SUPREME COURT OF VICTORIA

Re ROBINSON

ADAM, J.

12, 13 October 1971

Real property—Restrictive covenant—Application for discharge of modification to permit erection of shops—Covenant that no building other than private dwelling-house be erected—Covenant in conflict with use permitted under planning scheme—Whether covenant obsolete—Whether modification would deny practical benefits—Substantial injury—*Property Law Act* 1958 (No. 6344), ss. 79A, 84.

The applicant was the registered proprietor of four allotments which were subject to a restrictive covenant whereby no building other than a private dwelling-house of a stated minimum cost was to be erected on any allotment. Under the Shire of Mornington Planning Scheme the use of the allotments for shops was permitted but the use thereof for residential buildings was forbidden. Upon application for modification of the covenant to permit the erection of seven shops on two of the allotments,

Held: (1) the covenant was still capable of benefiting those persons entitled to enforce it and was, therefore, not obsolete.

Driscoll v. *Church Commissioners for England*, [1957] 1 Q.B. 330; [1956] 3 All E.R. 802; *Perth Construction Pty. Ltd.* v. *Mount Lawley Pty. Ltd.* (1955), 57 W.A.L.R. 41; *Re Truman, Hanbury, Buxton & Co. Ltd.*, [1956] 1 Q.B. 261; [1955] 3 All E.R. 559, referred to.

(2) Although the Court should deem material the fact that the allotments had been subjected to a planning scheme which forbade the use of them in the only manner permitted by the covenant and although the continued existence of the covenant would impede the reasonable user of the allotments, modification of the covenant would deny practical benefits to those entitled to the benefit of it.

(3) The Court was not satisfied that the proposed modification would not amount to substantial injury to the persons entitled to the benefit of the restriction.

Ridley v. *Taylor*, [1965] 1 W.L.R. 611; [1965] 2 All E.R. 51, referred to.

(4) Accordingly, the application should be refused.

Application

This was an application under s. 84 of the *Property Law Act* 1958 for discharge or modification of a restrictive covenant. The relevant facts appear in the headnote and in the judgment, *infra*.

P. A. Liddell, for the applicant.

J. G. Larkins, for the objectors.

Cur. adv. vult.

Adam, J.: This is an application by Ernest Travers Robinson under s. 84 of the *Property Law Act* 1958 seeking a discharge or modification of a restrictive covenant which affects his land.

The land in question is at Mount Eliza. The applicant is the registered proprietor of four lots numbered 449, 450, 497 and 498 on plan of subdivision No. 10791, which is lodged in the Office of Titles. As appears from the plans in evidence, this land comprising four blocks is situate at Acheron Avenue: on one boundary is Barmah Street, and on the other Bethanga Street, which run at right angles to Acheron Avenue.

The restrictive covenant sought to be modified was created upon a transfer of these four lots from one John Henry King to one Arthur Good

in 1950. King was the proprietor, apparently, of the large tract of land included in this subdivision, in so far as it had not been previously transferred out. By the restrictive covenant then created, Good, as the transferee of the subject property of this application, covenanted "that he for himself, his heirs, executors, administrators and transferees the registered proprietors for the time being of the lots in question, and every part thereof, covenants with John Henry King, his heirs, executors, administrators and transferees, registered proprietor or proprietors for the time being of the land comprised in the principal certificate of title, that is vol. 4658, folio 443, other than the land thereby transferred, as follows", and then the first of these covenants, and the only one with which we are concerned, reads: "that no building shall be erected on any of the lots hereby transferred other than a private dwelling house, the cost of which, exclusive of fences and outbuildings and architects' fees shall be not less than £500". It appears that the applicant was successor in title, not immediately but through other transactions, from Good of these lots which are bound by this covenant. It appears that he became registered proprietor in 1961 or 1962, and has been the registered proprietor since.

The lots in question numbered 449, 450, 497, 498 were at all material times, that is to say prior to the applicant becoming the registered proprietor, and since, I think, about 1959, subject to a town planning scheme. The scheme is referred to as the Shire of Mornington Planning Scheme 1959, which was in 1961 formally approved by the Governor in Council, and thereupon became part of the planning law affecting this locality. The subject land was there zoned "Commercial B" and the importance of that is that under the planning scheme the subject land may be used for shops but not for purposes of residence, save in so far as any residence may be associated and attached to the shops. There is, under the planning scheme, therefore, a ban against using these lots as required by the covenant—not otherwise than for the purposes of erecting a private dwelling-house on each.

