our intention to demolish these sites for town house redevelopment within the next few months. Such development is, of course, permitted by the zoning imposed on Parriwi Road by the Mosman Municipal Council.

You presently have the benefit of an old (1927) restrictive covenant over these properties which no longer reflects the present uses permitted in respect of this land. We have sought the opinion of Senior Counsel experienced in such matters (especially in the Mosman area), in regard to the likelihood of a successful application to the Supreme Court for the variation of the terms or alternatively the extinguishment of these covenants having particular regard to the changed character of the surrounding neighbourhood, the original purpose of the covenants and the Council imposed height restriction which protects the view of rear properties such as yours, the prime and obviously quite proper purpose of such a covenant. Counsel advises that the Court would almost certainly overturn the covenants as they presently exist.

To save this company the time and yourself the costs associated with court action we request that you release the said properties from the burden of the covenants; we would of course meet all legal and associated costs involved in such a release. The proposed development is naturally of the same high standard as those already carried out or presently under construction by our company in the area.

As you will appreciate the matter is one of some urgency to this company and we would be obliged if you could convey your attitude, whether favourable or not, to the writer within fourteen days. Failing receipt of such reply we will have no alternative but to assume that you decline and we will commence the appropriate proceedings."

Not surprisingly, the defendants then consulted their solicitors, who, on 28 September 1987, wrote to Post Investments as follows:

"DR AND MRS T J WILSON — RESTRICTIVE COVENANT
36 AND 38 PARRIWI ROAD, MOSMAN

Dr and Mrs T J Wilson have handed to us your letter to Dr Wilson dated 17 September last with instructions to reply to it.

We assume that your letter is requesting our client to release your company from the burden of the covenants in respect of numbers 36 and 38 Parriwi Road.

Your letter does not inform our clients precisely of the nature and extent of the development that your company wishes to carry out on the above properties. Further, your letter does not inform our clients of the extent of the variation of the covenants that you intend seeking in any application to the Court. They are naturally alarmed that you should ask them to release the properties from the burden of the covenants.

Our clients have lived in their house above the properties in Parriwi Road for more than 23 years. They regard the continued existence and observance of the covenants as fundamental and essential to their enjoyment of their home. As you know from our previous correspondence our clients intend moving the Court to restrain any activity which appears to involve any breaches of the covenants.

It is obviously of importance to your company and our clients that the issues between them be defined as quickly as possible and determined

expeditiously. Our searches have disclosed that your company is not yet the registered proprietor of the two properties you refer to in your letter, so we assume that it may be some little time before you are in a position to commence development. It would therefore seem to be appropriate for your company to commence its proceedings forthwith so that our clients may then understand precisely the nature of the relief sought by your company and the nature and extent of the development proposed. Our clients will then be in a position to cross-claim in the same proceedings for any injunctions they may be advised to seek restraining the development. Provided your company gives our clients an undertaking that no contract for the development will be let nor any development commenced pending the determination of the issues between the company and our clients, it will not be necessary for them to seek any interlocutory relief.

Our clients are also anxious to know where they stand and shall co-operate in having the issues determined at any early date. We have instructions to accept service of any proceedings your company may commence.

Our clients are naturally anxious to know what your company proposes as soon as possible. In the event that your company were not prepared to give our clients any undertaking along the lines of that sought above it would be necessary for them to seek interlocutory relief without further notice to you.

Please let us know as soon as possible when it is that you expect that the company will be in a position to commence its proceedings. Please also let us have the undertaking we seek in this letter to avoid the necessity of complicating the proceedings by an application for interlocutory injunctions."

Further letters from the defendants' solicitors — the detail of which letters it is not necessary to record — followed over the course of the ensuing two months before these proceedings were commenced on 24 November 1987 when there was filed a summons in which the plaintiffs prayed the following (inter alia) relief:

"1. An order that the restrictions notified in and affecting the whole of the lands specified in the Schedule hereto and being contained in the covenants specified in the Schedule hereto be wholly extinguished.

2. Alternatively to paragraph 1 hereof an order that the said restrictions be modified or partially extinguished so as to permit the demolition of the buildings presently standing on the said lands and the erection thereon of buildings and structures substantially as described in the Affidavit of Geoffrey Vere Reed to be sworn and filed herein.

3. A declaration that the restrictions referred to in paragraph 1 hereof are unenforceable as against the plaintiffs. . . .

SCHEDULE

(a) The property situated at and known as 36 Parriwi Road, Mosman being the whole of the land comprised in Certificate of Title Volume 4007 Folio 200 as affected by the covenants contained in Transfer No B497398.

(b) The property situated at and known as 38 Parriwi Road, Mosman being the whole of the land comprised in Certificate of Title Volume

POST INVESTMENTS PTY LTD AND ANOTHER v WILSON AND ANOTHER †

Equity Division: Powell J

19, 20 February, 9 May 1990

Torrens System — Restrictive covenants — Extinguishment — By operation of law — Where merger of dominant and servient tenement — Not applicable to land under Real Property Act 1900.

Torrens System — Restrictive covenants — Extinguishment or modification — By order of court — Whether restriction obsolete — Whether restriction impeding reasonable user of servient tenement — Discretion — Conveyancing Act 1919, s 89.

Restrictive Covenants — Interpretation and construction — Building restrictions — "Cottage" — "House" — Use "only as a private residence" — Whether applicable to town-house construction.

Restrictive Covenants — Proceedings to discharge, extinguish or modify — By order of court — Whether restrictions obsolete — Whether impeding reasonable user of servient tenement — Discretion — Conveyancing Act 1919, s 89.

Injunctions — Mandatory injunctions — Particular purposes — In aid of legal right — Restrictive covenant — Building in breach of restriction — Demolition sought — Flagrant breach — Principles applicable — Discretionary considerations.

The *Conveyancing Act* 1919, s 88, makes provision for the registering and enforcing of restrictive covenants. Under s 89(1) the court may "by order, modify or wholly or partially extinguish the restriction" upon being satisfied, inter alia, that by reason of change in use the restriction ought to be deemed obsolete, that the reasonable user of the servient tenement is being impeded or that the relevant parties have agreed to the restriction being modified or extinguished. Under s 89(3) the court may make a declaration as to the effect and extent of a restriction or obligation.

Held: (1) The common law doctrine of extinguishment of interests in land by merger of title does not apply to land registered under the provisions of the *Real Property Act* 1900. (633D, 637C, 640A)

Re Standard and the Conveyancing Act 1919 (1967) 92 WN (NSW) 953 and *Margil Pty Ltd v Stegul Pastoral Pty Ltd* [1984] 2 NSWLR 1, considered and applied.

(2) Where a restrictive covenant is noted on the certificate of title for the servient tenement, it may only be extinguished or modified on the grounds specified in s 89 of the *Conveyancing Act* 1919. (640B-641D)

(3) Where, in a particular case, the facts justify a finding at common law that a restriction has been waived or extinguished, the court retains a discretion to make, or to refuse to make, an order under s 89(1) or a declaration under s 89(3) of the *Conveyancing Act* 1919. (639F-G)

(4) Where the primary restriction in a covenant created and registered in 1927 was that "a cottage building only shall be erected, together with garage, if desired", "cottage" meant a comparatively small country or suburban residence, usually of one storey — perhaps with a room or rooms in the roof — and sufficient accommodation for a single family unit: it could not apply to a structure comprised of five town-houses each with private terrace, garden and swimming pool. (640C-F)

(5) Where the primary restrictions in a covenant registered in 1927 were that only a "house" designed to meet certain limitations as to height and roof design should be built and when built should "be used as a private residence only" such word meant a structure of a permanent character structurally severed from other such structures, under its own separate roof, adapted for and used as, the place of residence of a single family or family group: it could not apply to a structure comprised of five town-houses each with private terrace, garden and swimming pool. (640G-641C)

(6) The court may grant a mandatory injunction to restrain breach of an express negative covenant; where the breach is in flagrant disregard of a party's rights and causes serious injury to those rights the proper exercise of the discretion requires the granting of the injunction unless the party asserting the right disentitles himself by reason of laches, acquiesence and/or delay on his part. (643F-646E)

Wakeham v Wood (1982) 43 P & CR 40 at 43-45, 46-47, followed and applied.

Lamshed v Lamshed (1963) 109 CLR 440 and *York Bros (Trading) Pty Ltd v Commissioner of Main Roads* [1983] 1 NSWLR 391, applied.

Note:

A Digest — CONVEYANCING (3rd ed) [234]; TORRENS SYSTEM (2nd ed) [109]; EQUITY (3rd ed) [354]; INJUNCTIONS (3rd ed) [33]; RESTRICTIVE COVENANTS (2nd ed) [6-7], [11-16]

CASES CITED

The following cases are cited in the judgments:

Alexandra, Re [1980] VR 55.
Breskvar v Wall (1971) 126 CLR 376.
Brightman v Hazel (1921) 54 NSR 81.
Brunner v Greenslade [1971] Ch 993.
Callanan and the Conveyancing Act, Re [1970] 2 NSWR 127.
Chamberlain and the Conveyancing Act, Re (1969) 90 WN (Pt 1) (NSW) 585.
Cobbold v Abraham [1933] VLR 385.
Cook, Re [1964] VR 808.
Cuvet v Davis (1883) 9 VLR 390.
Day v Waldron (1919) 88 LJKB 937.
Derham's Application, Re [1961] VR 174.
Do Carmo v Ford Excavations Pty Ltd [1981] 1 NSWLR 409.
Drake v Gray [1936] Ch 451.
Driscoll v Church Commissioners for England [1957] 1 QB 330.
Economy Shipping Pty Ltd v ADC Buildings Pty Ltd [1969] 2 NSWR 97.
Elliston v Reacher [1908] 2 Ch 374.
Federated Homes Ltd v Mill Lodge Properties Ltd [1980] 1 WLR 594; [1980] 1 All ER 371.
Ghey and Galton's Application, Re [1957] 2 QB 650.
Guth v Robinson (1977) 1 BPR 9209.
Gyarfas v Bray (1989) 4 BPR 9736.
Heaton v Loblay (1960) 60 SR (NSW) 332; 77 WN (NSW) 140.

†[EDITORIAL NOTE: An appeal to the Court of Appeal was disposed of by the filing of consent orders by which the appeal was dismissed.]

