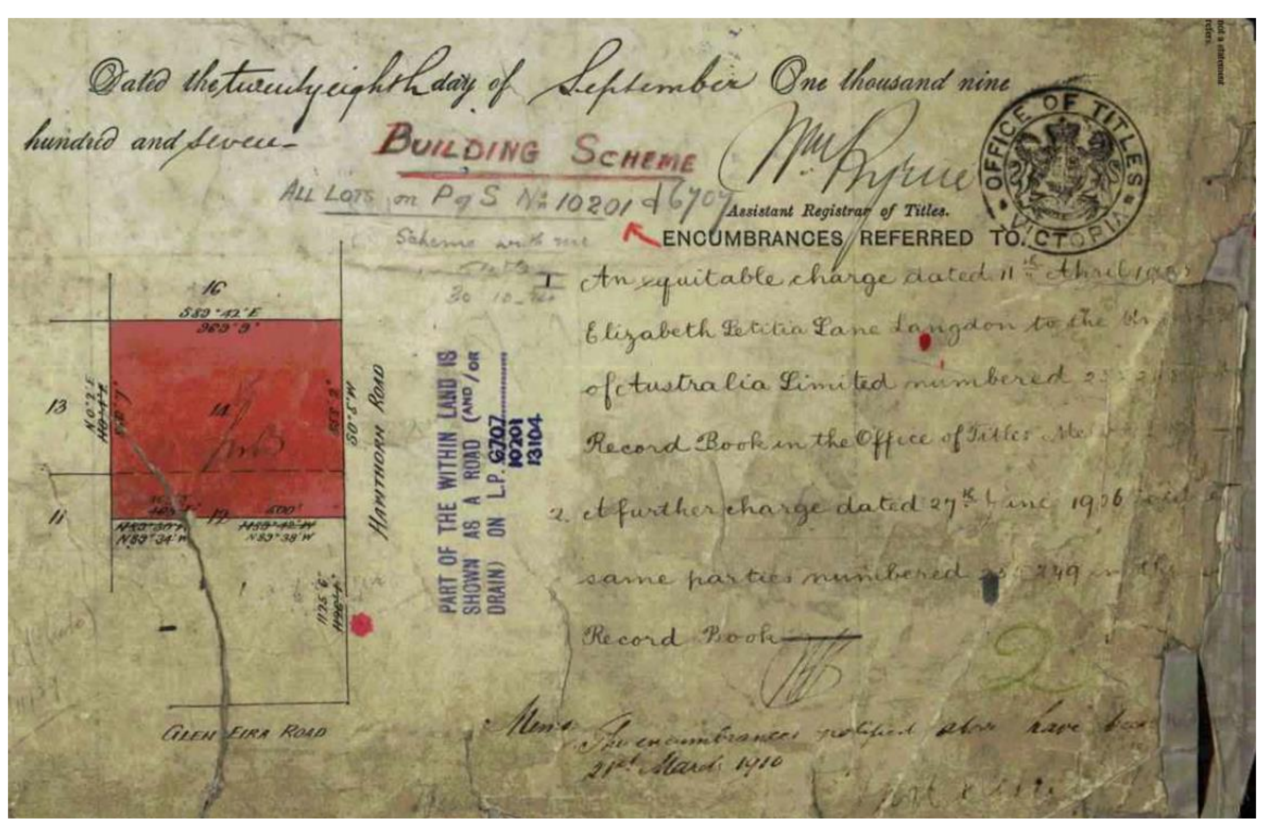
RESTRICTIVE COVENANTS IN VICTORIA

THEORY AND PRACTICE



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WHAT ARE RESTRICTIVE COVENANTS?

1. Restrictive covenants are contracts that run with the land, that are negative in nature.

2. As explained by Gillard J in *Fitt & Anor v Luxury Developments Pty Ltd* [2000] VSC 258, [54]–[70] a restrictive covenant is an agreement creating an obligation which is negative or restrictive, forbidding the commission of some act.

> 54 … In its most common form it is a contract between neighbouring land owners by which the covenantee[1] determined to maintain the value of his property or to preserve the enjoyment of his property acquires a right to restrain the other party, namely the covenantor,[2] from using his land in a certain way.
>
> 55 The original parties to the covenant can enforce it against the other.
>
> 56 Being a contract between two parties it does usually continue to bind those two parties personally and this is the position even when one of the parties ceases to own the land. However, the only remedy available in those circumstances where there is a breach would be nominal damages. …
>
> 58 Problems can arise when one of the parties to the covenant sells the land and ceases to have any control over it. By reason of the law of privity of contract the new owner not being a party to the covenant could not enforce it, except in the case of an assignment of the right to him.
>
> 59 However, the Common Law did recognise that the benefit of a restrictive covenant which was made with the covenantee having an interest in the land to which the covenant related, passed to his successor in title and could be enforced by the latter – see for example *Sharp v Waterhouse* (1857) 7E and D 816; 119 E.R. 1449.
>
> 60 At Common Law subject to proof of certain matters the benefit did run with the land and the covenantor was liable to the successors of the covenantee by reason of the terms of the covenant. In other words he was personally liable on the covenant.
>
> 61 Although the benefit could run with the land for the purpose of enforcing the covenant against the covenantor owner, at Common Law the burden did not run and hence a new owner was not liable on the covenant. See *Austerberry v The Corporation of Oldham* (1885) 29 Ch. D 750.
>
>> "As between persons interested in land other than as landlord and tenant, the benefit of a covenant may run with the land at law but not the burden: see the Austerberry case" per Lord Templeman in *Rhone v Stephens* (1994) 2 AC 310 at 317.
>
> 63 Because the Common Law did not enforce the burden of a covenant against a new owner, equity stepped in.
>
> 64 Equity recognised that the burden of restrictive covenant may run with the land in certain circumstances.
>
> 65 In 1848 in the historic case of *Tulk v Moxhay* equity intervened and provided remedies which were not available at common law in respect to the enforcement of a restrictive covenant against a subsequent transferee of land from the original covenantor.

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[1] The person to whom the promise is made.

[2] The person who makes the promise, or agrees to be bound by the covenant.

66 In *Tulk v Moxhay* (1848) 2 Ph. 774; 41 E.R. 1143 equity enforced a restrictive covenant against a purchaser of the land who was not the covenantor but who purchased with full notice of its terms.

67 The facts were that in the year 1808 the plaintiff then an owner of a vacant piece of ground in Leicester Square in London as well as several houses forming the Square sold a piece of the ground by description of "Leicester Square Garden or pleasure ground . . . to one Elms in fee simple". In the deed of conveyance Mr Elms covenanted with the plaintiff "his heirs and administrators" – "that Elms, his heirs and assign should, and would from time to time, and at all times thereafter at his and their own costs and charges, keep and maintain the said piece of ground and square garden, and the iron railing around the same in its then form, and in sufficient and proper repair as a square garden and pleasure ground, in an open state, uncovered with any buildings, in neat and ornamental order."

68 The land was subsequently conveyed to a number of purchasers and ultimately to the defendant whose purchase deed contained a similar covenant with his vendor.

69 The defendant admitted that he had purchased the block of land with notice of the covenant in the deed of conveyance of 1808.

70 The defendant manifested an intention to alter the character of the Square garden and to build upon it and the plaintiff who still owned several houses in the Square applied for an injunction. The Master of the Rolls granted an injunction and motion was made to the Lord Chancellor to discharge the order.

3. Traditionally, restrictive covenants were imposed over lots as they were transferred out of a larger area of land that was in the process of being subdivided. For example, one of the covenants considered in *Randell v Uhl*[3] adopted the following formulation:

> … with the intent that the benefit of this covenant shall be attached to and run at law and in equity with every Lot on the said Plan of Subdivision other than the Lot hereby transferred and that the burden of this covenant shall be annexed to and run at law and in equity with the said Lot hereby transferred …

4. In the absence of a building scheme, discussed below, covenants are typically only enforceable by parties who take ownership of land remaining within the parent title[4] at the time of the transfer of the burdened land. Beneficiaries need not be appurtenant landowners. Although a more distant beneficiary may find it harder to show direct injury from a covenant's proposed variation, such as overlooking, overshadowing and visual bulk. To this extent, restrictive covenants can be haphazard in application and enforceability.

5. In other words, if your land was the first lot sold and transferred out of the parent title you may be bound by a promise to all future owners of land remaining in the estate, as all lots will transfer out after yours. On the other hand, if yours was the last lot transferred out of the parent title, you may find the owners of no other parcel of land can enforce the covenant against you.

6. This is an imperfect system.

7. Consider, for example, the following plan from an application to vary a covenant pursuant to section 84(1)(c) of the *Property Law Act 1958* (Vic) in Reservoir. The subject land to the south east of the plan, shaded green, is the burdened lot. The covenant provided that a prospective

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3 *Randell v Uhl* [2019] VSC 668.

4 'Parent title' refers to the title or description of a property *before* the land is subdivided or consolidated.

developer of the land may construct only *one* dwelling on the lot. The parcels shaded yellow are those lots with the benefit of the covenant:

8. In varying the single dwelling covenant to allow the development of land with four dwellings, Derham AsJ relied on the fact that most beneficiaries were some distance away. The beneficiary to the immediate north of the subject land was indifferent to, or supportive of the application to vary the covenant:

> (i) all other properties having the benefit of the covenant are so remote from the Land that there will be no significant impacts from overlooking, overshadowing and other amenity issues;
>
> …
>
> (m) there will be no reduction in the quality of life for beneficiaries of the covenant within the neighbourhood. The present rear yard of the Land does not contribute to their enjoyment and is generally remote from them;

9. Had the property to the north actively opposed the application, the Court might have arrived at a different conclusion. For example, in [*Foudoulis v O'Donnell* [2020] VSC 248,](#) Mukhtar AsJ explained that beneficiaries close to the burdened land would experience a tangible impact on their amenity:

> 26 Unlike the O'Donnells, the Kiriazidis' and the Danieles have additional grounds for resistance because they are physically so close to the plaintiff's land. They are in a position to be heard to say they will suffer tangible injury in having two double story dwellings of a substantial build near a boundary interfering with the privacy and the use and enjoyment of their back yard.
>
> 54 … in my judgment, the construction of two semi-detached double storey dwellings on the plaintiff's land would involve a substantial change to the built form and density of his land.

I have viewed the backyard of the Danieles place and the Kiriazidis' place and looked over to the plaintiff's land. One can envisage there will be no relief to the mass of the proposed build form when seen from the gardens of these beneficiaries.

55 Accordingly, I hold that the plaintiff has not made out a case under s 84(1)(c). I do not see an injustice in holding Mr Foudoulis to the covenant by which he is legally bound.

TECHNICAL REQUIREMENTS

10. For a covenant to be legally valid, the following elements are required:

a) it must be negative in nature;

b) it must touch and concern the land;

c) it must be annexed or assigned to the land; and

d) the benefited land must be 'easily ascertainable'.

A restrictive covenant must be negative in nature

11. A covenant must be negative in that it must restrain a person from dealing with land in a certain way. Whether a covenant is negative is assessed by the court as a question of fact. It is therefore immaterial whether the wording is phrased as a positive requirement:[5]

> 151. The court is concerned with substance rather than form and accordingly whether the covenant is negative in nature is a question of fact. It is immaterial whether the wording is positive. A negative covenant is one that restrains a person from dealing with his land in a certain way.

12. For example, although a covenant stating that a person 'must use a dwelling as a private residence only', is positively expressed, in substance it is a covenant to *not* use the premises for any purpose other than a dwelling.[6] As explained by the Victorian Law Reform Commission (**VLRC**):

> 6.87 The distinction between restrictive and positive covenants is one of substance, not form. A covenant is restrictive if it is possible to comply with it by 'doing absolutely nothing',[7] while a positive covenant requires some deliberate action or expenditure of money. For example, a covenant that a landowner must not allow a building to fall into disrepair is negative in form, but positive in effect, since action must be taken to maintain the building in a state of repair.[8]

13. In contrast, agreements made pursuant to section 173 of the *Planning and Environment Act 1987* (Vic) can run with the land and be positive or negative in nature:

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5 *Fitt & Anor v Luxury Developments Pty Ltd* [2000] VSC 258, [151].

6 Anthony P Moore, Scott Grattan, Lyndren Griggs, *Australian Real Property Law* (Thomson Reuters, 6th ed, 2016); *Thamesmead Town Ltd v Allotey* [1998] 3 EGLR 97.

7 Bruce Ziff, *Principles of Property Law* (Thomson Carswell, 4th ed, 2006) 381.

8 Victorian Law Reform Commission, *Easements and Covenants: Final Report 22* (Victorian Law Reform Commission 2011), 84.

(1) A responsible authority may enter into an agreement with an owner of land in the area covered by a planning scheme for which it is a responsible authority.

(1A) Without limiting subsection (1), a responsible authority may enter into an agreement with an owner of land for the development or provision of land in relation to affordable housing.

(2) A responsible authority may enter into the agreement on its own behalf or jointly with any other person or body.

(3) A responsible authority may enter into an agreement under subsection (1) or (1A) with a person in anticipation of that person becoming the owner of the land.

(4) Despite anything in this Division, if an agreement entered into with a purchaser in anticipation of the purchaser becoming owner is recorded by the Registrar of Titles, it does not bind the vendor unless the vendor assumes the purchaser's rights and obligations under the agreement.

A restrictive covenant must touch and concern the land

14. The requirement that the benefit of a covenant must 'touch and concern' the land can be seen in the cases of *Smith and Snipes Hall Farm v River Douglas Catchment Board*[9] and *Town of Congleton v Pattison*.[10]

15. In *Snipes Hall,*[11] the covenant required landowners of land abutting a river to maintain the riverbank. The riverbank fell into disrepair and caused flooding. The benefit that the river would not flood was found to directly affect, or touch and concern the land. Tucker LJ explained that, to touch and concern the land:

> … it must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land, and it must then be shown that it was the intention of the parties that the benefit therefore should run with the land.[12]

16. In contrast, the landowner in *Town of Congleton v Pattison*[13] operated a silk mill on his land. The covenant affecting his land barred people from outside the Parish from working at the mill. The Court found that such a covenant did not go to the mode of occupation of the land, but rather sought to limit foreigners from being able to find work, and as such it did not touch and concern the land.

17. When assessing whether the benefit touches and concerns the land, the benefitted land will need to be sufficiently proximate to the burdened land for it to be capable of receiving the benefit.[14] There is no need for the lands to be contiguous, however both parcels must be 'in the same neighbourhood'.[15] Thus, land in Mildura could not reasonably be said to be land that benefits from burdened land in Hawthorn.

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9 *Smith and Snipes Hall Farm v River Douglas Catchment Board* [1949] 2 All ER 179 (***Snipes Hall***).

10 *Town of Congleton v Pattison* [1808] EWHC KB J66 (***Congleton***).

11 *Snipes Hall.*

12 Ibid 183.

13 *Congleton.*

14 *Clem Smith Nominees v Farrelly* (1978) 20 SASR 227.

15 Ibid, 249.

A restrictive covenant must be annexed to land

18. Common law principles requiring the benefit and burden of a covenant to be annexed to the land are now reflected in sections 78 and 79 of the *Property Law Act 1958* (Vic).

19. Section 78 of the *Property Law Act 1958* (Vic) provides a statutory presumption that any person deriving title under the covenantee, being the owner of the originally benefitted land, will, all other factors being equal, take the benefit of the covenant:

> (1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed.
>
> For the purposes of this subsection in connexion with covenants restrictive of the user of land successors in title shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.[16]

20. Similarly, section 79 of the *Property Law Act 1958* (Vic) provides the further presumption that the land burdened by the covenant will continue to be burdened, even if it passes out of the ownership of the original covenantor:

> (1) A covenant relating to any land of a covenantor or capable of being bound by him, shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself, his successors in title and the persons deriving title under him or them, and, subject as aforesaid, shall have effect as if such successors and other persons were expressed.
>
> This subsection shall extend to a covenant to do some act relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.

21. The practical effect of section 78 and 79 of the *Property Law Act 1958* (Vic) is that — save where expressly set out in the covenant to the contrary — the benefit and burden of the covenant will pass from the original covenanting parties to the subsequent possessors in title:

> 43 For completeness, I note that there are several statutory provisions that extend the benefit or burden of a covenant, being ss 78, 79 and 79A of the PLA. Section 78 provides that a covenant made after the commencement of the Act is deemed to be for the benefit of the covenantee and his successors in title, even if those words are not used, and s 79 applies the same deeming provision in respect of the burden of a covenant in relation to covenants made after the commencement of the Act. It is not necessary to consider those provisions further in this case, as the Covenant is of an earlier date.
>
> 44 Counsel for the plaintiff has taken me to an earlier provision, in force at the time of creation of the Covenant. That provision is s 65 of the Conveyancing Act 1904. Section 65(2) of that Act deemed a covenant 'relating to land not of inheritance or not devolving on the heir as special occupant' (which would appear to be the situation in respect of the Covenant) to be made with 'the covenantee his executors administrators and assigns' even if those persons were not expressed to be benefited in the covenant itself. That deemed extension does not in my view annex the benefit of the Covenant to land, but merely extends its personal benefit to those other persons. In this case, the covenantee's executor is himself deceased, and there is no evidence of any assignee of the benefit of the Covenant from the covenantee. Thus s 65 does not undermine the plaintiff's contentions in this case.[17]

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16 Section 78 of the *Property Law Act 1958* (Vic).

17 *Re Hunt* [2017] VSC 779, 793.

The benefited land must be ‘easily ascertainable’

22. Section 78 and 79 of the *Property Law Act 1958* (Vic), however, do not overcome any failure to adequately describe the land with the benefit of the covenant.

23. For example, in *Beman Pty Ltd v Boroondara City Council*[18] the text of the Covenant was as follows:

> The said Robert Padmore Greenshields hereby covenants with the said Kate Lynch and James Byrne and their transferees that any buildings (except outbuildings) now and hereafter to be erected on the said land transferred shall be built of brick or stone with roofs of tiles, slates or iron or any other material and … will not erect on that part of the said land transferred fronting Mary Street any shop or detached dwelling house facing Mary Street only but this covenant shall not prevent the said Robert Padmore Greenshields or his transferees from erecting outbuildings and accommodation appurtenant to any buildings erected in Glenferrie Road and it is intended that this covenant shall be set out as an encumbrance at the foot of the Certificate of Title to be issued in respect of the said land and shall run with the land.[19]

24. The applicant owned the land and wished to develop it for apartments. It had sought a planning permit to remove the Covenant from the title to the land on the basis that the Covenant no longer had any work to do and was unenforceable.

25. The Boroondara City Council issued a planning permit modifying the terms of the Covenant, rather than permitting its removal. The applicant appealed to the Victorian Civil and Administrative Tribunal seeking the removal of the Covenant, rather than the variation of its terms.

26. The Tribunal affirmed the decision of the Council and made no amendment to the planning permit that had been issued. Its key finding was that, on the proper interpretation of the terms of the Covenant, it was probable that there were still beneficiaries of the Covenant and this should have been fully investigated as part of the permit application.

27. On appeal, Emerton J of the Supreme Court of Victoria disagreed with the Tribunal’s conclusion and found that the covenant was unenforceable:

> 32 … had the Covenant described the benefiting land as the un-transferred part or parts of the land owned by Kate Lynch and James Byrne on the relevant date, it may have served to create a restrictive covenant enforceable by the landowners from time to time of the previously un-transferred part or parts of the original parcel. In in the absence of some such specification, however, while it might be possible to speculate with a level of confidence about which land the parties intended should benefit from the Covenant, the benefited land is not ‘easily ascertainable’.
>
> 33 Hence, notwithstanding that the Covenant expresses the intention that it ‘run with the land’ the subject of the transfer and records that the buyer, Mr Greenshields, covenants with Kate Lynch and James Byrne ‘and their transferees’, it does not satisfy the third element identified above: it does not specify which land held or previously by Kate Lynch and James Byrne ‘and their transferees’ is to benefit from the Covenant.

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18 *Beman Pty Ltd v Boroondara City Council* [2017] VSC 207.

19 Ibid, 207 [2].

> 34 In these circumstances, the words '*and shall run with the land*' at the end of the Covenant are not 'game-changing'. They do not solve the problem of identifying the land to benefit from the Covenant.[20]

28. Similarly, in *Re Hunt* [2017] VSC 779, Lansdowne AsJ declared a covenant to be ineffective on the basis that the covenant failed to identify any land with the benefit:

> 47 The Covenant does not identify in its terms any land to which its benefit is annexed. In my view, it is unarguable that the Covenant does not annex its benefit to land, and so is personal only to the transferor and his executor, both of whom are now dead.[21]

PRIVATE PROPERTY RIGHTS MERGING WITH PUBLIC PLANNING LAW

Restrictive covenants were once a nascent form of planning control

29. Restrictive covenants were an early form of town planning control, providing for the use and development permitted or encouraged in a particular area. For instance, the network of covenants that helped create the Ranelagh Estate in Mt Eliza (shown below) was described by Eames J in *Greenwood & Anor v Burrows & Ors*[22] as directed towards establishing a residential estate:

> In this case it seems to be clear enough that the purpose of [the restrictive covenant] is to maintain the purely residential character of the land which is subjected to it. And there is no doubt in this case that other lots have been made subject to the like restrictions, and that the general purpose is to preserve not only the particular lot in this case as a residential area, but the general area as a residential area ... It is a very common type of covenant and well recognized as having this object of preventing the area being turned into an area of a different character.

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20 Ibid. See also *Re Hunt* [2017] VSC 779.

21 *Re Hunt* [2017] VSC 779, 794. See also *Re Ferraro* [2021] VSC 166.

22 *Greenwood & Anor v Burrows & Ors* (1992) V ConvR 54–444.

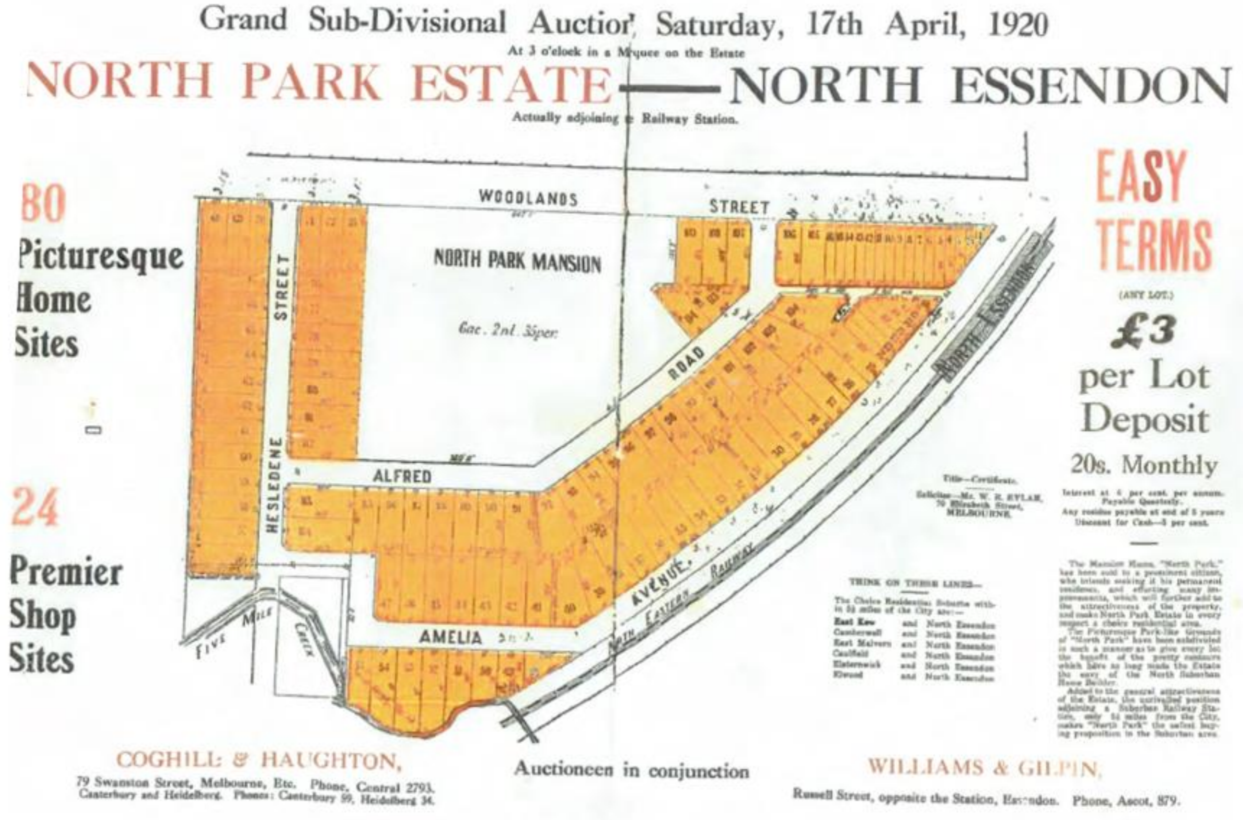
30. In *Prowse v Johnstone & Or* [2012] VSC 4 Cavanough J found that a network of single dwelling covenants was a form of dwelling density control, noting the attendant benefits that

such a condition provides:

> The plaintiff … confronts a restrictive covenant, indeed a web of restrictive covenants, with a clear purpose or object indistinguishable from the purpose or object identified by the Full Court in *Re Stani*[23] in respect of a similar covenant, namely to ensure that "one residence only was to be erected on each block so that there would be a reasonable density of population giving a reasonably quiet residential atmosphere, attractive in that it would provide a tranquil, quiet existence". Similarly, *in Re Miscamble's* Application McInerney AJ said of a comparable covenant that its purpose was … to prevent the erection on the subject land of more than one dwelling house, and thereby to preserve the area in question … as an area of spacious homes and gardens … .[24]

31. In *Conlan v Benton & Ors*,[25]the narrow lots facing Woodland Street, Essendon in the following proposed plan of subdivision, were intended to establish a commercial precinct by restricting those lots for use as a shop or shops with an associated residence:

> … That the said Sarah Searls her heirs executors administrators or transferees shall not at any time hereafter erect or allow to be erected on the land hereby transferred any building other than one shop or shops with or without dwelling house attached... [26]



23 At page 8.

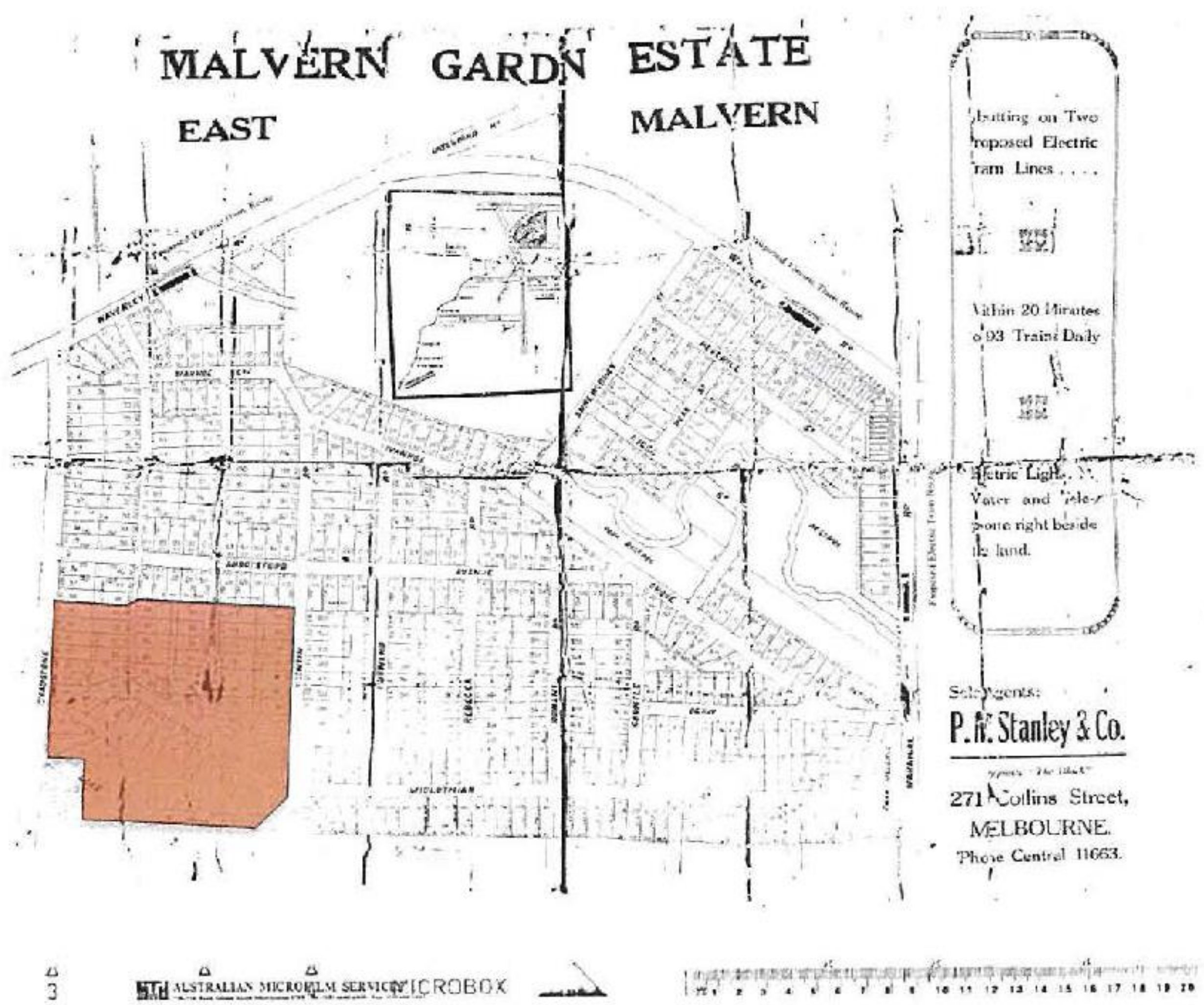
24 *Re Miscamble's Application* [1966] VR 596, 601.

25 *Conlan v Benton & Ors* [2017] VSC 244.

26 Ibid [7].

32. Restrictive covenants have also been used as a means of preventing quarrying pits from blighting residential estates, such as those found in the Malvern Garden Estate in East Malvern. In [*City of Stonnington v Wallish*](), [27] Ierodiaconou AsJ explained:

> 31 … 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.



33. In *Re Izadi and others* [2019] VSC 137 Mukhtar AsJ found that the purpose of a 'building materials' covenant was to establish a residential neighbourhood of buildings made with quality and durable materials:

> 24 The purpose of the materials covenant is to establish a residential neighbourhood of buildings made with quality and durable materials as a matter of structural integrity as well

[27] *City of Stonnington v Wallish* [2021] VSC 84.

as aesthetic presentation and, I suppose, to get away from what might have once been regarded as undesirable or fire hazardous timber homes or, worse still, shanty fibro-sheeting. The first question is whether the covenant disallows plaster rendering over brick walls. There are various authorities which say that a building materials covenant is not breached by the application of a particular finish such as a concrete render over exposed: see *Jacobs* v *Greig*;[28] *Grech v Garden City*[29] and *Clare v Bedelis*.[30] The photographs in evidence show that the rendered finish achievable on a substrate of polystyrene foam does make it, at least from a distance, imperceptible from a rendered finish over a brick wall. The same type of finish and aesthetic purpose is achieved. I saw fit to reveal to the parties in Court that I am personally closely familiar with the choice and the use of a rendered polystyrene finish on an upper storey external wall.

34. The lightweight construction regularised in the Court's decision can be seen on the upper level of the building shown below:

Planning schemes are now the primary means of controlling land use and development

35. This reliance on a network of restrictive covenants as a precinct-based development control has now been largely subsumed by the operation of the *Planning and Environment Act 1987* (Vic) and its network of planning schemes, zones and overlays.

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28 *Jacobs v Greig* (1956) VLR 597.

29 *Grech v Garden City* [2015] VSC 538.

30 *Clare v Bedelis* [2016] VSC 381.

36. Indeed, in [City of Stonnington v Wallish](),[31] the Court was moved to conclude that the introduction of planning controls and other surrounding circumstances all but made the network of quarrying covenants 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 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.
>
> …
>
> 125 As it is no longer realistic for quarrying to occur on the land, the covenants are now obsolete.

37. It is a common mistake, however, to assume that the very existence of planning controls and policies means that a network of covenants has no work left to do. As explained by Mukhtar AsJ in *Re Jensen*:[32]

> [10] … As for the request that the Court take into account planning considerations, it will be better, I would respectfully suggest, if councils are concerned about such matters, for them to assist the Court by becoming respondents to the proceedings and putting before the Court any matters concerning planning policy. The legislation does not require the Court to take into account the relationship between covenants and public planning control. The traditional view has been that the Court concerns itself only with the question whether an applicant comes within the heads stated in s 84 of the Act.[33] Recent decisions of this Court have it that town planning principles and considerations are not relevant to the Court's consideration of whether an applicant has established a ground under s 84: see *Vrakas v Registrar of Titles*[34] and *Prowse v Johnstone.*[35]

38. That said, consideration of town planning controls and policies might be relevant to the extent they may assist a court in understanding how land might be developed, should a variation to a covenant be approved:

> 105 Turning to other relevant principles, I note the statement of Kyrou J that town planning principles and considerations are not relevant to the court's consideration of whether an applicant has established a ground under s 84(1). His Honour cites five Victorian cases in that regard. I agree that <u>those cases make it clear that it is no part of the Court's function to consider whether a proposed development would or would not be desirable or acceptable under town planning principles and considerations. However, in the present case the plaintiff seeks to make use of statutory planning provisions in a slightly different way. She says that those provisions include protections for neighbouring properties.</u> She says that this is potentially relevant for the purpose of assessing substantial injury. I am prepared to assume, without deciding, that planning provisions of that kind may be relevant in that way. However, as will be seen, the provisions upon which the plaintiff seeks to rely in the present case do not sufficiently avail her in any event.[36]

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31 *City of Stonnington v Wallish* [2021] VSC 84.

