IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION

No. 2010/1313

IN THE MATTER of an Application pursuant to s.84 of the *Property Law Act* 1958 for the discharge of a restrictive covenant

MAUREEN CARMEL PROWSE

Plaintiff

v

LILIAN MARY JOHNSTONE & OTHERS
as per attached schedule

Defendants

DEFENDANTS' OUTLINE OF SUBMISSIONS

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Filed on behalf of: The Defendants	DX 494 Melbourne
Prepared by:	Tel 03 9609 1555
Russell Kennedy	Fax 03 9609 1600
Solicitors	Ref: ADC 303861-00001
469 La Trobe Street	Attention: Damian Neylon
MELBOURNE VIC 3000	Email: dneylon@rk.com.au

SUBJECT LAND

1. The subject land is known as 191 to 193 Wattletree Road, Malvern being Lots 7 and 8 on LP5320 and being the land described in Certificate of Title Volume 3607 Folio 399 (**Burdened Land**).

2. There are 32 persons who are entitled to the benefit of the covenant who object to its removal and are named as defendants.

NATURE OF APPLICATION

3. An application for the removal of the restrictive covenant from the Burdened Land was made to the Supreme Court on 12 March 2010. What was then sought was the discharge of the covenant in its entirety. The application related to a 3 storey, 18 unit mixed-use development including

2 commercial units. The Originating Motion was amended on 3 June 2010, 11 June 2010 and again on 11 October 2010 to seek:

> *An order pursuant to section 84(1)(a) of the* ***Property Law Act*** *1958* (**PL Act**) *or alternatively section 84(1)(c) of the PLA that the restriction created by instrument of transfer registered number 683810 affecting lots 7 and 8 on plan of subdivision no. 5239* (sic) *being the land described in certificate of title volume 3607 folio 399 be wholly discharged in so far as it affects the subject land.*
>
> *In the alternative to paragraph 1, an order pursuant to section 84(1)(a) of the PLA or alternatively section 84(1)(c) of the PLA that the restriction be modified in so far as it affects the subject land by deleting:*
>
> > "will not erect more than one house on each of the said Lots and that any house so erected shall be of stone or brick or brick and stone with roof of slates or tiles on the main portion thereof at a cost of not less than six hundred pounds each exclusive of stables and outbuildings and that such building shall not be used for any trade or business AND FURTHER that the said William Durham Leslie his executors administrators or transferees will not subdivide either of the said Lots into smaller allotments nor reduce the frontage thereof to a smaller frontage than appears on the said Plan of Subdivision"
>
> *and replacing it with:*
>
> > "will not construct on the said land any building other than one which is generally in accordance with the plans annexed hereto and marked "A" for identification or a detached house."

4. On 25 November 2010, an affidavit of the plaintiff was filed abandoning the commercial unit component and substituting residential units.

5. Last week, a further amendment was proposed to the Originating Motion with a new declaration to be sought in essence contending that the development in fact complies with the covenant. On this view, no change to the covenant is necessary and the development can proceed without any modification to the covenant.

6. Further plans were produced on the second day of the hearing with two pedestrian walkways deleted from the Wattletree Road elevation of the proposed building. This change was made because it was realised that the

proposed 18 dwelling development could not comply with the requirement that there be a single house on each lot. However, the development still fails the test and contains 18 separate dwellings and accesses and separate and exclusive facilities including individual and separate accommodation, dining, cooking, laundry and cleaning. It also fails the prohibitions on subdivision into smaller allotments and smaller frontages.

THE COVENANT

7. The restrictive covenant in question is contained in Instrument of Transfer 683810 dated 11 May 1912 and registered on title on 14 May 1912 (**Covenant**).[1]

8. The transfer transferred Lots 7 and 8 on LP5320. The Covenant states:

> *AND the said William Durham Leslie doth hereby for himself his executors and administrators covenant with the said Jane Langmore and Arthur Charles Langmore their executors and administrators Registered proprietor or proprietors for the time being of the untransferred part of the land in said Certificate of title that he the said William Durham Leslie his executors administrators or transferees will not at any time or times hereafter quarry on the said land or cart or carry away any stone gravel soil or sand therefrom or <u>make any excavations therein except such as may be necessary for laying the foundation of any building on the said land</u> AND FURTHER <u>that he or they will not erect more than one house on each of the said Lots</u> and that any house so erected shall be of stone or brick or brick and stone with roof of slates or titles on the main portion thereof at a cost of not less than Six hundred pounds each exclusive of stables and outbuildings <u>and that such building shall not be used for any trade or business</u> AND FURTHER that the said William Durham Leslie his executors administrators or transferees <u>will not subdivide either of the said Lots into smaller allotments nor reduce the frontage thereof to a smaller frontage than appears on the said Plan of Subdivision</u> AND the said William Durham Leslie hereby requests that the above covenants may appear as an encumbrance on the Certificate of Title to be issued in respect of the land hereby transferred and run with the land.*
>
> (underlining added)

[1] Exhibit MC-2.

9. There are two lots in the Burdened Land and one house has been erected on the Burdened Land extending over both lots. A second house on the Burdened Land would constitute a dual occupancy of the Burdened Land.

AFFIDAVITS

10. The plaintiff relies upon the following affidavits:

Affidavit	**Date sworn**
Affidavit in support sworn by Maureen Carmel Prowse	12 March 2010
Second Affidavit in support sworn by Maureen Carmel Prowse	25 November 2010
Affidavit in support sworn by Michelle Cupples	12 March 2010
Second Affidavit in support of Michelle Cupples	20 May 2010
Third Affidavit in support sworn by Michelle Cupples	19 May 2011
Fourth Affidavit in support sworn by Michelle Cupples	14 June 2011
Affidavit in support sworn by Robert Walter Easton	23 July 2010
Second Affidavit in support sworn by Robert Walter Easton	30 November 2010
Affidavit in support sworn by John Kenneth Dowling	30 July 2010
Second Affidavit in support sworn by John Kenneth Dowling	30 November 2010

11. The defendants are persons entitled to the benefit of the covenant and rely upon the following affidavits and expert report:

Affidavit	**Date sworn**
Affidavit of Randy James Laporte	27 August 2010
Affidavit of Matthew Philip Preston	10 September 2010

Affidavit of Lilian Mary Johnston	20 September 2010
Affidavit of James Ormonde Lucas	20 September 2010
Affidavit of Wendy Patricia Kimpton	20 September 2010
Affidavit of Thanh Giang Phan	20 September 2010
Affidavit of Lorraine Maria Bourke	20 September 2010
Affidavit of Michael John Lynne Wharton	20 September 2010
Affidavit of David Oliver	20 September 2010
Affidavit of Joan Lynette Conron	20 September 2010
Affidavit of Laura Ann Conroy	20 September 2010
Affidavit of Astrida Cooper	20 September 2010
Affidavit of Panchalinga Das	20 September 2010
Affidavit of Katrina Michelle Allen	22 September 2010
Affidavit of Lynne Maree Raines	23 September 2010
Affidavit of Susan Jane Wykes Sweet	23 September 2010
Affidavit of Gillian Elizabeth Miles	23 September 2010
Affidavit of Douglas Walter Campbell	23 September 2010
Affidavit of Graeme Bryant Weber	23 September 2010
Affidavit of Amanda O'Dell McDougall	23 September 2010
Affidavit of Georgina Anthea McNamara	23 September 2010
Affidavit of Katharine Quincerot	27 September 2010
Affidavit of Samlyn Joy Crockett	7 October 2010
Report of Robert Milner	3 February 2011
Affidavit of David George Weil	15 February 2011

GROUNDS OF APPLICATION

12. No grounds for the removal are set out in the Originating Motion in its original or amended form or in the supporting affidavits other than the plaintiff wishes to construct a 3 storey unit development with basement carpark.