The applicant has from an early date after acquiring these lots had plans for the erecting of shops permitted under the planning scheme. The original plan appears to have been for, I think, some 14 shops covering the four lots. That original plan was modified much more recently by another plan which is in evidence before me, which provides seven shops with parking space and minor roads connected with the shops on two of the allotments numbered 449 and 450. There is no current proposal regarding the further development of the other two lots, numbered 497 and 498, and the application seeks the modification of the restrictive covenant to permit of the carrying out of this proposal for the erection of the seven shops on these two blocks.

The benefit of the 1950 covenant was expressed to go with the transferor and heirs, executors, administrators and transferees, registered proprietor or proprietors for the time being of the land comprised in the vendor's certificate of title, and it appears that at the time of this transfer there was a substantial area of land still in the parent certificate of title, and also that subsequently to the transfer to Good in 1950, a number of other lots had been transferred out of the parent title. It is not in dispute that the proprietors of these subsequently transferred parts of the land have the benefit of this restrictive covenant. Were it not for legislation introduced in 1964, which is now s. 79A of the *Property Law Act* 1958, it would be a moot point whether anyone had the benefit of this covenant other than the original owner who transferred them, because of the law as it stood before that legislation the benefit

of the covenant would not automatically have run on the transfer of parts of land by the original vendor subsequently. But any doubts on that point are removed by this legislation which attaches the benefit to any partial transfer of the whole land, and as I say, there have been many such transfers of part of the land since the covenant was created.

The matter comes before me because the application has been opposed by persons who own land in the area which has the benefit of the restrictive covenant. Mr. Larkins has announced his appearance for some 18 objectors. Those who are entitled to the benefit of this covenant are conveniently indicated on a plan which has been put in evidence which indicates that among these who are entitled to the benefit there are some whose lands are almost adjacent to the subject lands; others are further removed. Thus on the other side of Acheron Avenue from the subject land there is lot 496, owned by Wills who has the benefit of this covenant. On the other side of Barmah Road, immediately opposite the subject land lot 524 is owned by one of the objectors, and as one goes along Barmah Street, on either side of the subject land, there are others in the near vicinity who have the benefit of this covenant.

As the matter was opposed, the master could not deal with the application himself, but under the rules has referred it to be dealt with by the Court.

The land itself benefited by the covenant is part of what is called the Earimil Estate, at Mount Eliza. From the affidavits one gets a general picture of the area and it appears that since the creation of this covenant, apart I think from two developments, there has been no departure on the part of other purchasers who are subject to the like covenant from the restriction against erection of any building, any house, other than a private dwelling-house. The two qualifications on that is that there has been since then a reserve created, on which a primary school has been built, which is along from Acheron Avenue, being bounded on by Barmah Street and Bethanga Street, about eight blocks away in a westerly direction. That is one modification. The other is there has been a reservoir further to the east which fronts Kanya Road. But for the rest, the area in question, the Earimil Estate, has remained residential. By no means have all the blocks been built on: about 40 per cent of them remain vacant to this day, but there has been a substantial number which have residences on them, and most of those have been built within the last six years or so. But up to this stage it has been a residential area, and the objectors profess to be primarily concerned with this area remaining a residential area, and not providing shops. It appears, and I have no reason to doubt this, that the general appearance of the area is what has been described as semi-rural. The objectors who have submitted affidavits lay great store on it remaining purely residential. I need not elaborate on the reasons that they have urged; the privacy which such a residential area has, as against one which has shops in it; the safety for children and so on; the desire to have no commercial enterprises within the area to disturb the general peace and quiet to which some people attach great weight. A general ground for objection to the use of the subject land for shops is that that will alter the general character of this particular area, as shops are likely to attract many people who would not otherwise come there. Reference was made to the particular project on which the applicant is founding as it makes provision for much parking space indicating the expectation of many cars coming there for shopping purposes. Of course if many people are attracted to the proposed shops that, particularly for those who have blocks in the immediate vicinity, will alter for them the character of the site of their dwelling. In the case of Wills,

obviously, he or she would be looking across at these shops, instead of some private reserve as contemplated by the covenant. And so one could say of the immediate block to the south—No. 524—the occupant of that house would be looking upon the shop, and others nearby would be, of course, affected, although perhaps not quite so obviously as those I have mentioned.