High Standard Constructions Ltd, Ex parte (1928) 29 SR (NSW) 274; 46 WN (NSW) 75.
Holmes v Ryde Municipal Council (1969) 90 WN (Pt 1) (NSW) 290.
House v The King (1936) 55 CLR 499.
Ilford Park Estates Ltd v Jacobs [1903] 2 Ch 522.
James v Plant (1836) 4 Ad & El 749; 111 ER 967.
Kerridge v Foley (1964) 82 WN (Pt 1) (NSW) 293.
Kimber v Admans [1900] 1 Ch 412.
Lamshed v Lamshed (1963) 109 CLR 440.
Leichhardt Municipal Council v Daniel Callaghan Pty Ltd (1981) 46 LGRA 29.
Louis and the Conveyancing Act, Re [1971] 1 NSWLR 164.
Margil Pty Ltd v Stegul Pastoral Pty Ltd [1984] 2 NSWLR 1.
Martyn, Re (1965) 65 SR (NSW) 387; 82 WN (Pt 2) (NSW) 241.
Mason and the Conveyancing Act, Re (1960) 78 WN (NSW) 925.
M'Carthy v Cunningham (1877) 3 VLR (L) 59.
Mogensen v Portuland Developments Pty Ltd (1983) NSW Conv R ¶55-116.
Morris v Redland Bricks Ltd [1970] AC 652.
Munns v Watson [1937] VLR 178.
Naish and the Conveyancing Act, Re (1960) 77 WN (NSW) 892.
Pieper v Edwards [1982] 1 NSWLR 336.
Redmond and the Conveyancing Act, Re (1965) 82 WN (Pt 1) (NSW) 427.
Richardson v Graham [1908] 1 KB 39.
Riley v Penttila [1974] VR 547.
Robinson, Re [1972] VR 278.
Roe v Siddons (1888) LR 22 QBD 224.
Rogers v Hosegood [1900] 2 Ch 388.
Rose Bay Bowling and Recreation Club Ltd, Re (1935) 52 WN (NSW) 77.
Standard and the Conveyancing Act 1919, Re (1967) 92 WN (NSW) 953.
Texaco Antilles Ltd v Kernochan [1973] AC 609.
Tietyens v Cox (1916) 17 SR (NSW) 48; 34 WN (NSW) 10.
Tiltwood, Sussex, Re; Barrett v Bond [1978] Ch 269.
Treweeke v 36 Wolseley Road Pty Ltd (1973) 128 CLR 274.
Truman, Hanbury Buxton & Co Ltd's Application, Re [1956] 1 QB 261.
Tulk v Moxhay (1848) 2 Ph 774; 41 ER 1143.
Wakeham v Wood (1982) 43 P & CR 40.
Ward v Paterson [1929] 2 Ch 396.
Warren v Coombes (1979) 142 CLR 531.
Webster v Strong [1926] VLR 509.
Wilson and Conveyancing Acts 1919-1943, Re (1949) 49 SR (NSW) 276; 66 WN (NSW) 147.
Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 WLR 798; [1974] 2 All ER 321.
York Bros (Trading) Pty Ltd v Commissioner of Main Roads [1983] 1 NSWLR 391.
Yorkshire Insurance Co v Clayton (1881) LR 8 QBD 421.

No additional cases were cited in argument.

APPEAL

This was an appeal from a decision of Master Hogan refusing to make orders on a summons for orders to modify or extinguish certain restrictive covenants noted on the certificate of title to land under the Torrens System.

L G Foster, for the appellants.

J L Trew QC, for the respondents.

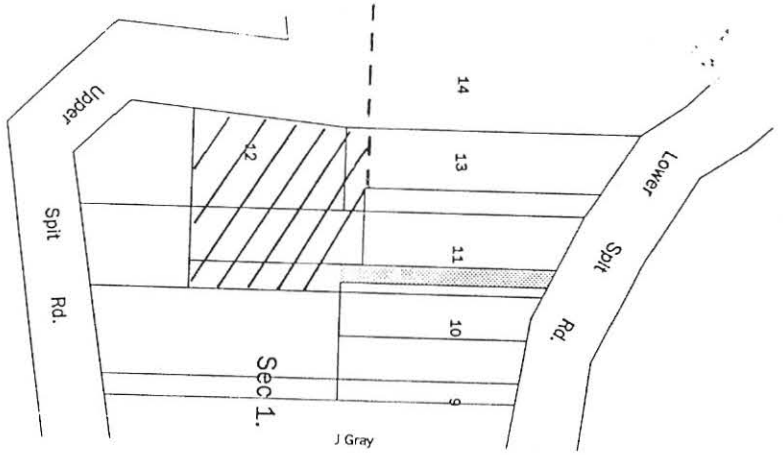
Cur adv vult

9 May 1990

POWELL J. The defendants/respondents, Dr and Mrs Wilson, are, and, at all material times have been, registered as the proprietors of the land formerly comprised in certificate of title, registered vol 2077, fol 210 but now comprised in certificate of title, registered vol 12997, fol 166 (the defendants' land) upon which land is erected a substantial two-storeyed dwelling known as "Camelot", No 197 Spit Road, Mosman, which dwelling the defendants, and members of their family, have occupied as their home since the defendants purchased the property in June 1963.

At the time of the commencement of these proceedings, the second plaintiff (Mr Reed) was, and had since 1984 been, registered as the proprietor of the land formerly comprised in certificate of title, registered vol 2380, fol 20, but now comprised in certificate of title, registered vol 8448, fol 91 (No 40 Parriwi Road), while the first plaintiff (Post Investments), a company controlled by Mr Reed, had entered into two several contracts to purchase the land, formerly part of the land comprised in certificate of title, registered vol 2077, fol 211, but now comprised in certificate of title, registered vol 4091, fol 180 (No 38 Parriwi Road), and the land, formerly the balance of the land comprised in certificate of title, registered vol 2077, fol 211, but now comprised in certificate of title, registered vol 4007, fol 200 (No 36 Parriwi Road) — the purchase of No 38 Parriwi Road was completed in March 1988, and, although the date on which it occurred is not known to me, I have been informed that the purchase of No 36 Parriwi Road was completed some time ago, and prior to this matter coming on for hearing before me.

The defendants' land; and Nos 36, 38 and 40 Parriwi Road had all formerly been part of a larger parcel of land — about 1 acre, 2 roods, 12.5 perches in area — comprising lots 10 and 13, and part of lots 9, 11 and 12 of section 1 of what was apparently known as "the Spit Estate", which larger parcel of land was comprised in certificate of title, registered vol 1587, fol 110 issued by the Registrar-General in February 1905 to Agnes Minnie Hollingworth (Mrs Hollingworth) — the land the subject of that certificate of title is shown shaded in the plan which I set out below.



By memorandum of transfer, registered 23 July 1910, Mrs Hollingworth transferred Nos 36 and 38 Parriwi Road — together with a right of way over the land shaded on the plan to one Frank Cecil Jack (Mr Jack). The memorandum of transfer had endorsed on it as one of the "encumbrances, liens and interests" to which it was subject:

> "COVENANT not to erect on either of the said Lots or any part thereof a building of less value than Three hundred and fifty pounds."

After the registration of that memorandum of transfer, certificate of title, registered vol 2077, fol 211 (see above) was issued to Mr Jack by the Registrar-General, the certificate of title bearing the endorsement:

> *"This Certificate of Title* is issued subject to the covenant contained in Instrument of transfer No 571713;"

— however, given the date of the memorandum of transfer, and the absence of any identification of the dominant tenement, the efficacy of the "covenant", and of its endorsement on the certificate of title, in binding Nos 36 and 38 Parriwi Road may be doubted: see *Re Martyn* (1965) 65 SR (NSW) 387; 82 WN (Pt 2) (NSW) 241; cp *Re Louis and the Conveyancing Act* [1971] 1 NSWLR 164.

By memorandum of transfer, registered 23 July 1910, Mrs Hollingworth transferred the defendants' land — subject to a right of way to Saunders Fawckner Nicholls (Mr Nicholls). The memorandum of transfer contained the following:

> "... reserving to the purchasers of lots 2" — probably, although it is not clear, the land edged purple on the plan set out above — "4 and 5 a right of way upon the land coloured (brown) ...
>
> AND the said Saunders Fawckner Nicholls his executors administrators and assigns Doth hereby covenant with the said Agnes Millie Hollingworth her executors administrators or assigns not to erect on the land within described or any portion of it a main building of less value than Three hundred and fifty pounds such building to be of brick or stone or brick and stone."

After the registration of that memorandum of transfer, certificate of title, registered vol 2077, fol 210 (see above) was issued to Mr Nicholls by the Registrar-General, the certificate of title bearing the endorsement (inter alia):

> *"This Certificate of Title* is issued subject to the covenant and conditions contained in the above mentioned Instrument of Transfer No 571711;"

which endorsement attracts the same comments as to its efficacy as I have already made in respect of the endorsement made upon the certificate of title issued by Mr Jack. (I add, in passing, that a reference to the plan attached to the memorandum of transfer to Mr Nicholls makes it clear that "Camelot" had, by that time, been erected on the defendants' land; later events would suggest that, after May 1910, Mr Nicholls occupied "Camelot" as his home.)

By memorandum of transfer, registered on 4 November 1910, Mr Jack transferred Nos 36 and 38 Parriwi Road to Mr Nicholls.

By memorandum of transfer, registered 20 June 1913, Mrs Hollingworth transferred No 40 Parriwi Road — to Mr Nicholls. The memorandum of transfer contained a covenant — which, because of the time at which it was given, and the absence of any identification of the dominant tenement — the endorsement of which on the certificate of title was probably invalid and ineffective to bind the land (see *Re Martyn)* — in the following terms:

> "AND the said Saunders Fawckner Nicholls hereby covenants with the said Agnes Minnie Hollingworth that the said Saunders Fawckner Nicholls his executors administrators and assigns shall not erect or permit to be erected upon the land hereby transferred any main building of other materials than brick or stone or both brick and stone and such main building shall in each case cost not less than Three hundred and fifty pounds."

Following the registration of that memorandum of transfer, certificate of title, registered vol 2380, fol 20 (see above) was issued to Mr Nicholls by the Registrar-General.

By memorandum of transfer, registered 10 July 1913, Mrs Hollingworth transferred to one Percy Marks (Mr Marks) "part lot 13 Sec 1 ... subject to Building Covenants". Since I have not seen that memorandum of transfer, I assume that the land the subject of it was that part of the balance of lot 13, and, further, that the "Building Covenants" were similar to those contained in the earlier memoranda of transfer to Mr Jack and Mr Nicholls. Following the registration of the memorandum of transfer, certificate of title, registered vol 1587, fol 110 seems to have been partially cancelled and a fresh certificate of title, registered vol 2384, fol 76, seems to have been issued to Mr Marks by the Registrar-General.