32 *Re Jensen* [2012] VSC 638.

33 See generally *Bradbrook and Neave's Easements and Restrictive Covenants* (3rd ed.), 19.79.

34 *Vrakas v Registrar of Titles* [2008] VSC 281.

35 *Prowse v Johnstone* [2012] VSC 4.

36 Ibid [105].

39. This reasoning was applied by Riordan J in *Oostemeyer v Powell*[37] who found that planning provisions might be relevant to assessing a realistic picture of what could be constructed on the Land if the Covenant is modified:

> In *Prowse v Johnstone*, Cavanaugh J considered that, in assessing the benefits actually conferred by the covenant, the Court should have regard to 'the realistic probabilities of the plaintiff actually bringing about the "worst" that could be done under the existing covenant.' His Honour was also prepared to 'assume, without deciding' that in assessing the benefits which would remain, if the covenant is removed or modified, the Court could consider the protections afforded to neighbouring properties by statutory planning provisions. In my opinion, it is relevant to consider evidence of statutory planning provisions to the extent it shows 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'.[38]

40. However, the amenity protections inherent in planning controls are a compromise between the private need for privacy against the broader public need for urban consolidation. It is therefore wrong to assume a privacy protection in a planning scheme covers off on the proprietary interests of beneficiaries. As Cavanough J explained in *Prowse v Johnstone & Or*[39]:

> 118 I am not satisfied that all substantial injury would be prevented by the operation of the provisions of the planning scheme. The plaintiff relies in particular on clause 55 of the Stonnington Planning Scheme, commonly known as ResCode. However, those provisions represent a legislative compromise between the interests of developers and the interests of surrounding residents. They leave considerable discretion to the planning authorities. They cannot be regarded as a substitute for the proprietary rights of the defendants pursuant to the restrictive covenant.

41. It is therefore an error to apply town planning principles in a section 84 application, as one might in a merits planning appeal before the Victorian Civil and Administrative Tribunal:

> 41 Instead of the correct test for the first limb of s 84(1)(a) Mr Chapman asks whether the Covenant is 'out-moded' and expresses the view that:
>
> > The continuation of the existing single dwelling covenant on this property is considered to be redundant in the context of the suite of planning policy, restrictions and requirements applicable to the area that has generally kept density to a modest level that is respectful of the low key character of the neighbourhood.
>
> 42 The test is not whether the restriction in the Covenant is 'out-moded' or 'redundant' i.e. no longer necessary. It is whether it retains utility i.e. is still capable of fulfilling any of its original purposes, even if only to a diminished extent.[40]

42. Indeed, the Court is more likely to accept that the policies inherent in urban consolidation demonstrate the enduring value of the covenant:

> 58 Indeed, I accept the submission by the Council that the objective or purpose of constraining population density in the Covenant is now quite different, in fact contrary, to the planning objective of increasing urban density expressed in recent state planning pursuant to the Planning and Environment Act 1987. Far from showing that the Covenant is obsolete, this shows that it has even greater utility for its beneficiaries than perhaps at earlier times. It is

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[37] [2016] VSC 491.

[38] Ibid [49].

[39] Ibid [118].

[40] *Del Papa v Falting & Ors* [2018] VSC 384.

> important to keep in mind that the question in this application is not whether or not the restriction to a single dwelling is desirable from a planning perspective, or from the perspective of the state as a whole, but whether it retains utility or its modification would cause substantial injury as a matter of private property law.[41]

For many years, planning permits could facilitate the breach of restrictive covenants

43. Prior to 2000, planning permits could be granted that would permit a breach of a restrictive covenant.

44. For instance, in *Luxury Developments v Banyule CC*[42] the Tribunal explained that its remit was exclusively the application of town planning controls and policies. It had no jurisdiction to consider the proprietary legal interests raised by the existence of a restrictive covenant:

> **15.2 Restrictive Covenant**
>
> A restrictive covenant affects the property. This covenant limits the development to one dwelling on the site. Mr. Hooper submitted that the restrictive covenant has no bearing on the decision to be made on the planning merits of this proposal. I agree with this submission. Any action to remove or vary the covenant will be the subject of a separate application and procedures by the landowner, and may or may not be the subject of a separate application for review, depending on which legal course the applicant chooses to take. Whilst the area is comprised of single and two storey detached housing, that does not necessarily prohibit the removal of the covenant nor does it necessarily prohibit, in a planning sense, the development of the site for more than one dwelling.[43]

45. Few landowners had the resources or inclination to protect their property rights and so developers would routinely construct developments on the calculated assumption that no potential beneficiaries would enforce the covenant.

46. However, after the permit was granted in the above case of *Luxury Developments v Banyule CC*, and construction commenced in furtherance of the permit, the residents of the Hartland Estate in Ivanhoe commenced injunctive proceedings in the Supreme Court of Victoria.

47. Over four days in the Practice Court of the Supreme Court, Gillard J determined to stop the construction of three medium density homes at 270 Lower Heidelberg Road, Ivanhoe East:

> 332 Luxury Developments commenced building works on 14 February 2000 in the knowledge that the plaintiffs and particularly Mr Fitt had warned Mr Seiffert that if it commenced building works they would take legal proceedings.
>
> 333 The plaintiffs issued their originating motion on 6 March 2000 and Mr Seiffert continued with the building works to 31 March. Luxury Developments have spent approximately $75,000 on the works to date. A proportion of the cost was incurred after the proceeding was instituted.
>
> 335 I am satisfied that there are no discretionary factors which would preclude the plaintiffs enforcing their right. Luxury Developments proceeded with this development with full knowledge that it had been opposed at every step by the plaintiffs and others and with the knowledge that there was a substantial probability that a proceeding would be brought

---

[41] *Del Papa v Falting & Ors* [2018] VSC 384

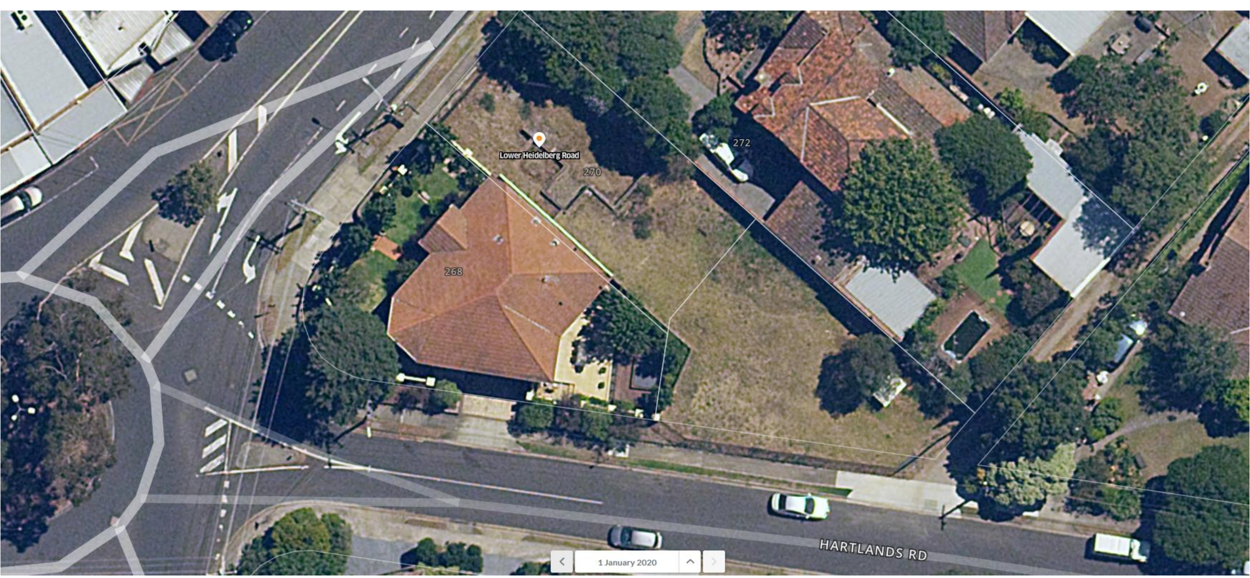
[42] *Luxury Developments v Banyule CC* [1998] VCAT 1310.

[43] Ibid.

against it. Further, Luxury Developments did not take advantage of the course that was open to it to approach the court under s 84 of the Property Law Act to determine the question before commencing the building works.

337 In my opinion the plaintiffs have established the necessary requirements to enforce the benefit of the covenant in equity against Luxury Developments which purchased the land with full knowledge of the terms of the covenant and is bound by the burden.[44]

48. To this day, only one of the three dwellings have been completed:



Since 2000, planning permits cannot result in the breach of a covenant

49. Luxury Developments subsequently went into liquidation, leaving the residents of the Hartlands Estate unable to recover their costs. Partly in response to this case, the Victorian Parliament passed the *Planning and Environment (Restrictive Covenants) Act 2000*, an Act that would prevent planning permits from being issued where they would breach a restrictive covenant.

50. The second reading speech explained:

> In 1988, the then Labor government introduced ground-breaking legislation to allow covenants to be removed or varied by planning processes. This introduced a simple alternative to complex Supreme Court proceedings.
>
> In 1993, the Kennett government introduced amendments to the legislation that made it very difficult to remove or vary a covenant by grant of a planning permit. Most applicants then opted to apply for a permit to use or develop land, before subsequently acting to remove or vary the covenant.
>
> This caused a variety of problems. Covenant beneficiaries had to participate in two applications to defend a covenant.
>
> They also found that relying on the covenant in support of their objections was not a relevant planning consideration. Applicants lost the chance for simultaneous consideration of both development and covenant matters. Responsible authorities and the now Victorian Civil &

44 *Fitt & Anor v Luxury Development Pty Ltd* [2000] VSC 258.

> Administrative Tribunal lost opportunities to act as a one-stop shop. At times, responsible authorities felt obliged to grant permits even though they supported the covenant.
>
> This bill implements a simple principle to end these problems – that a permit to use or develop land must not be granted if the permit would result in the breach of a covenant. It may only be granted if authority to remove or vary the covenant is given either before or at the same time as the grant of the permit.[45]

51. Section 61(4) to the *Planning and Environment Act 1987* (Vic) now provides:

> (4) If the grant of a permit would authorise anything which would result in a breach of a registered restrictive covenant, the responsible authority must refuse to grant the permit unless a permit has been issued, or a decision made to grant a permit, to allow the removal or variation of the covenant.[46]

52. In *Pivotel Pty Ltd v Maroondah CC*,[47]Senior Member Byard explained that this provision changed the sequence in which development approvals must be sought:

> 3. The effect of this sub-section is that, where planning permission is required for the use or development of land which, if acted on, would result in a breach of a restrictive covenant, the granting of such permission (prior to the removal or modification of the restrictive covenant so that it would no longer be breached by what the permit authorises) is barred. In other words, in those circumstances, the restrictive covenant must be removed or so modified before the use and/or development permit is granted, or at the same time. An applicant can no longer obtain the use and/or development permit first, and then worry about the restrictive covenant afterwards.
>
> 4. This represents a change in the law. Prior to the 13 December 2000, where various different permits, consents, licences and the like were required under various pieces of legislation before a proposal could be realised, the proponent could seek those licences, permits, approvals, etc. in any order he, she or it might choose. …

Planning permits cannot be conditioned on the later removal of a covenant

53. It might be thought that an application for planning permit could be made with a condition requiring the later removal or modification of the restrictive covenant. However, that possibility was quashed in *Design 2u and on behalf of Y & P Harel Pty Ltd v Glen Eira SC*.[48]

54. This case involved an application for review of the council's refusal to grant a permit for a multi-unit development. The subject land was affected by a registered restrictive covenant, which the parties accepted as restricting development on the land to a single dwelling. The Council argued that the Tribunal was precluded from granting a permit in this case because of the operation of section 61(4),[49] set out above.

55. The applicant argued that, provided the permit contains a condition as required by section 62(1)(aa), such a permit could not be properly described as a permit which authorised the breach of a registered restrictive covenant. Section 62(1)(aa) provides as follows:

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45 Victoria, *Parliamentary Debates*, Legislative Assembly, 1 June 2000, 2160 (the Hon John Thwaites).

46 *Planning and Environment Act 1987* (Vic), s 61(4).

47 *Pivotel Pty Ltd v Maroondah CC* [2001] VCAT 895 (31 May 2001).

48 *Design 2u and on behalf of Y & P Harel Pty Ltd v Glen Eira SC* [2010] VCAT 1865.

49 *Planning and Environment Act 1987* (Vic).

> **62 What conditions can be put on permits?**
>
> (1) In deciding to grant a permit, the responsible authority must—
>
> …
>
> (aa) if the grant of the permit would authorise anything which would result in a breach of a registered restrictive covenant, include a condition that the permit is not to come into effect until the covenant is removed or varied; and

56. The Tribunal was not persuaded that a condition to the effect of section 62(1)(aa) can operate to overcome the prohibition in section 61(4):

> 5 I find that unless there is a prior or simultaneous grant of a permit or decision to grant a permit to allow the removal of variation of the covenant, a permit cannot be granted by either the responsible authority or the Tribunal if the grant of a permit would authorise anything which would result in a breach of the covenant. I find that as the grant of a permit in this particular case would result in a breach of the covenant affecting the subject land, the application for review must fail and should therefore be dismissed.

57. It is for this reason that developers must now seek to vary a restrictive covenant *before* applying for planning permission.

58. That said, the Tribunal has found that section 61(4) will *only* prevent the grant of a permit if the grant of a permit itself would authorise the breach of covenant. If a further permit is required to authorise the thing that would result in the breach, then that does not preclude the grant of a permit by reason of section 61(4). For example, Deputy President Horsfall said in *Dukovski v Banyule City Council*:[50]

> [22] It is well established that where a covenant places restrictions on construction on an allotment, e.g. a single dwelling covenant, a permit to subdivide the land does not result in a breach of the covenant. Whilst the subdivision may be a pre-requisite or part of the process for ultimate sale of a … dwelling, the subdivision itself does not result in the breach. The breach is created by the relevant construction.

59. Thus, it is not sufficient that the grant of the permit will simply create a set of circumstances where a breach of the covenant may occur in the future.

60. In *Trevanion v Maroondah City Council,*[51] the Tribunal was dealing with a two-lot subdivision of land which already had an existing dwelling but was subject to a single dwelling restrictive covenant. The Council granted a permit but attached a note to the permit as follows:

> Council advises that a restrictive covenant exists on title, and prior to the construction of any dwelling on the subject land, a variation of the restrictive covenant to allow the construction of a dwelling on the land would be required.[52]

61. The Tribunal found "there is a good case that some form of warning should be given in the permit regarding the implications of the restrictive covenant." However, the Tribunal decided that rather than include a note on the permit, it should be replaced by a more comprehensive and better drafted permit condition.

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[50] *Dukovski v Banyule City Council* [2003] VCAT 190.

[51] *Trevanion v Maroondah City Council* [2004] VCAT 2480.

[52] Ibid [3].

62. In *Peter Wade v Yarra Ranges Shire Council*,[53] Gibson DP granted a permit for a two-lot subdivision but included a condition that a statement of compliance must not be issued unless and until the restrictive covenant is removed or varied to allow construction of a dwelling on each of the lots created by the subdivision.

Permits can be granted on the condition that the proposal is brought into compliance with a covenant

63. Further, the Tribunal seems content to direct a permit issue subject to changes that would bring a development into compliance with a restrictive covenant. For instance, in *Iacono v Hobsons Bay CC*[54] Member Martin, made findings to this effect:

> 17 However I see a satisfactory resolution to this uncertainty to be that any updated permit conditions set out in the Appendix to this decision make it very clear that the section of the southern façade currently shown as glazing alongside the lift shaft (at the owner's discretion) either:
>
> - remain glazed, but with this glazing being clad over a solid brick or stone external wall; or
> - converted into one of the two listed Hardie matrix panel materials, clad over a solid brick or stone external wall.
>
> 18 To be clear, I am not querying the design merits of this proposed use of a large area of south-facing glass (which may well be attractive), but the starting point needs to be compliance with the covenant.
>
> 19 My overall finding is that, with the design change explained above and assuming the 'Legend' shown in Drawings 3.1 and 3.2 is updated to more overtly ensure that any proposed secondary materials are still clad over a solid brick or stone external wall, I am satisfied that the proposal complies with the covenant.

Trust for Nature covenants do not trigger section 61(4) of the *Planning and Environment Act 1987*

64. In *Blackhall v Greater Geelong CC* (Amended)[55] legal member Dalia Cook concluded that non-compliance with a Trust for Nature covenant does not prevent the grant of a planning permit that would result in its breach:

> **Trust for Nature covenant**
>
> 85 We accept the responsible authority's submission that the Trust for Nature Covenant applying to the subject land would not restrict the grant of a permit having regard to section 61(4) of the *Planning and Environment Act 1987*. <u>While it is a type of registered restriction, it has been created under the regime of the *Victorian Conservation Trust Act 1972*. We find that for a registered restriction to prevent the grant of a permit (where a breach would otherwise result), it would need to have been created under the regime of the *Subdivision Act 1988*.</u>

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[53] *Peter Wade v Yarra Ranges Shire Council* [2005] VCAT 111.

[54] [2015] VCAT 769

[55] [2016] VCAT 1507

RESTRICTIVE COVENANTS ARE COMMON IN VICTORIA

65. Restrictive Covenants are commonly found throughout Victoria, particularly in the eastern suburbs of Melbourne — from Prahran, down to Brighton and through Glen Waverley out to Boronia.

66. The largest cohesive network of covenants is perhaps in Reservoir in Melbourne's north, described by Morris J in *Stanhill v Jackson*:[56]

> 4 It would appear that in about 1919 two entrepreneurs, Thomas Michael Burke and Patrick Deane, purchased 1,119 acres of land at Reservoir and gradually commenced the process of subdividing the land into more than 3,000 lots. Initially the residential lots were transferred directly out of the original title. Later larger lots were transferred out of the original title, then these larger lots were further subdivided into residential lots.

67. In *Foudoulis v O'Donnell*,[57] Mukhtar AsJ explained that this area is the subject of "more than a few" applications for the modification of restrictive covenants:

> 23 The objectors Vicky and John Kiriazidis objected on similar and additional grounds. They say that the neighbourhood is mostly large blocks with single dwellings on them; the character of the neighbourhood gives it the benefit of providing a quiet, family friendly environment with low-density living and a limited amount of traffic; and that to allow the modification in this case would allow or encourage the possibility of other medium density developments such as townhouses in the area. In support of that apprehension, they exhibit a standard form letter addressed to 'Dear Home Owner' which they in the post from the 'Acquisitions Manager' of a firm describing itself as 'one of Victoria's largest suburban property development firms'. In substance, that letter states that the developer 'is now looking at certain pockets of Melbourne for townhouse development opportunities' and 'based on our research we are interested in speaking with you regarding the potential purchase of your property as you have fit (sic) a specific criteria'. The letter also says that the developer will 'pay a premium for your property in return for a longer settlement (approx. 12 months), as it gives us the opportunity to obtain a permit to develop your land before we settle with you'.
>
> 24 It may be supposed this letter was sent to others in the neighbourhood. As counsel for the objectors put it, 'developers are circling' and 'will be interested in this case'. I am able to say this Court has experienced over recent years more than a few applications to modify single dwelling covenants in other neighbourhoods in Reservoir.

---

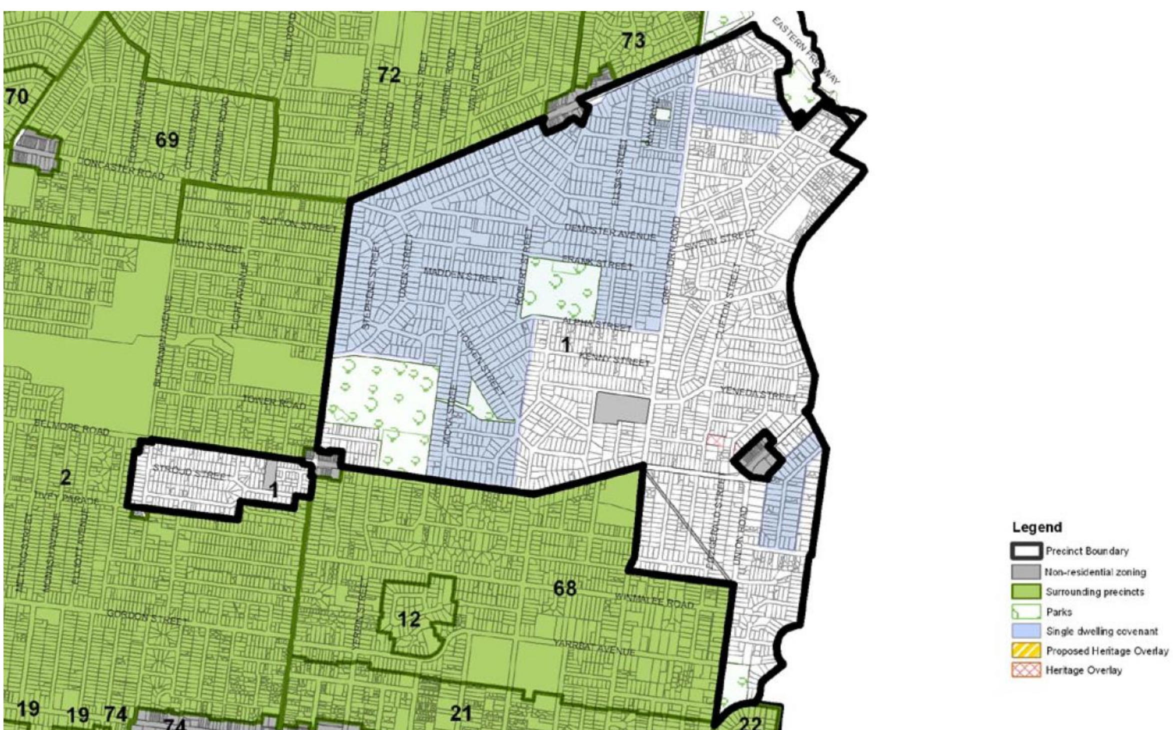
[56] *Stanhill v Jackson* [2005] VSC 355.

[57] *Foudoulis* [23].

Figure 4: Boundary of Grandfather or Parent Title in red boundary of title 4984/715 in blue and subject land is arrowed

[58]

68. One network of covenants in Balwyn is so intact, it enjoys a degree of protection in the Boroondara Planning Scheme, which is ironic given that one enduring effect of single dwelling covenants is to defeat the otherwise broadly accepted principle of urban consolidation:[59]



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[58] Annexure A, in *Foudoulis v O'Donnell* [2020] VSC 248.

[59] Boroondara Character Study, Precinct Statement, Precinct 1, Adopted 24 September 2012, updated October 2013.

RESTRICTIVE COVENANTS ARE STILL BEING CREATED

69. Given the scope of modern-day planning controls, one might expect restrictive covenants to be declining in popularity. However, they are still being introduced and may be of indefinite duration. The VLRC report lamented:

> Restrictive covenants emerged as a means of controlling land use when public planning was in its infancy, but are used now more than ever. When land is subdivided, hundreds of lots may be created.
>
> Each lot may be sold by the developer subject to a number of restrictive covenants that can be enforced by all or many of the other lot owners.
>
> Restrictive covenants are commonly created to ensure that the neighbourhood is built to the developer's plan and does not change. They may be created for a limited time but many are of indefinite duration. The proliferation of covenants that are difficult to remove when circumstances change is an emerging problem for future owners. To control the problem, we recommend that future covenants operate for a definite period and no more than 20 years.[60]

70. As recently as April 2021, Land Use Victoria was moved to introduce two, new forms where parties intend to seek to record a restrictive covenant in the Register using a transfer or plan.[61] These were said to have been created due to a "significant number of transfers and plans lodged that … do not meet the requirements for recording a valid restrictive covenant". Typical errors include:

    a) benefitted land not being identified; or

    b) attempts to burden and benefit the same land.

IDENTIFYING THE BURDENED LAND

71. If a restrictive covenant burdens or runs with a parcel of land, it should be noted under the heading "Encumbrances, Caveats and Notices" on a register search for a certificate of title available from Landata.[62] For example:

> ENCUMBRANCES, CAVEATS AND NOTICES
>
> Covenant 843295

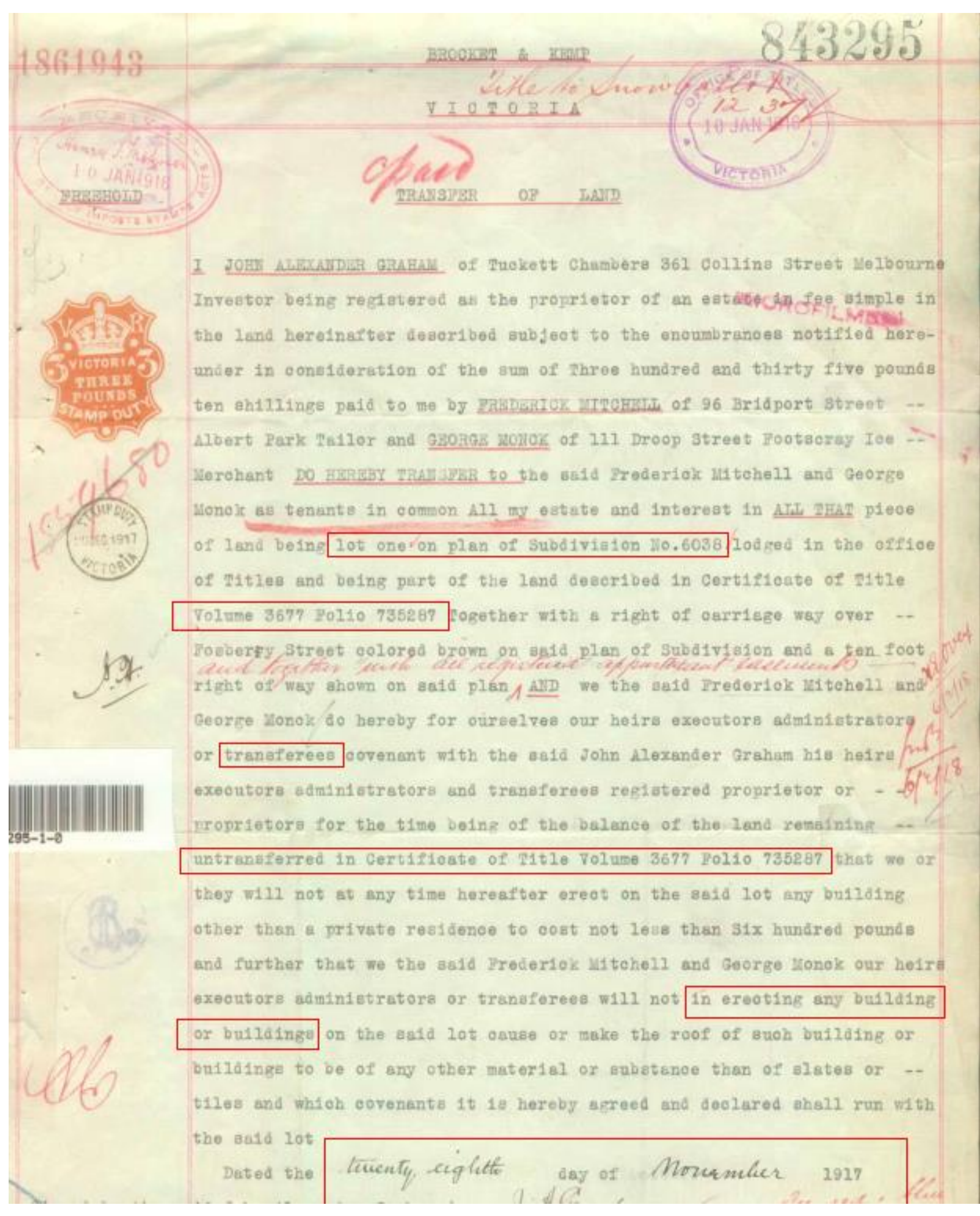
72. The instrument of transfer creating the covenant will then typically look something like this:

---

60 Victorian Law Reform Commission, *Easements and Covenants: Final Report* (Victorian Law Reform Commission 2011), 10.

61 See Fees, Guides and Forms: www.land.vic.gov.au/land-registration/fees-guides-and-forms.

62 Landata is a search service for land titles, producing imaged certificates of title, such as the example shown above.



843295

1861943

BROCKET & KEMP

VICTORIA

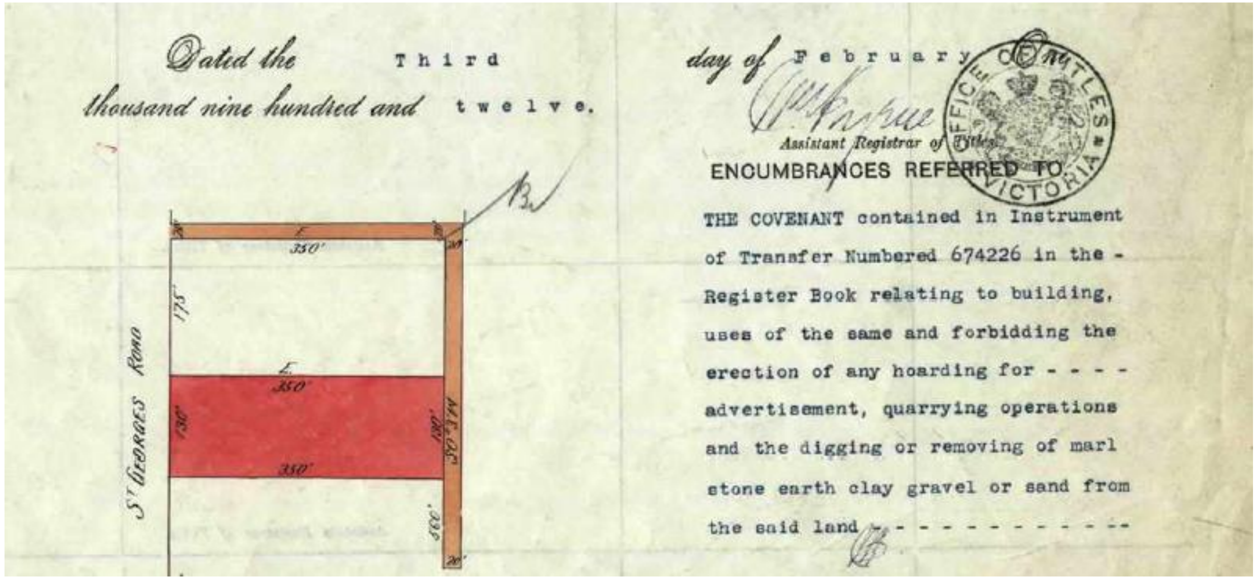
FREEHOLD

TRANSFER OF LAND

I JOHN ALEXANDER GRAHAM of Tuckett Chambers 361 Collins Street Melbourne Investor being registered as the proprietor of an estate in fee simple in the land hereinafter described subject to the encumbrances notified hereunder in consideration of the sum of Three hundred and thirty five pounds ten shillings paid to me by FREDERICK MITCHELL of 96 Bridport Street -- Albert Park Tailor and GEORGE MONCK of 111 Droop Street Footscray Ice -- Merchant DO HEREBY TRANSFER to the said Frederick Mitchell and George Monck as tenants in common All my estate and interest in ALL THAT piece of land being lot one on plan of Subdivision No.6038 lodged in the office of Titles and being part of the land described in Certificate of Title Volume 3677 Folio 735287 together with a right of carriage way over -- Fosberry Street colored brown on said plan of Subdivision and a ten foot right of way shown on said plan AND we the said Frederick Mitchell and George Monck do hereby for ourselves our heirs executors administrators or transferees covenant with the said John Alexander Graham his heirs executors administrators and transferees registered proprietor or -- proprietors for the time being of the balance of the land remaining -- untransferred in Certificate of Title Volume 3677 Folio 735287 that we or they will not at any time hereafter erect on the said lot any building other than a private residence to cost not less than Six hundred pounds and further that we the said Frederick Mitchell and George Monck our heirs executors administrators or transferees will not in erecting any building or buildings on the said lot cause or make the roof of such building or buildings to be of any other material or substance than of slates or -- tiles and which covenants it is hereby agreed and declared shall run with the said lot

Dated the twenty eighth day of November 1917

73. Alternatively, a covenant may be disclosed on the imaged certificate of title itself.


Dated the Third day of February thousand nine hundred and twelve.

Assistant Registrar of Titles

ENCUMBRANCES REFERRED TO

THE COVENANT contained in Instrument of Transfer Numbered 674226 in the Register Book relating to building, uses of the same and forbidding the erection of any hoarding for advertisement, quarrying operations and the digging or removing of marl stone earth clay gravel or sand from the said land

But this is likely to be a summary of the covenant rather than the document that created it.

74. If you are acting for a responsible authority seeking to establish that a covenant does not offend section 61(4) of the *Planning and Environment Act 1987*, discussed in greater detail below, you should ask for production of:

    a) the instrument of transfer that created the covenant; or

    b) the plan of subdivision that created the restriction—

    paying particular attention to the date at which the covenant was created, in the former case, being the date at which the agreement was made.

IDENTIFYING THE BENEFITTED LAND

75. Typically, the nature and extent of the beneficiaries can be discerned from a careful reading of the words of the covenant, but this may require further title searches and a careful examination of the parent title.

76. To be legally effective, a covenant can only attach the benefit to land owned by the covenantee at the time it was signed. Yet a surprising number of covenants purport to convey the benefit of a covenant to all the land in a subdivision, despite this being legally ineffective. In *Xu v Natarelli*,[63] Ierodiaconou AsJ explained:

> 105. However, contractual principles of privity exclude the registered proprietors of the lots transferred out of the parent title before the covenant was made. Equity does not extend the benefit of the covenant to them although it does extend the benefit to proprietors (and their successors in title) of the lots transferred out of the parent title, that is subdivided and sold, *after* the restrictive covenant was made.[64]

63 *Xu v Natarelli* [2018] VSC 759.