13. Plans submitted with the second affidavit of Maureen Prowse[2] show the plaintiff intends to develop and use the Burdened Land for 18 residential apartments and underground carparking. 7 units are on the first level, 7 on the second level, and 4 on the third level. 36 car spaces are provided in the basement. There are two lifts, and a lobby at each level and a staircase. There are balconies for each unit at the second and third levels. There are 20 north facing windows at the third level, and another 20 east facing windows at the third level. There are 24 north facing windows at the second level, and another 24 east facing windows at the second level. The footprint of the development covers most of the site. There were three ground level accesses from Wattletree Road and access is also provided from the basement car park by lifts and stairs. Whilst in the plans produced during the hearing two pedestrian entrances from Wattletree Road have been deleted, there is no legal means by which owners or occupiers who wish to access the street directly can or should be prevented from doing so.

THE STATUTORY PROVISION

14. Section 84(1) of the *Property Law Act* 1958 provides that the Court shall have power to modify or discharge a restriction 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 impede such user; or*

[2] Exhibit MCP-3- proposed development plans dated 5 November 2010.

> ...
>
> *(c) that the proposed discharge or modification will not substantially injury the persons entitled to the benefit of the restriction...".*

15. There are two independent limbs of section 84(1)(a):

    a) that the covenant should be deemed obsolete; and

    b) that the continued existence of the covenant would impede the reasonable user of land without securing practical benefits to beneficiaries of the covenant. *Re Alexandra* [1980] VR 55 at 57-8; *Re Pivotel Pty Ltd* (2001) V ConvR 54-635 at 62, 213 [28]-[29].

16. Section 84(1)(c) requires the applicant to show that the proposed discharge or modification of the covenant will not substantially injure the persons entitled to the benefit of the restriction. The test to be applied is similar to that required for the second limb of section 84(1)(a) – *Re Alexandra* at page 60; *Re Stani* (unreported Judgment of the Full Court, Supreme Court of Victoria, 7 December 1976) at page 10:

> *Having considered the application in so far as it was based on s84(1)(a), we turn to the submission under s84(1)(c). It is to be observed that the Victorian legislature introduced the word "substantially" in paragraph (c), thus differing from the equivalent English statute. Whether the addition of the word "substantially" changes the nature of the test to be applied in considering the possible injury to the persons entitled to the benefit of the restriction has been the subject of some divergence of views. Adam J., in Re Robinson (1972) VR 273 at p284, was of the opinion that in the case before him it made no difference. He referred to Ridley v Taylor (1965) 1 WLR 611, where Russell LJ at p622 pointed out that the purpose of para (c) was "to preclude vexatious opposition cases where there is no genuineness or sincerity or bona fide opposition on any reasonable grounds." Having regard to the purpose of para. (c) it may well be that this is the correct view, that in other words any injury sufficient to prevent the Court modifying the restriction must be something more than unsubstantial, must be real and not fanciful detriment: Re Cook (supra). In the long run the test to be applied is similar to that applied in determining under paragraph (a) whether the continued existence of the restriction would secure practical benefits to other persons: See Re*

> *Ghey and Galton's application (supra) at pp.659-660, and Re Robinson (supra) at p. 284.*

17. The plaintiff carries the onus of proof to satisfy the Court that an order should be made in her favour – *Re Robinson* [1972] VR 278 at 285; *Greenwood & Anor v Burrows* (1992) VConvR 54-444 at 65,192. In the absence of the Court being so satisfied, there is no power to make any order discharging or modifying restriction.

18. Even if the case is made out under section 84(1), the Court retains a discretion whether or not to make an order in the plaintiff's favour – *Re Stani* at page 7; *Greenwood v Burrows* at 65,192.

OBSOLESCENCE

19. In order to succeed under the first limb of section 84(1)(a) the plaintiff must establish 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 restrictions ought to be deemed obsolete. The inquiry is as to whether the purpose of the restriction can no longer be achieved – *Re Markin* [1966] VR 494 at 496. Here the neighbourhood appears largely agreed as the Cooril Estate in its current form bounded by Wattletree Road, Thanet Street, and Cooril Crescent. Whilst the northern boundary of the Estate is not defined by a road, it is clearly evident by the changes in allotment size and built form.

20. In *Re Markin* [1966] VR 494 Gillard J at p.496 said:

> *Looking then at the requirements specified in s.84(1)(a) of the* Property Law Act *1958, the applicants must prove that the original purpose in imposing the covenant can no longer be achieved because of changes in the character of the property or the neighbourhood: see* Re Truman, Handbury, Buxton and Co Ltd's Application; Driscoll v Church Commissioners for England *[1957] 1 WB 330; [1956] 3 All ER 802;* Re Mason and The Conveyancing Act *(1960), 78 WN(NSW) 925.*
>
> *Now it is no light task to sustain this burden. In many cases, the real purpose is not easily discovered and, accordingly it is difficult to discover whether the restriction has become obsolete.*

21. In *Re Robinson* [1972] VR 278 at 281-2 Adam J said that obsolescence occurs when the restrictive covenant has become futile or useless:

> *... I have to be satisfied on the first limb of paragraph (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. It appears to me the critical words in that limb of the section are the words 'shall be deemed to be obsolete'. What does 'obsolete' mean? When is a restrictive covenant properly to be deemed 'obsolete'? This has by authority been stated to arise when the object of the restrictive covenant can, by reason of changes that have occurred, be no longer achieved or fulfilled. In other words through changes that have occurred the restrictive covenant has become futile or useless.*

22. His Honour after citing *Re Truman, Handbury and Buxton Co Limited and Driscoll v Church Commissioners for England* further said at p.282:

> *It appears from that, that if the restrictive covenant continues to have any value for the persons entitled to the benefit of it then it can very rarely, if at all be deemed obsolete. One really enquires into the purpose of the restrictive covenant.*