By memorandum of transfer, registered 25 September 1918, Mrs Hollingworth transferred the residue of the land still comprised in certificate of title, registered vol 1587, fol 110 — I assume the residue to have been lot 2 — to Mr Nicholls "subject to covenants together with right of way". Since I have not seen the memorandum of transfer, I assume that the "covenants" were similar to those contained in the earlier memoranda of transfer to Mr Jack and Mr Nicholls, and that the "right of way" which was granted was over the land shaded on the plan set out above. Following the registration of the memorandum of transfer, certificate of title, registered vol 1587, fol 110 was wholly cancelled and a fresh certificate of title, registered vol 2879, fol 121 was issued to Mr Nicholls by the Registrar-General.

Thus, the position which had been reached by the end of September 1918 was that, of the land which had formerly been owned by Mrs Hollingworth and had been the subject of certificate of title registered vol 1587, fol 110, Mr Nicholls owned the defendants' land (certificate of title, registered vol 2077, fol 210), what I have assumed to have been lot 2 (certificate of title, registered vol 2879, fol 121), Nos 36 and 38 Parriwi Road (certificate of title, registered vol 2077, fol 211) and No 40 Parriwi Road (certificate of title, registered vol 2380, fol 20), while Mr Marks owned the land in certificate of title, registered vol 2384, fol 76. It is this fact, coupled with the covenants which he obtained when, as he later did, he proceeded to sell Nos 36, 38 and 40 Parriwi Road, which have led me to say, as I have earlier done, that the facts suggested that, after May 1910, Mr Nicholls occupied "Camelot" as his home.

By memorandum of transfer, registered No B497398, registered on 20 May 1927, Mr Nicholls transferred No 36 Parriwi Road to one George

Oswald Bennett (Mr Bennett). The memorandum of transfer — in which No 36 Parriwi Road was described as "Lot 3" — contained a covenant on the part of Mr Bennett in the following terms:

"The transferee covenants with the transferor that:

1. On the said Lot 3 a cottage building only shall be erected together with garage if desired.

2. No portion of the foundations of the cottage building to be erected on the said lot shall be nearer the back boundary of Lot 3 than forty feet. The level to be reckoned as that which is the natural level of the ground at four feet from the northern boundary of said Lot 3 and on the forty foot aforesaid line and no portion of the cottage is to be higher than twenty five feet from the level above indicated.

3. All buildings on the said lot shall be constructed of brick and/or stone and be roofed with slate or tile and shall be of not less value than three hundred and fifty pounds.

4. On the said Lot 3 the water closets and lavatory accommodation shall be incorporated with the main building erected thereon or be built as an annex thereto in such manner as to disguise its character or in such other position as may be agreed upon by the transferor and the transferee.

5. On the said Lot 3 no stables or buildings of an offensive nature will be built or used.

6. The buildings upon the said lot sold shall be used as a private residence only with necessary appurtenances to the exclusion of any shop or trade purpose.

7. The transferor shall be at liberty at any time to omit vary or modify any of the covenants as to lands in the said estate not sold but which he may subsequently sell.

The land to which the benefit of the covenant is intended to be appurtenant is that comprised in Certificate of Title registered Volume 2077 Folio 210. The land which is to be subject to the burden of such covenant is the land hereby transferred. The persons if any by whom or with whose consent the covenants may be released varied or modified is the transferor his executors administrators or assigns.

And the benefit of such covenants shall run with the land and enure to the property which is held by the transferor under Certificate of Title dated 12th August 1910 Registered Volume 2077 Folio 210 and such covenants or any of them may be released varied or modified by the transferor his executors administrators or assigns or other the owner for the time being of the land mentioned in the said Certificate of Title."

Following upon the registration of the memorandum of transfer, certificate of title, registered vol 2077, fol 211 (see above) was partially cancelled, and a fresh certificate of title, registered vol 4007, fol 200, was issued to Mr Bennett by the Registrar-General.

By memorandum of transfer, registered 31 October 1927, Mr Nicholls transferred No 40 Parriwi Road to one William Joseph Hammond (Mr Hammond) at the same time granting a right of way, as appurtenant to No 40 Parriwi Road. The memorandum of transfer contained a covenant on the part of Mr Hammond in the following terms:

"And the transferee covenants with the transferor that any main

building erected on the land hereby transferred shall be constructed of brick and/or stone and such main building shall be roofed with slate and/or tile and shall not be of less value than three hundred and fifty pounds and shall only be one storey high and furthermore that the height of any building erected on the said land shall not be greater than twenty seven feet from the natural surface of the land hereby transferred and such height shall be calculated from a point being the lowest point of a line across the said land thirty three feet distant from the back line of the said land and such building shall be used as a private residence only with the necessary appurtenances thereto and to the exclusion of any shop or trade purpose and it shall not be erected closer than thirty three feet from the back line of the adjoining allotment and it is hereby declared the land appurtenant is the whole of the land contained in Certificate of Title Volume 2077 Folio 210 and the land which is subject to the burden of this covenant is the land hereby transferred and the person (if any) by whom or with whose consent the said covenant may be released, varied or modified is the said transferor, his executors, administrators or assigns."

By memorandum of transfer, registered 8 December 1927, Mr Nicholls transferred No 38 Parriwi Road to one Pauline Florence Myrtle Taylor (Mrs Taylor). The memorandum of transfer contained a covenant on the part of Mrs Taylor in the following terms:

"The Transferee for herself her executors administrators transferees and assigns covenants with the transferor that

1. No portion of the height of the house (chimneys excepted) shall exceed 23 feet calculated from the average level of the surface of the ground at a line 40 ft from the Eastern boundary of the land comprised in Certificate of Title Vol 2077 Fol 210 such line being drawn across the said Lot 4 from North to South and any such building shall not have a ridge from North to South to full extent of building.
2. On the said Lot 4 the Water closets and lavatory accommodation shall be incorporated with the main building erected thereon.
3. The buildings on the said Lot 4 shall be used as a private residence only with necessary appurtenances to the exclusion of any shop or trade purposes.
4. The land to which the benefit of this covenant is intended to be appurtenant is that comprised in the said Certificate of Title Vol 2077 Fol 210 — the land which is to be subject to the burden of such covenant is the land hereby transferred. The persons (if any) by whom or with whose consent the said covenant may be released varied or modified is the transferor his executors administrators of assigns And the benefit of such covenants shall run with the land and enure to the property which is held by the Transferor under the said Certificate of Title Volume 2077 Fol 210 and such covenants or any of them may be released varied or modified by the Transferor his executors or assigns or other the owner for the time being of the land in the said Certificate of Title Vol 2077 Fol 210."

Following the registration of the memorandum of transfer, certificate of

title, registered vol 2077, fol 211 (see above) was cancelled and a fresh certificate of title, registered vol 4091, fol 180 (see above), issued to Mrs Taylor by the Registrar-General.

I pause, here, to remark that since the dominant tenement identified in the several covenants taken by Mr Nicholls when he disposed of each of Nos 36, 38 and 40 Parriwi Road was limited to the land contained in certificate of title, registered vol 2077, fol 210 — the defendants' land — it seems at least likely that, although still occupying "Camelot" as his home, Mr Nicholls had, by that time, disposed of what I have assumed was lot 2 — the land highlighted on the plan set out above.

Certificate of title, registered vol 2308, fol 20 bears the endorsement:

> *"No B608642 Deed dated 14th February 1928 made between* Saunders Fawckner Nicholls of the one part and William George Hammond of the other part whereby the abovementioned Covenant contained in instrument of Transfer No B559734" (see p 10 (above)) "was released and revoked to the extent of admitting the construction of Attic Rooms in Roof of the said building but not so as in any way to increase the height of the said building above twenty-seven feet as provided in the said covenant and restrictions
>
> *Produced 9th January 1928 and* Entered 16th April 1928 at 10 o'clock in the forenoon."

There is something curious about this endorsement, first, since the "dealing" bearing registration No B608642 is, not a deed such as is described, but a letter dated 5 January 1928 from Messrs Stephen Jaques and Stephen to the Registrar-General in the following terms:

> "Herewith we hand you Agreement dated 29th November 1927, modifying the building covenant contained in Transfer No B559734 in respect of the land comprised in Certificate of Title dated 3rd July 1913, Volume 2380 Folio 20, and shall be glad if you will cause a notification of same to be made on the said Certificate of Title.
>
> For this purpose we lodge herewith the Deed and shall be obliged if you would expedite the matter in any possible";

secondly, because of the date attributed to the "Agreement" referred to in the letter; thirdly, because of the references, in the letter to both an "Agreement" and "the Deed"; fourthly, because of the date attributed to the deed in the endorsement on the certificate of title; and, finally, since, in a letter dated 11 February 1986, written by the defendants' solicitors to the plaintiffs' solicitors, the following (inter alia) appears:

> "Registrar-General informed" (our searcher) "that the original Deed dated 14 February 1928 was not held and that it was most likely handed back to the lodging party. There was no registration in the Deeds Registry. The Deed was lodged by Messrs Stephen Jacques (sic) and Stephens (sic) and on our enquiry of Messrs Stephen Jacques (sic) Stone James no Deed was held in their strong room under the names Nichols (sic) or Hammond."

Be all that as it may, four things seem clear enough: first, that some document recording an agreement to vary the covenant was lodged with the Registrar-General; secondly, that the endorsement to which I have earlier referred was made on certificate of title, registered vol 2380, fol 20; thirdly, that, when that certificate of title was cancelled in 1963 and a fresh certificate

of title, registered vol 8448, fol 91, issued, it bore the endorsement (inter alia) "Covenant created by Transfer B559734 as varied by Deed dated 14th February 1928. See B608642"; and, finally, that, at some time — one assumes, in about 1928 — a single-storeyed cottage, containing "attic rooms", within its roof, was built on No 40 Parriwi Road.

However, to return to the narrative: Mr Nicholls appears to have died at some time prior to 1936, for, on 31 January 1936, there were lodged with the Registrar-General, first, a transmission application, given dealing No C407045, seeking the registration of Muriel Grace Nicholls (Miss Nicholls) and William Leech Nicholls (Mr Nicholls Jnr) as proprietors, as joint tenants, of the defendants' land, and, secondly, a memorandum of transfer of the defendants' land, from Miss Nicholls and Mr Nicholls Jnr to Mr Hammond.

Since it bears upon one of the submissions advanced on behalf of the plaintiffs in these proceedings, it is as well to pause, here, for the purpose of emphasising the fact that, from 12 February 1936, when the transmission application and the memorandum of transfer were registered, until 22 June 1954, when a memorandum of transfer by him to one Archibald Thomas Herbert Gilkes (Mr Gilkes) of No 36 Parriwi Road was registered, Mr Bennett was registered as proprietor of both 36 Parriwi Road, the servient tenement for the purposes of the covenant contained in memorandum of transfer registered No B497398, and the defendants' land, the dominant tenement for the purposes of that covenant.