64 Ibid, [105]. Emphasis in original.

77. Derham AsJ explained in [*Randell v Uhl*](),[65] that the date of the execution of the transfer is the relevant date, not registration:

> 57 It is common ground between the parties that if there is no building scheme, then certain lots in the subdivision do have the benefit of the Covenants, namely those lots that remained untransferred out of the Head Title at the time of the execution of the transfers of Lots 12 and 13, respectively; but that those that were transferred out of the Head Title before Lots 12 and 13, respectively, do not have the benefit of the Covenants. This is because it is well established that the original covenantee and his successors cannot enforce a restrictive covenant against a successor in title of the covenantor unless they retain land which is benefited by the covenant.[66] Thus, a vendor of land in respect of which he takes the benefit of a restrictive covenant cannot, by the covenant, annex the restriction to land which he does not own at the time of the covenant, unless the covenant is given as part of a building scheme.[67] If the existence of a building scheme is established, the defendants do not have to prove that the benefit of the Covenants was annexed to their land. The date of the execution of the transfer is selected as the relevant date because it is only in equity that the burden and benefit of the Covenants run with the Land, and in equity the date on which the transfers were executed is the relevant date, not registration.

78. This principle does not extend to restrictions on title made pursuant to *Subdivision Act 1998*. This is discussed in more detail, below. In this instance, the need for privity is displaced by the operation of the statute.

BUILDING SCHEMES

79. An absence of privity may be circumvented by the establishment of a building scheme, as described by Hargrave J *Vrakas v Mills* [2006] VSC 463:

> Where the lots in a subdivision of land are all sold subject to a restrictive covenant, the Court may find that there has been a scheme of development, often called a building scheme. Where a scheme of development is established, all purchasers and their assigns are bound by, and entitled to the benefit of, the restrictive covenant.[68]

80. The best contemporary discussion of buildings schemes can be found in *Randell v Uhl*, in which Derham AsJ explained:

> 58 Where the lots in a subdivision of land are all (or substantially all) sold subject to a restrictive covenant, the Court may find that there has been a building scheme. Where a building scheme is established, all purchasers and their assigns are bound by, and entitled to the benefit of, the restrictive covenant.[69]
>
> 59 In *Elliston v Reacher*[70] Parker J stated the requirements in terms 'that have since been universally accepted',[71] as follows:

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65 [2019] VSC 668.

66 *Chambers v Randall* [1923] 1 Ch 149; *Langdale v Sollas* [1959] VR 634, 639.

67 *Re Mack and the Conveyancing Act* [1975] 2 NSWLR 623; *Xu v Natarelli* [2018] VSC 759, [105].

68 *Vrakas v Mills* [2006] VSC 463, [27].

69 *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258, [249]-[254].

70 *Elliston v Reacher* [1908] 2 Ch 374.

71 *Re Dennerstein* [1963] VR 688, 692 (Hudson J). The principles stated by Parker J have been cited with approval in many Australian cases, including *Cobbold v Abraham* [1933] VLR 385, 391; *Langdale v Sollas* (1959) VR 637,

[I]t must be proved (1) that both the plaintiffs and defendants derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and (4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors. If these four points be established, I think that the plaintiffs would in equity be entitled to enforce the restrictive covenants entered into by the defendants or their predecessors with the common vendor irrespective of the dates of the respective purchases.[72]

60 Counsel for the defendants pointed out, quite correctly, that there is an additional requirement that almost goes without saying, namely, that the area to which the building scheme extends must be defined.[73]

61 In addition, because the Land is under the operation of the *TLA*, the decision in *Re Dennerstein*[74] establishes, as Hargrave J put it in *Vrakas v Mills*, that:

…in order to bind a transferee of land registered under the *Transfer of Land Act* with a restrictive covenant arising under a scheme of development, it is necessary for the notification in the Register to give notice of:

(1) the existence of the scheme;

(2) the nature of the restrictive covenant; and

(3) the identity of the lands affected by the scheme, both as to the benefit and the burden of the restriction.

Further, it is necessary that this notice is given in the certificate of title, either directly or by reference to some instrument or other document to which a person searching the Register has access.[75]

81. Derham AsJ explained, there is often only limited circumstantial evidence available to assist in establishing the existence of a building scheme:

63 … Sometimes there is evidence of an auction of many or most of the lots in a subdivision and of a contract that is the source of the covenant in question, as was the case in *Dennerstein.* On other occasions there is little more than the registered instruments and

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641; *Cousin v Grant* (1991) 103 FLR 236; *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258, [255]; *Vrakas v Mills* [2006] VSC 463, [28].

72 *Elliston v Reacher* [1908] 2 Ch 374, 384.

73 *Reid v Bickerstaff* [1909] 2 Ch 305, 323; *Dennerstein* [1963] VR 688, 693; *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258, [144].

74 *Re Dennerstein* [1963] VR 688.

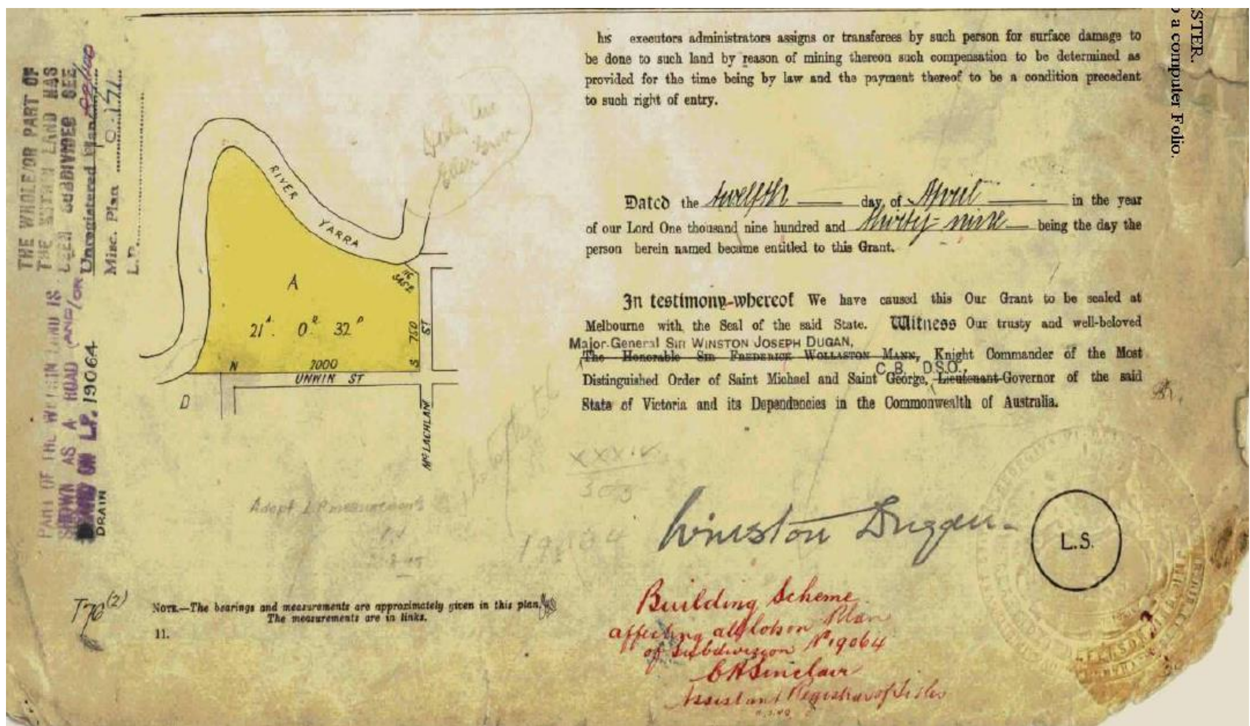
75 *Vrakas v Mills* [2006] VSC 463, [45].

what may be inferred from the terms of the covenant.[76] Nevertheless the court can draw the inference from the documentation and will readily do so where it is proven that there was a large subdivision of building blocks and which were sold over a relatively short period by a common vendor and a common form of restrictive covenant.[77]

82. However, in *Randell*, despite the existence of the building scheme being discoverable from an examination of documents on the register of titles, Derham AsJ found that a purchaser should *not* be obliged to make inquiries beyond those documents disclosed on a simple register search — a document typically provided in a section 32 statement[78]:

> 82 … If it were sufficient notice that the Head Title in this case bears the notification of a building scheme, it would require a person interested in purchasing the Land to search the Register further than the title search indicated and to go back to the Head Title and the original, or first edition, of the Subdivision. That would render conveyancing a hazardous and cumbersome operation beyond what is reasonable to expect.
>
> 83 In summary, I am satisfied that a building scheme was established but the notification of it was not sufficient to give notice of it to the plaintiffs because a search of the title of the Land by the plaintiffs did not, and would not, reveal the existence of the scheme either directly, or indirectly by reference to any instrument referred to in the search of the title.[79]

83. The head title or Grandparent Title from *Randell*, is shown below:



his executors administrators assigns or transferees by such person for surface damage to be done to such land by reason of mining thereon such compensation to be determined as provided for the time being by law and the payment thereof to be a condition precedent to such right of entry.

Dated the twelfth day of April in the year of our Lord One thousand nine hundred and thirty-nine being the day the person herein named became entitled to this Grant.

In testimony whereof We have caused this Our Grant to be sealed at Melbourne with the Seal of the said State. Witness Our trusty and well-beloved Major-General Sir Winston Joseph Dugan, ~~The Honorable Sir Frederick Wollaston Mann,~~ Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, C.B., D.S.O., ~~Lieutenant~~-Governor of the said State of Victoria and its Dependencies in the Commonwealth of Australia.

Winston Dugan

L.S.

Building Scheme affecting all lots on Plan of Subdivision No 19064

NOTE.—The bearings and measurements are approximately given in this plan. The measurements are in links.

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76 *Re Dolphin's Conveyance* [1970] Ch 654; *Re Texaco Antilles Ltd v Kernochan* [1973] AC 609; See *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258, [146].

77 *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258, [146]-[148]; *Vrakas v Mills* [2006] VSC 463, [29].

78 A section 32 statement is a document prepared by the vendor to prospective buyers. The statement outlines relevant caveats and covenants on the land, as well as providing zoning and building permit information.

79 *Randell v Uhl* [2019] VSC 668.

APPLICATIONS TO MODIFY OR REMOVE A RESTRICTIVE COVENANT

Clause 52.02 of the relevant planning scheme

84. Efforts to modify or remove restrictive covenants from land often commence with an application for planning permit to modify or remove the covenant pursuant to clause 52.02 of the relevant council planning scheme that provides:

> **52.02 EASEMENTS, RESTRICTIONS AND RESERVES**
>
> **Purpose**
>
> To enable the removal and variation of an easement or restrictions to enable a use or development that complies with the planning scheme after the interests of affected people are considered.
>
> **Permit requirement**
>
> A permit is required before a person proceeds:
>
> - Under Section 23 of the *Subdivision Act 1988* to create, vary or remove an easement or restriction or vary or remove a condition in the nature of an easement in a Crown grant.
>
> …
>
> **Decision guidelines**
>
> Before deciding on an application, in addition to the decision guidelines in clause 65, the responsible authority must consider the interests of affected people.

85. However, caution must be exercised when applying to modify a restrictive covenant through the planning permit process:

a) first, notice will need to be given to all owners and occupiers of land with the benefit of the Covenant. In some cases, this may amount to tens if not hundreds of properties:

> **52 Notice of application**
>
> (1) Unless the responsible authority requires the applicant to give notice, the responsible authority must give notice of an application in a prescribed form—
>
> (a) to the owners (except persons entitled to be registered under the Transfer of Land Act 1958 as proprietor of an estate in fee simple) and occupiers of land benefited by a registered restrictive covenant, if the application is to remove or vary the covenant;
>
> …

In contrast, an application made pursuant to section 84 of the *Property Law Act 1958* typically only requires direct notice to the most proximate beneficiaries;[80]

b) second, section 60(5) and to a lesser extent, section 60(2) of the *Planning and Environment Act 1987* are difficult provisions to satisfy, meaning that few, if any, planning permit applications to remove or modify restrictive covenants succeed where there is sustained opposition by a beneficiary. These are discussed in more detail below;

c) third, an application to remove or modify a restrictive covenant necessarily awakens the interest of a well-resourced (and often legally represented) opponent in the responsible authority or relevant municipal council. In contrast, applications pursuant to section 84

[80] See 'The extent of notice required' below/

of the *Property Law Act 1958* rarely attract the involvement of a municipal council unless it happens to own land with the benefit of the Covenant. As a matter of practice, notice is rarely if ever directed to councils simply by reason of their being responsible for roads in the relevant neighbourhood. In *Re Pivotel Pty Ltd*,[81] the Maroondah City Council received notice of, and actively opposed an application to amend a covenant, but it was the beneficial owner of parkland in the relevant subdivision;

d) fourth, when making an application to the Supreme Court to modify a restrictive covenant via section 84 of the *Property Law Act 1958*, any earlier application to modify a restrictive covenant via the *Planning and Environment Act 1987* needs to be disclosed to the judge hearing the later section 84 application. Part of the reason for this is that the Court's current practice is to ensure that each beneficiary who objected to an earlier application (irrespective of its statutory basis) receives notice of the section 84 application. This obligation to give notice to more distant and active beneficiaries can have a significant impact on the conduct of the section 84 application, by triggering the opposition of parties that might otherwise not have been involved in the section 84 process, were it not for this broader notice obligation; and

e) the expression "interests of affected people" in clause 52.02 of the relevant planning scheme has been construed to include non-beneficiaries. In *Hill v Campaspe SC* [2011] VCAT 949, Gibson DP held:

> 61 A proposal to remove or vary a restrictive covenant will clearly affect the property law rights of the owners of land with the benefit of the covenant. However, the provisions of the *Planning and Environment Act 1987* and the planning scheme have blurred the distinction between property law rights and what I will refer to as 'planning interests'. I do not consider that the scheme for removing or varying a covenant under the legislation is limited to a consideration only of the effect on property law rights. If that was intended, the consideration of issues could have been limited to a consideration of issues arising only under section 60(5) (or section 60(2)). But that is not the scheme established under the Act and the planning scheme.

In contrast, in an application pursuant to section 84 of the *Property Law Act 1958*, the Supreme Court is unlikely to give much weight to the views of persons without a proprietary interest in the proceedings, and in many instances, they may not even be aware the application is being considered. In *Re DVC Management & Consulting Pty Ltd*,[82] Mukhtar AsJ explained:

> 5 … as a covenant is a private not a public obligation, only a person having the benefit of the covenant (i.e., the ability to enforce it) has standing to object to such an application in this Court. Of course, if a covenant is removed or modified, disaffected neighbours may make later objections to the particular features of the proposed development to the planning authority on public planning grounds if and when a planning permit is sought.

[81] *Re Pivotel Pty Ltd* [2000] VSC 264.

[82] *Re DVC Management & Consulting Pty Ltd* [2018] VSC 814.

This is, however, in the discretion of the Court. In *Re Milbex*,[83] Byrne J was prepared to entertain the objections of a non-beneficiary before allowing the variation of a single dwelling covenant to allow the construction of a seven-unit development.

Section 60(5) of the Planning and Environment Act 1987

86. Section 60(5) of the *Planning and Environment Act 1987* has been described as "a high barrier that prevents a large proportion of proposals":[84]

> (5) The responsible authority must not grant a permit which allows the removal or variation of a restriction referred to in subsection (4) unless it is satisfied that—
>
> (a) the owner of any land benefited by the restriction (other than an owner who, before or after the making of the application for the permit but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer any detriment of any kind (including any perceived detriment) as a consequence of the removal or variation of the restriction; and
>
> (b) if that owner has objected to the grant of the permit, the objection is vexatious or not made in good faith.

87. More particularly, in *McFarlane v City of Greater Dandenong,*[85] the Vice President of the Tribunal, Judge Strong and Member Cimino set out what they considered to be the propositions distilled by the Tribunal in relation to Section 60(5)(a) in *Carabott & Ors v Hume City Council and T Scuderi*:[86]

> 1 It is for the Tribunal to determine whether it is satisfied on the balance of probabilities that any covenant beneficiary "will be unlikely to suffer any detriment of any kind if the variation is permitted." In other words it is not a question of whether the Tribunal is satisfied there will be detriment: the Tribunal must be affirmatively satisfied that there will be none.
>
> 2. Compliance with planning controls does not, of itself, and without more, establish that a covenant beneficiary will be unlikely to suffer any detriment of any kind. Consideration of a proposal from a planning perspective often requires a balancing of competing interests. There is no such balancing exercise involved in the consideration of the issue which arises under paragraph (a). The nature of the enquiry is fundamentally different.
>
> 3. The mere assertion of the existence of a detriment is not sufficient to demonstrate its existence. On the other hand, loss of amenity will constitute a detriment, and in this regard amenity includes "an appeal to aesthetic judgment, which is difficult to measure, however the notion of 'perceived detriment' specifically contemplates that this consideration is relevant to the enquiry".
>
> 4. The determination must be made on the evidence before the Tribunal "including the appeal site and its environs".
>
> 5 It is not necessary for an affected person to assert detriment. This is so for two reasons: first, because the Tribunal must be affirmatively satisfied of a negative, namely that there will probably be no detriment of any kind; secondly, the Tribunal is entitled to form its own views from the evidence.

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[83] *Re Milbex* [2006] VSC 298.

[84] *Hill v Campaspe SC* [2011] VCAT 949, [65].

[85] *McFarlane v City of Greater Dandenong* 2001/P51398 [2002] VCAT 696.

[86] *Carabott & Ors v Hume City Council and T Scuderi* (1998) 22 AATR 261.

88. In *Giosis v Darebin CC* [2013] VCAT 825, the Victorian Civil and Administrative Tribunal comprised of Senior Member H. McM Wright QC confirmed that 60(5) of the *Planning and Environment Act 1987* (Act) is useful for little more than removing "deadwood" or non-contentious restrictive covenants.[87]

89. The case concerned an applicant seeking to review the decision of the Darebin City Council to refuse a permit to vary a restrictive covenant burdening land at 26 Maclagan Crescent, Reservoir (refer detail from Land Victoria, plan below).

90. The part of the covenant sought to be varied vary provides as follows.

> (c) no shops, laundries, factories or works shall be erected on this Lot and <u>not more than one dwelling house</u> shall be erected on any one Lot and the cost of constructing each house shall not be less than Four Hundred Pounds (inclusive of all architect's fees and the cost of erecting any outbuildings and fences). [emphasis added]

91. The variation sought to replace the words "one dwelling house" with the words "three dwellings" thereby enabling the application to be made to redevelop the land for three units or dwellings.

92. There were five objectors, three of which were beneficiaries, all of whom lived 100m away from the burdened land.

93. The Council had refused the application on the grounds that:

> The proposed variation to the Covenant … to allow not more than three dwellings to be constructed on the lot will result in detriment to beneficiaries and is therefore contrary to Section 60(5) of the Planning and Environment Act 1987.

94. The Tribunal quoted from the second reading speech of the *Planning and Environment (Amendment) Act* 1993 (Vic) that inserted section 60(5) into the Act. This speech coined the term "deadwood" covenants or covenants without a continuing purpose:

> The effect of the clause is that permits should be granted only for "dead wood" covenants if no owner benefitting from the covenant objects to its removal or variation. The alterative avenues to remove or vary a covenant remain in place, being applications to the Supreme Court under the Property Law Act 1958 and the preparation of a planning scheme amendment.

95. After quoting from *Carabott and Ors v Hume City Council* (1998) 22 AATR 261 that considered the effect of s60(5) of the Act in some detail, the Tribunal raised a particular flaw with the proposal before it—the absence of plans:

> 17 Unlike many applications for a variation of a restrictive covenant the present applicant has not concurrently sought approval for any particular form of development. This makes it difficult for the responsible authority to be satisfied as required by paragraph (a) because it must consider all possible forms of three unit multi-dwelling development and conclude that it is unlikely that any of them would cause detriment to a benefitting owner.

96. The Tribunal found in the absence of a firm development proposal there were an infinite number of three unit or three dwelling developments that could take place in consequence of the variation of the covenant and that it could not be "positively satisfied of a negative, namely, that there is unlikely to be detriment of any kind":

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[87] *Giosis v Darebin CC* [2013] VCAT 825, 1.

> 21 … In my view it is simply not possible to say that none of those developments would be likely to have a detrimental impact of some kind on the benefitting properties, particularly the adjoining units at 28 Maclagan Crescent. The application for permit therefore falls at the first hurdle.

97. This case therefore underscores the limited utility of applying to VCAT to modify or remove a covenant in the face of heartfelt opposition on the part of one or more beneficiaries. The absence of plans simply made the task more difficult.

The Tribunal may refuse an application under section 60(5) even in the absence of objectors

98. In practice, if an objection is pressed under this provision, it is rarely a good use of time or resources to pursue a Council's refusal to remove or modify a covenant to the Victorian Civil and Administrative Tribunal.

99. This was affirmed in *Willis v City of Casey* [2022] VCAT 650 where the Tribunal refused an application to remove a restrictive covenant that would have allowed a second dwelling on a lot, notwithstanding the absence of an objecting beneficiary:

> 23 Section 60(5)(a) is not confined to the receipt of objections by beneficiaries of registered restrictive covenant. Any detriment of any kind in relation to any land with the benefit of the covenant must be considered, whether the owners of such land have objected or not. Section 60(5) of the P&E Act requires the Council as the responsible authority and, upon review, the Tribunal (standing in the Council's shoes) to be independently satisfied about the likelihood of detriment. This is not a matter that is dependent upon whether or not there are objections.

Section 60(2) of the Planning and Environment Act 1987

100. For covenants created on or after 25 June 1991, a less restrictive test applies.

> (2) The responsible authority must not grant a permit which allows the removal or variation of a restriction (within the meaning of the Subdivision Act 1988) unless it is satisfied that the owner of any land benefited by the restriction (other than an owner who, before or after the making of the application for the permit but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer—
>
> (a) financial loss; or
>
> (b) loss of amenity; or
>
> (c) loss arising from change to the character of the neighbourhood; or
>
> (d) any other material detriment—
>
> as a consequence of the removal or variation of the restriction.

101. This provision was the subject of detailed analysis in *Waterfront Place Pty Ltd v Port Phillip CC*:[88]

> **Construction and Application of Legislation**
>
> 60 There is no provision under the Planning and Environment Act 1987 or any other legislation for the payment of compensation for the removal or variation of a restrictive covenant by either planning scheme amendment or the grant of a permit under clause 52.02.

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[88] [2014] VCAT 1558.

61 This means that the grant of a permit to remove a restrictive covenant amounts to a de facto expropriation of an interest in property without compensation. This a situation which the law will generally seek to avoid notwithstanding its recognition that the essential purpose of planning legislation is to control and limit the exercise of property rights (see *271 William Street Pty Ltd v City of Melbourne* 1975 VR 156).

62 The Tribunal considers that this has two consequences in relation to the application of s. 60(2) of the Act.

63 First, the provision is designed to protect proprietary interests and therefore should be interpreted as beneficial legislation and given as wide a meaning as the words of the sub-section reasonably allow.

64 Secondly, the standard of proof required to satisfy the threshold tests must have regard to the severity and consequences of the findings of fact. In *Briginshaw v Briginshaw* (1938) 60 CLR 336 Dixon J. (as he was then) said at pp. 361 – 362:

> Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.

65 More recently, in *Kyriacko v Law Institute of Victoria Limited* (2014) VSCA 322, the Court of Appeal pointed out that because the Tribunal is not bound by the rules of evidence, neither the provisions of s. 140 Evidence Act 2008 nor the common law principles established by Briginshaw are of strict application. However, the Court went on to say (at para 26):

> Nevertheless, those principles reflect common sense notions of probability with respect to human conduct and it is entirely proper for the Tribunal to take them into account when considering allegations of serious misconduct.

66 The Court referred to what the High Court said in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170:

> [T]he strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove.

67 The Tribunal considers that expressed in colloquial parlance it must be persuaded to a "comfortable level of satisfaction" that the threshold requirements are met rather than "only just satisfied".

68 Section 60(2) of the Act was considered by the predecessor of this Tribunal *Pletes v City of Knox and Minister for Planning* (1993) 10 AATR 155. The case was heard a short time after the enactment of the provision. The Tribunal comprised the President and two legally qualified members, and this legal firepower was intended to synthesise principles emerging from cases involving restrictive covenants that had come before the Tribunal up to that time.

69 The Tribunal enunciated a number of propositions of law at pp. 162 – 163. They include the following:

> The expression "any other material detriment" in Section 60(2)(d) qualifies the loss mentioned in each of the sub-sections (a), (b) and (c) with the result that the loss referred to in each means material loss. (Russel, Crimmin, Harvey). Further

> the word "material" in this section means "important detriment, detriment of such consequence viewed on an objective basis. It does not include trivial or inconsequential detriment" (Russell, Harvey). We add that the word conveys to us the connotation of "real and not fanciful detriment" (Stokes). It is to be contrasted with the somewhat wider meaning of the use of the word "material" in Section 52 of the Act (Tjorpatsis).

> 70 This proposition does not sit entirely easily with a beneficial construction of the sub-section but is clearly sensible and practical and, given the composition of the Tribunal, is of compelling authority so far as this Tribunal is concerned.
>
> 71 The Tribunal also said:
>
> > In performing the exercise required by Section 60(2) it seems to us essential to look at the purpose and effect of the covenant as one of the factors relevant in determining the likelihood of any loss or detriment in the event of removal or variation.
>
> 72 The Tribunal stated that in applying the tests set out in s. 60(2) it is not a question of balancing the loss suffered by a benefiting owner in each of the categories set out in paragraphs (a) to (d) against the planning benefits of removal or variation of the covenant. The tests must be applied in absolute terms. Consideration of the planning merits can occur only if the tests are satisfied and the discretion to grant a permit thereby enlivened. This Tribunal respectfully agrees.
>
> 73 Moreover the reference in sub-section (2) to "the owner of any land benefited by the restriction" means that the Tribunal must take into account the circumstances of all owners who enjoy the benefit of the covenant, not just those benefitting owners who have objected to the application.

102. On the evidence, the Tribunal concluded that in relation to the proposed variations of the covenants, the threshold tests imposed by section 60(2) of the Act were satisfied.

Section 47(2) of the Planning and Environment Act 1987

103. One of the first questions often asked of aspiring applicants for covenant modification is whether there have been any longstanding breaches of the covenant.

104. The answer to this question can have significant implications. Where land has been used or developed for at least two years in breach of a restriction[89] in a manner that would be lawful under the *Planning and Environment Act 1987* but for the covenant, an application to vary the restriction may be made pursuant to section 47(2) of the *Planning and Environment Act 1987.*

105. Such an application may be made without:

a) notice of the application under section 52 of the *Planning and Environment Act 1987* (including beneficiaries of the Covenant); and

b) the application being referred under section 55 to any relevant referral authorities:

> (2) Sections 52 and 55 do not apply to an application for a permit to remove a restriction (within the meaning of the *Subdivision Act 1988*) over land if the land has been used or developed for more than 2 years before the date of the application in a manner which would have been lawful under this Act but for the existence of the restriction.

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[89] As that term is defined in section 3(1) of the *Subdivision Act 1988* (Vic).

106. The *Subdivision (Miscellaneous Amendments) Bill* introduced section 47(2) into the Act:[90]

> Clause 61 amends section 47, 68, 69, 81 and 85 of the *Planning and Environment Act 1987* in relation to easements or restrictions. This is consequential on amendments outlined elsewhere in these notes.
>
> It also provides that the notification procedures under the *Planning and Environment Act* 1987 do not apply to the removal of covenants from land where an otherwise lawful building has breached the covenant for more than 2 years.

107. In *Hill v Campaspe SC*[91] Gibson DP construed the provision by reference to its purpose, namely to respond to acquiescence in appropriate circumstances:

> 23 To decide what this provision means it is necessary to look at the purpose of the provision. I consider the purpose of the provision is to recognise the principle of acquiescence. This is the principle that assent to an infringement of rights, either express, or implied from conduct, will normally result in the loss of right to equitable relief.[92]

108. The learned Tribunal Member found that breach of part of a covenant might not allow removal of the whole of the covenant:

> 24 I consider that to allow a breach of one part of a covenant to be used as an excuse to seek removal of the whole of a covenant, including parts which have not been breached, without giving notice to benefiting land owners could be open to abuse. A land owner wishing to remove a covenant without letting people know could deliberately breach one part of the restriction, which people may not notice or may not mind, then use that breach as a lever to remove the whole of the covenant without notice under sections 52 and 55 of the Act. I do not consider that this is what the Act has in mind. Such a view would also be quite contrary to the very onerous provisions elsewhere in the Act where covenants are concerned, which protect the interests, and indeed even the perceived interests, of benefiting land owners. In the present circumstances it is quite possible that people having the benefit of the covenant may not be concerned about a breach relating to a shed whereas they may be concerned about a breach relating to a second dwelling.
>
> 25 In my view, acquiescence in the breach of one part of a covenant should not be construed as acquiescence in the breach of the whole of the covenant. In order for people with the benefit of a covenant to be denied notice of an application to vary or remove a covenant on the basis that they have acquiesced in a breach for more than 2 years, they must have acquiesced in a breach of all the relevant aspects of the covenant which are proposed to be varied or removed. It is not sufficient for them to have acquiesced in the breach of part only.
>
> 26 … [I]f part of a covenant is breached, and the breach continues for years without any action on the part of those having the benefit of the covenant, it is reasonable that no notice should be given of an application to vary by removal part of the covenant of which there is a breach. But this exemption from notice pursuant to section 47(2) of the Act should not extend to the removal of any aspect of a covenant of which there is no breach.

109. In some respects, this is an awkward provision because:

a) the provision contemplates an application to *remove* a covenant, whereas on one view the deletion of parts of a covenant might be said to allow its *modification*. Member

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90 Explanatory Memorandum, *Subdivision (Miscellaneous Amendments) Bill 1991* No. 48, section 61(1)(c).

91 *Hill v Campaspe SC* [2004] VCAT 1456.

92 See too: *Pagrati v Boroondara CC* [1996] VicAATRp 20

Komesaroff resolved this tension in *Hawley v Yarra Ranges SC*[93] by applying the Latin maxim *Major continet in se minus* (the greater includes the lesser)[94]:

> 26 … it seems to me to be patently absurd for section 47(2) to forgo public notification of an application for a permit to completely remove a restriction yet require public notification of an application for a permit to vary a restriction, because removal is total, whereas variation would, by definition, not be so all-encompassing. Nothing could be greater than total removal of a restrictive covenant, so:
>
> > a court when interpreting ordinary or subordinate legislation should eschew creating absurdities ... technicalities and angels dancing on pinheads are to be avoided. See *Leibler v City of Moorabbin*[95].

b) it is not clear how the responsible authority's discretion is to be exercised in the absence of notification. While the Tribunal has on occasions suggested section 60 should nonetheless apply,[96] it is not always easy to reconcile the principle of acquiescence with its inferences of dispensation from matters such as "detriment", "loss of amenity", and in particular, the subjective "perceived detriment" test in 60(5); and

c) it is not clear whether the provision can be used in circumstances where the breach has already been rectified through demolition or the removal of non-complying materials.

110. This divergent approach to the application of section 47(2) is partly because there have been few cases that have considered the provision. If the advantage offered by the provision is to avoid bringing an application to the attention of beneficiaries, it makes little sense to appeal a Council's refusal to exercise its power under this section.

111. Consistent with the need for discretion, applications under section 47(2) should be pursued through a separate planning application before the substantive use or development application is made. In other words, if an applicant wishes to build a rear extension out of Alucobond metal and there is a covenant on the land requiring walls to be constructed of brick or stone, an application to remove the relevant part of the covenant under section 47(2) should be made as a separate permit application, in advance of the permit application for the extension.

112. An application pursuant to section 47(2) should be accompanied by sworn evidence as to the existence and duration of the breach and legal advice supporting the provision's use. Evidence may be in the form of aerial or other photographs, building permits or from people familiar with the dwellings' development.

113. In the following examples:

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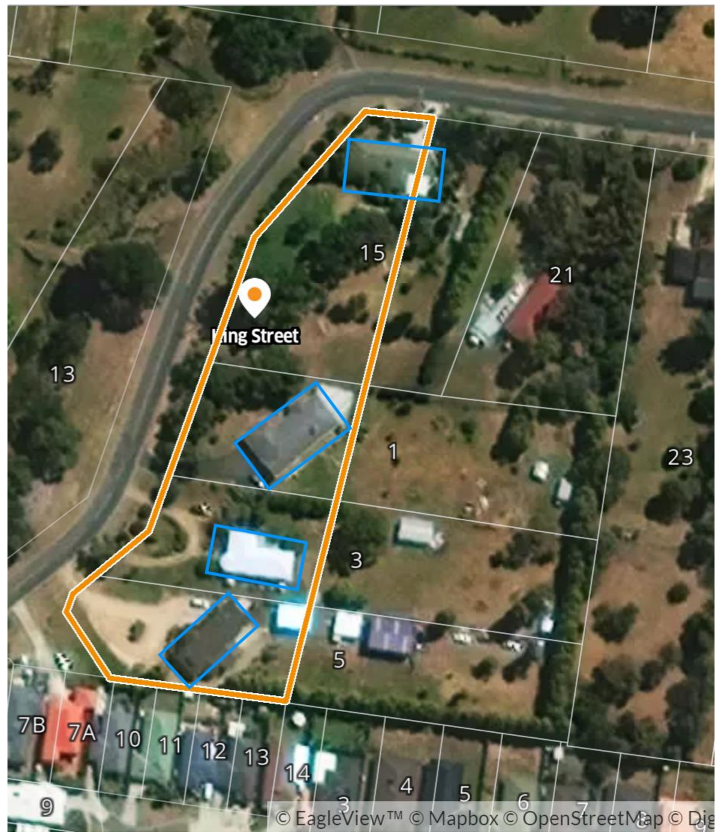
93 [2007] VCAT 268

94 See Black's Law Dictionary, Seventh edition, Bryan A Garner Ed, West Group. St Paul Minn, 1999 @ page 1656.

95 (1992) 8 AATR 188, Victorian Supreme Court, per Nathan J.