23. In *Re Pivotel Pty Ltd* (2001) VConvR 54-635 at 62,214 [48] McDonald J concluded that the covenant was not obsolete because the purpose of the "one dwelling only" covenant, namely to "provide a spacious living environment when compared to the development that may otherwise occur on other allotments", could still be achieved notwithstanding:

a) changes in the character of the "neighbourhood"; and

b) the construction of four dwellings on the subject land:

> *48 ... I have reached the conclusion that the purpose of imposing "one dwelling only" restrictive covenants on some 31 allotments in the subdivision including Lot 38 was to confine the use of those allotments to residential purposes and to strictly limit and control the number of dwellings that may be erected on each allotment in order to provide a spacious living environment when compared to the development that may otherwise occur on other allotments. Accordingly, as best as can be ascertained it is my view that such was the purpose for imposing the restriction on Lot 38. The fact that changes have occurred in the character of the "neighbourhood" including that within the area comprising the*

> *subdivided land since 1921 to the present, does not lead me to conclude that this purpose can no longer be achieved. That purpose is still able to be served thereby providing within the subdivision, housing development of a varied and mixed character. The fact that by the Order of the Master made on 7 October 1987 the restrictive covenant affecting Lot 38 was modified to a "not more than four dwelling houses on the subdivided lot" did not bring about a change in the character of Lot 38 nor did it constitute a material circumstance which results in the original purpose of the imposition of the restriction with respect to that allotment no longer being able to be served. This is so because of the size of the allotment. The modification of the restrictive covenant affecting Lot 38 at that time was a modification made, in my view, which was consistent with the original purpose of the imposition of the restriction. Accordingly, the conclusion I have reached when considering the first limb of paragraph (a) of s.84(1) of the Act is that it ought not to be deemed that the restrictive covenant affecting Lot 38 has become obsolete because I consider that the original purpose for imposing the restriction on that lot can still be served.*

24. In relation to the first limb of s 84(1)(a), the "neighbourhood" must be determined as at the date of the hearing, rather than the date of the covenant.[3] What comprises the "neighbourhood" is a question of fact.[4]

25. Robert Milner's evidence is that the neighbourhood includes the Burdened Land and land belonging to the defendants:

> *Having visited the site, walked around the area, reviewed background documents and read the affidavits, it is my opinion that the boundaries of the immediate neighbourhood is defined by the significant infrastructure in proximity to the site which terminate the residential environment: Wattletree Road to the south of the site, and Cabrini Hospital to the west of the site. Although the site fronts Wattletree Road, and the site on which Cabrini Hospital is located was a formative component of the Coonil Estate, these, in my view, create boundaries to the neighbourhood.*
>
> *To the north, I consider that the neighbourhood extends approximately two blocks back into the Coonil Estate, and east to*

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[3] *Re Miscamble's Application* [1966] VR 596, 597, 601; *Re Pivotel Pty Ltd* (2001) V ConvR ¶54-635; [2000] VSC 264, [29] ("*Pivotel*").

[4] *Re Miscamble's Application* [1966] VR 596, 602; *Greenwood v Burrows* (1992) V ConvR ¶54-444; 65,196.

> *Thanet Street. The neighbourhood is formed by its historic context, residential nature and consistent and connected streetscape.*[5]

26. In the present circumstances the purpose of the covenant is similar to that approved by the Full Court in *Re Stani* (at page 8):

> *...the learned Judge observed that it was necessary to go back to the purpose or design of the subdivider in imposing the covenant; that it was imposed for the purpose of ensuring 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.*

27. In *Re Miscamble's Application*, McInerney AJ found at 601 that:

> *... the purpose of the covenant 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 ...*

28. Whether a covenant is obsolete is a question of fact to be determined in each case. A covenant will only be obsolete if it has lost all value and is incapable of achieving, to any degree, any purpose or object to the covenantor.

29. A covenantor may have multiple purposes or objects. A covenant that can fulfil one of its original purposes, albeit to a limited degree, is not obsolete. Justice Kyrou summarised the relevant law in *Vrakas v Registrar of Titles*:[6]

> *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".*[7] *A covenant is not obsolete if it is still capable of fulfilling any of its original purposes, even if only to a diminished extent.*[8] *The test is*

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[5] At page 9.

[6] [2008] VSC 281

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

[8] *Re Miscamble's Application* [1966] VR 596, 597; *Greenwood v Burrows* (1992) V ConvR ¶54-444, 65,197.

> *whether, as a result of changes in the character of the property or the neighbourhood, or other material circumstances, the restriction is no longer enforceable or has become of no value.*[9] *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.*[10]
> *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.*[11]

30. The evidence of Robert Walter Easton does not extend beyond identifying isolated instances of changes to the covenant within the original parent title for example to permit additional single dwellings to be constructed, to reorient lots, to permit a swimming pool to be constructed within the grounds of a substantial residence, or to provide for a bowling club to established within the estate. None of the changes referred to by Mr Easton affect the character of the estate or bear any similarity to the 3 storey multi-unit development sought in the application.

31. Plainly the purpose of the original covenant is still achieved by the maintenance of the very large number of single dwellings on large allotments. It is also achieved by the complete absence of blocks of units within the estate in contrast to surrounding areas.

32. In *Greenwood v Burrows* at page 65,197 Eames J said:

> *One such objective, in my opinion was the maintenance of reduced population numbers in the area and that continues to be achieved by the covenant (although to a lesser degree than the designers of the Estate may have liked). The fact that the covenant is incapable of fulfilling, wholly, one of its original purposes but may do so to a limited extent if nonetheless evidence that the covenant is not obsolete.*[12]

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[9] *Greenwood v Burrows* (1992) V ConvR ¶54-444, 65,196. See also *Re Miscamble's Application* [1966] VR 596, 601.

[10] *Re Robinson* [1971] VR 278, 282; *Greenwood v Burrows* (1992) V ConvR ¶54-444, 65,197; *Chatsworth Estates Co v Fewell* [1931] 1 Ch.224, 230 per Farwell J.

[11] *Greenwood v Burrows* (1992) V ConvR ¶54-444, 65,197 – 65,198.

[12] *Re Miscamble's Application* [1966] VR 596 at 597

33. The defendants' objections are set out in the affidavits sworn by them. They include –

a) loss of character of the residential estate being an estate with large single dwelling family homes and substantial gardens;

b) loss of privacy and overlooking into neighbouring private outdoor living areas and gardens;

c) bulk and dominance of proposed building particularly when viewed from adjoining residences and properties;

d) loss of large, spacious Edwardian family home on the Burdened Land and surrounding mature trees and established garden;

e) loss of family neighbourhood with front and rear gardens;

f) loss of spaciousness, beauty and privacy;

g) construction of a 3 storey building with basement car parking over virtually the entire site in conflict with the prevalent single dwelling residential character of the area;

h) additional noise, traffic, parking and access issues associated with 18 units and 33 basement car spaces;

i) this is the "thin end of the wedge" and the precedent effect of the removal of the covenant for the construction of a large unit development would be very significant;

j) the character of the Coonil Estate has been maintained for over 90 years and should be preserved;

k) much of the Coonil Estate is a recognised heritage overlay area which should be preserved;

l) the proposed development will be an isolated "eye-sore" in stark contrast to the many period and heritage homes surrounding the Burdened Land; and

m) the plaintiff's land was purchased as part of the Coonil Estate, and has benefitted from the reciprocal covenants given by others.