Between 1927, when Mrs Taylor became registered as the proprietor of No 38 Parriwi Road, and 1958, the title to that property passed through a number of hands. However, on 8 January 1959, there was registered a memorandum of transfer, of No 38 Parriwi Road, from the then registered proprietor to one Ann Marjorie Maas (Miss Maas) who thereafter continued as registered proprietor until 18 April 1988 — that is, after the commencement of these proceedings — when a memorandum of transfer, given in pursuance of a contract for sale made 17 August 1987 between Miss Maas and Post Investments was registered.

By memorandum of transfer, registered on 26 July 1963, Mr Bennett transferred the defendants' land to the defendants — following a number of dealings affecting the land over the ensuing ten years, or thereabouts, the current certificate of title, registered vol 12997, fol 166, was issued to the defendants in February 1976.

Meantime, so it seems, Mr Gilkes — or, perhaps, it had been Mr Bennett — had had certain extensions to the cottage on No 36 Parriwi Road carried out, the effect of which extensions was (inter alia) that the rear portion of the cottage was closer to the rear boundary of the block than 40 feet. It seems clear enough — notwithstanding the plaintiffs' submission, to which I have earlier referred, as to the effect in law of Mr Bennett's concurrent ownership of No 36 Parriwi Road and the defendants' land — that either, or both, of Mr Gilkes and his advisers — or, perhaps, it was Mr and Mrs Scott, to whom I will shortly refer, and their advisers — on the one hand, and the defendants and their advisers, on the other, were of the view, first, that the covenants contained in memorandum of transfer of No 36 Parriwi Road to Mr Bennett still bound No 36 Parriwi Road, and, secondly, that the extensions constituted a breach of those covenants. That this was the view

taken seems to be demonstrated by the fact that, on 7 October 1968, the defendants and the then mortgagee of the defendants' land, but seemingly not Mr Gilkes, executed a deed which, so far as is relevant, was in the following form:

"THIS DEED is made the day of October 1968 BETWEEN TERENCE JOSEPH WILSON of Mosman in the State of New South Wales Dentist and VERONICA WILSON his wife (hereinafter called the dominant owners) of the first part, AUSTRALIAN MUTUAL PROVIDENT SOCIETY, ... (hereinafter called the mortgagee) of the second part and ARCHIBALD THOMAS HERBERT GILKES of Mosman aforesaid Company Director (hereinafter called the servient owner) of the third part.

WHEREAS by Memorandum of Transfer dated the 30th day of May, 1927, Registered Number B497398 made between Saunders Fawckner Nicholls of Sydney aforesaid Journalist of the one part and George Oswald Bennett of Sydney aforesaid Accountant of the other part for the consideration therein mentioned the said George Oswald Bennett as transferee of an estate in fee simple in part of the land comprised in Certificate of Title Volume 2077 Folio 211 being Lot 3 in Plan annexed to the said Memorandum of Transfer Registered Number B497398 (now being the whole of the land comprised in Certificate of Title Volume 4007 Folio 200) covenanted with the said Saunders Fawckner Nicholls (who was then the registered proprietor of an estate in fee simple in the whole of the land comprised in Certificate of Title Volume 2077 Folio 210 adjoining the said Lot 3) in the words following namely:

'1. On the said Lot 3 a cottage building only shall be erected together with garage if desired.

2. No portion of the foundations of the cottage building to be erected on the said lot shall be nearer the back boundary of Lot 3 than forty feet. The level to be reckoned as that which is the natural level of the ground at four feet from the northern boundary of the said Lot 3 and on the forty foot aforesaid line and no portion of the cottage is to be higher than twenty five feet from the level above indicated.

3. All buildings on the said lot shall be constructed of brick and/or stone and be roofed with slate or tile and shall be of not less value than three hundred and fifty pounds.

4. On the said Lot 3 the water closets and lavatory accommodation shall be incorporated with the main building erected thereon or be built as an annex thereto in such manner as to disguise its character or in such other position as may be agreed upon by the Vendor and the Purchaser.

5. On the said Lot 3 no stables or buildings of an offensive nature will be built or used.

6. The buildings upon the said lot sold shall be used as a private residence only with necessary appurtenances to the exclusion of any shop or trade purposes.

7. The transferor shall be at liberty at any time to omit vary or modify any of the covenants as to lands in the said estate not sold but which he may subsequently sell.

The land to which the benefit of the covenant is intended to be appurtenant is that comprised in Certificate of Title registered Volume 2077 Folio 210. The land which is to be subject to the burden of such covenant is the land hereby transferred. The persons if any by whom or with whose consent the covenants may be released varied or modified is the transferor his executors administrators or assigns And the benefit of such covenants shall run with the land and inure to the property which is held by the transferor under Certificate of Title dated 12th August 1910 registered Volume 2077 Folio 210 and such covenants or any of them may be released varied or modified by the transferor his executors administrators or assigns or other the owner for the time being of the land mentioned in the said Certificate of Title.'

AND WHEREAS the dominant owners are now the registered proprietors of an estate in fee simple in the said land comprised in Certificate of Title Volume 2077 Folio 210 subject to a mortgage dated the 11th day of July, 1963, Registered Number J394431 from the dominant owners to the mortgagee over the said land.

AND WHEREAS the servient owner is now the registered proprietor of an estate in fee simple in the said land comprised in Certificate of Title Volume 4007 Folio 200.

AND WHEREAS there is erected on the said land comprised in Certificate of Title Volume 4007 Folio 200 a brick residence on stone foundations with a tile roof, together with brick and timber additions with a channelled galvanised iron roof known as No 36 Parriwi Road, Mosman.

AND WHEREAS as appears by Surveyor's Report dated 16th August, 1968, made by A B McLeod & Associates, a photostat copy whereof is hereunto annexed and marked 'A', there has been a breach of the said covenant contained in Transfer No B497398 in the following respects namely: (i) The foundations of the said residence are nearer the back boundary of the said Lot 3 than forty feet and in fact are distant three feet nine inches or thereabouts from the back boundary and (ii) the said additions to the said residence are not constructed of brick and/or stone and roofed with slate or tile and in fact are constructed of brick and timber and roofed with a channelled galvanised iron roof.

AND WHEREAS it has been agreed between the dominant owners and the servient owner with the consent of the mortgagee that the obligations under the above recited covenant should be released or modified to the extent and in the manner hereinafter appearing.

NOW THIS DEED WITNESSETH that the dominant owners with the consent of the mortgagee testified by its execution hereof hereby release the servient owner and his successors in title to the said land comprised in Certificate of Title Volume 4007 Folio 200 from the obligations of the covenant hereinbefore recited to the extent necessary to permit or enable the said residence as so erected and added to lawfully to stand and remain on the said land comprised in Certificate of Title Volume 4007 Folio 200, but without releasing the servient owner or his successors in title from the said covenant in any other respect.

IN WITNESS whereof the parties hereto have hereunto set their hands and affixed their seals on the day first above written.

SIGNED SEALED and DELIVERED by the ..."

The deed appears to have been lodged with the Registrar-General at some time prior to 17 October 1968, and to have been given dealing No L202764. Thereafter the following endorsement:

> "By deed dated 2nd October 1968 the covenant contained in Transfer No B497398 was modified as therein set out.
> See No L202764
> Entered 17th October 1968"

was placed on certificate of title, registered vol 4007, fol 200.

By memorandum of transfer, registered No L219364, dated 21 October 1968 and registered 30 October 1968, Mr Gilkes transferred No 36 Parriwi Road to Ian Walpole Scott (Mr Scott) and Bernice Ann Scott (Mrs Scott).

Between 1927, when Mr Nicholls transferred No 40 Parriwi Road to Mr Hammond, and 1971, the title to that property passed through the hands of two other registered proprietors. By memorandum of transfer, registered 16 March 1971, the then registered proprietor transferred No 40 Parriwi Road to British Holdings Pty Ltd (British Holdings).

At some time which is not clear, but which seems as if it may have been in 1972 the cottage on No 40 Parriwi Road was damaged by fire. Following that fire, so it is said "the roof and upper level were rebuilt without the incorporation of attic windows and (Quaere: with) a lower roofline".

It would appear that Mr Scott died at some time prior to 1980, for, on 21 February 1980, upon the registration of a notice of death, Mrs Scott became registered as the sole proprietor of No 36 Parriwi Road.

Since it has a bearing on some of the submissions advanced on the hearing, I record that the *Mosman Local Environmental Plan No 1* published in the New South Wales *Government Gazette* No 11 of 22 January 1982, contains the following (inter alia) provision:

> *"Suspension of certain laws, etc*
>
> 30.(1) For the purpose of enabling development to be carried out in accordance with this plan or in accordance with a consent granted under the Act —
>
> (a) in relation to any development —
> (i) section 314(1)(c) of the Local Government Act, 1919; and
> (ii) Schedule 7 to that Act;
>
> (b) in relation to development carried out in accordance with clause 12, section 37 of the Strata Titles Act, 1973; and
>
> (c) in relation to development within any zone other than Zone No 2(a1), 2(a2), 2(a3), 2(b1), 2(b2), 2(c), 2(d), 2(e1), 2(e2) or 2(f), the operation of any covenant, agreement or instrument imposing restrictions on the development,
>
> to the extent necessary to serve that purpose, shall not apply to any such development.
>
> (2) Pursuant to section 28 of the Act, before the making of this plan —
>
> (a) the Governor approved of subclause (1);
>
> (b) the Minister for the time being administering the provisions of the Local Government Act, 1919, referred to in that subclause concurred in writing in the recommendation for the approval of the Governor of subclause (1) in so far as that subclause relates to those provisions; and
>
> (c) the Minister for the time being administering the provision of the Strata Titles Act, 1973, referred to in that subclause concurred in writing in the recommendation for the approval of the Governor of subclause (1) in so far as that subclause relates to that provision."

As it seems to be agreed between the parties that Nos 36, 38 and 40 Parriwi Road are all situated within a residential 2(c) zone for the purposes of the *Mosman Local Environmental Plan No 1*, it would follow that, if, as at 22 January 1982, those properties were still the subject of the various covenants taken by Mr Nicholls in 1927, the *Mosman Local Environmental Plan* did not so operate as to deprive those covenants of further effect.

By memorandum of transfer, given dealing No V392723, and registered on 23 October 1984, British Holdings transferred No 40 Parriwi Road to Mr Reed.