96 See *Hill v Campaspe* [2004] VCAT 1399 at [11]

a) evidence of multiple dwellings (highlighted in blue) was used in support of an application to remove the single dwelling restriction on the lot highlighted in orange:



b) evidence of non-compliant roofing materials was used to support an application to remove an obligation to build a roof from slate or tiles:

and

c) evidence of non-compliant building materials was used to support an application to remove a covenant creating an obligation to construct a dwelling from brick or stone:

114. The planning permit amending the covenant might look like this:

PLANNING PERMIT

Planning & Environment Regulations 2015

Planning Scheme: **Banyule**

Responsible Authority: **Banyule City Council**

P[redacted]/2022

ADDRESS OF THE LAND:

[redacted]

THE PERMIT ALLOWS:

Variation to covenant [redacted]

THE FOLLOWING CONDITIONS APPLY TO THIS PERMIT:

1. Unless otherwise agreed in writing by the Responsible Authority, Covenant [redacted] registered on Lot [redacted] of Plan of Subdivision [redacted] Volume [redacted] Folio [redacted] shall be amended to delete the following:

   "nor shall there at any time be or suffered on the said lot hereby transferred more than one building and that roofed with tiles or slate..."

2. The certified plan must be lodged with the Office of Titles for registration in accordance with Section 23 of the *Subdivision Act 1988*.

Expiry of permit

3. The permit shall expire if the variation of restriction has not been registered with the Office if Titles within two (2) years of the date of this permit.

115. Aerial photographs can be obtained through:

a) Google Earth (historical imagery)—open source;

b) NearMap—subscriber service; or

c) MetroMap—subscriber service.

116. Historic imagery is also available via:

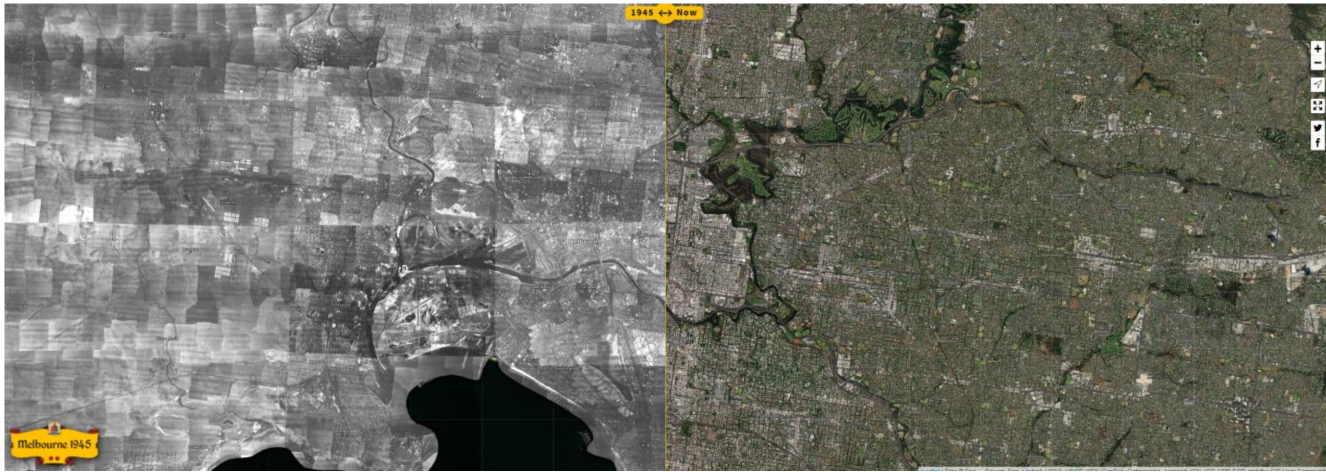
a) Mapshare—http://mapshare.vic.gov.au/webmap/historical-photomaps/

b) Photomapping: http://www.photomapping.com.au/historic-imagery; images@photomapping.com.au; (03) 9328 3444; 133 Abbotsford Street, PO Box 369, NORTH MELBOURNE 3051;

c) United Photo and Graphic Services Pty Ltd— https://www.unitedphoto.com.au/; images@unitedphoto.com.au;

d) Geoscience Australia—https://www.ga.gov.au/ and

e) https://1945.melbourne/



Section 84 of the *Property Law Act 1958*

117. Where opposition from one or more beneficiaries is considered likely, an application may be made to remove or modify the restrictive covenant pursuant to section 84(1) of the *Property Law Act 1958* (Vic):

> **84 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

(b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction whether in respect of estates in fee-simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed have agreed either expressly or by implication by their acts or omissions to the same being discharged or modified; 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 discharge or modification nor shall any compensation be 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.

118. Section 84(1) is structured as a series of threshold tests to be satisfied before the court's discretion to exercise its power is enlivened.

119. A procedural requirement for a declaration as to notice can be found at Rule 52.09, *Supreme Court (General Civil Procedure) Rules* 2015 (Vic):

52.09 Restrictive covenant

(1) This Rule applies where on an application under section 84 of the *Property Law Act* 1958 an order is made under subsection (3) of that section directing the plaintiff to make inquiries or give notices.

(2) Whether the plaintiff has made inquiries and given notices in accordance with the order and what the results of the inquiries are shall be determined by an Associate Judge after inquiry.

(3) The Associate Judge shall by order declare what the Associate Judge has determined under paragraph (2) and the application shall not proceed until the order is made.

120. The jurisdiction of the Associate Justices to exercises powers pursuant to section 84 are set out in Order 77 of the *Supreme Court (General Civil Procedure) Rules 2015*:

Order 77—Authority of Associate Judges

77.01 Authority

(1) Subject to this Order, an Associate Judge, in addition to exercising the powers and authorities conferred by any other provision of these Rules, may, in any proceeding to which these Rules apply, give any judgment or make any order, including any judgment or order in the exercise of the inherent jurisdiction of the Court.

(2) Subject to this Order, an Associate Judge, in addition to exercising the powers and authorities conferred by any other provision of these Rules, may hear and determine—

(a) any application and exercise any powers and authorities under the following statutory provisions—…

(vii) section 84 of the *Property Law Act 1958* and Part IV of that Act;

The origins of section 84 of the Property Law Act 1958

121. A useful explanation of the history of section 84 of the *Property Law Act 1598* can be found in [*Stanhill v Jackson*] [2005] VSC 169.

122. In this case, Morris J carried out a thorough analysis of section 84 in an endeavour to discover the underlying purpose of the statute. His Honour's thesis was that the mischief to which the provision was directed was the restriction of the use or development of land by private treaty, often of ancient origin, which inhibited the achievement of reasonable current needs:

> 43 On 11 December 1918, by Act No 2962, the Victorian Parliament passed a law relating to property. Section 10 of that Act is in remarkably similar terms to section 84 of the *Property Law Act* 1958 and is its original ancestor. In its original form it did not include what is now section 84(1)(c); nor did it then include provisions in relation to the payment of compensation. [The predecessor to section 84(1)(c) and the provisions concerning the payment of compensation were added in 1928.]
>
> 44 In moving the Second Reading of the Bill in the Legislative Assembly Mr Mackey MLA said:
>
> > "This Bill, which relates exclusively to the law of real property, is a Bill that was drafted in England, and brought in in the Imperial Parliament in pursuance of the recommendations of a very important Royal Commission appointed to inquire into the state of our real property law. That Royal Commission consisted of the most eminent equity and conveyancing men in the Old Country, including Lord Buckmaster, the late Chancellor of England."[97]
>
> 45 Between 1908 and 1911 a Royal Commission in England on the Land Transfer Acts had recommended that restrictive covenants affecting registered land be registered by reference to the instrument creating them, and, as part of this reform, that the High Court be empowered to discharge or modify obsolete restrictive covenants affecting land, whether they be registered or unregistered.[98] An initial draft of what is now our section 84 appears to have been penned by Sir Benjamin Cherry and introduced into the United Kingdom parliament by Lord Haldene in 1913, but then shelved on account of the war.[99] In 1919, in the Fourth Report of the Acquisition and Valuation of Land Committee on the Transfer of Land in England and Wales ("the Scott Committee"), more widespread reforms were recommended. The Scott Committee reported:
>
> > "We have considered the best method of dealing with restrictive covenants which continue to bind land after they have become obsolete. As we stated in our Second Report (para.22), 'this question is one of considerable importance, as a large amount of land is bound by restrictive covenants. In many cases such covenants were originally imposed for the protection of vendors who have long since ceased to have any interest in enforcing such covenants, and in other cases land is bound by covenants which were originally designed to ensure that the neighbourhood should continue to enjoy a residential or other special character, and such covenants continue to be in force long after the neighbourhood has ceased to enjoy the special character, to preserve which the covenants were imposed. In some such cases the covenants are, no doubt, ignored, but in others

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97 Hansard, 6 September 1917, page 1391.

98 See the discussion in *Fourth Report of the Acquisition and Valuation of Land Committee on the transfer of Land in England and Wales*, Cmd 424, 1919, ("the Scott Committee"), page 41.

99 See Patrick Polden, "Private Estate Planning and the Public Interest", 49 Modern Law Review 195, March 1986, at 196.

the owners of the land which is subject to such restriction are in doubt as to their position, and are debarred from making the fullest use of their property, or are compelled to purchase the release of the covenants.'

"It is, in our view, very desirable that there should be a power vested in an appropriate authority, on the application of any person interested in any land affected by any restriction arising under covenant or otherwise, by order to discharge or modify any such restriction, on being satisfied that the restriction ought to be deemed obsolete, or that its continued existence would impede the reasonable user of the land for public or private purposes, or that the persons of full age and capacity entitled to the benefit of the restriction have agreed expressly or impliedly to the restriction being discharged or modified, subject to payment of compensation to the persons entitled to the benefit of such restrictions, if such persons are, in fact, damaged by the discharge or modification of such restrictions.

"There are some grounds for thinking, as was recommended by the Royal Commission on the Land Transfer Acts, that the authority to exercise such a power should be the Court. But, in our opinion, questions of policy rather than of law would often be involved in the consideration of such a proposal, and for this reason we do not regard a court as the most suitable authority. It is not for judges either to make new contracts for parties, or to invent new rules of public policy.

"In paragraph 22 of our Second Report above quoted, we advised that the modification or extinction of restrictive covenants should be entrusted to the Sanctioning Authority recommended in our First Report. To that advice we still adhere, and trust that steps may be taken to set up the Sanctioning Authority there recommended. But, in the meantime, we think that jurisdiction to extinguish or modify restrictive covenants, and to assess compensation (if any) in connection therewith should be entrusted to the official arbitrators appointed under the *Acquisition of Land (Assessment of Compensation) Act*, 1919. This recommendation is embodied in Section 86 or Mr Cherry's Law of Property Bill."[100]

46 It was not until 1925 that the law in England was changed to give effect to the recommendation of the Royal Commission and the Scott Committee concerning restrictive covenants.[101] The power was not vested in a court but in an authority outside the court system, but without prejudice to any concurrent jurisdiction of the Court.[102] The drafting of the section included the ability to discharge or modify a restriction subject to the payment of compensation.

47 No doubt by reason of the form of section 84 of the English *Law of Property Act* 1925 the Victorian Act was amended in 1928 to introduce the power to discharge or modify a restriction subject to the payment of compensation and, also, by introducing the provision which is now section 84(1)(c).[103]

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100 *Scott Committee*, at pages 7 and 8.

101 See section 84, *Law of Property Act* 1925 (UK).

102 The expression "the Authority" where used in the *Law of Property Act* 1925 meant one or more of the Official Arbitrators appointed for the purposes of the *Acquisition of Land (Assessment of Compensation) Act* 1919 as may be selected by the Reference Committee under that Act: see section 84(10) of the *Law of Property Act* 1925.

103 In the explanatory paper to the Victorian Statutes 1929 it is stated that the English legislation relating to property has to a limited extent been embodied in the consolidation of Acts. In relation to section 84 the paper explains that this is based upon section 10 of the Victorian *Real Property Act* 1918, with "some useful additions and variations,

> 48 As Jude Wallace has observed[104], the processes of reform of land law in England are uniquely relevant to Victoria. English historian, Patrick Polden, has explained that section 84 of the English Act was always intended to provide a practical remedy to discharge or remove "live" restrictions.[105] He explains that the Scott Committee was seeking to develop a method of dealing with the legal straitjackets that often constrained land use and prevented a flexible response to changes in society or the economic function of a particular locality. The inclusion of a provision to compensate – and the vesting of the power in a body other than a court – emphasised that the exercise of the power necessarily involved town planning and compensation questions.
>
> 49 Polden analysed the approach taken by arbitrators hearing applications for the discharge or modification of covenants prior to the judgment of Farwell J in *Henderson* in 1940. He observed that arbitrators adopted a robust approach, largely discounting legal niceties, and routinely modified covenants subject to the payment of compensation. According the Polden, the hearings tended to resemble a planning enquiry rather than a conventional lawsuit, with the arbitrator taking a very active part in the proceeding. Many of the applications involved the construction of flats. The attitude taken by the arbitrators is illustrated by the statistics that only 7% of applications resulted in the *discharge* of the covenant; but only 10% were dismissed outright. The overwhelming number of applications resulted in the modification of the covenant, sometimes subject to the payment of compensation.
>
> 50 In 1950 the jurisdiction under the English version of section 84 was transferred to the Lands Tribunal. According to Polden, this led to a decisive shift in the nature of the enquiry, from one having a planning character to a law suit. Further, partly as a result of cases such as *Henderson*, the approach of the tribunal was far more cautious than that of the arbitrators. In 1969 the English law was further modified, including a change to the second limb of paragraph (a) which refers to "some" reasonable user instead of "the" reasonable user. Other changes were made at this time, which have moved the English law away from the Victorian law.
>
> 51 This brief historical analysis demonstrates that, at least since 1928, the purpose of section 84 of the Victorian Act has been to empower the court to vary restrictions, subject to the payment of compensation, in broadly defined circumstances, so as to effect the better use and development of land in the *public* interest. The mischief at which the provision was directed was the restriction of the use or development of land by private treaty, often of ancient origin, which inhibited the achievement of reasonable current needs. Hence this history does not support a narrow construction of the empowering provisions in section 84; rather it is consistent with the grammatical meaning I have set out above.

123. His Honour concluded by finding that section 84 was intended to address circumstances where the use or development of land is restricted in a manner contrary to the public interest:

> 52 In carefully defined circumstances, the court is given power to discharge or modify a private restriction in order to serve this public interest. So understood, it is difficult to justify a narrow interpretation of the various circumstances which would enliven the power of the court to make an order discharging or modifying a restriction. On the contrary, the ordinary grammatical meaning of section 84(1), set out above, is reinforced by reference to the policy basis of the section.

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the desirability of which seems clear, and which are in accordance with section 84 of the English Act". (See page lxxxiv.)

104 Jude Wallace, "Property Law Reform in Victoria", (1987) 61 ALJ 174.

105 Patrick Polden, "Private Estate Planning and the Public Interest", 49 *Modern Law Review* 195, March 1986.

124. Justice Morris' attempt to return the Court's focus back to the words of the statute was met with reproach in some quarters, with Young J writing in the Australian Law Journal that although the actual result of the case appears appropriate:

> … single judges who approach cases on the basis that the majority of previous decision of the same wording over the past 60 years are misguided, seldom do the public a service. This is because so many precedents have been created, documents drafted, and advice given on the basis of what appeared to be universally accepted propositions, that disturbance other than by the High Court (and perhaps intermediate appellate courts) is usually to be avoided.[106]

125. But as each year passes, Morris J's analysis appears increasingly prescient, with section 84 now being functionally reduced to a test of "substantial injury" with minimal statutory guidance for the exercise of judicial discretion.

126. Compensation for restrictive covenant modifications is rarely, if ever, paid except in negotiated settlements and, as will be explained below, sections 84(1)(a) and 84(1)(b) have atrophied and are no longer of practical application.

127. Meanwhile single dwelling restrictive covenants continue to fetter land that is otherwise earmarked for a higher and better use such as land zoned Residential Growth along the Principal Public Transport Network.

Section 84(1)(a) of the Property Law Act 1958

128. The principles that apply to an application under s 84(1)(a) were set out by Kyrou J, as he then was, in *Vrakas v Registrar of Titles*:[107]

> 24 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.[108] 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).
>
> 25 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.[109] What is the "neighbourhood" is a question of fact.[110]
>
> 26 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".[111] A covenant is not obsolete if it is still capable of fulfilling any of its original purposes, even if only to a diminished extent.[112] The test is whether, as a result of changes in the character of the property or the neighbourhood, or

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106 (2007) 81 ALJ 68.

107 *Vrakas v Registrar of Titles* [2008] VSC 281, [24-25].

108 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*").

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

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

111 *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].

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

other material circumstances, the restriction is no longer enforceable or has become of no value.[113] 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.[114] 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.[115]

27 Strictly speaking, the inquiry is as to whether the restriction of user created by the covenant is obsolete, rather than as to whether the covenant itself is obsolete.[116]

28 In relation to the second limb of s 84(1)(a), to establish that a covenant would impede the reasonable user of the land, it must be shown that "the continuance of the unmodified covenants hinders, to a real, sensible degree, the land being reasonably used, having due regard to the situation it occupies, to the surrounding property, and to the purpose of the covenants".[117] Whether this is so is essentially a question of fact.[118]

29 It is not sufficient merely to show that the continued existence of the covenant would impede a particular reasonable use which is proposed by the applicant.[119] The applicant must show that the restriction will impede all reasonable uses.[120]

30 "Practical benefits" within the meaning of the second limb of s 84(1)(a) are any real benefits to a person entitled to the benefit of a restrictive covenant and are not limited to the sale value of the land benefited by the covenant.[121]

31 It must be established that the covenant is not necessary for any reasonable purpose of the person who is enjoying the benefit of it.[122]

32 If a relaxation of the restriction imposed by a covenant would be likely to lead to further applications of a similar nature, resulting in a detrimental change to a whole area, this "precedential" effect may be relevant in determining whether the restriction secures any practical benefits.[123]

33 Whether there are any practical benefits to other persons is a question of fact.[124]

129. In contemporary legal practice, applications to remove or modify a restrictive covenant in studied reliance on section 84(1)(a) of the *Property Law Act* 1958 are rare:

a) it is already sufficiently difficult for an applicant to establish that a covenant is incapable of fulfilling any of its *original purposes*. It is close to impossible to prove that

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

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

115 *Greenwood* (1992) V ConvR 54-444, 65 197 - 65 198.

116 *Greenwood* (1992) V ConvR 54-444, 65 194.

117 *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 8; *Re Alexandra* [1979] VR 55, 58; *Pivotel* (2001) V ConvR 54-635; [2000] VSC 264, [34]; *Bevilacqua v Merakovsky* [2005] ANZ ConvR 504; [2005] VSC 235, [23] ("*Bevilacqua*").

118 *Re Alexandra* [1979] VR 55, 58.

119 *Miscamble* [1965] VR 596, 602-3.

120 See the cases referred to in *Stanhill Pty Ltd v Jackson* (2005) 12 VR 224, 233 [17] fn 15 ("*Stanhill*").

121 *Re Robinson* [1971] VR 278, 283; *Pivotel* (2001) V ConvR 54-635; [2000] VSC 264, [36].

122 *Re Alexandra* [1979] VR 55, 59; *Pivotel* (2001) V ConvR 54-635; [2000] VSC 264, [35]; *Bevilacqua* [2005] ANZ ConvR 504; [2005] VSC 235, [23].

123 *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 9-10.

124 *Re Alexandra* [1979] VR 55, 59.

a covenant has no residual *ancillary* value where an application to remove or modify a covenant is actively opposed by a beneficiary;

b) there are few, if any, instances in which an application to modify a restrictive covenant pursuant to section 84(1)(a) of the *Property Law Act 1958* might succeed, where an application pursuant to section 84(1)(c) would not. If this is correct, and section 84(1)(a) no longer has any work to do, Morris J might well have been correct that the original intention of section 84 has been lost over time:

> 25 … Covenants have been modified, in contested circumstances, in a number of cases.[125] But the general approach to the section has been to place a substantial onus upon an applicant to demonstrate that the power is enlivened. Indeed, as the years have passed, there may have been a tendency to look for guidance, not so much to the words of section 84, but to the words used by judges over the years in explaining the meaning of the words used in section 84. One must question this practice.[126]

130. In [*City of Stonnington v Wallish & Ors*][127], Ierodiaconou AsJ was prepared to accept that planning controls and changed factual circumstances meant that quarrying was no longer likely in the suburb of Chadstone. Had Her Honour been required to do so, she would have found the excavation covenants on the land obsolete, but consistent with the above analysis, her Honour had already found that the application had been made out under section 84(1)(c):

> 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 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

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125 See, for example, *Re Shelford Church of England Girls' Grammar School*, per Lush J, Supreme Court of Victoria, 6 June 1967; *Re Alexandra* [1980] VR 55 per Menhennitt J; and *Longo Investments Pty Ltd* [2003] VSC 37 per Osborn J.

126 [*Stanhill Pty Ltd v Jackson* [2005] VSC 169], [25].

127 *City of Stonnington v Wallish & Ors* [2021] VSC 84.

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.

131. Arguably, the principle reason why section 84(1)(a) no longer has much (if any) work to do, is the finding in *Greenwood* that a covenant may not be deemed obsolete if it retains *any* value as a restriction, even if that restriction is unrelated to the covenant's original purpose:

> 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.[128]

132. With respect to the learned judge, it is difficulty to see how this can be correct. If the test of obsolescence in section 84(1)(a) of the Act was confined to the *intended* purpose of the covenant, and not some *ancillary* purpose that later arises, section 84(1)(a) might again be put to some use. Under the *Greenwood* principle above, it is difficult to envisage a case in which section 84(1)(a) genuinely has some work to do for in every case a restriction might have some enduring, ancillary benefit to an objector.[129]

Section 84(1)(b) of the Property Law Act 1958

133. Section 84(1)(b) of the *Property Law Act 1958* may be available to modify or remove a covenant if one can demonstrate on evidence the support of all beneficiaries.

134. While this power might also be available pursuant to section 88(1C) of the *Transfer of Land Act 1958* that provides:

> (1C) A recording on a folio of a restrictive covenant that was created in any way other than by a plan under the *Subdivision Act 1988* may be amended or deleted by the Registrar under this section if the restrictive covenant is varied or released by—
>
> (a) the agreement of all of the registered proprietors of the land affected by the covenant; …

the Registrar will typically refuse to consent to the removal of a restriction if there is any suggestion of a building scheme or indeed if there is a need to apply the rule in *Xu v Natarelli* discussed elsewhere in these notes.

135. Significantly, the Court may be prepared to order the modification of a covenant under this section without notice to beneficiaries, provided it can be made clear that the beneficiaries have provided consent and acknowledged that the Court would be invited to grant the relief sought without further notice. Recently, in *Re: 17 Hope Street Pty Ltd* S ECI 2023 3678 the Court noted in other matters:

> H. The evidence demonstrates that all beneficiaries consent to the Covenant being removed as an encumbrance over the Land. See the Mutual Deed of Release dated 1 September 2023 contained in Exhibit 'JDC-2' to the second Christodoulakis affidavit.
>
> I. The evidence further discloses that each beneficiary was informed that the plaintiff would bring this proceeding, and that they each informed the plaintiff's solicitor that no further

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[128] *Greenwood* (1992) V ConvR 54-444, 65 197 - 65 198.

[129] Compare the approach of the Court in *Greenwood*, with the analysis of Derham AsJ in *Jiang*, below.

notice in the matter was sought. Accordingly, the Court is satisfied that there is no utility in giving further notice of the application to beneficiaries before the determination of the application.

J. The Court is satisfied that all persons having the benefit of the Covenant expressly consented to its removal from the Register, and by necessary implication to the Covenant being discharged by this Court.

136. Significantly, the Court has been prepared to exercise its power without the need for an expert report in support of the application, however, this cannot be assumed if the Court requests material upon which to inform its residual discretion under section 84(1):

K. The Court considered whether expert evidence was required from a town planner. However, given the lots benefiting from the Covenant are evident on the Covenant itself, and the beneficiaries consent to the application, expert evidence is not required to determine this application.

137. This makes an application under section 84(1)(b) one the most fastest and cost-effective means of modifying a restrictive covenant, but careful attention should be given to:

a) the identification of beneficiaries; and

b) the evidence in support of the application.

138. Section 84(1)(b) might also be invoked where there is an established breach of a covenant, and evidence of laches or delay on the part of beneficiaries to remedy the breach. Here, the breach might be used to support or supplement an application under section 84(1)(c) as a failure to enforce a breach of a covenant might be used to suggest an absence of injury, in particular, when the breach dates back many years.

Section 84(1)(c) of the Property Law Act 1958

139. This leaves section 84(1)(c) as the engine room of the Supreme Court's restrictive covenant modification jurisdiction.

140. The operation of section 84(1)(c) of the *Property Law Act 1958* was recently set out by Derham AsJ in *Randell v Uhl*:[130]

84 The plaintiff relies on s 84(1)(c) of the *PLA*, and therefore has the burden of proving as a matter of fact that the proposed discharge or modification will not substantially injure those with the benefit of the covenant.[131] The plaintiff must prove the negative[132] and the failure by the plaintiff to establish its plans with specificity may result in the Court not being satisfied that the conditions of the section have been fulfilled.[133]

85 The following guiding principles apply to determine whether those entitled to the benefit of the covenant will not be substantially injured:

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130 *Randell v Uhl* [2019] VSC 668.

131 *Vrakas v Registrar of Titles* [2008] VSC 281, [40] (Kyrou J) and the cases cited (***Vrakas***).

132 Ibid, [42].

133 Ibid.

(a) a substantial injury must be a detriment to the benefitted land that is real and not fanciful.[134] 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'.[135] 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;[136]

(b) the substantial injury relates to practical benefits, being any real benefits to the person entitled to the benefit of the covenant.[137] 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;[138]

(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'.[139] This consideration is referred to as the 'precedent value';[140] and

(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;[141]

(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*;[142]

(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';[143]

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

---

134 Ibid, [36].

135 *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.

136 *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].

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

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

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

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

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

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

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

(i) town planning principles and considerations are not relevant;[144]

(ii) the absence of objectors to the discharge or modification of a covenant will not necessarily satisfy the onus of proof;[145] and

(iii) each case must be decided on its own facts,[146] and each covenant should be construed on its own terms and having regard to the particular context in which it was created;[147]

(iv) 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.[148] The Court in exercising its discretion, may consider town planning principles and the precedent value.

141. Critically, the starting point in a section 84(1)(c) application is to establish the relevant 'comparator' against which to assess the injury occasioned by the proposed modification or removal of a covenant. In *Re Ulman*[149] 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.[150]

142. In *Re Forrester* (***Forrester***),[151] the Court applied this principle by accepting planning evidence that the impact of a large single dwelling would be similar to that of two separate dwellings:

> 37 Mr Easton says he considered the nature of any alternate complying use or development which could otherwise be built on the Subject Land. In particular, he considered a large double story replacement dwelling which does not require a planning permit and as such do not involve third party objection rights. Mr Easton opines that a large dwelling could have a potentially greater impact on any nearby Beneficiaries' properties than the Plaintiff's proposal. He further notes that there were several examples of new double and triple storey dwellings within the neighbourhood and the planning scheme in this location does not limit the height or site coverage…
>
> 90 I do not consider the amenity impacts from the proposal to be significant and I accept Mr Easton's opinion and the Plaintiff's submissions in this regard. First, the Covenant does not restrict dwelling height or bulk and open space of the lots. <u>I accept the Plaintiff's submission that the impact of her proposal may be no greater than the dwelling capable of being constructed upon the Subject Land with the Covenant in its present form</u>.

143. That said, this point is routinely misunderstood by objectors.

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

145 Ibid, [43].

146 Ibid, [44].

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

148 *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***).

149 *Re Ulman* (1985) V Conv R 54-178.

150 Ibid at 63,420.

151 [2023] VSC 284.

144. For instance, beneficiaries in *Randell v Uhl* focused on the fact that trees would be lost if the property was developed for two dwellings, despite the loss of many of the same trees if the land was developed for a single dwelling:

> 115 I agree that what lies behind many objections, particularly from the immediate neighbours, Ms Griffith and Ms Whyte, is the fact that there will be a structure on each lot where previously there has been none. That is the position that has obtained for the whole life of the Subdivision and it is understandable that their attitude to the development of the Land is affected by the delight of a vacant lot of land adjacent to their lots.

145. Similarly, in *City of Stonnington v Wallish & Ors* [2021] VSC 84, the beneficiaries complained about the impact of the construction of a new sporting stadium, despite the fact that if the application to vary the covenant failed, the stadium could still be built, albeit with above ground car parking:

> 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*,[152] 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.[153]
>
> 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 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.

146. In *Jiang v Monaygon Pty Ltd* [2017] VSC 591 Derham AsJ found that the test of injury must be seen through the prism of the Covenant's purpose. In this case his Honour found that a single dwelling covenant was not a de facto height control because the original purpose of the covenant was to control density, not height:

> (c) a restrictive covenant may secure an auxiliary benefit which is not expressly enumerated within the covenant's wording. However, such an auxiliary benefit must fall within the ambit of the original covenant to be considered a benefit under that covenant. However, in R v Paddington and St Marylebone Rent Tribunal, Ex parte Bedrock Investments Ltd, Lord Goddard CJ summarised the standard at which the court must be satisfied to imply a covenant:
>
> No covenant ought ever to be implied unless there is such a necessary implication that the court can have no doubt what covenant or undertaking they ought to write into the agreement.

---

152 *Prowse* [2012] VSC 4.

153 Ibid [104].

> (d) this observation is consistent with the Australian authorities on the requirements that must be satisfied before a term will be implied into any kind of contract. The suggested limitation on the height of buildings on the subject land sought to be implied into the covenants burdening the subject land is neither reasonable, obvious, capable of clear expression or necessary to give the covenants commercial efficacy;
>
> (e) these matters create an insurmountable problem for any argument that the single dwelling covenant at 33 High implies a height restriction, because it is impossible to state with precision at the date the covenant was granted in 1936 exactly what height above natural ground level any single dwelling on the land must not exceed; and
>
> (f) for these reasons, the single dwelling covenant is discrete and separable from any implied height restriction (as are the two quarrying restrictions, explored in more detail below). It operates to secure its own benefits, namely that the original low-density residential character of the neighbourhood is preserved. There is no evidence in all the circumstances to suggest that the covenantors intended to impose any particular height restriction on the subject land.
>
> 60 Further, the plaintiff submitted that to construe either of the covenants in this application as having that effect would be to empower a neighbour to impose an additional restriction on the subject land that it did not have as at the date the covenant was granted in 1936. This, in essence, turns the 'no substantial injury' test as interpreted in the decided cases on its head. It would be wrong to construe covenants as intending to confer and in fact conferring at the outset benefits which only arise because of later changes to the use of a neighbouring property with the benefit of the covenant.
>
> 61 In my opinion, a comparison of the benefits initially intended to be conferred by the covenant and actually conferred, with the benefits, if any, which would remain after the covenant has been discharged or modified, leads to the conclusion that no height restriction was intended to be conferred, and none is actually conferred, by the single dwelling restriction, and the modification or removal of the covenant will not change that position. It was not seriously contended by Monaygon that any height restriction could be implied into the covenant.

147. Perhaps the most dramatic example of the *Re Ulman*[154] principle in operation can be seen in *EAPE Holdings*,[155] an application that succeeded largely because the applicant was otherwise intending to use and develop the land with a rooming house — an as of right land use under the relevant planning scheme, and a use and development of land otherwise consistent with the existing covenant:

> 51 Having regard to the precedential effect of the modification, in combination with the loss of amenity that would be suffered by the benefited owners directly adjacent to the Land, I would have refused the application to increase the number of permitted dwellings had the matter ended there. I could not have been satisfied that there would be no substantial injury to beneficiaries by reason of the modification.
>
> 66 [However]… I consider the alternative proposal of a six bedroom rooming house, with the possibility of a subsequent addition of a further three bedrooms, is a genuine and likely alternative to the preferred addition of two dwellings at the rear of the Land.
>
> 83 [Also] I conclude that the rooming house proposal would be permitted by the restriction in the covenant, without the necessity for modification.

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154 *Re Ulman* (1985) V Conv R 54-178.

155 *EAPE Holdings* [2019] VSC 242.

148. Lansdowne AsJ accepted that "worse issues of noise and disturbance may arise from adult and probably unrelated rooming house residents than from the residents of the proposed additional two dwellings."[156]

149. Although her Honour was at pains to ensure that the rooming house proposal in that case was genuine, given the suitability of many pre-development dwellings to rooming house use, it is perhaps surprising that reliance on this approach isn't used more often.