34. It is submitted that there is no proper basis for removal of the covenant on the ground of obsolescence. Far from obsolescence, the purposes of the covenant are achieved throughout the estate and on the Burdened Land.

IMPEDE THE REASONABLE USER OF LAND WITHOUT SECURING PRACTICAL BENEFITS

35. The second limb of section 84(1)(a) requires that the plaintiff show that the covenant, to a real and sensible degree, hinders the land being reasonably used having regard to its situation, the surrounding property and the purpose of the covenant – *Re Stani* per the Full Court at page 8; *Re Alexandra* per Menhennit J at page 58; *Re Pivotel* per McDonald J at 62,214 - 62,215 at [34], [49]-[51]. Here the Burdened Land contains a large dwelling which always has been, and is now entirely successfully used as a residence.

36. Further, the plaintiff must establish that the continued existence of the restrictive covenant would not secure practical benefits to others. There must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the person who is enjoying the benefit of it – *Re Robinson* per Adam J at 283; *Re Alexandra* per Menhennit J at 59 and *Re Pivotel* per McDonald J at 62,215 at [35], [49] – [51].

37. In *Re Stani* the Full Court upheld the trial Judge's finding that the continued use of the restriction would not impede the reasonable user of the land in that case. The practical benefits of the continuance of the covenant include the benefit of living in the area of single dwelling houses on relatively large allotments:

> *Living in an area of light population density with the great advantages that go with that circumstance.*[13]

38. In *Vrakas v Registrar of Titles*[14] the court found that the purpose of a single dwelling covenant of a minimum value was to establish an estate dominated by quality detached single dwellings and to create a low density housing environment with plenty of space for trees and gardens in each allotment:

> *52 There was considerable debate before me as to the purpose of the restrictive covenants that apply in the estate. Much of this debate was focused on an advertisement that was prepared in approximately 1914 for the sale of allotments in the estate. As this was what we would today describe as a "marketing document" and contained inconsistencies about the contemplated uses of the land, it does not assist me. In the absence of other contemporaneous evidence of purpose, the purpose can be inferred from the fact that a single dwelling covenant with a minimum construction cost of £500 per dwelling was imposed on nearly all of the allotments in the estate. That purpose was to establish an estate that is overwhelmingly dominated by good quality detached single dwellings and to create a low density housing environment with plenty of space for trees and gardens in each allotment. Further, irrespective of the purpose of the covenants and whether that purpose was legally enforceable in light of the then prevailing law,*[15] *they have in fact produced an estate having the above characteristics and the benefits for the residents of the estate, including the defendants, resulting from those characteristics.*

39. Significantly, the removal of a restriction may lead to further applications to remove similar restrictive covenants in the neighbourhood:

> *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*

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[13] At page 9.

[14] [2008] VSC 281

[15] Prior to the enactment of s 79A of the PL Act in 1964, the benefit of a single dwelling covenant in favour of an allotment was lost once the allotment was transferred out of the parent title unless, as a matter of construction, the covenant referred to each and every part of the dominant land in the parent title: *Re Arcade Hotel Pty Ltd* [1962] VR 274, 277-8, 279.

> *may be relevant in determining whether the restriction secures any practical benefits.*[16]

40. Having regard to the interest of developers in localities like Malvern, this is of particular significance.

41. Morris J discussed (obiter) in *Stanhill v Jackson* the issue of whether a covenant impeded the reasonable user of land His Honour advocated taking into account town planning considerations (see paragraphs 32-36 and paragraph 66). Consideration of town planning matters at that stage of the inquiry is contrary to the existing authority – *Greenwood v Burrows* at 65,198 to 65,203 per Eames J:

> *It was submitted by Mr Greenberger that "other circumstances" should include all relevant town planning consideration which moved the AAT to allow the appeal. This submission runs counter to the long-established view expressed in this Court that town planning considerations were not the matter which concerned the Court in its determination whether jurisdiction section 84 has been established… Mr Greenberger does not dispute that that has been approach of this Court to date but submits that it is an approach which it is out of touch with modern requirements for the development land. For reasons which I will consider later I am not attracted by this argument and I decline to consider "other circumstances" as being an invitation for me to adopt the role of a town planning tribunal."*

42. Similarly in *Re Robinson* (1972) VR 278 at 285 per Adam J held:

> *For that reason, I do not think the applicant has made out the conditions for my exercise of jurisdiction under section 84(1)(c). I may add that much has been said, both in affidavits and submissions to me, as to the great advantage which would really accrue to this area which is becoming more densely populated by having such shops as are provided for under this plan. I do not enter in that because, as has been repeatedly said, in exercising this jurisdiction the Court is not a planning authority. Whether or not it would be advantageous as a matter of planning to permit this development here seems to me quite beside the point.*

43. McDonald J applied this finding in *Re Pivotel* at 62,221 [50]:

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[16] *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 9-10, applied in *Vrakas v Registrar of Titles* [2008] VSC 281

> *In exercising the power vested in it pursuant to s.84(1) of the Act, the Court is not concerned with town planning considerations – Re Anton Stani, p.6; Re Robinson at p.285; and Greenwood & Anor v Burrows & Ors (1992) V Conv R, 54,444 at 65,198. Accordingly, the determination of the Administrative Appeals Tribunal relevant to lot 38 and the permits issued thereafter as to the use and development of the land cannot be determinative of the issue whether the restriction now impedes the reasonable user of the land. As referred to by Balmford J in M.A. Zeltoff Pty Ltd and Margaret Barkeley v Stonnington City Council [1998] VSC 270 at p.9 there are a number of different statutory means whereby a restrictive covenant may be varied or removed which are provided for separately in legislation involving the operation of different principles that must be applied without reference from one to another. That which I must have regard to in these proceedings are the provisions of s.8.4(1) of the Act.*

44. See too the Full Court authority of *Re Stani* at page 6 (see also *Kort Pty Ltd v Shaw* [1983] WAR 113 per Burt CJ at 115 and Coghlan J in *Fraser v Di Paolo* [2008] VSC 117 at paragraphs [42] and [55]). The position adopted by the Court for many years is even more appropriate following the 2000 amendments to the *Planning and Environment Act* 1987 which resulted in the present section 61(4). Why would the Court make an assessment of planning matters when no planning application has yet been made to the responsible authority, objections have not been received or heard and the responsible authority and other interested authorities have not had the opportunity to express a view? The Court would be pre-empting the entire planning process.