Before that occurred, however, Mr Reed — or another of his companies, Reed Constructions Pty Ltd (Reed Constructions) — had — seemingly in July 1984 — lodged with the Council of the Municipality of Mosman (the council) an application for building approval in respect of alterations or extensions which Mr Reed proposed to have carried out to the cottage then erected on No 40 Parriwi Road. It would further seem that notice of that application was then given by the council to the defendants, following which the defendants, who were about to leave for overseas, retained an architect, Mr Thorp, to inspect the plans which had been lodged with the application and to advise them whether the works, the subject of the application, would constitute a breach of the covenant to which No 40 Parriwi Road was subject.

Mr Thorp appears to have inspected the plans — which, so he says, differed from the plans finally approved by the council on 28 September 1984 — at some time prior to 7 August 1984. When he did so, he observed, inter alia, that the proposed works provided for various rooms to be built in a new upper floor, the new upper floor to be timber-frame constructed, with external wall linings of asbestos sheet and timber battens and roofed with tiles, and, further, that because the plans were inaccurate, it was not possible to determine whether the roof line would exceed the height provided for in the covenant.

Mr Thorp appears then to have discussed the proposed works with both the defendants and with officers of the council — Mr Thorp also wrote to the council on 7 August 1984 but to no avail.

Mr Thorp also says in his affidavit:

> "5. Subsequently, I spoke to the second named plaintiff. We had a telephone conversation including words to the following effect:
>
> 'THORP: I am an Architect. I understand that you have lodged plans and drawings with Mosman Council relating to certain extensions which you propose making to the house at 40 Parriwi Road. I have been instructed by Dr and Mrs Wilson, the owners of 197 Spit Road, to inspect those plans and advise them as to the effect of the proposed alterations to the house. I have inspected those plans and I would like to discuss with you the nature of the proposed alterations to the house. Dr and Mrs Wilson's greatest concern relates to the height of the roof as it appears on the plans.

I can't tell from the drawings whether the (sic) exceed the permissible height as there are no heights or levels shown on the drawings. They are particularly concerned that the height should not contravene the restriction imposed by the building covenant affecting 40 Parriwi Road. They are also concerned that the building appears to go over their boundary and the plans show that you will be using a form of alternative cladding instead of brick work in the construction.

REED: I will send you details of the height in due course via my building foreman. We are using an alternative cladding which will be less bulky in appearance than if the additions were built in brick.

THORP: Yes, it would appear less bulky.'

6. Mr Reed said nothing to me to the effect of seeking approval for any part of the proposed additions. I said nothing to the effect that any part of the proposed additions were approved.

7. Subsequently, I received a telephone call from a Mr Benstead. He said words to the following effect: 'I am Mr Reed's building foreman. The levels for the ridge height have been worked out and a copy of the details will be sent to you.' Subsequently I received drawing No 142.2A with levels marked on it. The levels marked on the drawing indicated that the covenant height restriction was not breached.

8. On 16 November 1984 I inspected the approved plans and thereafter inspected the site."

In their joint affidavit sworn 15 April 1988 the defendants say that "late in November 1984 (they) observed that a large part of the roof of 40 Parriwi Road was removed and replaced by a tarpaulin. Several days later (they) observed vertical walls being constructed from the opening in the roof in a material which appeared to (them) to be similar to fibro cement. (They) instructed (their) solicitors to write to (Mr Reed)."

The letter written on 27 November 1984 by the defendants' solicitors to Mr Reed was as follows:

"Re Dr and Mrs T J Wilson

Re Properties 197 Spit Road, Mosman and 40 Parriwi Road, Mosman

We have been consulted by Dr and Mrs T J Wilson of 197 Spit Road, Mosman. Their property known as 197 Spit Road, being the land comprised in Certificate of Title Volume 12997 Folio 166, has the benefit of a restrictive covenant created by Transfer B559734 relating to the land in Certificate of Title Volume 8448 Folio 91 being the property known as 40 Parriwi Road, Mosman, of which you are the registered proprietor.

The covenant was created for the protection of the outlook from our client's property.

It requires, inter alia, that any main building shall be constructed of brick and/or stone and roofed with slates and/or tiles and that it shall only be one storey high and that the height of any building on the land shall not be greater than 27 feet from the natural surface of the land such height being calculated from a point being the lowest point of a line across the land 33 feet distant from the back line of the land.

Our clients have been very concerned to observe that part of the roof of the residence erected on your property 40 Parriwi Road has been removed in a manner which suggests that you may be increasing the height of the building by adding another storey which would be a clear breach of the covenant and would cause considerable damage to the outlook from our clients' property.

We are instructed that after our clients learned that a development of your property was proposed, their architect enquired at the Mosman Municipal Council and was informed that you were aware of the existence of the covenant and that it would be complied with.

We are instructed to inform you that our clients require you to observe the provisions of the covenant as to the number of storeys permitted, the height of the building and the materials to be used and that if any building activity takes place which is in breach of the covenant our clients will institute legal proceedings seeking, inter alia, appropriate injunctive relief and an order for demolition of any works in breach of the covenant and for costs.

We are instructed to require you to provide urgently full details of the work being carried out on your property and, in particular, such information as will establish that the work being carried out is not in breach of the covenant, if that is the position.

Also we take this opportunity to inform you that a Surveyor has advised our clients that a stairway which has been constructed to provide pedestrian access to the house erected on your land encroaches upon our clients' land by up to about one foot. We are instructed to inform you that our clients require this encroachment to be rectified and if work is presently being done upon the land it is felt that the encroachment might conveniently be rectified at the same time."

Although the position is not entirely clear, Mr Thorp would seem to suggest that, on 27 November 1984, he spoke again on the telephone with Mr Reed for, in his affidavit (sworn 25 August 1988), Mr Thorp continues:

"9. On 27 November 1984 upon the instructions of the defendants I wrote to the Council a letter a copy of which is hereunto annexed and marked with the letter 'A'.

10. On the same date I wrote to the second plaintiff a letter, a copy of which is hereunto annexed and marked with the letter 'B'.

11. I then received another telephone call from the second named plaintiff. We had a conversation including words to the following effect:

'THORP: Our survey shows that the height of the ridge is within the covenant height limit, but the existing porch slab encroaches over the boundary. The drawings for the additions will also encroach. A letter is on its way to you concerning the porch encroachment.

REED: I would like to have a meeting with Dr Wilson to discuss this.

THORP: I am meeting with Dr Wilson on another matter and will discuss your request with him.'

12. On or about 29 November 1984, I received a further telephone call from Mr Reed. We had a conversation which included words to the following effect:

'REED: I have received a letter from Dr Wilson's solicitor alleging a breach of the covenant. What is the situation.

THORP: I am not aware of the solicitor's letter.

REED: Don't you approve of the use of less bulky materials than brick.

THORP: I gave you no approvals in our previous conversations and I do not have the authority to approve anything.

REED: I understand that.'

13. I subsequently received a telephone call from Mr Geoffrey Lumsdaine and we had a conversation including words to the following effect:

'LUMSDAINE: I am Mr Reed's architect. What is happening.

THORP: I am instructed to advise Dr and Mrs Wilson on the effect of the proposal. I have told Mr Reed that the porch and proposed additions there encroach on Dr Wilson's property and that the Wilsons are concerned about that, about the building obstructing their view and about the use of material other than brick.' "

It seems tolerably plain that Mr Reed was not disposed to permit either the letter of 27 November 1984 from the defendants' solicitors, or his conversations with Mr Thorp, to deter him from having the extensions carried out, and that he proceeded to have them completed as soon as was possible, and, this, notwithstanding that, as seems now to be accepted, the extensions, unless approved of by the defendants, clearly involved breaches of the covenant in at least two aspects.

Although the plaintiffs in these proceedings have sought to assert that Mr Thorp, on behalf of the defendants, approved of the proposed works, I do not accept that this was so, nor, I believe, did Mr Reed, at the time, understand Mr Thorp to have done so. That this is a correct assessment of the position is, I suggest, confirmed by the following letter written by Mr Reed to the defendants' solicitors on 10 December 1984:

"RE: PROPERTIES — 197 SPIT ROAD, MOSMAN AND 40 PARRIWI ROAD, MOSMAN

We are in receipt of your correspondence dated 27 November, 1984 and advise as follows.

The covenant as quoted by you has been amended on 9 January, 1928 to allow attic construction to increase the height of the building up to 27 feet as provided by the covenant.

We also advise that discussions were held between Mr Peter Thorp representing your client and the writer regarding the covenant prior to construction.

These discussions covered the height limitation of the attic construction proposed and the use of the alternative cladding (being AC with cedar battens in lieu of brickwork).

Mr Thorp agreed with ourselves that the proposed method of construction would be less bulky than brickwork and he has also stated that this was his advice to his clients. His main concern was the height of the proposed work and in this regard please see letters from Mr Thorp's surveyor and from Mr Thorp, attached.

We point out that the work is some 800mm below the maximum height allowed by the covenant and we see this as a considerable concession to the Wilsons' view.

The encroachment mentioned in your last paragraph is being rectified.

We hope this clarifies the situation and is to your client's satisfaction."

Quite what happened, thereafter, is difficult to discern from the evidence, although the letter to which I next refer would suggest that the defendants' solicitors sought the advice of counsel as to the defendants' rights in the matter. That letter, dated 14 August 1985 from the defendants' solicitors to Mr Reed was as follows:

"Re 40 Parriwi Road and Restrictive Covenants

We are instructed by Dr and Mrs T J Wilson of 197 Spit Road, Mosman that various works have been carried out to your house in breach of restrictive covenants in favour of Dr and Mrs T J Wilson. We are further instructed that these works were queried at the time of construction but works were continued despite the doubts expressed as to compliance with covenants.

We are in receipt of the advice of Senior Counsel to the effect that the works carried out to your house are in breach of the restrictive covenants in favour of Dr and Mrs T J Wilson.

We are instructed therefore to insist upon the immediate removal of all those alterations and works made to the premises in breach of the covenant."

Although, again, what happened, thereafter, is obscure, the letter to which I will next refer — and, as well, letters dated 23 January 1986 and 3 July 1987 from the defendants' solicitors to the plaintiffs' solicitors would suggest that, for a time, there were discussions about the possibility of the parties entering into a deed of variation of covenant a draft of which seems, at one stage, to have been forwarded to the plaintiffs' solicitors.

On 5 December 1985, the plaintiffs' solicitors wrote to the defendants' solicitors as follows:

"Reed Constructions Pty Limited

Premises: 40 Parriwi Road, Mosman

We have been instructed to act for Reed Constructions Pty Limited and refer to your letter of 14 August last written to Mr G V Reed. We apologise for the delay in replying to that letter.

