

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

S CI 2016 03365

IN THE MATTER of an application under section 84(1)(c) of the *Property Law Act 1958* for the modification or removal of the restrictive covenant contained in Instrument of Transfer No. 1389775 registered in the Land Titles Office in the Register Book and imposed upon the land known as 282-284 Balwyn Road, Balwyn North being the land in Certificate of Title Volume 05477 Folio 376, between:

HELEN AND JOHN WILSON PTY LTD

Plaintiff

- and -

IAN HUNDLEY

Defendants

and others according to the attached schedule

ORDER

- JUDGE: The Honourable Associate Justice Mukhtar
- DATE MADE: 1 May 2017
- ORIGINATING PROCESS: Originating Motion
- HOW OBTAINED: On the hearing of the motion as adjourned on 14 February 2017
- ATTENDANCE: Not required. The Court was willing to make these orders 'on the papers' under rule 59.07 according to a proposed consent order as signed by the parties' solicitors.
- OTHER MATTERS:
- A. On 21 September 2016, the Court made orders under section 84(3) of the *Property Law Act 1958* requiring the plaintiff to give notice of this application to landowners in the near vicinity having the benefit of the covenant in a manner and form as stated in that order. That included a requirement to display publicly a notice on the plaintiff's for a fixed period. For the purposes of rule 52.09(3) of the *Supreme Court (General Civil Procedure) Rules 2005*, the Court declares the notices were given in accordance with those orders.
- B. The matter returned to Court on 21 November 2016. By that time, the plaintiff received objections to the application from seven landowners. On that date, those

objectors were joined as defendants to this proceeding. The plaintiff filed an amended originating motion joining those parties as defendants on 23 December 2016.

- C. On 14 February 2017, the Court made procedural orders for the filing of affidavits and any expert opinion evidence from a town planner in opposition to such evidence as had already been filed on behalf of the plaintiff. Subsequently, the defendants by their solicitor filed affidavits of: Justine Edwina Grover sworn 26 January 2017; Eileen Dwyer sworn 26 January 2017; Ian Hundley sworn on 26 January 2017; David Robson sworn 27 January 2017; Chris Madsen sworn 27 January 2017; Richard Didelis sworn 25 January 2017 and Lorraine Sparks sworn 29 January 2017. The defendants also filed an affidavit of Robert Milner, a town planner of 10 Consulting Group Pty Ltd in support of their opposition to the application, and to be considered with the opinion evidence of the plaintiff's town planner Robert Walter Easton as stated in a report dated June 2016, and a supplementary report dated March 2017. Thus there was a contest of expert opinion on the question whether the proposed modification would or would not cause substantial injury, that being one of the available grounds for the exercise of the Court's power to modify or discharge a covenant under section 84(1) of the *Property Law Act 1958*.
- D. The covenant prevents, amongst other things, the building of more than one dwelling on the land. The plaintiff proposes to develop the land by sub-dividing the property and constructing two double storey free-standing dwellings as depicted in the proposed development plans exhibited in the plaintiff's materials. Alternatively, the Court has been told that the properties will be sold as subdivided lots.
- E. An order of the Court made on 3 April 2017 records that the parties were negotiating a possible resolution of the application without the need for a mediation order. The parties have reached a mutually satisfactory settlement agreement with respect to variation of the restrictive covenant and seek that the Court make a consent order giving effect to that agreement on the basis that the proposed modification of the restrictive covenant will not substantially injure the persons entitled to the benefit of the restriction.

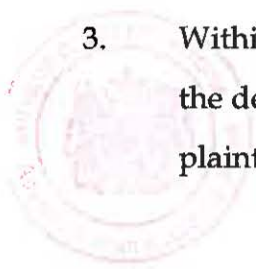


- F. The Court will accede to making the order by consent. The order involves a stipulation about site coverage, set back and building height. The Court is wary about modifying covenants by introducing restrictions of the type that are typically the subject of planning laws or planning considerations. But in this case, the stipulations are plain, not elaborate, the product of informed consideration, and ought be capable of implementation and observance without controversy.

THE COURT ORDERS BY CONSENT -

1. Pursuant to section 84(1)(c) of the *Property Law Act* 1958, the restrictive covenant contained in instrument of transfer number 1389775 in the Register kept by the Registrar of Title under the *Transfer of Land Act* 1958 and affecting Lot 105 on Plan of Subdivision 007529 being the land described in certificate of title volume 05477 folio 376 and known as 282-284 Balwyn Road, Balwyn North in the State of Victoria, be modified as depicted in the covenant extracted below, by the insertion of the words underlined and in bold text, so that the covenant as modified, reads -

...I the said Samuel Williams for myself my heirs executors administrators and transferees do hereby covenant with the said Ferdinand Finger his heirs executors administrators transferees the registered proprietor or proprietors for the time being of the remainder of the land now comprised in the said Certificate of Title that no building shall be erected on the said Lot save one or two dwelling houses covering no more than 50% of the land, and being set back no less than five (5) metres from the eastern boundary and set back no less than nine (9) metres from the western (Balwyn Road) boundary, and no higher than nine (9) metres, and valued without outbuildings at not less than Five hundred pounds
2. As soon as practicable after the authentication of this order, the plaintiff shall lodge a copy with the Registrar of Titles.
3. Within fourteen (14) days of receipt of this Court's order, the plaintiff shall pay to the defendant's solicitors, \$23,273.00, as the agreed quantum of costs payable by the plaintiff to the defendants in this matter.



DATE AUTHENTICATED: 1 May 2017



ASSOCIATE JUDGE

Mukhtar

THE HON ASSOCIATE JUSTICE MUKHTAR

SCHEDULE OF PARTIES

HELEN AND JOHN WILSON PTY LTD

Plaintiff

- and -

IAN HUNDLEY

First Defendant

LORRAINE SPARKS

Second Defendant

JUSTINE GROVER

Third Defendant

DAVID ROBSON

Fourth Defendant

EILEEN DWYER

Fifth Defendant

CHRIS MADSEN

Sixth Defendant

RICHARD DIDELIS

Seventh Defendant