45. In *Vrakas v Registrar of Titles*[17] Kyrou J resolved this issue in the following way:

> *47 In Stanhill Pty Ltd v Jackson, Morris J, after considering the ordinary grammatical meaning of s 84(1), the history of the provision and the provision's policy basis, departed from what he described as the narrow traditional approach to s 84(1) in favour of a more "robust" interpretation of the provision and indicated that, in his view, "some of the restrictions adopted in earlier cases are without*

[17] [2008] VSC 281

> *justification".*[18] *In essence, his Honour held: in relation to the first limb of s 84(1)(a), that "obsolete" should be given its ordinary meaning of "outmoded" or "out of date" (rather than meaning something that is futile or wholly unable to achieve its original purpose); in relation to the second limb of s 84(1)(a), that "the reasonable user of the land" means a user of the land acting reasonably, with what is reasonable to be gleaned from current attitudes and circumstances (including town planning issues), "impede" means to retard, obstruct or hinder (and does not mean "prevent"), and "practical benefits" are actual benefits having substance rather than purely theoretical or trifling benefits; and, in relation to s 84(1)(c), that it must only be shown that any harm caused to a person entitled to the benefit of a covenant would not be of real significance or importance. In the recent decision of Fraser v Di Paolo, Coghlan J referred to, but found it unnecessary to express a settled view about Morris J's comments.*[19]
>
> *48 In this case, I apply the longstanding principles to the interpretation of s 84(1). I note, however, that had I applied Morris J's interpretation of s 84(1) (which has much to commend it), the result would have been the same.*

46. In the present case the plaintiff has not established that the covenant will impede the reasonable use of the Burdened Land. The Burdened Land has been used as a family home for many years. There is no reason why this cannot continue indefinitely into the future.

Parliament has seen fit not to amend s84 of the *Property Law Act 1958*

47. In response to a question from the Court, Counsel for the Plaintiff conceded that where a provision is re-enacted after having been judicially considered, Parliament is presumed to intend the meaning that was adopted in the earlier cases:

> *HIS HONOUR: All right. Well, we'll see. All right. One thing I do have to though consider, and I'm not sure whether Justice Morris did consider it in Stanhill v. Jackson. I'll just put it to you for your comment in due course. You spoke of old cases saying this and old cases saying that. Is there not a principle of statutory construction*

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[18] (2005) 12 VR 224, 231 [13], 239 [41]-[42].

[19] [2008] VSC 117, [26]-[28], [32]-[36].

> *to the effect that where a provision is re-enacted after having been judicially considered, parliament is presumed to intend the meaning that was adopted in the earlier cases?*
>
> *MR WRIGHT: I think there is such a principle. Yes.*

48. Insofar as s84 of the *Property Law Act* 1948 is concerned the Victorian Parliament has in recent years enhanced its effectiveness by preventing a Responsible Authority from issuing planning permits that would allow a development inconsistent with a restrictive covenant. Relevantly, this amendment to the *Planning and Environment Act* 1987 provides:

> *9. Decision on application for a permit*
>
> *After section 61(3) of the Principal Act insert—*
>
> *"(4) <u>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</u> unless a permit has been issued, or a decision made to grant a permit, to allow the removal or variation of the covenant."*

49. It is understood that this amendment was partly a response to a case known as *Fitt & Anor v Luxury Developments Pty Ltd [2000] VSC 258* in which a group of residents had to take out an injunction in the Supreme Court to prevent a medium density development from being constructed in Ivanhoe, after the development was approved by VCAT despite it being inconsistent with the restrictive covenant:

> *208 Subsequently Luxury Developments applied to the Council of the City of Banyule for a planning permit to erect three dwellings on the land. Mr Fitt objected to the grant of the permit. Before the Council determined the matter Luxury Developments instituted a proceeding in the Victorian Civil and Administrative Tribunal (VCAT) contending that Banyule had failed to decide whether the permit should be granted or not and on 12 January 1999 VCAT refused the application. A further application was made to the Council and Mr Fitt again objected to the application. On 26 April 1999 the Council refused the application of Luxury Developments.*
>
> *209 In May 1999 Luxury Developments appealed to VCAT against the decision and <u>on 17 August 1999 VCAT determined that the appeal be allowed and a permit issue</u>.*
>
> *210 On 22 August 1999 Mr Fitt wrote to Luxury Developments care of its planning consultant advising of the terms of the*

restrictive covenant and gave notice that if construction was attempted while the covenant remained in force appropriate legal action would be taken.

211 On 25 August 1999 Banyule City Council issued the planning permit as directed by VCAT. In September 1999 Luxury Developments made application to the City of Banyule for a permit to sub-divide the land into three lots. Again Mr Fitt objected to the application. On 26 October 1999 the City of Banyule certified the plan of sub-division.

212 Mr Fitt and other residents sought a review of that decision at the VCAT on the basis that the permit was inconsistent with the restrictive covenant and VCAT dismissed the application proceeding on the basis that it would not take into account for town planning purposes or sub-division approval the existence of a restrictive covenant on the title to land.

213 Mr Fitt in November and December again wrote to Luxury Developments making it quite clear to Mr Seiffert that the objection still remained and that any works undertaken would be in breach of a restrictive covenant.

214 Mr Seiffert ignored the letters.

215 In January 2000 Mr Fitt became aware that a building permit had been issued although he had observed a hoarding in December that it was proposed to erect three houses on the property.

216 On 14th February 2000 construction equipment arrived on the land and on that day work commenced to excavate and remove soil from the land.

217 Mr Seiffert was and is of the opinion that the restrictive covenant did not apply because Luxury Developments had gone through a town planning process and also obtained a plan of sub-division.

50. The second reading speech of the *Planning and Environment (Restrictive Covenants) Act* 2000 stated:

> *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. Covenants 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 an irrelevant planning consideration. Applicants lost the chance for simultaneous consideration of both development and covenant matters. Responsible authorities and the now Victorian Civil and 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.*

51. The Parliament's intention as embodied in this amendment to the *Planning and Environment Act* 1987, far from being antagonistic to restrictive covenant, is to protect their operation.