Matters such as building height, bulk, siting, vegetation, windows and setbacks are not relevant

150. In *Randell v Uhl*,[157] Derham AsJ found that matters such as height, bulk, siting and position on the lot, removal of vegetation, orientation of windows and treatment of the front and side setbacks were not relevant in an application to modify a single dwelling covenant:

> 37 Mr Milner also noted that at present a large house could be constructed on former Lot 13 (lot 1 on the title plan of the Land), in compliance with the Lot 13 Covenant, which could be large and imposing on the south eastern neighbour, with outbuildings and garage, that had two crossings to the street. <u>He correctly observes that the Covenants do not regulate aspects of the proposed development that relate to height, bulk, siting and position on the lot, removal of vegetation, orientation of windows and treatment of the front and side setbacks</u>. <u>These matters, so far as they are considered by the witnesses, including Mr Gattini, as being a factor in the issue of substantial injury, are not relevant to this application, although they are of course highly relevant to any planning application</u>.
>
> …
>
> 124 The assessment of whether the users of the benefitted properties will be substantially injured in their enjoyment of their properties remains one that is determined by whether two dwellings on the Land, one on each lot after equalisation, will have that effect. The exact configuration of the developments is more a matter for the planning process. The bulk (other than the area of the dwelling, meaning the floor area), height, front and side setbacks and site coverage are matters that are not usually appropriate to be delimited by the Covenants. They are not within the original scope or intent of the Covenants in this case. Similarly, the questions of overlooking and overshadowing the neighbours are matters for the planning jurisdiction.

Traffic and parking concerns rarely amount to substantial injury

151. Equally, matters of parking and traffic are not regulated by a single dwelling covenant. As Lansdowne AsJ explained in *Re EAPE Holdings Pty Ltd* [2019] VSC 242:

> 46 Matters of parking and traffic congestion are also not directly regulated by a single dwelling covenant. A single dwelling restriction does not of itself limit the number of occupants, or how many cars they may have. For example, a large family home with multiple young adult children still in residence may mean there are multiple vehicles to house and park.

152. Consistent with this, in *Re Zhang [2018] VSC 721*, Derham AsJ found:

> 28 Any traffic impacts as a result of the approval of the application will not result in any increased burden on the beneficiaries of the covenant. The concept plans for the proposed redevelopment show that it is intended that sufficient off-street parking will be provided

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[156] At [86].

[157] [2019] VSC 668

to support the demands of the additional dwellings, thereby limiting any potential traffic or parking impacts.

153. In *Re Jonson* [2016] VSC 721 Ierodiaconou AsJ found that the variation of a single dwelling covenant to allow *six dwellings* would not create sufficient traffic congestion to amount to substantial injury:

> 41 Both parties refer to the issue of traffic congestion. There was no evidence to suggest that there would be traffic congestion due to the building of the six units. Further, although it is not a determinative factor, it is observed that the proposed development of the subject land provides for a garage for each of the six units, and a proposed visitor parking space. Traffic issues may be the subject of town planning considerations.

154. More recently, Matthews AsJ reiterated these principles in *Re Forrester*:[158]

> 94 …The Covenant does not contain any restrictions regarding to traffic. As the Plaintiff correctly submits, a single dwelling covenant does not control parking and traffic. Therefore, the Covenant did not intend to and did not actually confer benefits regarding traffic. Even if it did, I find it difficult to see how a variation of a single dwelling covenant to allow two dwellings would create sufficient traffic congestion to amount to substantial injury, particularly so when the proposed lots are 2000m^2 each and the business involving heavy machinery will cease. It is not as if traffic to the subdivided Subject Land will even need to pass the Objectors' lots, as they are further along the cul de sac. It is the Objectors who need to pass by the Subject Land when travelling to their own properties. In this instance, therefore, an increase in traffic to the Subject Land (even if there is such an increase) is unlikely to have any impact, let alone substantial impact, on the Objectors. Ms King's comment that if the front house is sold and six people move in such that the traffic will increase is not something that is prevented by the Covenant. That is something which could occur regardless of whether the application is granted and a second house built.

The Court has acknowledged that corner sites are more likely to support variation

155. The Supreme Court has previously concluded in *Hermez v Karahan*[159] that an additional dwelling is more likely to lead to an absence of substantial injury where that development is situated on a corner:

> 34 …
>
> (f) as for the issue of whether the removal of the single dwelling restriction will create a precedent, I note that this is the last vacant lot within the neighbourhood, and in any event, the land is a corner block where multi unit development tenders to be less intrusive. …

Impact on property value is of questionable relevance

156. Myers J in *Heaton v Loblay*[160] concluded that where a covenant does not intend to protect the value of a property, any depreciation in property value as a result of the modification or discharge of the covenant should not be relevant:

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158 [2023] VSC 284.

159 [2012] VSC 443

160 (1960) 60 SR (NSW) 332.

> … Expert evidence has been tendered on behalf of the defendants to prove that the modification would not depreciate the value of the plaintiff's property. I do not pause to consider that point because loss of value is not necessarily a decisive factor and where, as in this case, the covenant was not exacted to preserve the value of the covenanter's land but for another and different purpose, value is not a factor at all.[161]

157. This position was supported by Gillard J in *Re Cook* [1964] VR 808:

> …It seems to me that in order to succeed under paragraph (c) the applicant cannot establish his case by merely proving that there will be no appreciable injury or depreciation in value of the property to which the covenant is annexed: see Re Parimax (S.A) Pty Ltd [1956] SR (NSW) 130. If it were proved by evidence that the purpose of the covenant was not to preserve the value of the property, proof of value may even become irrelevant: see Heaton v Loblay (1960) 77 WN (NSW) 140 at 142.[162]

158. The Court will typically adopt the view that absent evidence to the contrary, there is just as much likelihood of a property appreciating in value, if modifications to covenants are allowed to increase the density of development of lots in a subdivision.

Little weight is given to adverse findings by the Tribunal another different statutory processes

159. Applicants should not be too troubled by adverse rulings in relation to similar applications in a different statutory context, for it is relatively commonplace for applicants to turn to the Supreme Court process after mistakenly believing the common or garden *Planning and Environment Act* 1987 process will be quicker and cheaper. In [*Zwierlein v Coelho* [2021] VSC 451](), AsJ Hetyey explained:

> 15 In or around 2011, the plaintiffs applied to the Baw Baw Shire Council for a planning permit to modify the covenant to allow a three-lot subdivision and construction of three dwellings on the land. The application was refused by the Council and the plaintiffs appealed to the Victorian Civil and Administrative Tribunal ('VCAT'). VCAT ultimately refused the appeal.[163] However, the decision of VCAT is of limited relevance to the present application because it pertained to a different statutory test set out in s 60(2) of the *Planning and Environment Act 1987* (Vic). That provision essentially states that a permit for the variation or removal of a restriction in respect of land must not be granted unless the responsible authority is satisfied that a beneficiary of a covenant will be unlikely to suffer financial loss, loss of amenity, loss arising from change to the character of the neighbourhood, or any other material detriment as a consequence of the removal or variation of the relevant restriction. There are also differences between the nature of the proposal which was then before VCAT and the proposal the subject of the present application.

160. This is not to say the findings by a Tribunal can never have any relevance to a section 84 application, but the Court is going to want to be convinced on the evidence before it.

The process of applying to the Court pursuant to section 84 of the *Property Law Act 1958*

161. The starting point in any application to modify or remove a restrictive covenant is the Court's own Guidelines for Practitioners (**Guidelines**).

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161 *Heaton v Loblay* (1960) 60 SR (NSW) 332 at 336 as per Myers J.

162 *Re Cook* [1964] VR 808 at 810.

163 *Zwierlein v Baw Baw SC* [2011] VCAT 74.

162. The Guideline, and the principles articulated by Derham AsJ, above, invite applicants to establish their plans with specificity.

163. As with many aspects of section 84 applications, the degree of detail expected by plaintiffs increases in proportion to the amount of opposition to the application by beneficiaries. So:

a) while the Court was satisfied with the following degree of detail in the unopposed matter of *Re Hollow*:[164]

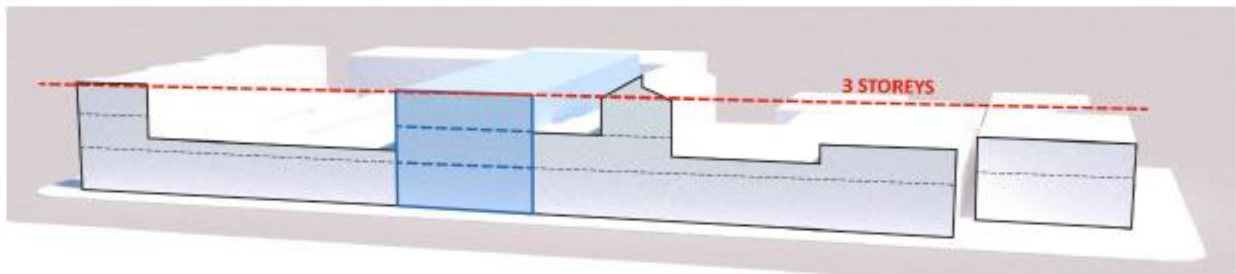
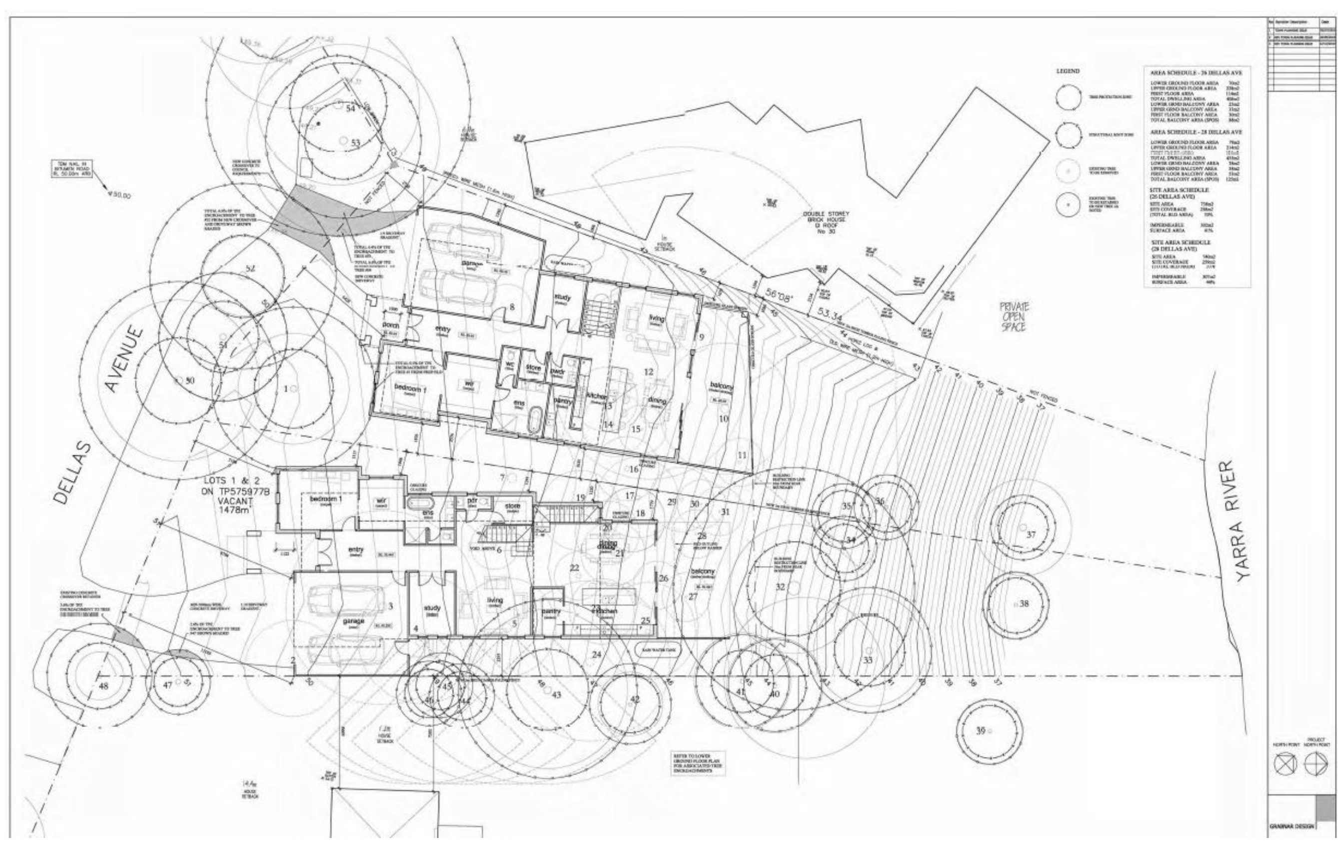


Figure 14 – Concept building envelope (view west) (Merlyn Street streetscape shown indicatively only)

b) the following detailed plans were prepared in *Randell v Uhl*[165], a case that proceeded to trial:



164. Many applicants wish to maximise the value of their land prior to sale but not develop the land themselves. This routinely occurs with deceased estates. In this instance, the plaintiff should

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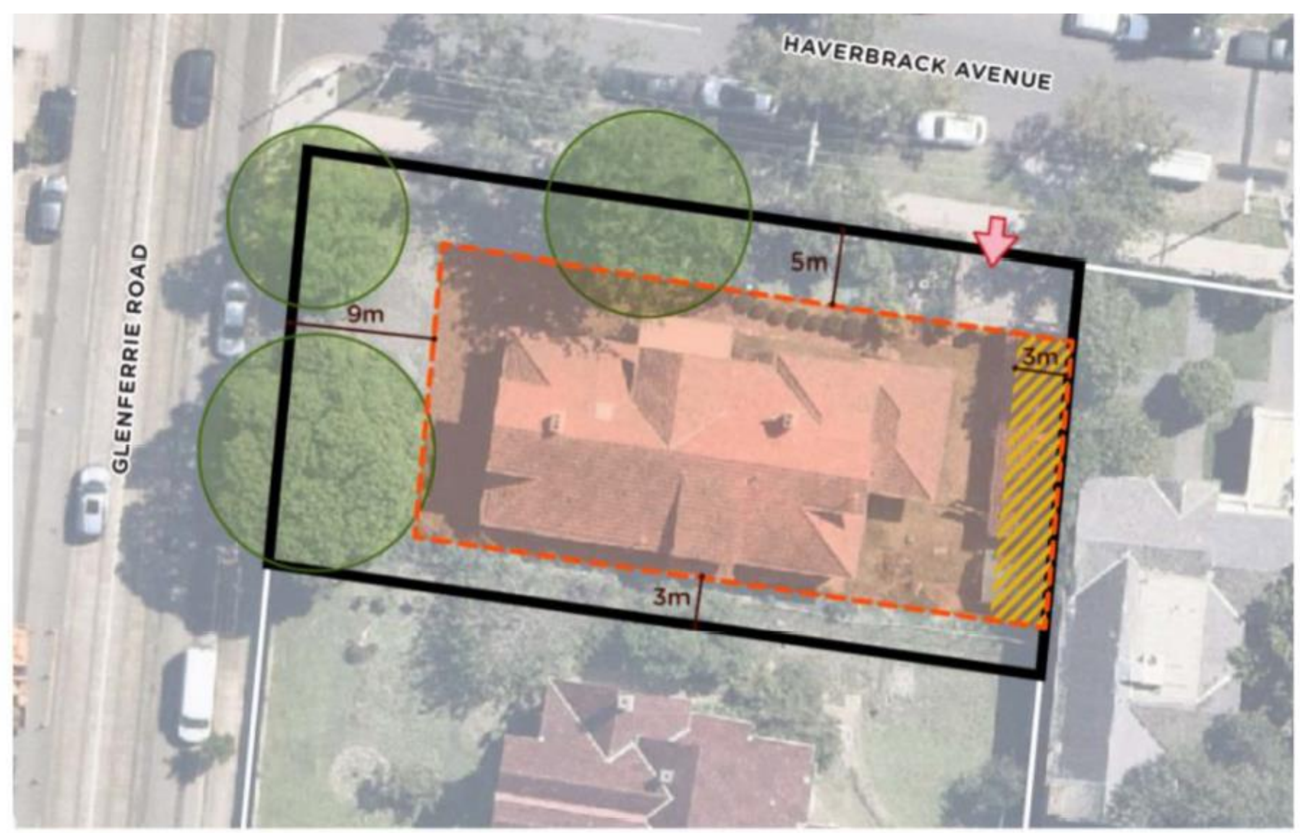
164 Unreported — S ECI 2020 01159.

165 *Randell v Uhl* [2019] VSC 668.

declare this fact and invite an expert assessment of what might be fairly described as a reasonably likely development following the disposition of the land.

165. The starting point may be a nominal building envelope showing setbacks and development constraints, but increased detail may be required if the matter proceeds to a contested hearing:



Site
Existing trees to be retained
Concept building envelope
9m Dimension
Maximum single storey
Existing access to be retained/ access to basement

166. In [*Zwierlein v Coelho* [2021] VSC 451](), the plaintiff was initially reluctant to provide plans given the property was to be sold. The court was ultimately satisfied that the following templates provided by a volume builder were sufficiently informative in the circumstances:

> 93 In discussing the Court's discretion in *Vrakas v Registrar of Titles*, Kyrou J observed:
>
> > Persons who apply to this Court seeking relief that they perceive will bring them financial and other benefits and which they know is perceived by other parties to be detrimental to them should be as specific as possible about the proposals they have in mind so that the Court is placed in the best position to assess the impact that those proposals may have on all the parties. <u>Plaintiffs who do not produce to the Court any specific plans but base their case on a general desire to optimise their options in relation to their property, as in this case, face the risk that the Court will not be satisfied, on the evidence, that they have made out their case</u>.

94 Similarly, in *Oostemeyer v Powell*, it was noted by Riordan J that the failure by an applicant to establish its plans for the property with specificity may result in the Court not being satisfied that the requirements of s 84(1) of the Act have been fulfilled.

95 Initially, the defendants took issue with the fact that the plaintiffs had not: (a) made clear whether they themselves would undertake the development of the land; or (b) provided concept plans, floor layouts, setbacks to boundaries, and elevations of the two new proposed dwellings.

96 However, as the defendants conceded in closing submissions, many of these deficiencies have been belatedly addressed in the plaintiffs' most recent iteration of their proposal. Exhibited to Ms Zwierlein's affidavit of 31 March 2021 were concept plans and floor layouts. In addition, the final version of the proposal contemplated the incorporation within the covenant of setbacks at the northern and eastern boundaries, together with a specified maximum height and site coverage in respect of each proposed new dwelling. What remains absent are elevations and particulars of the siting of the new dwellings on each lot.

97 Whilst the plaintiffs may be criticised for not putting forward specific plans at an earlier stage of the proceeding, they have ultimately provided the defendants and the Court with a sufficiently detailed description of the proposed development if the modification to the covenant is allowed.

167. However, the following diagram was deemed insufficient in in *Jeshing Property Management Pty Ltd v Yang* [2022] VSC 306:

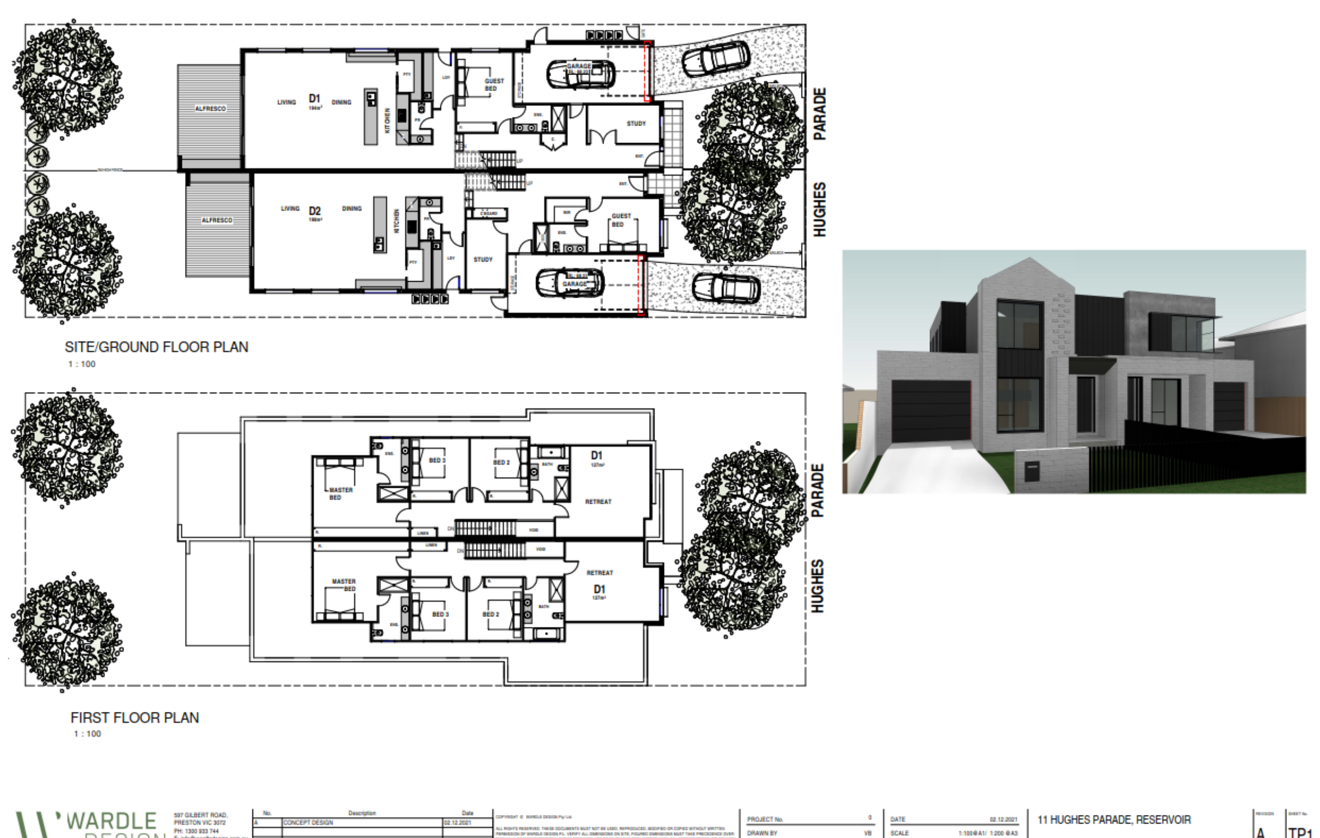
Annexure A to the Originating Motion

168. Matthews AsJ explained that such plans would not “clearly articulate the changes which may occur and whether they will be substantially injurious to the Defendants”:

> 338. For the reasons given above, I am not satisfied that there will be no substantial injury to any of the Defendants as a result of the Plaintiffs’ proposal. As a consequence, the s 84(1)(c) Application will be refused.
>
> 339. Before moving on, I wish to say something further about the way that the Plaintiffs put their case in respect of the Modification Applications, and it is convenient to do so here. The Plaintiffs clearly made a decision to pursue the Modification Applications without providing detailed drawings or plans of their proposal; rather, the detail of the proposal was confined to the Proposed Envelope. That was their choice, and they were entitled to run their case that way if they saw fit. As noted earlier, having made that choice, they then have to bear the consequences of it in terms of not being able to clearly articulate the changes which may occur and whether they will be substantially injurious to the Defendants.

169. While schematic plans such as these relied on *Yang* may be sufficient for unopposed applications or for mediated settlements, this decision suggests that plaintiffs take a risk by not preparing architectural drawings if the modification application proceeds to trial.

170. In anticipation of the first return, something like the following is ideal:



Graphical representation of developments acceptable to the Court (and the Titles Office)

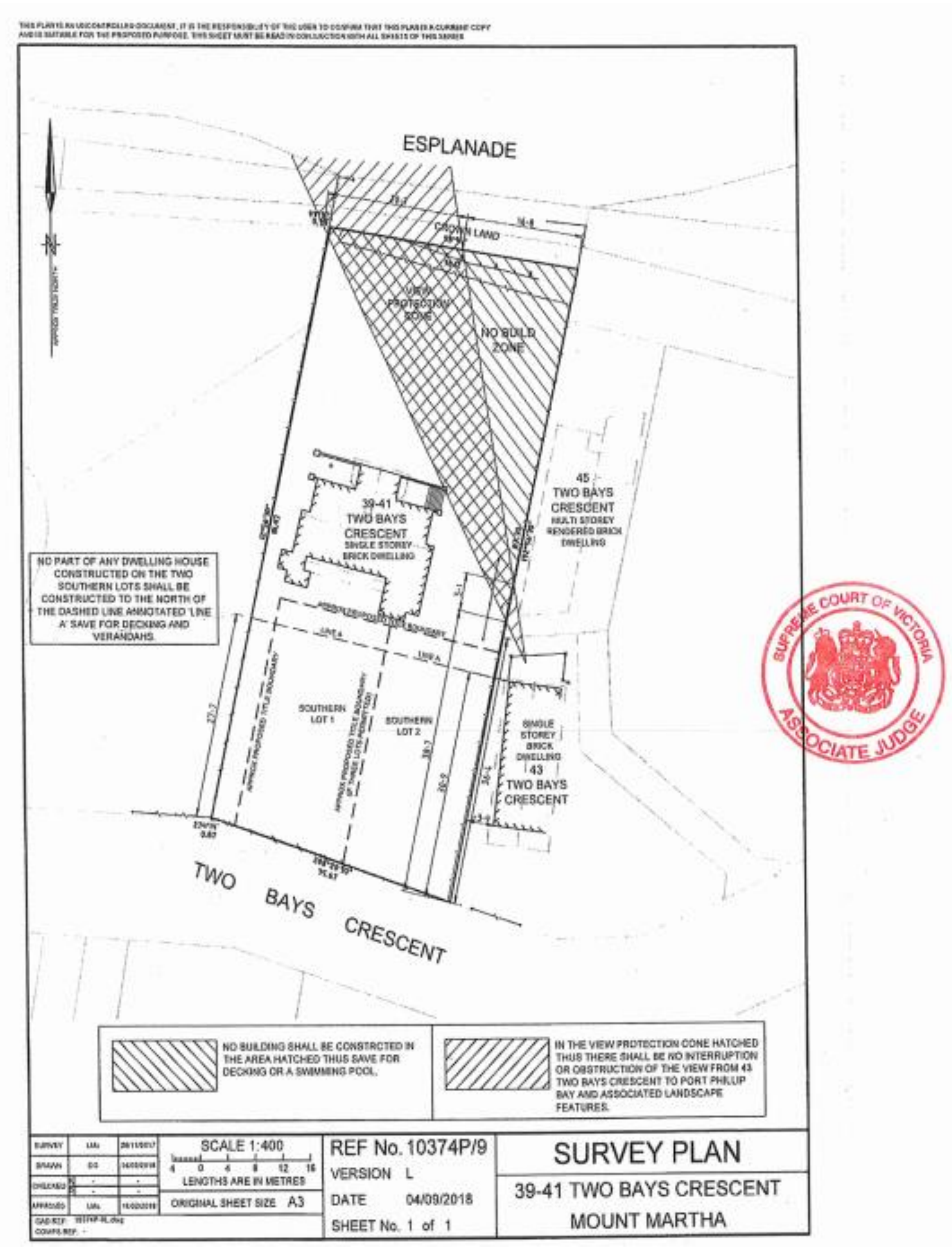
171. Although it was once common to vary covenants with the addition of the following words “… but this covenant will not prohibit the construction of any development generally in accordance with the development described in the plans prepared by ABC Architects dated 1 July 2016

numbered A00 to A30", this technique known as the 'proviso' has fallen out of favour with the Court because it means attaching plans to an instrument of transfer that may sit in the Office of Titles for decades to come.

172. It can also lead to difficulties in the planning process if the responsible authority under the *Planning and Environment Act 1987* believes the plans do not represent an acceptable planning outcome.

173. Graphical representations of covenant modifications may nonetheless be deemed acceptable by the Court. For instance, the following orders were approved by Derham AsJ in *Neumann v McGeoch* S C 2016 1811 (and subsequently registered by the Titles Office):

> THE COURT ORDERS BY CONSENT THAT:
>
> 1. Covenant 1522342 which affects the land in certificate of title volume 08746 folio 871 be modified as follows:
>
> (a) by deleting the following words from the covenant 'and (c) shall not erect or permit to be erected on the said lot hereby transferred more than one such dwelling house'; and
>
> (b) by inserting in the covenant the following words 'and (c) shall not subdivide the said lot into more than three lots and on any subdivided lot shall not erect more than one dwelling house with appropriate outbuildings; and
>
> (c) in accordance with the attached plan, being Plan Version L:
>
> (i) two new lots will be created to the south of the existing dwelling on the lot (" the two southern lots");
>
> (ii) no part of any dwelling house constructed on the two southern lots shall be constructed to the north of the northern extremity of the defendant's house, being beyond dashed Line A in Plan Version L (excluding the deck) save for decking and verandas;
>
> (iii) no building shall be constructed in the area hatched and identified as the "NO BUILD ZONE" on the attached plan save for decking or a swimming pool;
>
> (iv) in the area hatched and identified as the "VIEW PROTECTION CONE" on the attached plan there shall be no interruption or obstruction of the view from 43 Two Bays Crescent to Port Phillip Bay and associated landscape features.



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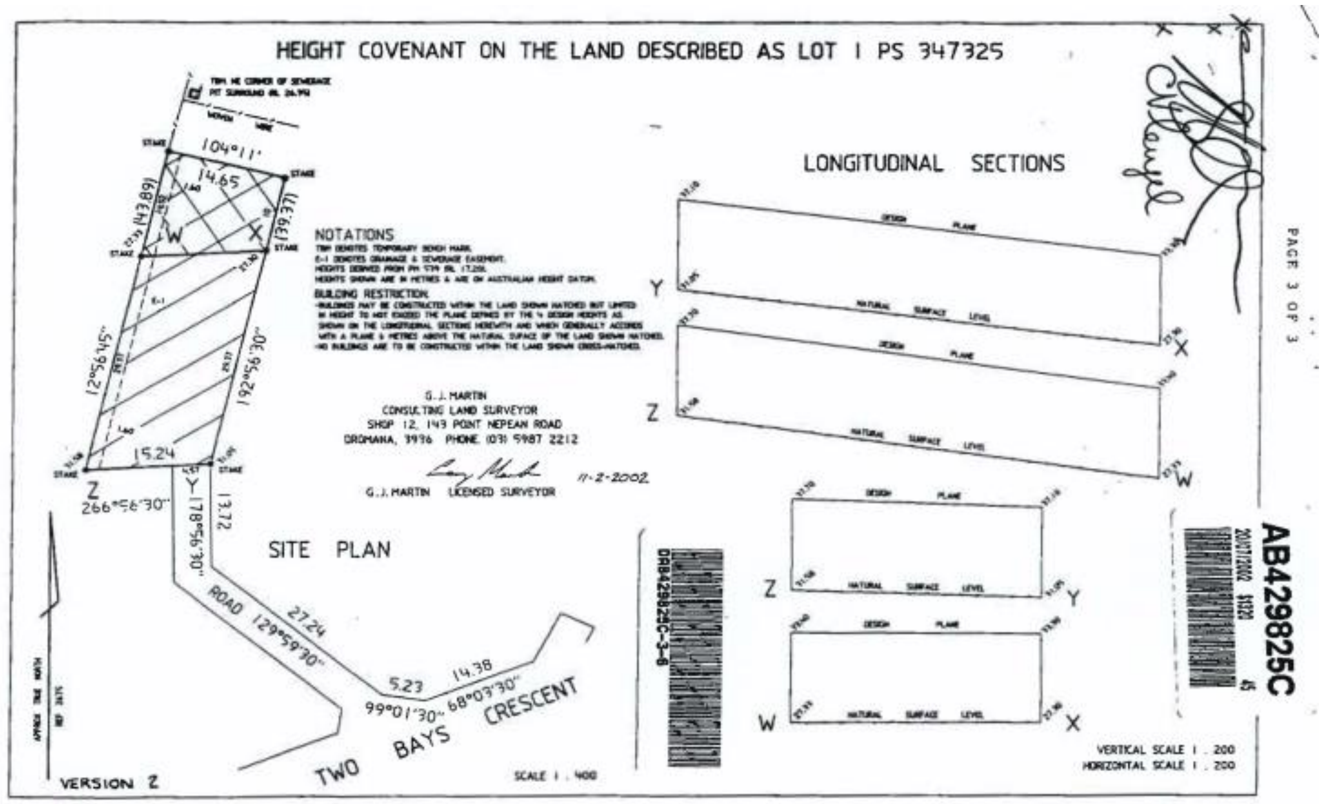
ESPLANADE
CROWN LAND
VIEW PROTECTION ZONE
NO BUILD ZONE
39-41 TWO BAYS CRESCENT
SINGLE STOREY BRICK DWELLING
45 TWO BAYS CRESCENT
MULTI STOREY RENDERED BRICK DWELLING
NO PART OF ANY DWELLING HOUSE CONSTRUCTED ON THE TWO SOUTHERN LOTS SHALL BE CONSTRUCTED TO THE NORTH OF THE DASHED LINE ANNOTATED 'LINE A' SAVE FOR DECKING AND VERANDAHS.
LINE A
SOUTHERN LOT 1
SOUTHERN LOT 2
SINGLE STOREY BRICK DWELLING
43 TWO BAYS CRESCENT
TWO BAYS CRESCENT
NO BUILDING SHALL BE CONSTRICTED IN THE AREA HATCHED THUS SAVE FOR DECKING OR A SWIMMING POOL.
IN THE VIEW PROTECTION CONE HATCHED THUS THERE SHALL BE NO INTERRUPTION OR OBSTRUCTION OF THE VIEW FROM 43 TWO BAYS CRESCENT TO PORT PHILLIP BAY AND ASSOCIATED LANDSCAPE FEATURES.
SCALE 1:400
LENGTHS ARE IN METRES
ORIGINAL SHEET SIZE A3
REF No. 10374P/9
VERSION L
DATE 04/09/2018
SHEET No. 1 of 1
SURVEY PLAN
39-41 TWO BAYS CRESCENT
MOUNT MARTHA
SUPREME COURT OF VICTORIA
ASSOCIATE JUDGE

174. Three dimensional building envelopes such as those set out in Instrument AB429825C, below, have also been imposed on plans of subdivision:



The extent of notice required

175. Unlike applications made pursuant to the *Planning and Environment Act 1987* (Vic), where notice of an application for the variation of a covenant is provided to all 'affected properties', notice under the *Property Law Act 1958* (Vic) is given only to the lots which have the benefit of the covenant. However, orders for notice may further be limited where the Court believes it to be appropriate.[166]

176. Section 84(3) provides:

> (3) The Court may before making any order under this section direct such inquiries (if any) to be made of any local authority or such notices (if any) whether by way of advertisement or otherwise to be given to such of the persons who appear to be entitled to the benefit of the restriction intended to be discharged, modified or dealt with as, having regard to any inquiries, notices or other proceedings previously made given or taken the Court thinks fit.