It seems necessary to refer to some of the previous correspondence. For example in your letter of 27 November, 1984 you point out that the covenant was created for the protection of the outlook from your clients property. We understand that the covenant was amended on 9 January, 1928 to allow attic construction to increase the height of the building up to 27 feet as provided by the covenant. We are relying on our clients instructions in the making of that statement and if that is not the position then you might like to advise us. The surveyor obviously retained by your clients architect Mr Thorp reported on 23 November, 1984 that the additions to the property comfortably complied with the covenant so far as height is concerned.

Our client in his letter to your firm of 10 December, 1984 pointed out that there were discussions between Mr Reed and Mr Peter Thorp your clients architect regarding the construction prior to that construction taking place. In those discussions height was mentioned and also the

proposed use of the alternate cladding namely AC with cedar battens in lieu of brickwork. Our client alleges that Mr Thorp agreed that the proposed method of construction would be less bulky than brickwork and more pleasing to the eyes.

We would like to believe that the Equity Court would not be minded to the granting of injunctions now to restrain the continuing breach and thereby bring about a demolition given that your clients had the opportunity of full discussion before the construction took place and the opportunity to apply for injunctive relief before that construction took place.

As we said before the height of the attic is far less than the maximum height allowed by the covenant and our client sees this as a considerable concession to your client's view. Construction took place.

Our client company does not wish to enter into a deed of variation of the covenant because basically the company believes that the covenant is now outdated particularly in view of the fact that the premises are now zoned, as we are instructed, to permit multiple dwellings. The above comments are particularly relevant to clause 1 in schedule 1. As to clause 2 our client has no objection to that clause. As to clause 3 our client does not agree. As to clause 4 our client says that the existing attic construction does in fact complement and blend with the colour of the roof.

Our client would hope that no proceedings are instituted given that your clients rights with respect to the height of the premises have been protected and further given that your clients architect was well aware of the nature of the external cladding of the attic portion of the premises and we are instructed that that structure would not in any way bring about a diminution in the value of your clients premises.

We look forward to hearing from you in due course;"

to which letter the defendants' solicitors replied on 23 January 1986 as follows:

"RE: 40 PARRIWI ROAD, MOSMAN — RESTRICTIVE COVENANT IN FAVOUR OF DR AND MRS T J WILSON.

Thank you for your letter of 5th December, the contents of which have been noted. We set out below observations from instructions given by our clients, Dr and Mrs Wilson.

We are instructed that as at 12th December 1985 the subject land comprised in Certificate of Title Vol 8448 Fol 91 is registered in the name of G V Reed subject to a mortgage in favour of Westpac Banking Corporation.

Our clients do not dispute the contention that 40 Parriwi Road complies with the restrictive covenant as to height.

Our clients instruct us that Mr Peter Thorp, Architect, had absolutely no authority to approve or disapprove of any proposals in relation to the building work at 40 Parriwi Road, Mosman. Mr Thorp was retained to examine the plans submitted to Mosman Council under a Development Application and report to Dr and Mrs Wilson. As proposed construction materials would go to the heart of the covenant, it seems highly unlikely that our respective clients would consider that such transactions could take place orally.

It is our opinion that the restraint of a continuing breach of covenant by way of injunction may create certain difficulties for our clients, but we believe that the substitution of equitable damages would take place. We believe that such damages under the circumstances of the apparent flagrant disregard of the objections of our clients would be considerable.

We are instructed that the restrictive covenant in its current form covers aspects of height, materials and usage. Mere compliance with restrictions as to height does not discharge the burdened owners' duties under the covenant.

Our clients reject the contention that the covenant is outdated and would point out that public and private land use restrictions are variously enforced. Any attempt to use 40 Parriwi Road for more than a single dwelling house should be considered in breach of the restrictions contained in the existing covenant.

Our clients' offer to negotiate a variation of the covenant was at the suggestion of the advice of Senior Counsel as a far more amicable solution to subsisting and anticipated breaches of the covenant. Under the circumstances of the breach of the covenant and the options in the hands of our clients we would ask that you obtain further instructions from your client in the light of the comments contained herein."

The defendants' solicitors wrote again to the plaintiffs' solicitors on 21 July 1986, on this occasion as follows:

"RE: 40 PARRIWI ROAD, MOSMAN — RESTRICTIVE COVENANT IN FAVOUR OF DR AND MRS T J WILSON.

We refer to our letter of the 23rd January 1986 in response to yours of 5th December 1985 and note that we have not yet had the benefit of your further comments in this matter. We draw your attention again to the final paragraph of our letter of 23rd January in that regard and look forward to hearing from you";

this letter producing a reply, dated 11 August 1986 which was as follows:

"RE: PREMISES — 40 PARRIWI ROAD, MOSMAN — RESTRICTIVE COVENANT IN FAVOUR OF DR AND MRS T J WILSON.

We refer to your letter of the 21st July. We obtained Opinion from Counsel and as a result of that Opinion we are instructed to inform you that our client is not prepared to execute the Deed of Variation."

Eventually, on 4 November 1986, the defendants' solicitors wrote, yet again, to the plaintiffs' solicitors, on this occasion as follows:

"RE: 40 PARRIWI ROAD, MOSMAN — RESTRICTIVE COVENANT IN FAVOUR OF DR AND MRS T J WILSON.

Thank you for your letter of 11th August 1986 and we apologise for our delay in responding thereto.

We have received advice that the extensions to No 40 Parriwi Road, Mosman are clearly in breach of the covenant.

We are instructed to ask whether your client is willing to enter into negotiations with a view to regularising the continuing breach without the need for proceedings. We are further instructed that where a mutually agreeable compromise cannot be reached we are to commence proceedings for a mandatory injunction seeking the removal of the offending third storey.

8448 Folio 91 as affected by the covenants contained in Transfer No B559734. . . ."

Thereafter, on 27 November 1987, the plaintiffs' solicitors wrote to the defendants' solicitors as follows:

"Post Investments Pty Limited and Geoffrey Vere Reed
Properties: 36, 38 and 40 Parriwi Road, Mosman
Your Clients: Terence Joseph Wilson and Veronica Maxine Wilson

As you are aware we act for Post Investments Pty Limited and Mr Geoffrey Reed.

We refer to the writer's telephone conversation with your Mr Ferris on 17 November, 1987. As discussed with Mr Ferris our clients propose that a meeting be convened between the parties (if necessary, accompanied by their legal representatives) for the purpose of placing before your clients particulars of the proposed development of Nos 36, 38 and 40 Parriwi Road, Mosman. Depending on the outcome of those discussions our clients are hopeful that agreement can be reached between the parties regarding the appropriate extinguishment or modification of the restrictive covenants which burden the aforementioned properties.

We note that Mr Ferris is seeking instructions regarding a meeting. Our client is anxious that the meeting be convened as soon as practicable. As we had not heard further from you our client has instructed us to commence proceedings in the Supreme Court of New South Wales seeking orders for the extinguishment or modification of the restrictive covenants.

We note from previous correspondence that you are instructed to accept service of process. We therefore enclose copy of Summons filed on 24 November.

Affidavits will be filed and served in support of the Summons in due course.

You will appreciate that as the termination of the current law term is imminent our client was anxious that proceedings be commenced in order to obtain a hearing date early in the New Year.

We have also been requested to reply on behalf of our client to your letter dated 28 September, 1987.

We are instructed that our client is not prepared to provide the undertakings referred to therein. In any event it is our view that it would be inappropriate for our clients to provide those undertakings when:

(a) they have not commenced any development in respect of the properties;
(b) nor have they conveyed to your clients any information which would suggest that the proposed development would be in breach of the restrictive covenants;
(c) nor do they have any intention of breaching the covenants.

In our view your clients have no basis for commencing proceedings.

We have discussed with our clients the possibility of preparing a detailed model of the proposed development. That model would be even more effective if it took into account the improvements erected on your client's property.

Would you please indicate urgently whether your clients are prepared to afford access for the purpose of taking appropriate measurements of their house.

We look forward to hearing from you regarding the proposed meeting between our clients."

Thereafter, on 14 December 1987, there was filed on behalf of the defendants a cross-claim in which they prayed the following (inter alia) relief:

"1. an order that the cross-defendants their servants and agents be restrained from: —
(a) letting any contract for the development described in the Schedule; and
(b) negotiating any development described in the Schedule.
2. an interlocutory order in terms of paragraph 1 until the hearing. . . .

SCHEDULE

Erection of town houses on the properties situate at and known as 36, 38 and 40 Parriwi Road, Mosman."

On or about 23 December 1987, Hopkins and Dyer Pty Ltd (Hopkins and Dyer), on behalf of Post Investments, lodged with the council an application for development consent in respect of Nos 36 and 38 Parriwi Road, the nature of the development being stated to be: "Demolition & Erection of No 5 Off Stata (sic) Title Residential Units."

Some indication of the nature of the building proposed for the site is given by the "Statement of Environmental Effects" which accompanied the application, and which contained (inter alia) the following:

"The proposal for 5 terraced strata units fits within Council LEP guidelines with particular emphasis being placed on compliance with the limit of 8.5m to max ridge height. The development follows the natural land form and overshadows its southern neighbour to a similar extent to that of the residence it replaces. Setbacks generally comply or are greater than code requirements except for 11.00m of wall at first floor level on the south boundary and similarly for 5.00m of wall on the north boundary where Unit 5 encroaches to a 3.00m set back where 5.50 would be required. No windows are directly positioned in these walls thus allowing dispensations to the northern wall and overshadowing is not a problem on the south wall. Given that setbacks elsewhere increase to 8.5m we believe that a reasonable compromise has been achieved. Minimum landscaped areas conform with the code including roof gardens, terraces and pool areas.

The design of the development maximizes orientation to the view and the resultant stepped facades reduce the effecting bulk of the building, particularly when viewed from the street.

Carparking for 10 resident cars is proposed in a security basement together with an additional 2 visitors bays occupying an area currently used at street level for 4 vehicles servicing the existing residence (sic).

Maximum height at any point above the sloping site is 2 storeys, thus contributing to the overall low profile. Sandstone terraced gardens at street level minimize the developments (sic) bulk and break down the scale of the natural vertical escarpment at this point of the site.

A series of roofed forms step up with the building and further reduce its apparent scale.

Proposed colours are terra cotta and sandstone for paving and landscape walls, with applied granosite coatings to all exposed building walls in blue/green/grey tonings to blend with the landscaping. Roofs of grey concrete shingle tiles are proposed. Landscaping would be super advanced where possible and densely planted in pool court areas and pedestrian spines.

Overall, we believe the development will blend happily with the scale and type existing on the high side of Parriwi Road and have little impact on adjoining properties. It should be noted that old height covenants placed on the site in favour of the western neighbour have been adhered too (sic) with the exception of a stairwell roof and lift motor room. All covenants affecting the site are currently in the process of being legally challenged by the site owners."