52. In *Re Alcan Australia Ltd; Ex parte Federation of Industrial Manufacturing and Engineering Employees* [1994] HCA 34 ; (1994) 181 CLR 96 at 106 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ the High Court recognised the abundance of authority for the proposition that it will be presumed that parliament intended that words repeated in legislation have the meaning previously judicially attributed to them:

> *"There is abundant authority for the proposition that where the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already "judicially attributed to (them)" ((28) Barras v. Aberdeen Steam Trawling and Fishing Co. (1933) AC 402 at 446 per Lord Macmillan. See also D'Emden v. Pedder [1904] HCA 1; [1904] HCA 1; (1904) 1 CLR 91 at 110; Pillar v. Arthur [1912] HCA 51; (1912) 15 CLR 18 at 22, 25, 29-30; Platz v. Osborne [1943] HCA 39; (1943) 68 CLR 133 at 141, 146, 146-147.), although the validity of that proposition has been questioned ((29) Salvation Army (Victoria) Property Trust v. Fern Tree Gully Corporation [1952] HCA 4; (1952) 85 CLR 159 at 174, 182; Reg. v. Reynhoudt [1962] HCA 23; (1962) 107 CLR 381 at 388; Flaherty v. Girgis [1987] HCA 17; (1987) 162 CLR 574 at 594.). But the presumption is considerably strengthened in the present case by the legislative history of the Act.*

53. The Table of Amendments to the *Property Law Act* 1958 reveals that the Act has been amended numerous times, most recently in 2010, but section 84 has remained.

SUBSTANTIAL INJURY

54. A requirement of an application based on section 84(1)(c) is that the plaintiff prove a negative, namely, that the proposed modification or removal of the covenant will not substantially injure those persons entitled to the benefit of the restriction – *Greenwood v Burrows* per Eames J at 65,199.

55. In *Re Cook* [1964] VR 808 at 810-11 Gillard J said:-

> *It should be noted that in paragraph (c) the emphasis is on the injury suffered by the persons entitled to the benefit. From the nature of the proprietary right arising from the restrictive covenant clearly the injury must occur in relation to the persons enjoyment of his property. Such injury can only be properly assessed by a comparison between the benefits intended to be conferred and actually conferred by the covenant initially on the persons entitled thereto and the resultant benefits, if any, remaining to such persons after the covenant has been modified. If from the evidence it appears that the difference between the two will not be substantial, then the applicant will have established a case for the exercise of the Court's discretion under (c). In order to make this comparison it is proposed to consider what benefits the covenant over the subject land may have conferred upon the persons entitled thereto, and then to assess whether the modification of such covenant would or would not substantially diminish the benefit so discovered.*

56. In *Vrakas*, Kyrou J explained;

> *34 In relation to s 84(1)(c), the test for whether a discharge or modification of a covenant would "substantially injure" a person entitled to the benefit of the covenant is similar to that in relation to "practical benefits" in the second limb of s 84(1)(a).*[20]

[20] *Re Robinson* [1971] VR 278, 284; *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 10; *Pivotel* (2001) V ConvR ¶54-

> *35 Section 84(1)(c) requires a comparison between the benefits initially intended to be conferred and actually conferred by the covenant, and the benefits, if any, which would remain after the covenant has been discharged or modified – if the evidence establishes that the difference between the two (that is, the injury, if any) will not be substantial, the ground in s 84(1)(c) is made out.*[21]
>
> *36 The injury must not be unsubstantial, and must be real and not a fanciful detriment.*[22]
>
> *37 It is not enough for the applicant merely to prove that there will be no appreciable injury or depreciation in value of the property to which the covenant is annexed.*[23]

57. In the present case, the removal of that covenant would plainly cause substantial injury to the defendants and to the other persons entitled to such benefit for the reasons set out in paragraph 33 above and in the affidavits.

58. Those objections are well founded having regard for example, to –

a) the height and bulk of the proposed development;

b) the mass of the development covering the entire site;

c) the potential for overlooking or perceived overlooking from the numerous balconies and windows particularly at the second and third levels;

d) the lack of set back particularly to the north and east;

e) the existence of sensitive private areas such as living rooms, meals rooms, external walkways and gardens and swimming pools immediately adjoining the Burdened Land;

635; [2000] VSC 264, [37]; *Bevilacqua v. Merakovsky* [2005] ANZ ConvR 504; [2005] VSC 235, [24].

[21] *Re Cook* [1964] VR 808, 810-11; *Fraser v Di Paolo* [2008] VSC 117, [36].

[22] *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 10; *Greenwood v Burrows* (1992) V ConvR ¶54-444, 65 199.

[23] *Re Cook* [1964] VR 808, 810.

f) the presence and activity of 18 households instead of one; and

g) the traffic impacts of a 36 car space basement and ramp.

59. The modification would particularly injure nearby beneficiaries by reason of the physical presence and impact of the proposed development. For instance:

a) Georgina Anthea McNamara will give evidence that:

People on rear balconies and in habitable rooms on upper levels of the proposed development would be able to look directly into my main living area and back yard of my property. The proposed development would create a considerable visual bulk when viewed from my property.

b) Matthew Philip Preston will give evidence that:

The Plaintiff's proposed development will dominate our private outdoor living area creating inappropriate overlooking and feeling of dominance from the Plaintiff's land. It will diminish the quality of our family life through the decreased enjoyment of our private outdoor living area and rear rooms on our home.

c) Wendy Patricia Kimpton will give evidence that:

The proposed development as set out in the Plaintiff's Affidavit will be an isolated "eye-sore" in stark contrast to the many period and heritage homes surrounding the Plaintiff's land.

60. Finally, the precedent value of a decision which favoured the removal of a covenant within this neighbourhood and subdivision is itself sufficient to constitute substantial injury to exclude the operation of section 84(1)(c) – *Greenwood v Burrows* per Eames J at 65,200:

> *In my opinion the Defendants would suffer substantial injury by virtue of the precedent value of a decision which favoured the Applicants in this case, and as the Full Court decided in Stani's*

case,[24] that consideration is of itself a factor which demonstrates that the claim under section 84(1)(c) has not been made out.

61. This principle was confirmed in *Vrakas*:

> *39 The prospect that, if the application for the discharge or modification of a covenant were granted, that might be used to support further applications in a similar vein, may be relevant.[25] Such "precedent value" may, in an appropriate case, of itself be a factor demonstrating that an applicant fails to establish the requirements in s 84(1)(c).[26]*

62. Similarly, in *Fraser v Di Paolo* [2008] VSC 117 Coghlan J gave weight to the proprietary value of the covenant while dismissing the argument that a single dwelling might be constructed with less restriction as to set back and landscaping:

> *54 Although there are some special features which attach to Lot 130, namely its size and position, the granting of a modification to allow four additional dwellings would have a great impact upon the future enforcement of the covenant together with matters adverted to in paragraph 47.*
>
> *55 It does not seem to me that just because the proposal is or would be acceptable in town planning terms that that consideration can overwhelm the issues which arise because of the existence of the covenant. <u>The argument that a single dwelling with less restriction as to set back and landscaping does not advance the matter either.</u>*
>
> *56 I am satisfied that the immediate impact of this proposal on the amenity of the defendants would not be great but what would be diminished is the value of the covenant.*
>
> *57 It would be difficult to maintain the covenant if the proposed modification were allowed.[27] That is not to say that modifications equivalent to the proposed modification would be readily made but it would undermine the single dwelling covenant to a large degree.*

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[24] Pages 9-11

[25] *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 11; *Greenwood v Burrows* (1992) V ConvR ¶54-444, 65 200; *Fraser v Di Paolo* [2008] VSC 117, [49]-[57].