There are other benefits which are claimed by the objectors for maintaining the pure residential character of this area, such as the habits of various types of birds to frequent it and give it its sort of rural setting, and that shops and the essential consequences of shops such as the litter and congregation of people, pollution, extra noise and so on would tend to send the wild life, which is claimed to be a feature of this area, away from this district. The point is that—and I would agree with this, even without direct evidence—that the presence of shops in a residential area does have an effect on the area in a variety of ways, such as increasing traffic, noise and the congregating of numbers of people, and so on. This is basically claimed by the objectors to be their objection to the granting of the present application, and it is for me to consider what the position is as a matter of law.

Now the jurisdiction which I exercise is solely that conferred by s. 84 (1) of the Property Law Act. By that section the Court is given "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"—and of course that is this case—"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) . . .". Then are set out three distinct branches "upon being satisfied" of any of which I have jurisdiction to discharge or modify as may be appropriate. The point I must make, and it has been made in many cases, is that it is for the applicant to bring himself within one or other of these branches, lettered (*a*), (*b*) or (*c*) before a court is authorized to interfere with a restrictive covenant. Paragraph (*a*) has been relied on by the applicant here, that is the Court being satisfied "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". Now to act under this branch of the section 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 where 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. A leading case justifying such an interpretation of the word "obsolete" is, *Re Truman, Hanbury, Buxton & Co. Ltd.*, [1956] 1 Q.B. 261; [1955] 3 All E.R. 559, and that has been followed and applied in another case to which I was referred, *Driscoll* v. *Church Commissioners for England*, [1957] 1 Q.B. 330, at p. 345; [1956] 3 All E.R. 802. In the latter case Hodson, L.J., followed Romer, L.J., in the earlier case.

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 inquires into the purpose of the restrictive covenant. In this case it seems to be clear enough that the purpose of it 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.

That being the object of this covenant, and the area up till this time having remained in fact residential and purely residential, it is quite clear that the covenant itself is not obsolete; it is still, as it always was from its inception, one capable of benefiting those who are entitled to enforce it, and who are interested to maintain the residential character of the area. This was recognized in the case in Western Australia where Virtue, J., delivered the judgment for the Full Court in *Perth Construction Pty. Ltd.* v. *Mount Lawley Pty. Ltd.* (1955), 57 W.A.L.R. 41, at p. 46, where he stated of a similar covenant there in the like circumstances that it was not obsolete, and I can see no more reason here for treating this as an obsolete covenant, whatever one might wish to say about the reasonableness or otherwise of those who insist on its being observed. Its purpose can still be achieved and that is the answer, it seems to me, to its not being deemed obsolete. But recognizing that, Mr. Liddell relied on the second limb of paragraph (*a*), which says that "upon the Court being satisfied"—and on reflection I think it still means "by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Court deems material"—that "the continued existence" of the covenant "would impede the reasonable user of the land without securing practical benefits to other persons". On my construction of this, first of all, it has got to be shown that since the creation of the covenant there have been "changes in the character of the property or the neighbourhood or other circumstances of the case which the Court deems material". Mr. Liddell stoutly contended that there had been changes in the character of the property. I find it unnecessary to finally decide that issue for a reason I will state in a minute, but I have doubts whether the character of this property can be considered to have changed by reason of anything that happened. The only change is one arising from the planning scheme, and as to whether that is such a change in the character of the property I take leave to doubt; but I do not need to decide it, because in addition it is sufficient, as to this first preliminary, that there have been either "changes in the neighbourhood or other circumstances of the case which the Court deems material". Again I take leave to doubt whether Mr. Liddell is correct in saying there have been relevant changes in the neighbourhood since the covenant was imposed; and the interesting question of whether the "neighbourhood" includes the lots in question, or only the lots surrounding the lots in question, I need not discuss, because I think that he is correct when he says that there have been *other* circumstances of the case which the Court should deem material. I consider that—and this was the view of Virtue, J., in the *Perth Case, supra*—the fact that the lots in question have been subjected to a planning scheme which forbids their being used for the purposes of the covenant—that is the erection of private dwellings—does provide circumstances which should be deemed material. The fact that the covenant cannot be observed in the sense that the land