177. At the first return, direct notice to land with the benefit of the covenant might be required in a manner similar to the following:

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166 Section 84(3) of the *Property Law Act 1958* (Vic).

178. Notice may take the form of an A3 sign on the land, direct notice to beneficiaries via the address indicated on the records of Land Use Victoria (and the street address of the benefiting land if different).

179. Orders may then be made for the return of the application at a future hearing at which objectors may attend.

180. A surprising number of applications attract no objections. Upon being satisfied that this is the case, the Court may grant the application.

181. Alternatively, objections may be received and/or objectors may attend court to be heard.

182. If a mutually acceptable agreement on the application cannot be reached with the objectors, orders may be made for the exchange of further evidence before the matter is listed for mediation and/or final hearing.

The court rarely exercises its power to discharge a covenant entirely

183. The Court is typically unwilling to exercise its power to discharge a covenant entirely, preferring instead to modify a covenant to allow the applicant's stated intentions.

184. The objective for applicants should therefore be to modify the restrictive covenant as modestly as possible, while nonetheless comfortably facilitating the intended use or development contemplated, appreciating that the responsible authority under the *Planning and Environment Act 1987* (the municipal council at first instance and then the Victorian Civil and Administrative Tribunal on review), may require additional changes to any plans.

185. That said, an application to *discharge* a restrictive covenant may be allowed where the Court finds that outcome appropriate to avoid future confusion:

a) see *Re: Ambrens*:[167]

> I In many cases, modification of a restrictive covenant to allow an intended development will be more appropriate than discharge of the covenant. In this case, however, the Court considers that discharge of the Covenant is more appropriate than modification. The Court considers that the proposed form of modification, to allow the construction of 'one residential building', could be unclear and so introduce confusion, and is not necessary given the nature of existing development proximate to the subject land and its zoning as residential.

b) see *City of Stonnington v Wallish & Ors*:[168]

> 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.

and

c) see *Re: Pierce*:[169]

> G. The Court accepts the Plaintiffs' submissions that the sole purpose of the Covenant was to control the materials used in the construction of the outer walls of any dwelling constructed on the land, and given the extended period of non-compliance with the restriction, including two substantial extensions to the original dwelling last century, that the proposed discharge of the Covenant will not substantially injure the persons entitled to its benefit.
>
> H. In reaching this decision, the Court notes the evidence of Katrin Pierce, one of the Plaintiffs, including that the Plaintiffs were evidently not involved in the construction of the dwelling or its extensions, and only became aware of the breach of the Covenant after their purchase of the land.
>
> I. The Court also records its consideration that the circumstances of the case did not warrant a modification of the Covenant in a manner that might have sought to reverse or negative the breaches, due to the future risk of confusion to those who may be required to interpret the meaning or operation of the restriction as it applies to the subject land.

Section 84(2) of the Property Law Act 1958 and other declaratory powers

186. Often an application to modify a restrictive covenant will be made in conjunction with an application as to the enforceability of the restrictive covenant.

187. The Court's power here is expressly set out in section 84(2) of the *Property Law Act 1958*:

> (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

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167 *Re: Ambrens* Unreported — SCI2016 03948.

168 *City of Stonnington v Wallish & Ors* [2021] VSC 84.

169 S ECI 2022 03509

(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.

188. By way of example, in *Prowse v Johnston*[170] the plaintiff's case was put first as a declaration application and as a modification application in the alternative:

> 21 … so far as declaratory relief is concerned, the plaintiff now seeks, in substance, a declaration that a development generally in accordance with the current architectural plans would not contravene that part of the restrictive covenant which prohibits the erection of more than one house on each of Lots 7 and 8. In the alternative, the plaintiff seeks an order under s 84(1)(a) or (c) of the Act modifying that particular restriction. Further, the plaintiff seeks an order under s 84(1)(a) or (c) modifying the restrictions relating to excavation, building materials, subdivision and frontages. Taken together, the modifications sought are modifications that would permit the construction of a building generally in accordance with the current architectural plans.

189. In that case, Cavanough J expressed reservations as to whether section 84(2) was capable of being used to determine a hypothetical question such as whether a building constructed in accordance with a given set of plans would satisfactorily comply with a restrictive covenant. His Honour therefore relied on the Court's general jurisdiction to make a declaratory order:

> 26 As indicated above, the declaration is sought under s 84(2) of the Act or under the Court's general or inherent jurisdiction and powers, including under s 36 of the Supreme Court Act 1986. It would necessarily be a declaration as to a situation or position that has not yet arisen, in that the development is merely proposed. It is very doubtful whether s 84(2) of the Act would authorise the Court to make a declaration of that kind. The plaintiff acknowledged this during oral submissions and thereafter placed principal reliance on the Court's general or inherent jurisdiction. I accept that that jurisdiction may extend to future questions, and that it is available in this case. The jurisdiction is apparently no less ample than any jurisdiction under s 84(2) of the Act. So it is not necessary to decide finally whether jurisdiction under s 84(2) of the Act also exists.

190. In *Stoops v Lefas*,[171] Cavanough J again discussed the Court's general jurisdiction to grant declarations in this context:

> 17. …However, the claim which Mr Stoops wanted to be free to advance at trial, as set out in the originating motion, was a claim of an entirely theoretical or hypothetical nature. It did not involve any definite development proposal for the land. In fairness to him as an unrepresented litigant, I informed him that, in my view, the Court would probably not entertain such a claim in any event and that, if he wished to proceed, he would probably need to put forward a definite building proposal. I also expressed concern that his claim might in any event amount to a claim for a declaration as to a future matter; that, in those circumstances, s 84(2)(b) of the *Property Law Act 1958* might not be applicable; and that he might need to rely on the Court's general jurisdiction and powers to grant declarations. …I ordered…that by a specified time the plaintiff file and serve a further amended originating motion confining the proceeding to a claim for a declaration in respect of a clearly defined proposal for the land in question, such as the proposal the subject of the decision given by VCAT in 2003 in the matter referred to above, namely *Stoops v Frankston City Council*; and that the parties be prepared on 14 May 2015 to advance the

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170 *Prowse v Johnstone* [2012] VSC 4.

171 [2016] VSC 350.

cases which, if this proceeding were not stayed, they would respectively advance at the final hearing of the proceeding (as confined in accordance with my order)…

19. In his further amended originating motion filed on 15 April 2015, Mr Stoops duly invoked s 36 of the *Supreme Court Act 1986* and Rule 23.05 of the *Supreme Court (General Civil Procedure) Rules 2005*[172] (as well as s 84(2)(b) of the *Property Law Act 1958*) in relation to his claim for a declaration in the contingent final hearing. He substituted for his theoretical or hypothetical claim a claim with respect to the very building proposal (and associated architects' plans) which had been the subject of the application for review determined by VCAT in 2003. He exhibited the relevant plans to an affidavit of his own affirmed on 10 April 2015 and filed on 15 April 2015.

191. In *Commonwealth v Sterling Nicholas Duty Free Pty Ltd*,[173] Barwick CJ explained that a court's general jurisdiction to make a declaratory order includes the power to declare that conduct which has not yet taken place will not be in breach of a contract or a law:

12. The jurisdiction to make a declaratory order without consequential relief is a large and most useful jurisdiction. In my opinion, the present was an apt case for its exercise. The respondent undoubtedly desired and intended to do as he asked the Court to declare he lawfully could do. The matter, in my opinion, was in no sense hypothetical, but in any case not hypothetical in a sense relevant to the exercise of this jurisdiction. Of its nature, the jurisdiction includes the power to declare that conduct which has not yet taken place will not be in breach of a contract or a law. Indeed, it is that capacity which contributes enormously to the utility of the jurisdiction.

192. A plaintiff seeking a declaration that a particular development proposal complies with a covenant should therefore invoke the Court's powers under section 36 of the *Supreme Court Act 1986* (Vic) (***Supreme Court Act***) and rule 23.05 of the *Supreme Court (General Civil Procedure) Rules* 2015 (Vic) (***Supreme Court Rules***), which reads as follows:

23.05 Declaratory judgment

No proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

193. The Court's general power to grant declaratory relief is discretionary, and requires a real question to be tried. Query whether a contradictor would be required in practice, or whether the Court would be satisfied with notice being first given to beneficiaries:[174]

13 The question of the efficacy of Regulation 10 can be resolved either by this Court in declaratory proceedings if brought or by Act of Parliament. There is power in this Court to determine declaratory proceedings, as provided by s 36 *Supreme Court Act 1986* and Rule 23.05 *Supreme Court (General Civil Procedure) Rules 2005*. In limited circumstances the Court will grant declaratory relief. As the Court stated in *Rozenes v anor. v Beljajev and ors.*:

"The essential requirement is that there be a real question, with the plaintiff having a real interest and a proper contradictor, and that the circumstances be such that it is appropriate to grant a declaration."

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172 These rules were repealed and replaced in 2015. The current corresponding provision is in the same terms.

173 (1972) 126 CLR 297.

174 *DPP v Frederico* [2006] VSC 24.

194. More generally, although plaintiffs are often tempted to run declarations as preliminary points, they are rarely short and sharp hearings, meaning that a failure in the declaration application can lead to litigation fatigue and the subsequent abandoning of an application. Far better then, in most cases, to run an application for declaration and an application for modification in the same hearing. As the adage goes "Most people who ask for a preliminary hearing on the separate question, eventually come to regret it."

195. Strictly speaking, the power in section 84(2) is declaratory only and a finding by the Court that a covenant is not binding on any beneficiaries is not sufficient for the Court to amend, or more relevantly, discharge a restrictive covenant. This results in the unhappy outcome of a restrictive covenant remaining on title, without any work to do. Any number of complications can arise here, with Councils potentially adopting the view that a covenant still encumbers the land—even if the Court has pronounced it moot.

196. For this reason, applications for declarations should be accompanied by an application to discharge a covenant pursuant to section 84(1)(c) adopting the reasoning that if no beneficiaries are impacted by the covenant, it follows that discharge will not substantially injure persons with the benefit of the restriction. Such a conclusion was reached by the Court in *Re Wilson* S ECI 2021/2822:

> H. The Court is satisfied that by reason of there being no person having sufficient standing as a beneficiary to enforce the Covenant's terms, it should be discharged.
>
> I. Further and in any event, the Court is satisfied that there is no injury, or substantial injury, caused to any potential beneficiary by the discharge of the Covenant.

Construing a restrictive covenant

197. There are two general propositions concerning the construction of restrictive covenants:

   a) the words of a restrictive covenant are generally to be given their 'ordinary and everyday meaning'; and

   b) the words must be construed in their context and upon reading the whole of the instrument.[175]

198. Associate Justice Derham restated the principles of construing a restrictive covenant in *Clare & Ors v Bedelis*.[176]

199. Critically, the objective of construction is to ascertain the intention of the parties at the time the covenant was created. That should be done principally by reference to the terms of the covenant itself — and not as commonly occurs, by reference to a contemporary dictionary or modern legislative terms:

> **The Construction of Restrictive Covenants**
>
> 31 A review of the authorities reveals the following principles of interpretation are applicable to restrictive covenants:

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175 *Prowse v Johnstone* [2012] VSC 4, [52].

176 *Clare v Bedelis* [2016] VSC 381.

(a) subject to the qualifications mentioned below, the ordinary principles of interpretation of written documents apply. [177] The object of interpretation is to discover the intention of the parties as revealed by the language of the document in question;[178]

(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.[179] Evidence may be admitted, however, as to the meaning of technical engineering, building or surveying terms and abbreviations;[180]

 (ii) must always be construed in their context, upon a reading of the whole of the instrument,[181] and having regard to the purpose or object of the restriction;[182]

(c) importantly, the words of a restrictive covenant should be given the meaning that a reasonable reader would attribute to them.[183] The reasonable reader may have knowledge of such of the surrounding circumstances as are available.[184] 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.[185] 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 …[186]

(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,[187] and having regard to the plan of subdivision and, depending on the evidence, possibly having regard to corresponding covenants affecting other lots in the estate;[188]

(e) because the meaning of particular words depends upon their context

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

178 Bradbrook & Neave; But see *Prowse v Johnston & Ors* [2012] VSC 4,[55]–[58].

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

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

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

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

183 *Phoenix* [157]–[158].

184 These are limited by the decision in Westfield and subsequent decisions: see Se*rtari 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, [33]–[34]; *Prowse*,[58].

185 *Westfield* [37]–[42]; *Sertari* [15]; *Phoenix* [148]–[158].

186 *Westfield*, [39].

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

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

(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.[189] Further, the decisions upon an expression in one instrument are of very dubious utility in relation to another;[190]

(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*,[191] do not apply to the construction of easements and covenants;[192]

(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;[193]

(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;[194] and

(i) generally speaking, the proper construction of an instrument intended to have legal effect is a question of law, not fact.[195] 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.[196] [*Footnotes from original*].

200. More recently, the Court of Appeal in *Jeshing Property Management Pty Ltd v Yang* [2023] VSCA 185 confirmed that the 'established principles' principles of interpretation apply, save for the specific rules regarding extrinsic evidence that apply to Torrens land being:

a) the words of a restrictive covenant are to be construed by reference to its text, context and purpose;

b) it is necessary to consider what a reasonable person in the position of the covenanting parties would understand the words to mean; and

c) a construction that accords with commercial sense and commercial convenience is to be preferred:

63 As the associate judge correctly stated, the principles to be applied in construing restrictive covenants are the same 'established principles' as apply to the construction of contracts, except the rules of evidence as to the admissibility of extrinsic evidence of surrounding circumstances are constrained by the decisions in *Westfield* and *Deguisa*. This is evident from the judgment of the Court of Appeal in New South Wales in *Phoenix*,[197] and the

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

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

191 (1982) 149 CLR 337.

192 *Westfield*; *Ryan v Sutherland* [2011] NSWSC 1397, [10]; *Prowse*, [57].

193 *Ferella*, [21]; Bradbrook & Neave's, [15.6].

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

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

196 See *S v Crimes Compensation Tribunal* [1998] 1 VR 83, 88; cf *Phoenix*, [158]; *Prowse*, [53].

197 [2010] NSWCA 64, [158].

judgment of this Court in *Barport Pty Ltd v Baum*.[198] On this basis, the principles stated by the High Court in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*,[199] with such adaptions as are necessary to reflect the decisions in *Westfield* and *Deguisa*, should apply to the construction of the Covenants, as follows:

(1) The meaning of the phrase at issue is to be determined objectively, by reference to its text, context (the entire text of the Covenants as well as any registered instrument or statutory provision referred to in the text of the Covenants) and purpose.[200]

(2) In determining the meaning of the relevant terms of the Covenants, it is necessary to ask what a reasonable person in the position of Mrs Buckley and Mr McDonald would have understood those terms to mean. That enquiry requires consideration of the language used by the parties in the Covenants, the circumstances addressed by the Covenants and the commercial purpose or objects of the Covenants.[201]

(3) A construction of the relevant words in the Covenants which accords with commercial sense and commercial convenience should be preferred over one which does not.[202]

201. In *Prowse v Johnston*,[203] Cavanough J emphasised that where a doubt or ambiguity about the meaning of a covenant arises and cannot otherwise be resolved, the rule of last resort is that the covenant should be construed against the owner of the burdened land:

> 86 I am not in any real doubt that the proposed development cannot be properly characterised as "one house" within the meaning of the expression "not erect more than one house" as those words appear in this covenant. However, before parting with this aspect of the case, I note that in *Ferella v Otvosi*,[204] Hamilton J held that where a doubt or ambiguity about the meaning of a restrictive covenant arises and cannot otherwise be resolved, the rule is that the covenant should be construed against the covenantor, although this is a rule of last resort. Bradbrook and MacCallum take the same view.

202. This rule appears to be often quoted, but rarely invoked.

Interpreting the text of a covenant

203. A common error of construction is to refer to a contemporary dictionary or planning scheme definition to construe a covenant, without trying to determine its underlying purpose.

204. For instance, in *City of Stonnington v Wallish & Ors*,[205] Ierodiaconou AsJ found that a covenant preventing excavation should not be construed literally, but should be construed in its proper context:

> 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

198 [2019] VSCA 167, [68].

199 (2015) 256 CLR 104.

200 Ibid [46].

201 Ibid [47].

202 Ibid [51].

203 [2012] VSC 4.

204 (2005) 64 NSWLR 101.

205 *City of Stonnington v Wallish & Ors* [2021] VSC 84.

'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.

205. In *Barport Pty Ltd v Baum*,[206] the Victoria Supreme Court of Appeal held that the judge had erroneously approached the construction of a restrictive covenant by defining a term according to dictionary definitions without regard to context:

> 88 In our opinion, the respondents were correct in submitting that the judge had erroneously approached the construction of the Covenant by attempting to define the phrase 'height limitation' by reference to dictionary definitions and divorced from its context. The expression is clearly capable of bearing different meanings depending upon the context in which it is used. A height limitation is not necessarily confined to a maximum allowable height beyond which the thing is not permitted. That was the meaning given by the judge. However, it is also apt to describe a height limit as the point at which the building or hangar becomes liable to be regulated under the MOS.

206. The Court of Appeal emphasised that the text of the covenant is 'critical' and must be construed by reference to the context of the instrument as a whole:

> 68 It is not necessary to dwell on the constructional principles that apply to construing a restrictive covenant on title. Plainly, the text of the covenant is crucial. As with any constructional exercise, context plays a role and the words should be construed by reference to the instrument as a whole and not in the abstract, but by reference to the location of the physical characteristics of the properties which are affected by it. However, context may not be used to ascertain or elucidate the subjective intentions or expectations of the covenantor. The purpose of the covenant will be important in so far as it can fairly be discerned from the instrument as a whole.

207. This principle was applied by Senior Member Martin in *Gorog v Stonnington CC* [2019] VCAT 1257, in which the Tribunal rejected a literal interpretation of the covenant:

> 121 Suffice to say that a good decision providing guidance on interpreting restrictive covenants is Waterfront Place Pty Ltd v Port Phillip CC [2014] VCAT 1558 and also see Tonks v Tonks [2003] VSC 195. The key aim is to ascertain the intention of the covenanting parties, at the time the covenant was created. The language of covenants is to be attributed its ordinary and colloquial meaning, as used at the time. For obvious reasons, it is usually inappropriate to rely on more recent circumstances or documents and then seek to 'apply them backwards in time'.
>
> 122 The question here is whether tennis court lighting falls foul of the critical words in the restrictive covenant 0853658 that I have quoted above. For the following reasons, my finding is that the tennis court lighting poles do not breach the requirements of same.
>
> 123 If one focuses for the moment on the words "of brick with roof of slate or tiles", I find that the intention of the covenanting parties was that the 'materiality' requirements imposed by these words simply apply to genuine buildings which are built on land affected by this covenant. I consider that it would be nonsensical to take the view that any structure at all built on land affected by this restrictive covenant can only be built of brick. If such a rigid approach was taken, for example no internal fencing or dog kennel could be built other than with bricks (which would seem strange). Similarly any clothes line would have to be made with brick instead of say the iconic metal Hills Hoist (which surely would be 'unAustralian'). I agree that the case Jacobs v Greig [1956] VLR 597 (which Ms Collingwood cited) is consistent with this type of 'common sense' rather than literal interpretation of this type of 'materials restriction'.

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[206] *Barport Pty Ltd v Baum* [2019] VSCA 167.

> 124 Rather, the 'pointy end of the stick' here seems whether or not the construction of tennis court lighting constitutes a breach of the prohibition under the restrictive covenant of the erection of "…any building but a private residence".
>
> 125 For the following reasons, I see no such breach arising.
>
> 126 First and foremost, with the aim of giving this restrictive covenant its ordinary meaning at the time that it was created, I am unconvinced that it was the intention of the covenanting parties that a taller but thin structure like these poles would constitute a 'building' for the purposes of the prohibitions imposed by this covenant.

208. Consistent with this, the Court of Appeal has found that statutory definitions such as those found in the *Planning and Environment Act 1987* do not determine the appropriate construction of terms in a covenant. In *Manderson v Smith*[207] Beach and Kennedy JJA held that:

> 43 The Macquarie Dictionary definition of a 'building' is as follows:
>
> 1.a substantial structure with a roof and walls, as a shed, house, department store, etc.
>
> 2.the act, business, or art of constructing houses, etc.
>
> There is nothing in this definition which suggests that a 'building' should extend to a boundary fence. In this respect, <u>we would respectfully disagree with Emerton J that it was appropriate to have recourse to the definition contained in the *Planning and Environment Act 1987*</u>. The matter does not appear to have been the subject of contested submission. In any event, we do not consider that any such recourse is necessary or appropriate. Although the Permit is to be interpreted pursuant to the definitions in that Act, the Permit is spent. It would also be unnecessary to include the words, 'or part of a building' if that definition applied, because the statutory definition already includes 'and part of a building'. <u>Rather, consistent with the principles already summarised, the words should not be interpreted using a technical or legal approach</u>.

209. In *Jeshing Property Management v Yang* [2023] VSCA 185, the Court of Appeal rejected a narrow interpretation of the words 'his … transferees', preferring to read the words in the context of the full composite phrase in the covenant:

> 64 The words which must be construed are not simply 'his … transferees' but the composite and conjunctive phrase 'for himself his [heirs]74 executors administrators and transferees'. Even when considered alone, this phrase is apt to describe a class including derivative transferees from Mr McDonald, which extends to each transferee who takes after him (broad meaning), and not simply to his 'direct transferees' as sought in the proposed declaration (narrow meaning). Reference to the text of the Covenants as a whole confirms that the broad meaning should be preferred to the narrow meaning.

210. In interpreting the meaning of the words 'his … transferees' with respect to whether the burden of the covenant extends beyond the original transferee, the Court of Appeal looked to the language used to express the benefit of the covenant. The Court found that as there was a clear objective intention to attach the benefit of the covenant to every derivative transferee, it was unlikely that the covenanting parties would have ascribed a narrow meaning to the duration of the burden of the covenant:

> 65 First, the objective intention for the Covenants to continue to burden transferees of the Land beyond direct transferees of Mr McDonald is apparent from the words describing the covenantee or beneficiary of the Covenants, namely Mrs Buckley 'and her transferees the

[207] [2021] VSCA 359.

registered proprietor or proprietors for the time being' of the land comprised in the great-great-grandparent title. If the identity of the burdened party is limited as the owner suggests, there is a disconformity between the duration of the beneficial interest under the Covenants and the obligation created by the Covenants. The phrase 'her transferees' in the description of Mrs Buckley as covenantee means every transferee who takes after her and mirrors the language used for Mr McDonald. The words 'the registered proprietor or proprietors for the time being' limit the operation of the Covenants in favour of her transferees only for such time as they are registered proprietors. In circumstances where there is a clear objective intention to benefit the owners of the land comprised in the great-great-grandparent title for the time being (including transferees of part of that land such as the neighbouring owners), it is unlikely that the original parties the Covenants intended the narrow meaning as to the duration of the burden of the Covenants. Such a result would be inconsistent with a construction resulting in the 'congruent operation' to the various components of the Covenants as a whole.

211. The Court of Appeal also favoured an interpretation that accorded with commercial sense, insofar as if the burden only extended to direct transferees, any transferee could simply transfer the land to an associated entity and avoid the burden of the covenant:

> 68 Third, adoption of the narrow meaning would produce absurd results which offend both common sense and commerciality. For example, if Mr McDonald died before transferring the Land, only his personal representatives would be bound, and not any transferee from them. Further, any transferee from Mr McDonald could easily avoid the burden of the Covenants by further transfer to an associated party. In circumstances where it was clearly intended to benefit the owners of the land comprised in the great-great-grandparent title for the time being, it would be unreasonable to attribute the narrow meaning to the parties.

Admissible evidence concerning the relevant context in construing a covenant

212. A key principle of the Torrens system is that a person need look no further than the register, and the physical features of the land itself, to understand attributes of and encumbrances on the land.[208]

213. This principle is stated in *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (1971) 124 CLR 73:

> But it seems to me that what is "notified" to a prospective purchaser by his vendor's certificate of title is everything that would have come to this knowledge if he had made such searches as ought reasonably to have been made by him as a result of what there appears.

214. The High Court recently restated this principle in *Deguisa v Lynn* (2020) 268 CLR 638:

> 88 A person who seeks to deal with the registered proprietor in reliance on the State's guarantee of the title of the registered proprietor disclosed by the certificate of title in the Register Book (or its electronic equivalent) is not to be put on inquiry as to anything beyond that which is so notified. A common building scheme can operate consistently with the scheme of the Act in relation to the enforceability of the benefit of a restrictive covenant only if those rights are notified on the certificate of title of the burdened land, or by express reference in a memorial on the certificate of title to other registered instruments which contain that information. Anything less is inconsistent with the natural and ordinary meaning of the text of s 69 and the purpose of the ***Act.***

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[208] *Breskvar v Wall* (1971) 126 CLR 376.

215. The High Court considered the judgments of Barwick CJ and Windeyer J in *Bursill*, finding that their honours' references to the searches of a prudent conveyancer relate only to searches of those documents notified on the relevant certificate of title, not documents that may be found through wider searches of the Registry Office:

> 56 It is tolerably clear from the context in which these observations were made that when Barwick CJ spoke of "search", he meant obtaining and reading such registered instruments as were notified on the certificate of title. He was certainly not suggesting the need for a search for documents that might have been found outside the Register Book or documents that might be found in the Registry Office but were not incorporated by an entry on the certificate of title.
>
> …
>
> 58 Contrary to the view of the majority of the Court below in the present case (73), the reasons of Barwick CJ in *Bursill* do not support the proposition that what is "notified" within the meaning of s 69 of the Act extends beyond what is referred to on the certificate of title, to include what might be found outside the Register or in other documents somewhere in the Lands Titles Office if one knew how to find them. Indeed, it is apparent from the passages cited that Barwick CJ, in speaking of registered dealings being available for "search and inspection", was speaking of the search of registered instruments or of instruments referred to in such instruments which were themselves registered.

216. *Deguisa* reversed the decision of the Full Court of the Supreme Court of South Australia, which found that a memorandum of encumbrance recorded on a parent title and in the schedule of dealings on the present certificate of title sufficiently was sufficient notification of the existence of a building scheme on the basis that a prudent conveyancer would have made reasonable searches having regard to what appears on the register:

> 47 The appellants appealed to the Full Court of the Supreme Court of South Australia from both of the primary judge's judgments. The majority of that Court (Peek J, with whom Hughes J agreed) upheld the conclusions of the primary judge. Peek J held that the 52 lots sold out of the subdivision that were encumbered with identical restrictive covenants, which did not include Lots 5 and 21, were therefore part of a common building scheme (56). His Honour held further that the appellants were sufficiently notified of the restrictive covenants. In this regard, Peek J proceeded upon the "governing principle", stated by Windeyer J in *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (57):
>
> > "What is 'notified' to a prospective purchaser by the vendor's certificate of title is everything that would have come to his or her knowledge if a prudent conveyancer had made such searches as ought reasonably to have been made by him [or her] as a result of what appears on that certificate of title." Peek J went on to say (58):
> >
> > "And if one inquires, 'What searches of the Register ought reasonably be made by a prospective purchaser?' the applicable principle becomes:
> >
> > 'A prospective purchaser is required to make such searches of the Register as ought reasonably be made by a prudent conveyancer having regard to both what appears on the vendor's certificate of title and what comes to his or her knowledge during the course of such reasonable searches.'"
>
> Importantly, Peek J understood that the searches contemplated by Windeyer J included searches that were not directed by entries in the Register Book to particular registered instruments. Peek J considered that the appellants, having inspected the Memorandum of Encumbrance referred to on the certificate of title, would have been put on notice of the

> possible existence of a "common building scheme", and thus of the likelihood of a number of identifiable lots with mutually enforceable covenants (59).
>
> 48 The appellants ought then to have undertaken the further searches of the Register that would have been undertaken by a prudent conveyancer; these searches would have confirmed that all the lots in the building scheme were sold by the same common vendors, had the same encumbrances and restrictive covenants attached to them, and originated from the same subdivision which had produced Lot 3, and that therefore Lot 3 was part of a common building scheme (60). Further, as to the searches that would have been conducted by a prudent conveyancer, Peek J accepted expert evidence adduced by the respondents to the effect that a search for the "distinctive surname 'Ayton'" in the 1965 or 1966 alphabetical listings of the vendors attainable from the Lands Titles Office would have yielded all of "the encumbrance names" (61). It is noteworthy that the expert evidence in relation to these searches was that "Ayton" rather than "Fielder" would be chosen for the purpose of the searches because "Ayton" was an unusual name, whereas "Fielder" would be "lost in numerous other Fielders" (62).

217. Thus, the High Court found that any prospective purchaser was only notified of the existence of the memorandum of encumbrance and that the covenant was invalid as the benefitting lots were not identified within:

> 73 As a matter of the ordinary and natural meaning of the language of s 69 of the Act, and in conformity with the authoritative exposition of the purpose of the Torrens system in *Westfield*, any intending purchaser of Lot 3 was notified by entry on the present certificate of title only of the memorialised Memorandum of Encumbrance, and of the terms of that instrument. There was no notification on the present certificate of title of the other lots that were benefited by the restrictive covenants in the Memorandum of Encumbrance. Those lots were not identified in the Memorandum of Encumbrance.
>
> 74 The land broker's reference to "a common building scheme" on the back of the Memorandum of Encumbrance did not identify a registrable dealing with land and was not a memorial of a subsisting encumbrance. More importantly, the land broker's notation did not identify the certificates of title to lots that have the benefit of the restrictive covenants that are said to burden Lot 3, so that those lots could be identified by a search of the Register.

218. In *Jeshing Property Management v Yang* [2022] VSC 306, Matthews AsJ found that it was consistent with *Deguisa* to refer to the network of covenants in construing the words of a covenant:

> 100 On this basis, the parties were in agreement that I could have regard to other covenants contained in instruments of transfer out of the Great Great Grandparent Title, as corresponding covenants affecting other parts of that estate. I agree that this is consistent with the approach taken in Deguisa.87 I note that Deguisa also makes clear that the principle is not so wide that any document on the register is available as an aid, but consider that the covenants in respect of properties transferred out of the Great Great Grandparent Title are admissible as material referred to in the relevant instrument or instruments referred to in that instrument. In this way it is possible to trace the benefit of the Covenants back to the Great Great Grandparent Title and identify covenants within the network in the Beaulieu Estate. I do not consider that other covenants, such as that said by the Plaintiffs to be imposed in respect of 19 Monaro Road, Toorak, are admissible. Nothing in respect of that covenant is to be found in the register pertaining to the Land or is able to be derived from instruments referred to in respect of the Land.

219. This was overturned by the Court of Appeal,[209] which found that only instruments expressly referred to in the certificate of title or the restrictive covenant are admissible. Referring to the network of covenants (recorded on the great great grandparent title) would be to go a step further than the documents permissible according to the principles in *Westfield* and *Deguisa*:

> 42 Nevertheless, the neighbouring owners correctly acknowledge that the statements in *Westfield* and *Deguisa* contain important and fundamental statements concerning the operation of the Torrens system of title by registration and the need for interests to be clearly notified on the certificate of title. On this basis, and as the neighbouring owners submit, in construing a registered instrument regard may be had to the objective factual context represented by other registered instruments which are referred to in the instrument to be construed. However, the difficulty for the neighbouring owners is that they seek to go a step further. They contend that the other covenants in the network of similarly worded covenants relied on by the associate judge are admissible to construe the Covenants because it is necessary to look at the great-great-grandparent title to determine the land which is benefited by the Covenants and, in doing so, reference must be made to the transfers of land referred to in the great-great-grandparent title which contain the other covenants.
>
> 43 We do not accept the contentions of the neighbouring owners on this issue. For the reasons given below, reference to the great-great-grandparent title falls within the principles stated in *Westfield* and *Deguisa*. It is an instrument expressly referred to in the Covenants and identifies by number the other transfers of land made as part of the subdivision recorded in the plan forming part of the great-great-grandparent title. It is not, however, necessary to look at those instruments of transfer in order to identify the benefited land under the Covenants. This is because the new certificates of title created by those transfers from the great-great-grandparent title are recorded under the dealings columns of the great-great-grandparent title. Thus, by reference to the Covenants and the great-great-grandparent title referred to in the Covenants, a purchaser of the Land would know all that is necessary to identify the lands which are benefited by the Covenants. It is unnecessary to search the dealing numbers of the other transfers of land in order to obtain this information. Thus, unlike in *Deguisa*, the Covenants were complete and bound the Land, subject to their proper interpretation.

220. Hence, as the network of covenants were not 'incorporated by reference' in the certificate of title or covenants, they were inadmissible:

> 45 The only interests notified on the certificate of title to the Land are the Covenants, by reference to the instruments of transfer which contained them. As discussed, the Covenants referred to the great-great-grandparent title and it is permissible to refer to that title to both complete the Covenants and to construe them. However, the associate judge's extension of the scope of admissible evidence to include the network of other covenants was in error. The transfers of land containing those other covenants were not 'incorporated by reference' in the certificate of title or the Covenants,56 or even referred to in them.57 In accordance with *Westfield* and *Deguisa*, the fact that the other transfers are referred to in the great-great-grandparent title is an insufficient basis to make them admissible to construe the Covenants.[210]

221. The practical effect is that a covenant cannot be construed by reference to what either is or isn't contained within other like covenants.