[26] *Greenwood v Burrows* (1992) V ConvR ¶54-444, 65 200.

[27] See Eames J *Greenwood v Burrows* (1992) V Conv R 54-444 at 65,200

63. In the present case, Astrida Cooper will give evidence that:

a) *The removal of the Plaintiff's restrictive covenant will adversely affect the neighbourhood by making it easier for future landowners to build inappropriate developments in a quiet, low rise family-oriented neighbourhood.*

b) *The proposed development outlined in the Plaintiff's Affidavit offends the terms and spirit of the restrictive covenant over the Plaintiff's Land.*

c) *The heritage overlay imposed by the local council, which was accepted without any significant opposition by residents of the Coonil Estate, demonstrates the desire of the residents to protect of the character of the neighbourhood.*

d) *The Plaintiff purchased its property subject to covenant and enjoyed benefits of covenant and that of other similar covenants in the Coonil Estate. The Plaintiff now wish to maximise the value of the Plaintiff's Land at expense of other owners in the area, such as me, who still enjoy the benefit of the covenant and comply with reciprocal covenants.*

e) *I am very concerned that the removal of the restrictive covenant over the Plaintiff's Land will have the practical effect of leading to many other restrictive covenants in the Coonil Estate being removed.*

64. There is a very serious precedential effect in this case. Malvern properties are highly attractive to developers. There are estate properties outside the heritage control which is any event should be disregarded and can be rescinded or changed. It is a public planning control not a safeguard of private rights. Approvals for multi-unit developments are possible in heritage overlay areas.

65. Notwithstanding the reliance placed by the Plaintiff in this case on section 84(1)(c) and the decision in *Stanhill,* significantly, in that case the Court ultimately held the land could sustain as few as two dwellings—potentially three dwellings if appropriately prepared plans had been before the Court:

> *70 It is open for me on this application to consider whether some other modification to the covenant, if made, would not substantially injure persons entitled to the benefit of the restriction. I regard this as a case where the subject land could be developed with two dwellings without substantially injuring persons entitled to the benefit of the restriction. I*

> *may have come to a similar conclusion in relation to a three dwelling proposal which demonstrated that all relevant amenity issues could be satisfactorily resolved. However in the absence of plans demonstrating this, and relying only on the provisions of the relevant planning scheme, I am not prepared to go beyond two dwellings.*

66. Such a development contemplated by the Court in Stanhill is therefore fundamentally different from the 18 unit development before the Court in the present proceedings.

67. Significantly too, the Court in *Stanhill* found that:

a) the appearance of the allowed development would be that of a single dwelling house; and

b) compatible with the existing development form in the area; and

c) the likely level of activity, especially traffic activity, is unlikely to be significantly different than that associated with a single dwelling:

> *71 In forming my conclusion that a modification of the restriction, so as to permit the erection of no more than two dwellings, will not substantially injure the persons entitled to the benefit of the restriction I rely upon the following factors. First, it is likely that the erection of two dwellings will result in one dwelling facing Rodman Street and one dwelling facing Sturdee Street. Similarly the erection of two dwellings is likely to result in just one cross-over onto each of Rodman Street and Sturdee Street. This outcome will be compatible with the existing development form in the area. It will avoid the appearance of a multi-dwelling development, even if the two dwellings share a common boundary. The construction of two dwellings, whether single or double storey, is also likely to leave an area available for landscaping purposes which is comparable with existing detached dwellings. The level of activity associated with two dwellings, especially traffic activity, is unlikely to be significantly different than that associated with a single dwelling. It is true that the difference between four or five dwellings, on the one hand, and two dwellings, on the other hand, is a matter of degree. But it is within this degree that substantial injury to the beneficiaries of the restriction commences to operate.*

68. None of these claims could be fairly made in relation to the proposal presently before the Court.

69. It should also be noted that despite the numerous amendments made to the Originating Motions in this case, the plaintiff has not agitated a fallback position in the event that the Court does not approve a development generally in accordance with the development proposed.

70. It is now too late to do so. As the Court said on the first day of this matter it's not up to the court to look for a proposal that will pass muster. It can't make a decision about something that has not been litigated:

> *HIS HONOUR: Yes. Presumably though the court is not generally authorised to go around thinking up what might or might not pass muster, if it hasn't been litigated.*
> *MR WRIGHT: I accept that, Your Honour, yes…*[28]

71. The heritage overlay forms part of the planning controls and is not germane to the Court's jurisdiction under section 84. In fact, it is an additional safeguard and protection obtained by the residents for the additional protection of the estate and not a justification for the removal of the Covenant. As has often been said, covenants are a matter of private property rights. Town planning is a public land use control imposed for the public good.

72. In addition, the plans provided are incomplete. In his report (Annex E), Mr. Easton describes them as "indicative" and states that "the design of the building may alter during the application process".

73. The Plaintiff has indicated that it does not want approval for precisely the development shown in the plans, but something generally in accordance with those plans:

> *HIS HONOUR: <u>Do I know that this plan which is about to be changed tomorrow, would comply with all 33 standards?</u>*

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[28] Transcript page 79

> *MR WRIGHT: You don't. You don't. But unless it does, you won't get a permit.*
> *HIS HONOUR: But it might have to be changed again in order to.*
> *MR WRIGHT: There's a failsafe mechanism.*
> *HIS HONOUR: Yes, but it might have to be altered from what is presently proposed.*
> *MR WRIGHT: It may have to be altered but it's unlikely to be altered in any material respect. There may be tweaking, which is why the permission would be to build generally in accordance with the plan.*
> *HIS HONOUR: Right.*

74. In fact, the Plaintiff will **not** have to prove compliance with the 33 standards, but with the more generalised objectives in ResCode. Clause 55 of the relevant Planning Scheme provides:

> A standard should normally be met. However, if the responsible authority is satisfied that an application for an alternative design solution meets the objective, the alternative design solution may be considered.

75. Moreover, it is clear that the plans the subject of the application are conceptual in nature, this was conceded by Mr Easton in his oral evidence. For this reason, the Victorian Civil and Administrative Tribunal may provide some liberty to the applicant in amending its application at a later date. As Justice Morris held in *Solid Investments Australia Pty Ltd v Greater Geelong City Council* [2004] VCAT 2356 that the less detail and precision there is in the primary document or documents, the more flexibility is given by the phrase "generally in accordance with":

> 62 I agree with the observation of Deputy President Horsfall in *Canet v Brimbank City Council* that general accordance is a question of fact to be judged on the facts and circumstances of each case and that the less detail and precision there is in the primary document or documents, the more flexibility is given by the phrase "generally in accordance with". None of the parties to the present proceeding disagreed with this statement of general principle.
>
> 63 In one sense the 1998 plans were concept plans. These plans were not intended to be the final plans of the proposed

development; rather development plans were to be prepared which would then be the relevant plans for town planning purposes.