cannot be used except in accordance with the covenant for a private dwelling, and in conformity with the planning legislation cannot be used for the purpose of a private dwelling, does seem to me a material circumstance. But as Virtue, J., held in the *Perth* Case, that is only the first step to invoking this second limb in paragraph (*a*). The Court must be satisfied that the continued existence of the covenant would impede the reasonable user of the land without securing practical benefits to other persons. I agree with him that the first of these requirements is satisfied, that the continued existence of the covenant as created, if it is allowed to continue, would impede the reasonable user of the land for the simple reason that the planning law affects this land as part of the law of the land, and the planning scheme forbids the use of this land for the erection of any private dwelling-house thereon. As the restrictive covenant prevents its use for any other purpose, it seems obvious to me that the existence of this restrictive covenant does impede the only user of the land which is permitted under the planning scheme. I may say that conclusion as to impeding the reasonable user of the land by reason of the planning scheme finds support in a case of *Re Alnutt's Application* (1961), 12 P. & C.R. 256. But the difficulty facing Mr. Liddell is the remaining provision. It is not sufficient that the continued existence of the covenant impedes the reasonable user of the land, because the section says "without securing practical benefits to other persons". Well, are any practical benefits secured to other persons by the existence of the covenant? The legislation is obviously framed to protect restrictive covenants which are of any practical benefit to other persons from modification or discharge, even though the existence of these restrictive covenants impedes any reasonable user of the land. The first concern obviously is the preservation of property rights, however hard the consequences may be to others. And so the question here is whether to interfere with the restrictive covenant at present existing would deny any practical benefits to other persons. The modification sought is to convert land, which under the restrictive covenant is limited to use for a private residence, to land which would be used for the purposes of shops. Is there any practical benefit to any of the persons entitled to the benefit of the covenant, because if to one person that would be sufficient—if to more persons, of course the case is strengthened. Can it be said that there is no practical benefit to any person entitled to have this covenant maintained? I think it is sufficient to state the proposition to answer it. The test of practical benefit, it seems clear enough, is not merely whether if the covenant is modified or discharged there would be any depreciation in the sale value of land benefited by it. The notion of practical benefit goes much further than that, as indicated by some of the cases that were cited to me. I think it sufficient to refer to the New South Wales case, *Re Pariwax (S.A.) Pty. Ltd.*, [1956] S.R. (N.S.W.) 130, which was followed in our Court: see per Gillard, J., in *Re Cook,* [1964] V.R. 808, at p. 810. They follow what Farwell, J., said in *Re Henderson's Conveyance,* [1940] Ch. 835; [1940] 4 All E.R. 1, and make it clear that if there is some real benefit to the person entitled to the restrictive covenant, then to deprive him of it is to deprive him of some practical benefit. And the right of a person to have preserved amenities for what he reasonably considers to be amenities for his projects is a right, the deprivation of which deprives him of a practical benefit.

In this case, who is to say that is is of no practical benefit to persons owning land in the immediate vicinity other land, to have that preserved consistently with the character of the neighbourhood as a whole as a private residential site rather than as a shopping commercial centre?

Different people may hold different views of this; the value of land may or may not be appreciated by what is done, but it is something of substance which has been recognized for very many years by the law, the right of a person to enjoy the property with its amenities as they want to enjoy it. There is a difference between living next or almost next to a shopping site where people come to shop and where cars are parked, and living next to a private residence. It is not really, I think, for a judge to say whether he personally would bother much one way or another; he has got to look at people as they are, and it is well recognized that such a matter as the character of the neighbourhood in this respect is one of material concern to home dwellers.

There was conflicting evidence as to whether the value of the lands benefiting by this covenant would really be affected if the covenant was modified or discharged or not. One estate agent said it would depreciate the value of the property nearby; another estate agent would not agree with that. But as I say, that is not an essential test at all, and it appears to me in a case of this sort not to provide a very relevant fact. The point is, is it a matter of substance, the preservation of this covenant or its rejection? Why should not a person, if entitled to have the land almost next door used for a private residence, insist on that, and resist having that land converted into a shopping centre with all that that involves? The law recognizes that as a practical benefit, and I think for that reason the applicant fails to bring himself within either of the two limbs in paragraph (*a*) : s. 84 (1) (*b*) has no application, because that depends on consent, which is, of course, wanting in this case. As to s. 84 (1) (*c*), that would allow a covenant to be discharged or modified on the Court being satisfied that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction. This again raises very much the same point, "substantially injure"; again the test is not, I think, what the effect on the value of those entitled to the benefit of the restriction is, but it is a similar test to that applicable when it is concerned with the practical benefits arising from the covenant.