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209 *Jeshing Property Management Pty Ltd v Yang* [2023] VSCA 185.

210 *Jeshing Property Management Pty Ltd v Yang* [2023] VSCA 185.

222. However, regard may be had to the great-great-grandparent title (or other instrument referred to within the relevant covenant):

> 51 The statement in *Deguisa* which is relied upon by the owner does not prevent reference to the great-great-grandparent title in construing the Covenants. Unlike *Deguisa*, this is a case where the relevant cancelled title is expressly referred to in the Covenants which are noted on the title to the Land. The situation in *Deguisa* was different. The question there was whether an open-ended search of the Register should have been made to locate a registered instrument which would complete an otherwise incomplete encumbrance.[211]

223. The continuing relevance of the physical context of the land was explained in *Richard Van Brugge & Anor v Meryl Lesley Hare & Anor* [2011] NSWSC 1364 [30] to [37]:

> 35 Authority is clear. In *Westfield Management Limited v Perpetual Trustee Company Limited* (2007) HCA 45 at [42] the High Court reasoned that the Court could determine user under a registered easement which "may change with the *nature of the dominant tenement* " (emphasis added). Also in *Sertari Pty Limited v Nirimba Developments Pty Ltd* [2007] NSWCA 324 when construing the words of an easement to determine whether a right of way was excessive the Court of Appeal confirmed at [15] - [16] that the effect of *Westfield Management Limited v Perpetual Trustee Company Limited* is that "extrinsic material apart from physical characteristics of the tenements, is not relevant to the construction of instruments registered under the Real Property Act".
>
> 36 Logic dictates the same result. It is difficult to give content to the rights under an easement unless some account is taken of the physical characteristics of the tenements. Otherwise the parties are engaged in an empty debate about the meaning of words in an instrument without reference to what is happening on the ground. The limitations of such a narrow view was emphasised by Campbell JA in *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64 at [158].[212]

224. Hence, reliance on extrinsic documents to aid construction, such as communications between the covenanting parties; contracts of sale; diary entries; or other documents intended to shed light on the subjective intention of the parties is impermissible. See *Westfield Management Limited v Perpetual Trustee Company Limited*: [213]

> 35 In going on to allow the appeal, Hodgson JA (again correctly) remarked that the decision of the primary judge appeared to be the product of an error in preparedness to look for the intention or contemplation of the parties to the grant of the Easement outside what was manifested by the terms of the grant. Extensive evidence of that nature had been led by Westfield on affidavit with supporting documentation.
>
> 36 In this Court, counsel for Perpetual submitted that some but not all of the extrinsic evidence had been admissible; in particular, the evidence said to supply part of the "factual matrix" but which post-dated a deed dated 26 February 1988 containing a covenant to grant the Easement was inadmissible. So also was said to be evidence of the subjective intention of the then owner of Glasshouse which had not been communicated to the then owner of Skygarden. Perpetual accepted that what had been admissible was evidence of a preceding oral agreement between those parties: this had been to the effect that the Easement was to permit access to Skygarden via Glasshouse.
>
> 37 However, in the course of oral argument in this Court it became apparent that what was engaged by the submissions respecting the use of extrinsic evidence of any of those

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211 *Jeshing Property Management Pty Ltd v Yang* [2023] VSCA 185.

212 Emphasis added.

213 *Westfield Management Limited v Perpetual Trustee Company Limited* [2007] HCA 45 Emphasis added.

descriptions, as an aid in construction of the terms of the grant, were more fundamental considerations. These concern the operation of the Torrens system of title by registration, with the maintenance of a publicly accessible register containing the terms of the dealings with land under that system. To put the matter shortly, rules of evidence assisting the construction of contracts *inter partes*, of the nature explained by authorities such as *Codelfa Construction Pty Ltd v State Rail Authority of NSW*[214], did not apply to the construction of the Easement.

38 Recent decisions, including *Halloran v Minister Administering National Parks and Wildlife Act 1974*,[215] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,[216] and *Black v Garnock*,[217] have stressed the importance in litigation respecting title to land under the Torrens system of the principle of indefeasibility expounded in particular by this Court in *Breskvar v Wall*.[218]

39 The importance this has for the construction of the terms in which easements are granted has been remarked by Gillard J in *Riley v Penttila*[219] and by Everett J in *Pearce v City of Hobart*.[220] The statement by McHugh J in *Gallagher v Rainbow*,[221] that:

> *"[t]he principles of construction that have been adopted in respect of the grant of an easement at common law ... are equally applicable to the grant of an easement in respect of land under the Torrens system",*

is too widely expressed. 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.[222]

Stress testing a restrictive covenant

225. When construing a restrictive covenant, a careful analysis of its various components is needed to understand its true effect, and indeed, whether it is effective at all.

226. One covenant in Toorak dating back to the 1960s, purported to prevent part of the land from being developed to more than one storey. The sole beneficiary was the neighbouring land to the south. The dwelling had been constructed on the assumption the covenant was valid. However, close consideration of the chronology revealed that the purported covenantee had already sold the benefitted land by the time the covenant was signed and registered. The Supreme Court therefore agreed that the covenant was unenforceable, given that the covenantee had lost his ability to enter into the agreement at the time the covenant was purportedly made.[223]

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214 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 350–2.

215 *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 80 ALJR 519, 526 [35]; 224 ALR 79, 88.

216 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 81 ALJR 1107,1150-1152 [190]–[198]; 236 ALR 209, 266–9.

217 *Black v Garnock* (2007) 237 ALR 1, 4 [10].

218 *Breskvar v Wall* (1971) 126 CLR 376. See also *Figgins Holdings Pty Ltd v SEAA Enterprises Pty Ltd* (1999) 196 CLR 245, 264 [26]–[27].

219 *Riley v Penttila* [1974] VR 547, 573.

220 *Pearce v City of Hobart* [1981] Tas R 334, 349–50.

221 *Gallagher v Rainbow* (1994) 179 CLR 624, 639–40.

222 Cf. *Proprietors Strata Plan No 9,968 v Proprietors Strata Plan No 11,173* [1979] 2 NSWLR 605, 610–612.

223 *Re Thaqi:* S ECI 2020 01338

227. In another case, a restrictive covenant in Altona had been the subject of extensive advertising in an application to modify what was believed to be a single dwelling restriction. However, closer examination revealed that the covenant suffered from the same flaw that was the subject of the following comment by Morris P in *Thornton v Hobsons Bay City Council.*[224]

> 11 In the present case the transferor has sought to identify the land to be benefited by reference to land remaining untransferred in a particular certificate of title. That method of identification purports to be a precise method. It follows, as Ms Tooher submitted, that there is less scope in such circumstances to use surrounding circumstances to identify the benefited land. The problem is that, at the time the transfer was made on 25 April 1953, certificate of title volume 6836, folio 089 was no longer in existence, it having been cancelled on 15 September 1952. Thus at that time there was no land remaining untransferred in that certificate of title. Hence notwithstanding the exactitude with which the draftsman of the covenant sought to achieve, in fact all he has achieved is a nonsense.

228. The Supreme Court agreed that the restrictive covenant was a nonsense and declared the restrictive covenant unenforceable.[225]

229. It should not be assumed that you will necessarily need to apply to the Supreme Court to have a covenant removed for reasons of defect or express limitation. For example, a covenant on the Mornington Peninsula was expressed to be for the benefit of the original vendor, its successors and transferees. The Covenant did not identify the land to be benefitted by the restriction contained in the Covenant. A letter to the Registrar of Titles was sufficient to have the covenant removed through the exercise of the Registrar's powers under section 106 of the *Transfer of Land Act 1958*.

Particular focus should be placed on whether a covenant controls use, development or both

230. When construing a restrictive covenant, it is important to determine whether the restriction was intended to control use, development or both. A good example of this can be seen in the case of *S. & J. Panayiotou v Moonee Valley City Council, & Ors*[226] in this case, Morris J was asked whether a permit for a child care centre at 74 McCracken Street would facilitate a breach of a restrictive covenant. His Honour found that the covenant was a development control and not a control on the use of land:

> 6 I now turn to the other matter that needs to be ascertained, namely the meaning of the covenant. The covenant is one which covers a sizeable suburban area, as part of a subdivisional development. It was imposed in 1922. There are a number of beneficiaries of the covenant. The key words of the covenant involve a promise on the part of the landowner, and on behalf of subsequent landowners, that:
>
> > No building shall at any time hereafter be erected on the land hereby transferred save one dwelling house with the usual and necessary outbuildings thereto and such dwelling house shall front McCracken Street.
>
> 8 This case turns upon the construction of the words in the covenant. It is established that in approaching such a task the object is to discover the intention of the parties as revealed by the language they have used in the document in question. (See, for example, *Tonks v Tonks* [2003] VSC 195 per Bongiorno J.) …

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224 [2004] VCAT 383

225 *Re Tran* S CI 2018 02425

226 [2003] VCAT 1279

> 9 The answer to the question must lie in the words used in the covenant. Turning to those words, it is apparent that the covenant is essentially concerned with the erection of buildings. The initial operative words in the covenant are that no building shall at any time hereafter be erected on the land. Those operative words are then qualified by a saving provision. The focus of the covenant is upon the erection of buildings; it is not upon the use of buildings.
>
> …
>
> 14 Essentially my conclusion is that the promise made in the covenant was a promise about how the area must be developed. It was not a promise about how the area would be subsequently used into the future.

231. On this basis, his Honour found that the covenant would not infringe section 61(4) of the *Planning and Environment Act 1987* and that subject to the planning merits, a permit could be granted for a child care centre.

Building materials covenants

232. The issue of building materials covenants was considered in *Jacobs v Greig* [1956] VLR 597 (***Jacobs***). This found that a practical approach to the construction of building materials covenants should be taken, so a building to be made of brick and stone—somewhat self-evidently—need not have windows made of brick and stone and may be rendered without breaching a covenant:

> Of course, all such covenants, including this covenant, must be read as they would be understood by an ordinary person, accustomed to the ordinary current use of the English language in the relevant locality, and acquainted with current social habits and usages. No one would read this covenant as requiring that floors, stairs, rafters, or doors should be of brick or stone, or as essaying to interdict on the estate the otherwise common practice of using glass windows, metal or porcelain plumbing materials, or concrete or terrazzo flooring, or cement or plaster rendering over brick walls.

233. Similarly, in *Gardencity Altona v Grech & Ors* [2015] VSC 538 (***Gardencity***) Lansdowne AsJ found that the addition of render didn't detract from the brickwork construction underneath:

> 116 In my view the proper conclusion from this evidence is that it is possible to detect the use of brick as a building material even if the brick is rendered, although perhaps without detailed examination only by an expert.
>
> …
>
> 140 … I consider the proper measure of the current use of brick or stone to be its actual incidence, not its physical appearance.

234. In *Gardencity*, Lansdowne AsJ warned that removal of a brick or stone restriction on a covenant may have a substantial, real sense of injury to beneficiaries of a covenant:

> 207 For these reasons, the plaintiff also fails under s 84(1)(c). The right protected by the covenant is a right to require construction in brick or stone. The defendants consider that right to be of value- they have a genuine, and reasonable, preference for brick or stone construction to other forms of construction. Section 84(1)(c) only permits removal of that right if it would not occasion substantial injury to the defendants. Substantial means real and not fanciful. In my view, it would be substantial injury to the defendants to remove their current right to insist on a certain quality building material on a property immediately adjacent (in the case of the third and fourth defendants) and at one remove and in a direct line of sight (in the case of the first and second defendants) without compensation, and

without any certainty as to what building material would be used instead. Removal of the restriction would also cause injury, that is not fanciful, by its likely precedential effect in the immediate proximity of the defendants' land, and in the neighbourhood generally.

235. For many years, *Jacobs* was also authority for the proposition that a brick building covenant required a dwelling to be constructed of solid brick or 'cavity-brick' and not brick veneer:

> … I am satisfied that an ordinary resident of Victoria, reading this covenant in the current decade, would understand it as requiring that the vertical construction of the relevant structures should be substantially wholly of brick or stone, and as forbidding inter alia the use of the method of construction known as "brick veneer".

236. However, in *Gardencity*, Lansdowne AsJ considered that *Jacobs* was limited to its particular facts and time, and brick veneer was now acceptable as 'brick' for the purposes of a covenant:

> 133 The plaintiff submits that *Jacobs v Greig* remains binding for the principle stated in the first extract above, but not the outcome stated in the second extract. The application of the principle would now not exclude brick veneer because it is now acceptable that a high quality building may be constructed in brick veneer. Mr McLaughlin gave evidence to this effect. Indeed, his evidence is that brick veneer construction had replaced double brick construction in Australia by 1950, and so, on that evidence the acceptability of brick veneer had commenced by the time of *Jacobs v Greig*, but had possibly not filtered down to the general population. It is possible that the judgment in *Jacobs v Greig* was also influenced by the location of the subject property in Toorak.
>
> 134 Having regard to Mr McLaughlin's expert evidence that brick veneer is now an acceptable use of brick in construction, I consider the particular outcome in *Jacobs v Greig* to be limited to its particular facts and time. On the principle identified in that case, I find that an ordinary resident of Victoria would consider the covenants here in question do not now exclude brick veneer. Accordingly, I find that for this case at least, brick veneer is 'brick' for the purposes of the covenants, and like covenants in the area.

237. In *Clare v Bedelis*, Derham AsJ found that nothing in the ordinary meaning of 'brick' suggested that a covenant requiring a building's walls to be made of brick meant that this requirement also applied to the internal walls of the building:

> 107 … Nothing in the ordinary dictionary meaning indicates that walls constructed out of bricks on the outer layer, with timber and plaster board on the inner layer, does not satisfy the description 'walls of brick'. …
>
> 108 In this case, there is an enclosing structure composed of brick to the outside world. Must the walls be made wholly or a substantially of brick? The commonsense that was applied by Sholl J in *Jacobs v Greig* when applied here leads me to the opposite conclusion to the one he reached. Given that the purpose of the restriction is to require the external appearance to be of brick or stone and to avoid low quality construction materials, there is no reason why walls of brick veneer do not meet the purposes. There was no complaint that the brick is rendered. …[227]

238. Further, Derham AsJ held that the requirement that a building's walls be built of brick was for aesthetic purposes, and thus only affected the external layer of the building:

> 113 In my unaccompanied view of the Land and neighbourhood, it became apparent that the bulk of the houses were constructed with an external appearance of brick. Some had upper levels that included timber. But the overall appearance of the neighbourhood was that

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227 *Clare & Ors v Bedelis* [2016] VSC 381 at [107] and [108].

> houses were substantial in size and built of brick, whether that was solid brick or brick veneer could not be seen. Apart from the decision in *Jacobs v Greig*, there is no warrant in this case for the conclusion that the requirement, in effect, that the dwelling house on the Land be constructed with walls of brick or stone has the purpose of anything more than the aesthetic appearance of the house and the avoidance of low quality materials.[228]

239. Derham AsJ appeared to doubt the merit of Sholl J's finding that the purpose of the materials restriction was for strength, durability, cost and fireproof qualities of a building:

> 110 The evidence before Sholl J in *Jacobs v Greig* did not appear to provide a factual basis for the conclusion that the building materials part of the covenant was to be understood as designed to protect purchasers with regard to the appearance, strength, durability, cost and fireproof qualities of the building.
>
> …
>
> 113 Apart from the decision in *Jacobs v Greig*, there is no warrant in this case for the conclusion that the requirement, in effect, that the dwelling house on the Land be constructed with walls of brick or stone has the purpose of anything more than the aesthetic appearance of the house and the avoidance of low quality materials. As I have said, I am not prepared to take judicial notice that strength, durability or any other matter forms a part of the purpose of the Covenant…

240. It is also noted that the judgement in *Jacobs* was for an interlocutory injunction whereas that of *Clare* concerned modification of a covenant and likely carries more weight:

> 113 … The evidence before Sholl J in *Jacobs v Greig* is not before me. In any event, that decision was merely an interlocutory decision arrived at on the basis that there was a prima facie case that the construction of the covenant required solid or cavity brick and not brick veneer.

241. This emphasis on quality of materials was further explained by Mukhtar AsJ in *Re Hammond* [2015] VSC 608, who noted that the quality of construction and availability of aesthetically high grade materials and finishes means that the court may consider that a brick covenant may no longer be as necessary as it was at the time the covenant was entered into:

> 23 In these sorts of covenants, the courts recognise the reality that in the last one hundred years the type, durability, and aesthetic quality of construction materials has so markedly changed and advanced that the court looks to see if there are any special benefits of a 'bricks and stone covenant' that might be taken away unjustly if the application is granted.
>
> …
>
> 25 …the fact is the availability of high grade, everlasting and aesthetically high grade materials and finishes cast serious doubt on views that might have been had over a century ago about building materials.

242. More recently, in *Re Izadi and Ors*.[229] Mukhtar AsJ found that a rendered finish over a substrate of polystyrene foam would be imperceptible from a rendered finish over a brick wall, since the same type of finish and aesthetic would be achieved:

> 24 The purpose of the materials covenant is to establish a residential neighbourhood of buildings made with quality and durable materials as a matter of structural integrity as

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[228] *Clare & Ors v Bedelis* [2016] VSC 381 at [113]. Emphasis added.

[229] [2019] VSC 137

well as aesthetic presentation and, I suppose, to get away from what might have once been regarded as undesirable or fire hazardous timber homes or, worse still, shanty fibro-sheeting. The first question is whether the covenant disallows plaster rendering over brick walls. There are various authorities which say that a building materials covenant is not breached by the application of a particular finish such as a concrete render over exposed: see *Jacobs* v *Greig*; *Grech v Garden City* and *Clare v Bedelis*. The photographs in evidence show that the rendered finish achievable on a substrate of polystyrene foam does make it, at least from a distance, imperceptible from a rendered finish over a brick wall. The same type of finish and aesthetic purpose is achieved. I saw fit to reveal to the parties in Court that I am personally closely familiar with the choice and the use of a rendered polystyrene finish on an upper storey external wall.

243. The *Victorian Civil and Administrative Tribunal* has also published several decisions of relevance to building materials restrictive covenants including findings:

a) that render over brick does not result in the breach of a brick covenant:[230]

> The use of zinc or aluminium cladding does not in anyway detract from the underlying compliance with the covenant that the building is constructed of solid brick. There is nothing within the covenant that indicates the building must be read as being constructed of brick. As stated in *Jacobs* 'decorative additions such as are frequently superimposed on the main vertical structure' can be used.

b) that a note on plans requiring compliance with a building materials covenant does not amount a failure to comply with section 61(4) of the Act; and

c) concrete panels covered by brick inlay satisfies a brick veneer covenant:

> 21 A covenant must be read as it would be understood by an ordinary person, accustomed to the ordinary meaning. Brick veneer is a common building technique defined in the Macquarie dictionary and whilst the ordinary person may not view the difference of an external brick wall as constructed of all brick or brick veneer it is what is perceived as the external fabric of the walls.
>
> 22 In this case the applicant is intending to put a brick inlay tile over the inner skin of the building. The applicant submits the brick inlay tiles will have an external appearance of brick, consistent with the appearance of a brick veneer wall. To the ordinary person this will appear as an external brick wall. There is no requirement as to the specification of the brick merely that a layer of brick is required.
>
> 23 Whilst the definition in the Macquarie dictionary indicates bricks being placed over a timber frame. Given changes to building techniques the use of concrete and steel frames make no difference to what is placed on the outer skin other than it must resemble brick or brick veneer. As indicated in *Bedelis* it is possible to satisfy the purpose of a covenant in different ways as building materials change over time. I note that in *Bedelis* whilst the walls were constructed of brick veneer a render was placed over the walls so for all intent the walls were not able to be viewed as brick.

and

d) concrete blocks are not bricks for the purposes of a brick and/or stone restrictive covenant:[231]

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230 *Beman Pty Ltd v Boroondara CC* [2013] VCAT 1249 per Senior Member Rickards

231 *Karlovic v Hobsons Bay CC* [2018] VCAT 1382 per Member Blackburn

> 39 Section 61(4) of the *Planning and Environment Act 1987* prevents a permit being issued, which would result in a breach of a restrictive covenant.
>
> 40 There is a restrictive covenant registered on the title of the land which relevantly requires the owner to not use any material other than brick and/or stone in the construction of the walls of any main buildings, without the consent in writing of Altona Beach Estates Limited.
>
> 41 While the proposal is mostly constructed with brick, its eastern second storey wall is to be of metal cladding and the ground floor southern and eastern walls are to be of concrete block.
>
> 42 Neither of these materials are brick or stone, as required by the covenant.
>
> 43 While concrete blocks may also be called concrete bricks, I do not consider that they fall within the common meaning of the term 'brick' as used in the restrictive covenant.
>
> > 'Brick' is defined in the *Macquarie Dictionary* (online) as:
> >
> > a block of clay, usually rectangular, hardened by drying in the sun or burning in a kiln, and used for building, paving, etc.
>
> 44 I do not consider concrete block, which is not made of clay, to fall within the above definition.
>
> 45 At the hearing, I asked the respondent about the consequences of me imposing a permit condition requiring changed materials, so that the proposal was entirely constructed from brick. I was advised that there would be no external consequences other than the appearance of the different material and that while it had cost implications, a permit condition requiring a change of materials would be preferable to me refusing to grant a permit for the proposal.
>
> 46 Accordingly, I have included a condition on the permit which requires materials to comply with the covenant. This would require the ground floor and first floor walls to all be constructed of brick, unless the covenant is varied or the respondent is able to obtain the consent of the original developer to an alternative material (if the developer is still in existence).

A cost-effective means of amending building materials covenants

244. In *Re Azzopardi Holdings Pty Ltd* S ECI 2022 4301, the Supreme Court was prepared to modify a building materials restrictive covenant without notice to beneficiaries. That was achieved by simply applying the words "or other materials with a rendered finish" after the brick and/or stone restriction.

245. Additionally, in *Re Nikolovski* S ECI 2023 2547, the Court was prepared to add in the following underlined words, again without notice to beneficiaries:

> … the transferee-will not at any time erect construct or build or cause to be erected constructed or built on the said land or any part thereof any building other than a private dwelling house of brick <u>or cement with stone or granite cladding and</u> with a roof of tiles slates or shingles of 2 stories in height with the usual necessary buildings.

246. The Court accepted the Plaintiff's submissions that the fixing of stone or granite finish to a brick substrate could be done without amendment to the covenant (consistent with the established practice of both the Courts and VCAT that the application of render is irrelevant for the purpose of compliance with a building materials covenant) so that all the variation would

allow is a change to the underlying supporting structure. Seen in that context a change to the underlying substrate would result in no injury to beneficiaries.

247. From receiving instructions to receipt of the orders, this process took just over three weeks, which gives an indication as to how efficient the Supreme Court process can be.

The principle in Tonks v Tonks—does "a dwelling" mean "one dwelling"?

248. In *Tonks v Tonks* (***Tonks***),[232] Bongiorno J held, that the use of the phrase 'a dwelling' in a restrictive covenant, was not intended to limit the number of dwellings upon the land, but rather only describe its intended use:

> If the parties to the original covenant had wished to restrict the number of dwelling houses built on each of these lots they could have done so very simply and definitively by replacing the word "a" in the covenant with the word "one", or by making some similar simple amendment. The true construction of the covenant is that it prohibits the placing of any building on the land unless that building is a dwelling house. Provided that any building constructed can be properly described as a dwelling house there would be no breach of the covenant. The covenant says nothing, in my opinion, as to the number of dwelling houses which might be built. To import a restriction as to the number of houses which might be built on lot 3 into the covenant would extend its effect beyond the words used by the parties without any warrant for doing so.[233]

249. The Covenant in that case provided:

> … (the registered proprietor for the time being) will not erect or cause or permit to be erected on the land hereby transferred or any part thereof any building other than a dwelling house. …[234]

250. This approach was followed by the Victorian Civil and Administrative Tribunal in *Berenyi v Moreland CC* and *Samson v Moorabool SC.*[235] In *Berenyi v Mooreland CC*, Senior Member Michael Wright QC noted that if it was the intention of the covenanting parties to restrict development to one dwelling, they would have substituted the word "one" for "a":

> **Construction of the Covenant**
>
> 11 The guiding principle to be applied in construing a restrictive covenant is to ascertain the intention of the parties when the covenant was created according to the ordinary and everyday meaning of the words they used (*Prowse v Johnstone* (2012) VSC 4).
>
> **The First Issue: More than One Dwelling**
>
> 12 In my view the covenant must be construed as allowing more than one dwelling on the land. It is fair to say that the applicant/objectors did not argue strongly to the contrary.
>
> 13 First, the ordinary and everyday meaning of the indefinite article "a" is consistent with either one dwelling or more than one dwelling. However, if it was the intention of the parties to restrict development to one dwelling they would and could easily have said so by substituting "one" for "a". This is a strong reason to construe the covenant as allowing more than one dwelling.[236]

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232 [2003] VSC 195.

233 *Tonks v Tonks* [2003] VSC 195 at [17].

234 *Tonks v Tonks* [2003] VSC 195 at [2].

235 *Berenyi v Moreland CC* [2016] VCAT 1471; *Samson v Moorabool SC* [2012] VCAT 1435.

236 [2016] VCAT 1471 at [11]–[13].

251. While the principle in *Tonks* is frequently applied by municipal councils and the Victorian Civil Administrative Tribunal, Mukhtar AsJ in *Re Hammond* noted that expressions in restrictive covenants containing the indefinite article 'a', such as 'a dwelling house', may not always mean 'one dwelling house', and should still be construed with reference to the usual principles of construction:

> Does the phrase 'a private dwelling house' mean 'one dwelling house'? It is unnecessary, I think, to engage in a disquisition about the principles of construction of restrictive covenants, but it has to be considered to some extent: see generally *Bradbrook and Neave's Easements and Restrictive Covenants*. The learned authors of that work see the construction of a covenant as no different to the objective technique applied by courts in the construction of written contracts.[237]

252. In *Re Hammond*, Mukhtar AsJ observed that the expression 'a private dwelling house' was susceptible of more than one meaning.[238] Namely, a promise to not build 'any building other than a private dwelling house' could be a promise about the type of building, or about the number of dwelling houses:

> …the statement 'I will not build any building other than a private dwelling house' means (and these are my words now) 'I will only build a house and not for example a shop or a factory so that even if I wish to build two houses, I am still keeping my promise because nowhere did I promise it would only be one house.' That is, it is a promise about the type of building. I think that is certainly one meaning. But I do not think it is the only possible meaning. A statement that 'I will not build any building other than a private dwelling house' could also mean 'I can only build a house' which as a matter of impression of language in the non-technical idiom of a purchaser of an ordinary suburban block in 1912 (if not now), may be a way of saying the only permitted building is one dwelling house. To my mind, that is an innate and not a forced ambiguity.[239]

The importance of costs in restrictive covenant applications

Costs are in the discretion of the Court

253. Section 24 of the *Supreme Court Act 1986* (Vic) specifies that costs are in the discretion of the Court:

> **Costs to be in the discretion of Court**
>
> (1) Unless otherwise expressly provided by this or any other Act or by the Rules, the costs of and incidental to all matters in the Court, including the administration of estates and trusts, is in the discretion of the Court and the Court has full power to determine by whom and to what extent the costs are to be paid.[240] …

254. This discretion in relation to costs is absolute and unfettered to ensure substantial justice is achieved between the parties:

> 3 … the court has an absolute and unfettered discretion in relation to costs, and may, in appropriate circumstances, examine the realities of the litigation and attempt to achieve on the matter of costs substantial justice as between the parties.[241]

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237 *Re Hammond* at [10].

238 *Re Hammond* [2015] VSC 608 at [1].

239 *Re Hammond* [2015] VSC 608 at [17].

240 *Supreme Court Act 1986* (Vic) s 24.

241 *Manderson v Wright (Costs)* [2018] VSC 177, [3] (John Dixon J).

The settled practice in civil litigation, however, is that costs follow the event

255. Despite this discretion, there is a settled practice that costs follow the event, and a successful litigant should receive their costs absent disqualifying conduct:

> Although costs are in the discretion of the Court, there is a settled practice (sometimes called a general rule) that in the absence of good reason to the contrary a successful litigant should receive his or her costs. It is not, however, a legal rule devised to control the exercise of the discretion.[242]

This settled practice is modified in section 84 applications to create a presumption that a plaintiff will cover the standard costs of beneficiaries

256. This discretion is modified in certain applications pursuant to section 84 of the *Property Law Act 1958* (Vic) to the effect that "unless the objections taken are frivolous, an objector should not have to bear the burden of his own costs when all he has been doing is seeking to maintain the continuance of a privilege which by law is his." As explained by Derham AsJ in *ROJ Property Group Pty Ltd & Anor v Eventpower Property Pty Ltd (Costs)*:[243]

> 7 … 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:[244]
>
> (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;
>
> (c) the plaintiff will usually obtain an advantage, often a great advantage commercially, by the modification or removal sought;[245]
>
> (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;[246] and

However, this presumption is not an entitlement to costs

257. This principle was applied by Morris J in *Stanhill Pty Ltd v Jackson*[247] who noted:

> The principle set out in *Re Withers* is consistent with other decisions of the Court, such as that by Gillard J in *Re Markin*, Lush J in *Re Shelford Church of England Girls' Grammar School* and McGarvie J in *Re Ulman*. In my opinion, it is a sound principle.

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242 *BCA Asset Management Group Pty Ltd v Sand Solutions (Vic) Pty Ltd* [2021] VSC 177, [11].

243 [2023] VSC 268

244 *Wong* [2014] VSC 282, [13]–[19].

245 For example see the observations of Anderson J in *Re Withers* [1970] VR 319, 319–320.

246 Ibid 320.

247 *Stanhill Pty Ltd v Jackson* [2005] VSC 169.

258. However, his Honour sounded a note of caution that objector defendants should not see the reimbursement of costs as an entitlement:

> 6 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.[248]

259. An example of such conduct can be found in *ROJ Property Group Pty Ltd & Anor v Eventpower Property Pty Ltd (Costs)*[249]. This case concerned a dispute between two commercial landowners each keen to advertise to passing traffic along the West Gate freeway. Derham AsJ gave the Defendants a time to absorb the nature of the application to modify the covenant, but after that period, his Honour found that the defendants had inappropriately put the plaintiff to unnecessary expense:

> 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 another company with a common director and secretary, namely Eventpower Solutions Pty Ltd.[250] 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'.[251] 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.[252] I also fail to see how this was not obvious to the defendant from early in the proceeding.
>
> …
>
> 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

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248 *Ibid,* [6].

249 [2023] VSC 268

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

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

252 Reasons [80].

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..

Offers of compromise and Calderbank offers can be taken into account in restrictive covenant applications

260. In *Mamfredas Investment Group Pty Ltd v PropertyIT and Consulting Pty Limited* Slattery J found that Calderbanks can be taken into account in applications to modify restrictive covenants[253]

> 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].

261. In *Wong v McConville*[254] Derham AsJ set out the relevant framework for Calderbank offers in a comprehensive way:

> 20. In *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2),*[255] 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.
>
> 21. In *Luxmore Pty Ltd v Hydedale Pty Ltd*[256] 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 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.[257] 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.

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253 [2013] NSWSC 929

254 [2014] VSC 282

255 (2005) 13 VR 435, 441–2 ('***Hazeldene***').

256 (2008) 20 VR 481; [2008] VSCA 212, [11].

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

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;[258]

    (c) The policy objectives underlying the principle in *Calderbank v Calderbank* include:[259]

        (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.[260]

        (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;[261]

        (iv) It is nevertheless important not to discourage potential litigants from bringing their disputes to the Court;[262]

    (d) It is undesirable that *Calderbank* letters be burdened with technicality;[263]

    (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 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;[264]

    (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;[265]

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

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

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

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

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

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

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

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

(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;[266] 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*,[267] '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'.

262. In *ROJ Property Group Pty Ltd & Anor v Eventpower Property Pty Ltd (Costs)* Derham AsJ found that had he not determined to order the defendant pay the plaintiffs' costs from an earlier date, he would have ordered costs from the date of the first Calderbank:

> 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.

263. Significantly, though this was an unusual case in which expert evidence was not presented. A Calderbank might therefore not be effective until late in most proceedings:

> 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.

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

267 [2003] FCAFC 1, [8].

> 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.

264. Calderbanks can have limited utility in binary applications, or matters in which there is little difference between a win and a loss. In *Lahanis v Livesay & Ors (Costs)* [2021] VSC 65 Derham AsJ found that in an application to modify a single dwelling covenant to allow two dwellings, there was insufficient difference between the offer to compromise and capitulation:

> 51 In this case, the factors that make up a so called 'genuine offer' have been separately considered, including whether the offer involved a real element of compromise. These matters include the timing of the offer, content and terms of the offer, its clarity, the explanation given for it, what was known or not known to the offeree at that time and the offerees' prospects of success. What is left for consideration in order to determine whether the offer was a 'genuine compromise', in the sense of a real compromise, is whether it had an element of compromise or whether in truth it required the defendants to capitulate. In my view, it essentially required the defendants to capitulate.
>
> 52 In conclusion, it is in my view incorrect to say, as the plaintiff submitted, that the real cause of the litigation from the time of the expiry of the Calderbank offer was the defendants' refusal to accept the offer and not the defendants' legitimate action in defence of the Covenant. The defendants were entitled to put their views before the court and justified in opposing the application, so that the costs incurred by them 'were a necessarily incident to such an application'. In my view, it is only right and proper that the plaintiff should pay all the defendants' costs incurred by reason of the application on the standard basis.