76. To this extent, the Court can have no confidence that the plans before it today will closely resemble the building that is ultimately built.

CONFORMITY WITH THE COVENANT

77. By amendments advised last week, the plaintiff now wishes to contend that the proposed development is in conformity with the covenant.

78. It is submitted that this is plainly not the case as –

a) what is proposed is not the construction of one house on each of the two lots;

b) it is proposed to subdivide the Lots into smaller allotments; and

c) it is proposed to excavate other than for foundations.

79. As a grant of private property rights over land, the Covenant is construed in accordance with the principal of non-derogation of grant. As was said in *Harmer v Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200, 225-6

> *… "it must be on the principle that a grantor shall not derogate from his grant, a principle which merely embodies a legal maxim of common honesty."*

80. In the present case, there are important pointers to the proper construction of the covenant –

a) there is a maximum of one house per lot specified in the covenant;

b) the conduct of businesses i.e. activities carried out gain or profit are prohibited; and

c) subdivision into smaller allotments or frontages is prohibited.

81. In *Downie v Lockwood* [1965] VR 257, 262, Smith J referred to a dwelling house in the narrower sense as being premises occupied or adapted for occupation by persons living in one household.

82. In *Longo Investments Pty Ltd* [2003] VSC 37, at [12] Osborn J described the hostel with which he was concerned as consisting of individual bedrooms and communal facilities creating one dwelling house. This situation was to be distinguished from those cases in which bedsitting rooms are individually occupied and have been regarded as separate dwelling houses. The proposed building was designed and intended to operate as one "household" in the terms of Smith J. in *Downie v Lockwood*.

83. In *Natraine Nominees Pty Ltd v Patton* [2000] VSC 303, Smith J reviewed a number of the cases relating to restrictive covenants. Whilst the words 'dwelling house' in their colloquial and ordinary meaning can include a building in which there is more than one residential unit depending on the layout and structure of the building, here there are multiple units, external doorways at ground level, other units having entry through lobby, lift and stairway arrangements, and all units having entry through basement car parking and lifts. All units are entirely separated, and are intended to operate as separate households. Ground floor units have their own separate private amenity areas, and open space, whilst units on the first and second floor levels have their own exclusive and separate balconies. All units have independent and exclusive accommodation, cooking, meals, laundry and cleaning facilities.

84. In *Re Marshall and Scott's Contract* [1938] VLR 98, Mann CJ held the erection of a villa containing two flats as contravening a restrictive covenant which provided that there should not be built on the land "any building save one dwelling house". In that case, there was one building but it contained structurally complete and separate dwellings under one roof.

85. It is submitted that on no view can it be said that the proposed development is a house, quite apart from the prohibition by the covenant of subdivision into smaller allotments which itself precludes the proposed development, and the prohibition on excavation other than for foundations.

CONCLUSION

86. As Farwell J. said in *Re Henderson's Conveyance* [1940] 1 Ch 835 at 846:

> *"Speaking for myself, I do not view this section of the Act as designed to enable a person to expropriate the private rights of another purely for his own profit. I am not suggesting that there may not be cases where it would be right to remove or modify a restriction against the will of the person who has the benefit of that restriction, either with or without compensation, in a case where it seems necessary to do so because it prevents in some way the proper development of the neighbouring property, or for some such reason of that kind; but in my judgment this section of the Act was not designed, at any rate prima facie, to enable one owner to get a benefit by being freed from the restrictions imposed upon his property in favour of a neighbouring owner, merely because, in the view of the person who desires the restriction to go, it would make his property more enjoyable or more convenient for his own private purposes."*

87. It is submitted that the Originating Motion as amended should be dismissed with costs.

Dated 23 June 2011

Greg Garde
Joan Rosanove Chambers

Matthew Townsend
Owen Dixon Chambers

Russell Kennedy

SCHEDULE OF DEFENDANTS

1. Lilian Mary Johnstone of 6 Derril Avenue, Malvern in the State of Victoria

2. Georgina Anthea McNamara of 4 Derril Avenue, Malvern in the State of Victoria

3. Matthew Philip Preston of 2 Derril Avenue, Malvern in the State of Victoria

4. Emma Jane Preston of 2 Derril Avenue, Malvern in the State of Victoria

5. James Ormonde Lucas of 8 Derril Avenue, Malvern in the State of Victoria

6. Isobel Clark Lucas of 8 Derril Avenue, Malvern in the State of Victoria

7. Mark Oliver Simmons of 42 Thanet Street, Malvern in the State of Victoria

8. Katrina Michelle Allen of 42 Thanet Street, Malvern in the State of Victoria

9. Wendy Patricia Kimpton of 40 Thanet Street, Malvern in the State of Victoria

10. Thanh Giang Phan of 1/197 Wattletree Road, Malvern in the State of Victoria

11. Mui Gek Merian Koh of 1/197 Wattletree Road, Malvern in the State of Victoria

12. Lorraine Maria Bourke of 2/197 Wattletree Road, Malvern in the State of Victoria

13. Julia Sandra Noel Wharton of 3/197 Wattletree Road, Malvern in the State of Victoria

14. Michael John Lynne Wharton of 3/197 Wattletree Road, Malvern in the State of Victoria

15. Talia Oliver of 3 Derril Avenue, Malvern in the State of Victoria

16. David Oliver of 3 Derril Avenue, Malvern in the State of Victoria

17. Amanda O'Dell McDougall of 38 Thanet Street, Malvern in the State of Victoria

18. Graeme Bryant Weber of 8 Coonil Crescent, Malvern in the State of Victoria

19. Prudence Joanna Weber of 8 Coonil Crescent, Malvern in the State of Victoria

20. Randy James Laporte of 2 Canberra Grove, Malvern in the State of Victoria

21. Douglas Walter Campbell of 8 Canberra Grove, Malvern in the State of Victoria

22. Gillian Elizabeth Miles of 1 Canberra Grove, Malvern in the State of Victoria

23. Joan Lynette Conron of 12 Coonil Crescent, Malvern in the State of Victoria

24. Allipatac Pty Ltd of 16-18 Thanet Street, Malvern in the State of Victoria

25. Laura Ann Conroy of 2 Grace Street, Malvern in the State of Victoria

26. Astrida Cooper of 3 Grace Street, Malvern in the State of Victoria

27. Panchalinga Das of 5 Grace Street, Malvern in the State of Victoria

28. Katharine Quincerot of 10 Grace Street, Malvern in the State of Victoria

29. Paul Rohan Sweet of 7 Grace Street, Malvern in the State of Victoria

30. Susan Jane Wykes Sweet of 7 Grace Street, Malvern in the State of Victoria

31. Samlyn Joy Crockett of 8 Grace Street, Malvern in the State of Victoria

32. Lynne Maree Raines of 20 Thanet Street, Malvern in the State of Victoria