I am far from satisfied that within the meaning of paragraph (*c*) that the proposed modification to relieve the subject land of the restriction in favour of "private house" and permit the land to be used for the shops as proposed would not amount to a "substantial injury" to the persons who are entitled to the benefit of this restrictive covenant. Many of them have said that they bought the land because of its quiet surroundings, its semi-rural appearance and that they brought their children there in the confidence that the restrictive covenants, of which they were aware, would be observed; and that the position would become quite different for them living as a unit if it becomes in the nearby area a shopping centre. There may not be many shops—as Mr. Liddell says—and it is a very small site in a very big area, but it is none the less, it seems to me, real in that it alters the surroundings and the character of the neighbourhood, and these persons with the benefit of it are entitled to complain that it would amount to an injury to them. There are authorities, which I think at this stage I need not now refer to in detail, on what amounts to an injury. Perhaps I should mention *Ridley* v. *Taylor,* [1965] 1 W.L.R. 611; [1965] 2 All E.R. 51, where one finds it stated that paragraph (*c*) is really to preclude vexatious opposition cases where there is no genuineness or sincerity or bona fide opposition on any reasonable grounds. There one can say that despite the opposition the proposed discharge of modification does not injure the persons entitled to the benefit of the restriction. In *Ridley* v. *Taylor,* I think, it was stated

that paragraph (*c*) was, "so to speak, a long stop against vexatious objections to extended user and is to deal with frivolous objections".

Our legislation differs from the English to the extent that we have inserted the words "substantially" before "injure"; in the English legislation the word "substantially" is not used. But, in my opinion, that makes no difference in this case. I have no reason to believe that the objectors are objecting otherwise than bona fide, and because they on reasonable grounds believe that they will suffer from the proposed modification of the restrictive covenant. The point is they do not want shops in their immediate vicinity; they prefer the area to be preserved as purely residential. They are quite prepared to go the relatively short distance to shops outside the area if they want to go to the shops. I think their views are entitled to respect, and they should not be castigated as objectors who are making foolish and vexatious objections not on sincere grounds.

For that reason, I do not think the applicant has made out the conditions for my exercise of jurisdiction under s. 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 into that because, as has been repeatedly said, in exercising this jurisdiction the Court is not a planning authority. Whether or not it would be advantagous as a matter of planning to permit of this development here seems to me quite beside the point. My jurisdiction is limited to what is set out in s. 84, and if the discharge or modification proposed would interfere with those who have the benefit of the covenant they cannot be forced, as it were, to surrender the full benefits of the covenant. It is for the applicant in a case of this sort to show there is no real benefit at all from continuing the covenant into which he or his predecessors have entered, and that, I find, is not this case. It is not for me to say how far I attach importance to the maintenance of pure residential areas or not; if it did, I would perhaps be rather inclined to support the view of the objectors; but it is not my view that matters, but it is a question rather whether the objectors' view is one that can reasonably be entertained. It may be assumed that the various purchasers bought this property confident that its character was not going to change from that of a pure residential area, and they are entitled to maintain that position.

It seems hard on the applicant; he was not the one who procured the zoning of this land; and I find, he is precluded under the planning scheme from using the land as authorized by the planning scheme by reasons of the existence of this covenant. On the one hand, though, he must be taken to have bought this land with the knowledge of this restrictive covenant, even though he knew that it had been zoned "Commercial B". He took a risk of being able in some way or other to get round this covenant—a risk which, I think, he has not succeeded in escaping. It is hard, though, on him that he cannot develop the land as matters now stand because of the planning scheme and the existence of this restrictive covenant. It is difficult to see to what use at the moment this land can be put by him without contravening either the restrictive covenant or the planning legislation. But one would hope that the authorities under the planning scheme, once appreciating the consequence of the zoning of this area, would be realistic and would not in effect condemn this area of land to sterility. It seems to me, although it is not for me to give any directions, that there is a fairly obvious solution which would enable this land to be used for the purposes for which it was originally transferred in 1950.

I have said sufficient. I need not deal with the question now as to

whether if I had been satisfied of the applicant's rights under s. 84 my discretion should have been exercised against him, for I agree that in that case I would have had a discretion. All I would say of that, if it is any comfort, is that I would have seen no reason at all in this case, if the applicant could have made out a case for the exercise of my jurisdiction, why I should have exercised my discretion against him.

The result, then, is that I must dismiss this application.

Application dismissed.

Solicitors for the applicant: *D. Condon & Co.*

Solicitors for the objectors: *Frost & Hunt.*

A. C. ARCHIBALD
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