265. Calderbanks have been successfully applied by defendants in *Michelmore v Suhr*[268], and *Manderson v Smith.*[269] In the latter case Efthim AsJ held that an offer of compromise should have been accepted and directed the Plaintiff to pay indemnity costs:

> 21 In my view, indemnity costs should be awarded to the defendants from the date of the first offer of compromise. The plaintiff commenced the proceedings knowing that he had a fence on his own property encroached the boundary line by a much greater distance than the defendants' fence and knowing that all other residents had fences. He should also have known that the defendants' fence was at best only six centimetres over the boundary line.
>
> 22 The first offer of compromise should have been accepted and, in my view, it was unreasonable that it was not. The defendants have come to the Court with clean hands, they obtained a permit from the local council to erect the fence. It is clear from the evidence of Ms Smith that the defendants were concerned about the native flora. They were put to a great deal of expense in defending this claim which they should never have had to do.

Costs may follow the event in interlocutory hearings

266. Costs are not infrequently imposed on objectors in covenant cases where costs are deemed to have been thrown away:

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268 [2013] VSC 284

269 Unreported, S ECI 2020 03378, 24 August 2021

a) an order for costs was made against the defendants in *Rouditser & Rouditser v Schreuder & Schreuder* S ECI 2018 01166 after the defendants were found by Derham AsJ to have been responsible for the trial being adjourned;

b) an order for costs was made against the defendants in *Livingstone v Kelleher & Pomponio* S ECI 2020 0460 after Matthews AsJ found the first defendant had put the court and the parties to unwarranted expense in necessitating an additional directions hearing;

c) an order for costs was made against the defendants in *Sijercic & Sijercic v Brotchie & Bennett in* S ECI 2021 03620 after Matthews AsJ concluded the defendant had not made sufficient effort to cooperate in the settling of pre-trial directions; and

d) an order for indemnity costs was made against a defendant in *210 Hawthorn Road Pty Ltd v Megan Ellinson and Ors* S ECI 2022 05081:

> I will allow the plaintiff's application for indemnity costs in respect of the costs dispute. As the reasons above disclose, there was no proper basis in fact or law for Dr Shafer's application to recover the costs of Mr Shafer's invoices. I accept the plaintiff's submission that it was a frivolous application. It was a poor use of time. It falls into the category of cases that is continued in wilful disregard of known facts or clearly established law, and warrants an order for indemnity costs: see *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189 at 7.

267. Costs were also awarded against an objector in *Jiang v Monaygon Pty Ltd (Costs)*[270] where Derham AsJ ordered that the Defendants were entitled to their costs up until the time of the mediation, but from that time onwards, they knew, or should have known, that their case was hopeless:

> 27 The defendant's solicitor and counsel (senior and junior) performed their respective tasks reasonably and properly, in the sense that they behaved respectfully, they generally abided the orders of the Court and they presented their client's case in the best possible way that they could. At the start of his submissions, Senior Counsel for the defendant even acknowledged that the decided cases made it difficult to bring its 'substantial injury' within the ambit of s 84, so that they did realise the hurdle the defendant faced. That forthright acknowledgment was clearly warranted. But regrettably it did not stop the defendant advancing a case that had no real factual or legal merit and thus no real prospect of success.
>
> 28 In these circumstances, the lack of substance to the opposition to the modification sought by the plaintiff means that the appropriate order is that the defendant pay the plaintiff's costs from an appropriate point, allowing sufficient time for the defendant to obtain proper and considered legal advice.
>
> 29 It is therefore necessary to consider the point from which it is appropriate to order the defendant to pay the plaintiff's costs.
>
> 30 The application was notified to the benefitted land holders pursuant to an order of the Court made on 26 August 2016. The notice was served by 9 September 2016. The defendant gave notice of intention to appear and oppose the application on 6 December 2016. By orders made that day, the defendant was joined to the proceeding and directions were made for the filing of material and the holding of a mediation by 28 April 2017.

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270 [2017] VSC 655

> 31 The mediation was held on 19 April 2017. On 27 April 2017 the parties requested a brief adjournment following the holding of the mediation, which was granted by order made that day. On 20 June 2017 the Court was informed that following the mediation the plaintiff and defendant had signed conditional terms of settlement and subsequently the condition or conditions failed. On that day the trial of the proceeding was fixed to commence on 21 September 2017 with orders and directions for that purpose.
>
> 32 This sequence suggests that the last and best opportunity for the defendant to receive and accept proper and considered legal advice as to the factual and legal merit of the application, its prospects of success, and the prospects of the defence in fact run succeeding, was at the time of the mediation. Accordingly that is the appropriate point to which the plaintiff should pay the defendant's costs, on a standard basis, and the date after which the defendant should be ordered to pay the plaintiff's costs of the proceeding, again on a standard basis.
>
> 33 The result is that it will be ordered that the plaintiff shall pay the defendant's costs up to and including the mediation of the proceeding on 19 April 2017 and the defendant shall pay the plaintiff's costs of the proceeding after the mediation on 19 April 2017, both on a standard basis to be taxed in default of agreement.

268. These examples of costs orders against defendants should not dissuade beneficiaries from acting in good faith to protect their property rights and from subsequently seeking reimbursement for the reasonable costs in doing so but defendants (and practitioners) must remember that they are bound by the following overarching obligations in the *Civil Procedure Act 2010*:

> **20 Overarching obligation to cooperate in the conduct of civil proceeding**
>
> A person to whom the overarching obligations apply must cooperate with the parties to a civil proceeding and the court in connection with the conduct of that proceeding.
>
> **22 Overarching obligation to use reasonable endeavours to resolve dispute**
>
> A person to whom the overarching obligations apply must use reasonable endeavours to resolve a dispute by agreement between the persons in dispute, including, if appropriate, by appropriate dispute resolution, unless—
>
> (a) it is not in the interests of justice to do so; or
>
> **23 Overarching obligation to narrow the issues in dispute**
>
> If a person to whom the overarching obligations apply cannot resolve a dispute wholly by agreement, the person must use reasonable endeavours to—
>
> (a) resolve by agreement any issues in dispute which can be resolved in that way; and
>
> (b) narrow the scope of the remaining issues in dispute—
>
> unless—
>
> (c) it is not in the interests of justice to do so; or
>
> (d) the dispute is of such a nature that only judicial determination is appropriate.
>
> **24 Overarching obligation to ensure costs are reasonable and proportionate**
>
> A person to whom the overarching obligations apply must use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to—
>
> (a) the complexity or importance of the issues in dispute; and
>
> (b) the amount in dispute.

25 Overarching obligation to minimise delay

For the purpose of ensuring the prompt conduct of a civil proceeding, a person to whom the overarching obligations apply must use reasonable endeavours in connection with the civil proceeding to—

(a) act promptly; and

(b) minimise delay.

Combined permit and amendment process—96A of the *Planning and Environment Act 1987*

269. Interestingly, the least-used means of removing or amending a covenant is also the one arguably capable of delivering the most ambitious proposals — namely, applying for a combined permit and amendment pursuant to section 96A of the *Planning and Environment Act 1987*. This section provides:

DIVISION 5 — COMBINED PERMIT AND AMENDMENT PROCESS

96A Application for permit when amendment requested

(1) A person who requests a planning authority to prepare an amendment to a planning scheme may also apply to the planning authority for—

(a) a permit for any purpose for which the planning scheme as amended by the proposed amendment would require a permit to be obtained; or

(b) if the amendment provides for the removal or variation of a registered restrictive covenant, a permit for a use or development which would, if the restrictive covenant were not removed or varied, result in a breach of that registered restrictive covenant.

270. In this process, the assessment is made according to ordinary planning principles and the broad, open textured test known as 'net community benefit'. In the *Mornington Peninsula C46 Panel Report*, Member Ball explained:

> First, the Panel should be satisfied that the Amendment would further the objectives of planning in Victoria. …
>
> Second, the Panel should consider the interests of affected parties, including the beneficiaries of the covenant. It may be a wise precaution in some instances to direct the Council to engage a lawyer to ensure that the beneficiaries have been correctly identified and notified.
>
> Third, the Panel should consider whether the removal or variation of the covenant would enable a use or development that complies with the planning scheme.
>
> Finally, the Panel should balance conflicting policy objectives in favour of net community benefit and sustainable development. If the Panel concludes that there will be a net community benefit and sustainable development it should recommend the variation or removal of the covenant.[271]

271. Here an applicant runs an entirely different risk. To succeed, an application will need the support of the local council *and* the relevant Minister at the time the amendment is both prepared and adopted. In the worst-case scenario, the period between these two events may be many months and punctuated by Council elections, adding a further element of political risk.

272. An example of this process being successfully employed was the approval of a Place of Assembly (museum) at 217 And 219 Cotham Road, Kew as part of Amendment C143 to the

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[271] *Mornington Peninsula C46 Panel Report* (Panel Report, April 2004) 25.

Boroondara Planning Scheme. This proposal involved the conversion of two dwellings into a contemporary museum with a liquor licence and on-site parking spaces, contrary to a restrictive covenant that prevented the use of the land for anything other than dwellings.

273. Arguably, there would have been no prospect that such an ambitious project would have been approved under section 84 of the *Property Law Act 1958* (Vic), but the project received Council backing at both ends of the process and a highly favourable planning panel report.

Removing or modifying a covenant by consent--88(1C) of the *Transfer of Land Act 1958*

274. A restrictive covenant can be removed or modified by consent. Section 88(1C) of the *Transfer of Land Act 1958* (Vic) that provides:

> (1C) A recording on a folio of a restrictive covenant that was created in any way other than by a plan under the *Subdivision Act 1988* may be amended or deleted by the Registrar under this section if the restrictive covenant is varied or released by—
>
> (a) the agreement of all of the registered proprietors of the land affected by the covenant; or
>
> (b) an order of a court or VCAT.

275. If the proposed modification or removal is not controversial and/or the number of beneficiaries is not large, this may be the most efficient means of proceeding.

Removing a covenant at the direction of the Registrar — 106(1)(c) of the *Transfer of Land Act 1958*

276. Finally, a covenant may be removed at the direction of the Registrar of Titles pursuant to section 106(1)(c) of the *Transfer of Land Act 1958* (Vic). This provides:

> (1) The Registrar—
>
> (c) if it is proved to his satisfaction that any encumbrance recorded in the Register has been fully satisfied extinguished or otherwise determined and no longer affects the land, may make a recording to that effect in the Register;

277. This provision can be used for covenants that do not define the land to which the benefit is affixed or where the benefit of the covenant might be said to have not passed to subsequent successors or transferees. Covenants of this nature were discussed in *Prowse v Johnstone*[272] at [62] and *Re Hunt*[273]. However, the Registrar will often rely on this power in the clearest of cases and is quick to refer applicants to the Supreme Court for clarification of the covenant's enforceability under section 84(2) of the *Property Law Act 1958*.

Removing a restrictive covenant imposed by mistake

278. The Supreme Court also has the power to remove restrictive covenants accidentally imposed by way of common mistake. For instance, in *Re: Prime Lands (Aust) Pty Ltd* S ECI 2022 02217 Matthews AsJ explained:

> 39 I accept the Plaintiff's submission that rectification is not confined to a contract and may be appropriate in respect of other instruments. Like Mukhtar AsJ in *Re Saliba S ECI* 2017 4200, I consider that where a transfer of land contains a mistake, in the sense of a failure to accord with the common intention of the parties to that transfer, it is susceptible to rectification and that the instrument of Transfer is "a concomitant of an agreement to sell and buy land" and provides a clear nexus to the intention of the parties as evinced in the Contract of Sale. However, it is not necessarily the case that the instrument sought to be rectified be one of a suite of documents giving effect to the contract.
>
> 40 For rectification on the grounds of a common mistake, that is, that the document does not reflect the common intention of the parties, the party seeking rectification must show a common intention continuing down to the execution of the document. While it is not necessary to show a prior agreement amounting to a contract provided that a continuing common intention has been established, in this instance, this is what we have. Here, the Transfer has not given effect to the common intention of the parties, that common intention being manifested in the Contract of Sale.

279. The Court ultimately ordered the deletion of the covenant offering, if required, a direction under s 103(1) of the *Transfer of Land Act* 1958:

> The restrictive covenant created in the Transfer of Land AR902375G as registered under the Transfer of Land Act 1958 (Vic) made between Tezek Pty Ltd as transferor and the Plaintiff as transferee on the land in lot 1616 on Plan of Subdivision No. 804775F, being the whole of the land described in Certificate of Title Volume 12051 Folio 810, shall be deleted it in its entirety to correct a common mistake made by the parties in the inclusion of the Restrictive Covenant in the Transfer of Land.

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[272] *Prowse v Johnstone* [2015] VSC 621.

[273] *Re Hunt* [2017] VSC 779.

Restrictions on title under the *Subdivision Act 1988*

280. The above discussion has largely focused on restrictive covenants in equity and it is generally accepted that the Supreme Court's section 84 jurisdiction extends to modifying or removing restrictions on a plan of subdivision. However, the appropriateness of this is not free from doubt. As explained in the VLRC Report:

> 6.14 Restrictive covenants need to be distinguished from covenants in statutory agreements and restrictions in a registered plan (statutory restrictions).
>
> 6.15 'Restrictive covenant' is a well-defined legal term and its legal consequences are fully specified in case law. It belongs in the realm of property law. Its clarity is being marred by legislation that extends the legal tests and procedures that apply to restrictive covenants to statutory agreements and uses the term 'restrictive covenant' to define restrictions.
>
> …
>
> 6.40 It is commonly assumed that a restriction created by registration of a plan is a restrictive covenant and that all lot owners in the subdivision have the benefit of it. The idea is likely to have been fostered by the inclusion of 'restrictive covenant' in the definition of 'restriction' in the Subdivision Act. It also finds some support from administrative provisions recently inserted into the Transfer of Land Act, which refer to a 'restrictive covenant created by plan'[274]
>
> 6.41 We disagree with this assumption. A restriction created in a plan is not one that equity would recognise or enforce, as the restriction is not created for the benefit of specified land. Equity has strict requirements about identifying the benefited land.[275]
>
> 6.42 In order for a restriction in a plan to operate as a restrictive covenant, the legislation would need to expressly give it that effect and confer the benefit of the covenant on other land.[276] Section 24(2)(d) of the Subdivision Act does not deem a restriction in a plan to be enforceable as if it were a restrictive covenant or provide for the benefit to be attached to other land. Nor does anything in the Transfer of Land Act give a restriction created under the Subdivision Act the effect of a restrictive covenant.
>
> …
>
> 8.4 Section 84(1) of the *Property Law Act* gives the court power to remove or vary 'any restriction arising under covenant or otherwise as to the user [of land] or any building thereon'. This phrase is unchanged from the *Real Property Act 1918* (Vic), and as such was never intended to refer to restrictions created under the *Subdivision Act 1988* (Vic) (Subdivision Act). 'Restriction' is used in its functional sense, to refer to the effect of the covenant on the use of the land.
>
> 8.5 The phrase 'any restriction arising under covenant *or otherwise'* (our italics) has generated discussion about the scope of the English equivalent of section 84. In Victoria, section 84 has only been applied to restrictive covenants7 and the extent to which it applies to restrictions arising 'otherwise' has yet to be considered by a court.[277]

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274 Ibid, 78. For example, *Transfer of Land Act 1958* (Vic) s 88(1AA)–(1A); *Subdivision Act 1988* (Vic) s 4(4), s 37(3)(c)(iv)(D).

275 See, e.g., *Re Dennerstein* [1963] VR 688, 696; *Fitt v Luxury Developments Pty Ltd* (2000) VSC 258, [100]–[106]; *Morgan v Yarra Ranges SC* (2009) VCAT 701, [14] citing *Thornton v Hobsons Bay CC* (2004) VCAT 383, [10]; *Bradbrook and Neave*, [13.39]–[13.41].

276 An example of how this could be done is section 88B(3) of the *Conveyancing Act 1919* (NSW).

277 Footnotes omitted.

281. To add to the confusion, restrictions on plans can be expressed as equitable restrictions, notwithstanding the arguably misleading nomenclature of "Land to Benefit":[278]

CREATION OF RESTRICTION.

UPON REGISTRATION OF THIS PLAN THE FOLLOWING RESTRICTION IS CREATED:

LAND TO BENEFIT: LOTS 1 TO 14 (ALL INCLUSIVE)

LAND TO BE BURDENED: LOTS 1 TO 14 (ALL INCLUSIVE)

DESCRIPTION OF RESTRICTION.

1. THE OWNERS OF LOTS 1 TO 14 (ALL INCLUSIVE) SHALL NOT ALLOW THE ERECTION OF MORE THAN ONE DWELLING ON ANY SINGLE LOT OR FURTHER SUBDIVISION OF ANY LOT.

2. THE OWNERS OF LOTS 1 TO 14 (ALL INCLUSIVE) SHALL NOT DEVELOP THE LAND OTHER THAN IN ACCORDANCE WITH AN APPROVED NEIGHBOURHOOD DESIGN PLAN PURSUANT TO PLANNING PERMIT No.1057/97.

282. That said, in *Manderson v Wright* [2016] VSC 677, Emerton J suggested that where a restriction in a plan of subdivision is recorded on title, it operates as a registered restrictive covenant, and is therefore subject to the usual methods for varying or removing restrictive covenants:

> 11. Pursuant to s 3 of the *Subdivision Act 1988* (Vic), 'restriction' means a restrictive covenant or a restriction that can be registered, or recorded in the Register under the Transfer of Land Act 1958 (Vic) .The restrictions in the plan of subdivision, including restriction No 2, are recorded on the titles to the land in the Warrenbeen subdivision. They therefore operate as registered restrictive covenants.
>
> 12. Section 88 of the Transfer of Land Act provides that a recording on a folio of a restrictive covenant that was created by a plan of subdivision must not be deleted or amended by the Registrar unless the restrictive covenant is released or varied by:
>
> (a) a plan of subdivision or consolidation; or
>
> (b) a planning scheme or permit under the *Planning and Environment Act 1987* (Vic) ; or
>
> (c) an order of a court…
>
> 14. Once a restrictive covenant has been recorded on title, there are therefore specific legal mechanisms that need to be used to vary the terms of the covenant.

283. Further, section 88(1B) of the *Transfer of Land Act* expressly provides that a restrictive covenant created by a plan under the *Subdivision Act* and registered on title may be varied by an order of a court:

> (1B) A recording on a folio of a restrictive covenant created by a plan under the Subdivision Act 1988 must not be amended or deleted by the Registrar under this section unless the restrictive covenant is varied or released by—
>
> (a) the agreement of all of the registered proprietors of the land affected by the covenant with the consent of the council of the municipal district in which the land is located; or
>
> (b) an order of a court or VCAT.

[278] See the discussion of a similar restriction in *Manderson v Wright* [2016] VSC 677.

Removal of restrictive covenants in the compulsory acquisition of land

284. The effect of section 24 of the *Land Acquisition and Compensation Act 1986* is that upon the publication of a notice of acquisition in the Government Gazette land vests in the acquiring authority free from encumbrances such as restrictive covenants:

> **24 Effect of notice of acquisition**
>
> (1) Subject to this section, upon publication in the Government Gazette of a notice of acquisition—
>
> (a) the interest in land described in the notice vests in the Authority without transfer or conveyance freed and discharged from all trusts, restrictions, dedications, reservations, obligations, mortgages, encumbrances, contracts, licences, charges and rates of any kind; and
>
> (b) any interest that a person has in that land is divested or diminished to the extent necessary to give effect to this subsection.

ENFORCING A BREACH OF A RESTRICTIVE COVENANT

The Court is generally not sympathetic to those who defiantly breach restrictive covenants

285. There have been a few recent cases in which restrictive covenants have been enforced in Victoria:

a) *Fitt v Luxury Developments*[279] has been mentioned previously. This was the return of a summons in a proceeding instituted by an originating motion seeking declarations and a permanent injunction to restrain a breach of a restrictive covenant. It didn't end well for the defendant, Luxury Developments with Gillard J observing that it had failed to utilise section 84 of the *Property Law Act 1958* prior to commencing construction:

> 332 Luxury Developments commenced building works on 14 February 2000 in the knowledge that the plaintiffs and particularly Mr Fitt had warned Mr Seiffert that if it commenced building works they would take legal proceedings.
>
> 333 The plaintiffs issued their originating motion on 6 March 2000 and Mr Seiffert continued with the building works to 31 March. Luxury Developments have spent approximately $75,000 on the works to date. A proportion of the cost was incurred after the proceeding was instituted.
>
> 334 The covenant in question is a restrictive one and as a general rule the court will grant an injunction and discretionary factors are of little moment. See *Post Investments Pty Ltd v Wilson*; *Hawthorn Football Club v Harding*.
>
> 335 I am satisfied that there are no discretionary factors which would preclude the plaintiffs enforcing their right. Luxury Developments proceeded with this development with full knowledge that it had been opposed at every step by the plaintiffs and others and with the knowledge that there was a substantial probability that a proceeding would be brought against it. Further, Luxury Developments did not take advantage of the course that was open to it to approach the court under s.84 of the *Property Law Act* to determine the question before commencing the building works.

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279 *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258

> 336 I reject the submission that the plaintiffs have been guilty of laches. The defendant continued with the works for a substantial period after service of the proceeding. Its damage has been increased accordingly. Further taking into account the circumstances the granting of the injunction would not affront this court in its equitable jurisdiction.

b) *Clare v Bedelis* involved a proceeding where the plaintiff claimed that the defendant had breached the covenant seeking:

   1) a permanent injunction restraining the defendant from breaching the covenant;

   2) orders requiring the defendant to demolish an existing house which was allegedly erected in breach of the covenant; and

   3) damages either in addition to or in substitution for an injunction.

   The defendant denied any breach of the covenant and successfully established that the house erected on the Land had walls of brick and was not more than one storey in height.

c) See too *Manderson v Wright (No 2)* [2018] VSC 162, below.

The consequences of breaching a covenant can be frightening

286. In *Manderson v Wright (No 2)* [2018] VSC 162 Justice John Dixon ordered the demolition of about $1 million of building renovations in the Barwon Heads, saying the building works occurred outside the permitted building envelope governed by a restrictive covenant:

> I am not persuaded in all of the circumstances that the hardship to the defendant from a demolition order is out of all proportion to the relief assured to the plaintiff.

287. The Court found that the defendant knew of the risk of enforcement, but pressed on:

> 76. The defendant already had advice from her architect and understood the problem. Earlier, on 29 January 2016, the architect emailed the plaintiff as follows:
>
> > I have drawn where I think the house is in relation to the proscribed building envelope. It won't be completely accurate as we have never had the property surveyed but I think we can assume that the original house was never within the required space.
> >
> > I'm assuming your neighbours (who are the only ones who can enforce this) won't have the stomach for it as it may end up backfiring on anyone who has done some work or cleared trees in the intervening twenty years. If any action is taken by a valid complainant it will need to be a Civil complaint.
> >
> > I recommend we soldier on until or unless we are formally notified of any problem. At the moment it sits as a verbal complaint with the planning department at City of Greater Geelong who have no jurisdiction in this.

288. A subsequent decision on costs of the proceedings, saw the defendant liable for 50% of the costs of the proceeding, claimed by the plaintiff to be an eye-watering $460,000.

That said, not all breaches are significant enough to warrant enforcement

289. However, it is important to appreciate that the Supreme Court will not enforce every breach of a restrictive covenant.

290. *Manderson v Smith S ECI 2020 03378* concerned the same resident of Barwon Heads applying for a mandatory injunction to compel his neighbours to remove at their cost, a fence constructed on their own land, that the plaintiff asserted was in breach of a restrictive covenant.

291. Efthim AsJ found that while there had been a breach of the restrictive covenant, his Honour refused to uphold Manderson's application:

> 56 Here the defendants' fence was not erected entirely on the boundary line. A small part of it is erected outside Lot 3 and at best the fence encroaches the hatched area by approximately 6cm. The fence does breach the Covenant. However I agree with the defendants that any incursion by the front fence into the hatched area is *de minimis*. If I ordered that the fence be removed, then there is a possibility that vegetation would need to be removed or damaged. It could do more harm than leaving the fence where it is.

292. A curious aspect of the case was that the Plaintiff's own fence was also in breach of the covenant:

> 28 In cross-examination Mr Manderson agreed that all properties in Warrenbeen Court have fences. He also agreed that he had a fence and a gate, and believes that the fence encroaches further than 6cm, and more like one to two metres, on to the hatched area on his lot (which is the area on which no buildings can be erected).

ATTEMPTS AT REFORM

293. In 2011, the Victorian Law Reform Commission published an extensive review of the law in relation to restrictive covenants and easements. It found the most appropriate approach for reform was the regulation of covenants by planning legislation (be it state or local/municipal planning policies). Crucially, this change would mean that planning legislation would modify the operation of covenants, but would not permit their removal:[280]

> 7.127 We propose a new model, in which covenants are regulated rather than remove by planning legislation. The key elements of this model arose from submissions in response to our consultation paper and from our subsequent consultations and deliberations.
>
> 7.128 As the model was not suggested as an option for reform in our consultation paper, stakeholders and the wider public have not yet had an adequate opportunity to comment on it. For this reason, we put the model forward as a set of proposals for further consultation rather than as a recommendation.
>
> 7.129 The following proposals give effect to the principle that regulatory easements and restrictions created by operation of statute for public planning purposes should be removed or varied by planning processes, while restrictive covenants and private easements attached to benefited or dominant land should be removed or varied under property law processes.
>
> 7.130 We propose that the provisions in section 23 of the Subdivision Act and in the Planning and Environment Act for the removal and variation of easements and restrictions should

[280] Victorian Law Reform Commission, *Easements and Covenants: Final Report* (Victorian Law Reform Commission 2011), 110.

no longer apply to restrictive covenants. The provisions would be retained for easements and statutory restrictions only.

7.131 Responsible authorities would no longer be able to grant a permit to remove or vary a restrictive covenant. The removal or variation of restrictive covenants without the consent of benefited owners would require an order under section 84(1) of the Property Law Act.

7.132 New provisions in the Planning and Environment Act would provide that:

- a planning scheme may specify forms of use or development of land that cannot be prevented by a restrictive covenant.
- a restrictive covenant cannot be enforced to the extent that it is inconsistent with such a specification.[281]

7.133 The effect of these amendments would be that a specification in a planning scheme could affect the operation of a covenant but not authorise its removal or variation.

7.134 We do not recommend that the specification should have the effect of suspending the covenant, as in section 28 of the EPAA. The concept of suspension is unnecessary and confusing. It creates uncertainty by suggesting that the effect on the covenant is temporary.

7.135 A planning scheme specification would be an amendment to a planning scheme. It could apply either to all existing restrictive covenants, or only to covenants created after the commencement of the relevant amendment. There would be no need for the amendment to identify the specific covenants or the lots affected by them.

7.136 Specifications that are intended to operate state-wide would be included in the Victorian Planning Provisions, which incorporate the State Planning Policy framework.[282] A specification that is intended to operate only within a municipal district, or within a particular zone, could be included in the local provisions of the planning scheme.

7.137 As the specification of a use or development would require an amendment to a planning scheme, benefited owners would be able to make submissions about the proposed amendment.[283]

7.138 Although owners corporation rules are outside our terms of reference, we suggest that the same mechanism could be used to restrict the operation of rules that impede the implementation of planning policies.[284]

7.139 There would be no need to amend the recording of a covenant in the register to show that its operation is restricted by a planning scheme specification. The register does not generally show the effect of land use regulation on property rights.[285] Since covenants are merely recorded, not registered, there is no question of inconsistency with the indefeasibility provision in section 42 of the *Transfer of Land Act 1958* (Vic).

294. Significantly, the VLRC found that newly created covenants should have a mandated limited life:

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281 This would require amendments to ss 6(g) and 6A of the *Planning and Environment Act 1987* (Vic).

282 Moreland Energy Foundation, Submission 30. 2, said that the suspension process should be able to be initiated by residents, local government or the Minister.

283 Section 21 of the *Planning and Environment Act 1987* (Vic) provides that any person may make a submission.

284 Moreland Energy Foundation, Submission 30, 1–2, where the Foundation points out that both owners corporation rules and covenants can impede sustainability measures.

285 Zoning and overlays are shown in planning certificates issued under the *Planning and Environment Act 1987* (Vic) s 199 and the *Planning and Environment Regulations 2005* s 57.

36. A restrictive covenant that is recorded by the Registrar after a specified date must be for a defined period of time not exceeding 20 years.

295. The VLRC found that planning schemes should be relieved of their powers to remove covenants:

Regulation as an alternative to removal

38. We propose the following set of reforms to planning legislation and recommend further public consultation regarding their implementation:

a. It should no longer be possible to remove a restrictive covenant by registration of a plan under section 23 of the *Subdivision Act 1988* (Vic). Consequential amendments should be made to the *Planning and Environment Act 1987* and the *Subdivision Act 1988* to omit provisions that enable restrictive covenants to be removed or varied by or under a planning scheme.

b. In determining an application for a planning permit, a responsible authority should not be expressly required to have regard to any restrictive covenant.

c. The *Planning and Environment Act 1987 (Vic)* should provide that:

i) The Victorian Planning Provisions may specify forms of use or development of land that cannot be prevented or restricted by a restrictive covenant.

ii) A planning scheme may, in respect of a zone or a planning scheme area, specify forms of permitted use or development of land that cannot be prevented or restricted by a restrictive covenant.

iii) A restrictive covenant is unenforceable to the extent it is inconsistent with such a specification.

296. The report also recommended that the Supreme Court, the County Court, the Magistrates' Court and VCAT should have concurrent jurisdiction to hear applications under section 84 of the *Property Law Act 1958* (Vic)*:*

Forum and costs

43. The Supreme Court, the County Court, the Magistrates' Court and VCAT should have concurrent jurisdiction to hear and determine applications under sections 84(1) and (2) of the *Property Law Act 1958*.

44. Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) should provide that, for the purpose of hearing an application under section 84 of the *Property Law Act 1958* (Vic), VCAT must be constituted by or include a member who in the opinion of the President has knowledge of or experience in property law matters.

45. In an application under section 84 of the *Property Law Act 1958*, the court or VCAT should apply the following principles to the award of costs:

a. Where the application is unsuccessful, the applicant should normally pay the costs of any respondent entitled to the benefit of the easement or restriction.

b. Where the application is successful, the applicant should normally pay the costs of the respondent incurred prior to the point in time at which, in the opinion of the court or of VCAT, the respondent has had a full opportunity to assess the merits of the application. The respondent should normally bear his or her own costs incurred after that point, but not the costs of the successful applicant.

297. The VLRC also recommended a new set of conditions that would replace the existing criteria in section 84(1)(a)–(c) of the *Property Law Act 1958* — a helpful expansion of the criteria over the essentially present test of "substantial injury":

Relevant considerations

46. The conditions in section 84(1)(a)–(c) of the *Property Law Act 1958* (Vic) should be removed. Instead, the court or VCAT should be required to consider the following matters in deciding whether to grant an application for the discharge or modification of an easement or restrictive covenant:

a. the relevant planning scheme

b. the purpose of the easement or restrictive covenant

c. any changes in circumstances since the easement or restrictive covenant was created (including any change in the character of the dominant or benefited land or the servient or burdened land or the neighbourhood)

d. any increased burden of the easement on the servient land resulting from changes to the dominant land or its mode of use

e. the extent to which the removal or variation of the easement or a restrictive covenant would cause material detriment to a person who has the benefit of the easement or restrictive covenant

f. the extent to which a person who has the benefit of an easement or a restrictive covenant can be adequately compensated for its loss

g. acquiescence by the owner of the dominant land in a breach of the restrictive covenant

h. delay by the dominant owner in commencing legal proceedings to restrain a breach of the restrictive covenant

i. abandonment of the easement by acts or omissions

j. non-use of the easement (other than an easement in gross) for 15 years

k. any other factor the court or VCAT considers to be material.

298. Notwithstanding the rigour and extent of substantive issues identified by the VLRC, the state government was unmoved by its recommendations, and few recommendations of the report were adopted:

	Restrictive Covenants	
26	As a first step, remove the legislative block (section 61(4) of the Act) to the grant of a planning permit until a restrictive covenant is varied	Not agree
27	Further examine the recommendations of the Victorian Law Reform Commission in its report on easements and covenants (Final Report 22)	Not agree

CONCLUSION

299. Restrictive covenants were initially conceived as a rudimentary form of planning control. Over time, restrictive covenants have been replaced by comprehensive and sophisticated planning schemes that have proven effective at controlling the use and development of land. Since 2000, the effect of section 61(4) of the *Planning and Environment Act 1987* has meant that planning permits cannot be granted where they authorise the breach of a restrictive covenant.

300. Given the difficulty of satisfying the tests in sections 60(2) and 60(5) of the *Planning and Environment Act 1987*, the Supreme Court of Victoria now bears a large part of the burden of reviewing restrictive covenants on land prior to the commencement of the planning permit process.

301. Yet the Supreme Court's jurisdiction established by section 84 of the *Property Law Act 1958* predates the modern planning system and is, for all practical purposes, limited to a simple test, namely whether the proposed discharge or modification of the restrictive covenant will substantially injure the persons entitled to the benefit of the restriction.

302. As Mukhtar AsJ observed in *Re DVC Management & Consulting Pty Ltd*,[286] the court in section 84 applications is only concerned with impacts on private rights:

> Recent decisions of this Court have it that town planning principles and considerations are not relevant to the Court's consideration of whether an applicant has established a ground under s 84: see *Vrakas v Registrar of Titles*[287] and *Prowse v Johnstone.*[288]

303. This is an uncontroversial expression of the law in Victoria. From a public policy perspective, however, although there may be some residual benefit played by restrictive covenants in establishing neighbourhood character, in practice, they represent a private agreement to opt out of the framework for planning the use, development and protection of land in the present and long-term interests of all Victorians.[289] The end result is that those urban precincts without those contractual protections are left to carry an additional burden of the amenity compromises inherent in urban consolidation.

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286 *Re DVC Management & Consulting Pty Ltd* [2018] VSC 814.

287 *Vrakas v Registrar of Titles* [2008] VSC 281.

288 *Prowse v Johnstone* [2012] VSC 4.

289 *Planning and Environment Act 1987,* section 1.