I interpolate, here, that, despite the assertion that the proposed building "fits within Council's LEP guidelines", and despite what later occurred, I would doubt whether it was within the council's power to give development consent for the proposed building. Clause 11(3)(a) of the *Mosman Local Environment Plan No 1* provides that "a person shall not erect a building on land within Zone No ... 2(c) ... having more than 2 storeys", and, on my understanding of the law (see *Leichhardt Municipal Council v Daniel Callaghan Pty Ltd* (1981) 46 LGRA 29), the proposed building is, not a two-storey building, but a five-storey building.

However, to return, yet again, to the narrative. The application for development consent not having been determined, meantime, the plaintiffs' solicitors, on 18 February 1988, lodged with the Land and Environment Court an application in the nature of an appeal against the council's deemed refusal of Post Investments' application to it.

Thereafter, on 29 February, and 16 March 1988, respectively, Post Investments completed the purchase of Nos 36 and 38 Parriwi Road.

On 10 May 1988, there was filed on behalf of the plaintiffs an amended summons in which they prayed the following (inter alia) relief:

"1. An order that the restrictions notified in and affecting the whole of the lands specified in the Schedule hereto and being contained in the covenants specified in the Schedule hereto be wholly extinguished.

2. Alternatively to paragraph 1 hereof an order that the said restrictions be modified or partially extinguished so as to permit the demolition or redevelopment of the buildings presently standing on the said lands and the erection thereon of buildings and structures substantially as described in the Affidavit of John Stephen Southwell to be sworn and filed herein.

3. A declaration that the restrictions referred to in paragraph 1 hereof are unenforceable as against the plaintiffs. ...

SCHEDULE

(a) The property situated at and known as 36 Parriwi Road, Mosman being the whole of the land comprised in Certificate of Title Volume 4007 Folio 200 as affected by the covenants contained in Transfer No B497398.

(b) The property situated at and known as 38 Parriwi Road, Mosman being the whole of the land comprised in Certificate of Title Volume 4091 Folio 180 as affected by the covenants contained in Transfer No B595505.

(c) The property situated at and known as 40 Parrawi Road, Mosman being the whole of the land comprised in Certificate of Title Volume 8448 Folio 91 as affected by the covenants contained in Transfer No B559734."

On or about 18 May 1988, the council formally refused Post Investments' application for development consent.

Thereafter, on 6 and 7 June 1988, Post Investments' appeal to the Land and Environment Court was heard by Assessor Domicelj, who, on 10 June 1988, upheld the appeal and granted development consent subject to a number of "conditions" of which one:

"33. The applicant's attention is drawn to the existence of Covenants over the sites of Nos 36 and 38 Parriwi Road held by the owners of No 197 Spit Road and that these Covenants have not been taken into account in determination of this application. Council has been advised that should this application be approved under the provisions of the Environment and Planning Act, the consent will not be able to be acted upon until the Covenants are either varied or removed and that this is a matter for the applicant to pursue, prior to lodgement of the Building Application"

need be noted.

Thereafter, on 21 June 1988, there was filed on behalf of the defendants an amended cross-claim in which they prayed the following (inter alia) relief:

"1. An order that the cross-defendants their servants and agents be restrained from:

(a) Letting any contract for the development described in the Schedule;
and

(b) Negotiating any development described in the Schedule.

2. An interlocutory order in terms of paragraph 1 until the hearing.

3. An order that the second named cross-defendant demolish the attic extension and alternative cladding described in paragraph 6 of the affidavit of G V Reed sworn 9 May 1988.

SCHEDULE

Erection of town houses on the properties situate at and known as 36, 38 and 40 Parriwi Road, Mosman."

Although a perusal of the court file does not reveal any order for the trial of separate issues, it is the fact that the proceedings — but not the cross-claim — were later listed for hearing before Master Hogan in November 1988, the hearing apparently occupying some four days, 7 to 10 November 1988 inclusive.

In his judgment, delivered on 30 June 1989, the master appears to have rejected all the submissions advanced on behalf of the plaintiffs. Thus:

1. the master rejected the plaintiffs' submission that the restrictions formerly imposed upon No 36 Parriwi Road were extinguished by merger upon Mr Bennett's becoming registered as the proprietor of the defendants' land;

2. the master appears to have been of the view that, even if those

restrictions had been extinguished by merger, not dissimilar restrictions had been imposed on No 36 Parriwi Road by the deed executed in 1968;

3. the master took the view that the proposed re-development of Nos 36 and 38 Parriwi Road would involve an infringement of the restrictions to which, in his view, each block was subject;

4. the master appears to have been of the view that the extensions and renovations carried out to No 40 Parriwi Road in 1984 infringed the restrictions to which that block was subject;

5. the master rejected the submission that the discussions between Mr Reed and Mr Thorp involved a waiver of the benefit of those restrictions;

6. the master rejected the submission that the restrictions were obsolete, and that their continuation would not secure any benefit to the defendants;

7. finally, the master was of the view that, the plaintiffs having purchased the various properties with knowledge of the restrictions, as a matter of discretion, the relief prayed ought to be refused.

In the circumstances, the master dismissed the proceedings with costs.

Being dissatisfied with the master's decision, the plaintiffs, on 28 July 1988 lodged an appeal from that decision, the grounds of appeal being, in substance:

1. that the master erred in holding that the restrictions affecting No 36 Parriwi Road had not been extinguished by merger;

2. that the master had erred in holding that the restrictions affecting No 36 Parriwi Road had been revived by the deed executed in 1968;

3. that the master had erred in holding that the proposed re-development of Nos 36 and 38 Parriwi Road would infringe the restrictions to which the blocks were subject;

4. that the master erred in holding that the restrictions were not obsolete, and that the continuation would secure some benefit to the defendants;

5. finally that — in some way which is not specified — the master's discretion under s 89 of the *Conveyancing Act* 1919 miscarried.

The hearing of the appeal was thereafter fixed for 19 February 1989 before me; however, although a perusal of the court file records no order to that effect, the parties proceeded upon the basis that the hearing before me would be both a hearing of the appeal, and a hearing of the defendants' cross-claim.

When the matter came on for hearing before me, Mr L G Foster appeared for the plaintiffs/cross-defendants while Mr J L Trew QC appeared for the defendants/cross-claimants.

Despite what appears to have been the parties' agreement as to the nature of the hearing before me, the hearing proceeded entirely upon the basis of the affidavits and documentary exhibits which had been tendered before the master, and the transcript of the oral evidence of those of the deponents of affidavits which had been tendered before the master who had been cross-examined. In addition, as did the master, I had the benefit of a view of the several properties in question and of the general area. In the result, the hearing, although occupying a little more than two days normal court time, was able to be disposed of in two days.

As both Mr Foster and Mr Trew were united in their approach to the principles to be applied on the hearing of the appeal from the master (each

referred to *Do Carmo v Ford Excavations Pty Ltd* [1981] 1 NSWLR 409; *Warren v Coombes* (1979) 142 CLR 531; *House v The King* (1936) 55 CLR 499) I do not record their submissions on that aspect of the matter.

So far as the balance of the matter is concerned, Mr Foster's submissions proceeding on the following lines — I alter, but only slightly, the order of the submissions:

1. The restrictions on No 36 Parriwi Road:

(a) These restrictions were extinguished by operation of law upon Mr Bennett becoming registered as proprietor of the defendants' land (he referred to *Texaco Antilles Ltd v Kernochan* [1973] AC 609; *Re Tiltwood, Sussex; Barrett v Bond* [1978] Ch 269; *Kerridge v Foley* (1964) 82 WN (Pt 1) (NSW) 293);

(b) to the extent to which *Re Standard and the Conveyancing Act 1919* (1967) 92 WN (NSW) 953 and *Margil Pty Ltd v Stegul Pastoral Pty Ltd* [1984] 2 NSWLR 1 would seem to support the submission — advanced on behalf of the defendants before the master — that the doctrine of merger does not apply to land registered under the *Real Property Act* 1900;

(i) they ought to be limited to cases of easements — which, in each case were in issue — which are conceptually different from restrictive covenants (he referred to *Re Martyn)*;

(ii) in any event, *Re Standard and the Conveyancing Act 1919* ought to be regarded as having been wrongly decided (he referred to s 47(7) of the *Real Property Act* 1900 introduced into the Act in 1970) while *Margil Pty Ltd v Stegul Pastoral Pty Ltd* can be supported upon the basis of s 47(7) of the *Real Property Act* 1900 (although Mr Foster did not refer to it, the judgment of Bryson J in *Gyarfas v Bray* (1989) 4 BPR 9736, would provide support for this submission);

(c) to the extent to which the master's judgment depends upon the supposed doctrine of reviver, it needed only to be observed that Mr Gilkes did not execute the deed executed by the defendants and their mortgagee in 1968, which deed was only intended to confer a benefit on Mr Gilkes and his successors in title, and not to extract a fresh covenant from him.

2. The construction of the various restrictive covenants:

(a) (if still applicable) affecting No 36 Parriwi Road:

(i) clause 6 — "the buildings ... shall be used as a private residence only ... to the exclusion of any shop or trade purpose" does not prevent the construction of a residential flat building (he referred to *Munns v Watson* [1937] VLR 178; *Re Derham's Application* [1961] VR 174) — it is intended only to prohibit the *use* of any building, which is erected, for any trade purpose;

(ii) even if the view be taken that a residential flat building is, for the purpose of the covenant, to be regarded as several buildings, that is not fatal, for cl 3 contemplates that more than one building might be erected;

(b) affecting No 38 Parriwi Road:

(i) clause 1, by providing that "any such building shall not have a ridge from North to South to full extent of building" did not require that any building *must* have a hipped roof; it only limited the extent of any ridge if there were a hipped roof;

(ii) for the reasons advanced in respect of cl 6 of the covenant in

relation to No 36 Parriwi Road, cl 3 did not prohibit the erection of a residential flat building;

(c) affecting No 40 Parriwi Road:

(i) it was accepted that the extensions carried out in 1984 involved infringements of the covenant, as varied, to the extent that:

(A) the building is more than one storey high and the extension is not within the "attic extension";

(B) it is constructed of materials other than brick and stone;

3. "The s 89 Case":

(a) If, contrary to what had been earlier put, it be held that the covenants affecting the subject properties were still enforceable, they ought to be varied or extinguished;

(b) The plaintiffs relied upon each of pars (a), (b) and (c), of s 89(1);

(c) So far as (a) is concerned:

(i) "obsolete" means that the original purpose of the covenant can no longer be achieved (he referred to *Re Truman, Hanbury Buxton & Co Ltd's Application* [1956] 1 QB 261; *Re Mason and the Conveyancing Act* (1960) 78 WN (NSW) 925; *Re Robinson* [1972] VR 278);

(ii) "reasonable user" requires that there can be no possible reasonable use of the land unless the covenant be modified or extinguished (he referred to *Heaton v Loblay* (1960) 60 SR (NSW) 332; 77 WN (NSW) 140; *Guth v Robinson* (1977) 1 BPR 9209; *Re Alexandra* [1980] VR 55; *Re Redmond and the Conveyancing Act* (1965) 82 WN (Pt 1) (NSW) 427; *Re Callanan and the Conveyancing Act* [1970] 2 NSWLR 127);

(iii) "practical benefit" requires that there be some *real* benefit accruing to the dominant tenement (he referred again to *Re Mason and the Conveyancing Act*); however it was accepted that, unless they be patently unreasonable, or actuated by malice, the assertions of benefit made by the dominant owner will normally be accepted (he referred to *Re Chamberlain and the Conveyancing Act* (1969) 90 WN (Pt 1) (NSW) 585);

(iv) the area around the defendant's property is now being developed for medium density housing so that the covenant is now obsolete;

(v) no practical benefit is retained by continuing the covenants as such structures as may be built on Nos 36 and 38 Parriwi Road without breach of covenant can produce as great an impact upon the defendants' view as, if not a greater impact on the defendants' view than, what is now proposed;

(d) so far as (b) was concerned: Mr Thorp's and the defendants', conduct in 1984 constituted a waiver, and abandonment, of the benefit of the covenant;

(e) despite their reliance on s 89(1)(c) the plaintiffs advanced no submission in respect of it;

(f) although it was accepted that, even if a ground for variation or extinguishment was made out, the court retained a discretion to make, or refuse an order (he referred to *Pieper v Edwards* [1982] 1 NSWLR 336; *Mogensen v Portuland Developments Pty Ltd* (1983) NSW Conv R ¶55-116; *Re Cook* [1964] VR 808) no ground for refusing to make an order had been made out.

4. The cross-claim:

(a) The defendants' having waived the infringement, no injunction ought be granted;

(b) Alternatively, the defendants having been guilty of laches acquiescence and delay, an injunction ought, as a matter of discretion be refused;

(c) Damages not having been claimed in either the cross-claim or the amended cross-claim they ought not now be awarded.

Except to the extent to which they dealt with the nature of the appeal, Mr Trew's submissions proceeded along the following lines — again, I alter, slightly, the order in which the submissions were put.

1. The restrictions on No 36 Parriwi Road:

(a) The doctrine of extinguishment by merger does not apply to land under the *Real Property Act* (he referred to *Re Standard and the Conveyancing Act 1919*; *Margil Pty Ltd v Stegul Pastoral Pty Ltd*; and distinguished *Kerridge v Foley* on the ground that it involved land under Old System title);

(b) Even if the restrictions were extinguished by merger, they were revived by the deed of 1968 which recognised the title of the defendants as owners for the time being of the dominant tenement (he referred to *James v Plant* (1836) 4 Ad & El 749; 111 ER 967; *Cuvet v Davis* (1883) 9 VLR 390; *Brightman v Hazel* (1921) 54 NSR 81; *Margil Pty Ltd v Stegul Pastoral Pty Ltd*).

2. The construction of the various restrictive covenants:

(a) *Affecting No 36 Parriwi Road*:

(i) as a general rule, words in such covenants should be construed colloquially, and not in a technical sense (he referred to *Ex parte High Standard Constructions Ltd* (1928) 29 SR (NSW) 274; 46 WN (NSW) 75);

(ii) further, covenants should be construed having regard to the circumstances existing at the time of their creation (he referred to *Holmes v Ryde Municipal Council* (1969) 90 WN (Pt 1) (NSW) 290);

(iii) a "cottage" means a one storeyed building with a hipped roof (he referred to *Ward v Paterson* [1929] 2 Ch 396);

(iv) "private residence" does not permit a "multi-residential building" (he referred to *Rogers v Hosegood* [1900] 2 Ch 388; *Day v Waldron* (1919) 88 LJKB 937; *Re Wilson and Conveyancing Acts 1919-1943* (1949) 49 SR (NSW) 276; 66 WN (NSW) 147; *Ex parte High Standard Constructions Ltd*);

(v) "roofed with slate or tile" necessarily involves a hipped roof, having regard to the usual method of house design at the time;

(vi) in any event, the proposed structure will intrude far closer than 40 feet from the rear boundary of the land.

(b) *Affecting No 38 Parriwi Road*:

(i) the references to "the house" and use as "a private residence only" clearly prevent the erection of, or use as, a "multi-residential building";

(ii) the reference to "a ridge from North to South to the full extent of

building" clearly contemplate a hipped roof, and prohibit the erection of a "ranch-style" building.

(c) *Affecting No 40 Parriwi Road*:

(i) as the plaintiffs now accept, the building, as altered in 1984, infringes the prohibition in two respects

(A) the upper storey; and

(B) the method of construction

(ii) since the building is also adapted for separate occupancies, it also offends against the covenant which clearly contemplates a single family residence.

3. The s 89 case:

(a) no ground for extinguishment or waiver had been made out;

(b) in respect of none of the three properties could it be said that the relevant covenant was obsolete or incapable of conferring any practical benefit on anybody — variation, and, a fortiori, extinguishment, would affect the view from, and general amenity of, the defendants' home, and would detract from its value (he referred to *Re Mason and the Conveyancing Act*; *Mogensen v Portuland Developments Pty Ltd*; *Re Chamberlain and the Conveyancing Act*; *Re Callanan and the Conveyancing Act*);

(c) nor did the covenant impede the reasonable user (he referred to *Heaton v Loblay)*;

(d) nor, in respect of No 40 Parriwi Road, could it be said that there had been any abandonment or waiver;

(e) even if a ground for variation or extinguishment had been made out, the court retained a discretion to refuse relief (he referred to *Pieper v Edwards*) and no error of principle on the part of the master had been demonstrated.

4. The cross-claim:

(a) it is now admitted that the 1984 alterations and extensions infringe the covenant;

(b) the building as altered substantially interferes with what had theretofore been the defendants' view from their home (he referred to *Wakeham v Wood* (1982) 43 P & CR 40; *Morris v Redland Bricks Ltd* [1970] AC 652; *Economy Shipping Pty Ltd v ADC Buildings Pty Ltd* [1969] 2 NSWR 97; *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798; [1974] 2 All ER 321);

(c) Mr Reed knew that he did not have approval before the work started;

(d) and the work continued after he received the letter of demand from the defendants' solicitors;

(e) the infringement being flagrant and substantial, the injunction should go;

(f) alternatively, the defendants should have an inquiry as to damages.

With that preface, albeit that, in the circumstances, it is rather lengthy, I turn to consider the issues raised on the appeal and the cross-claim.

1. The restrictions affecting No 36 Parriwi Road:

It being clear enough that between January 1936 when the memorandum of transfer to him of the defendants' land was registered, and June 1954, when the memorandum of transfer from him of No 36 Parriwi Road was registered, Mr Bennett was registered as the proprietor of both the dominant and servient tenements, the question which arises is whether the

benefit of the restrictions was extinguished upon the merger, or but merely suspended during the period when Mr Bennett was registered as proprietor of both properties.

The determination of that question, so it seems to me, requires, first, an examination of the position at common law, and, secondly, a determination of whether the provisions of the *Real Property Act* 1900 — and to an extent, of the *Conveyancing Act* 1919 — change what would otherwise be the position at common law.

As a broad general rule, the position at common law is that where land has been subject to an easement, or has been subjected to covenants restrictive of its user, for the benefit of other land, and thereafter the dominant and servient tenements come into the ownership *and* possession of the same person, any easement over, or restriction affecting the user of, the servient tenement is extinguished by operation of law. For the principle of merger to operate both "unities" — ownership and possession — must exist; it following that unity of possession without unity of ownership is not enough — and, for this purpose, unity of ownership involves the acquisition of both tenements for a fee simple absolute.

So far as easements are concerned, the authorities would seem to indicate that, if there is only unity of possession, the right is merely suspended until the unity of possession ceases, while if there is only unity of ownership, the right continues until there is also unity of possession: see, eg, *Richardson v Graham* [1908] 1 KB 39; see also Megarry & Wade, *The Law of Real Property,* 5th ed (1984) at 899; *Gale on Easements,* 15th ed (1986) at 345 et seq; Bradbrook and Neave, *Easements and Restrictive Covenants in Australia* (1981) at 374, par 1922. If an easement has been extinguished by merger, it does not revive automatically on severance, but must be the subject of a fresh grant, whether express or implied, by the common owner upon severance: see *James v Plant*; *Cuvet v Davis*.

Although the position as to restrictive covenants is less clear, the fact that the law, in this regard — except where what is involved is a restriction arising under a common building scheme — has been developed by analogy with the law relating to easements, would suggest, first, that, at common law, the benefit of a restrictive covenant is destroyed upon the ownership and possession of both dominant and servient tenements coming into the same hands (see, eg, *Kerridge v Foley*; *Re Tiltwood, Sussex*; *Barrett v Bond*; Megarry & Wade (op cit at 794); Preston & Newsom, *Restrictive Covenants Affecting Freehold Land,* 6th ed (1976); Bradbrook & Neave (ibid), and, secondly, that if that benefit has been destroyed in that way, it is not revived automatically on severance, but, if it is thereafter to exist, must be reimposed by the common owner at the time of severance: see *Texaco Antilles Ltd v Kernochan* (at 626) per Lord Cross of Chelsea; Megarry & Wade (op cit at 794); Preston & Newsom (ibid).

Whatever be the jurisprudential basis for the distinction, it seems now to be established that where what is involved is a restriction arising under a common building scheme, unity of ownership and possession does not, without more, put an end to the restriction as between the properties jointly owned, and that, in such case, in the absence of something more, the restriction, as between the jointly owned properties, is merely suspended during co-ownership and revives upon severance: see *Brunner v Greenslade*

[1971] Ch 993; *Texaco Antilles Ltd v Kernochan*; Megarry & Wade (op cit at 794); Preston & Newsom (ibid).

In the present case, it is clear that, although the relevant restrictions were imposed upon No 36 Parriwi Road at or about the time when the not entirely dissimilar restrictions were imposed upon Nos 38 and 40 Parriwi Road, the restrictions were imposed, in each case, solely for the benefit of the defendants' land, it following that they cannot be regarded as part of a common building scheme. This being so it must follow that if, notwithstanding that both the defendants' land and No 36 Parriwi Road are registered pursuant to the provisions of the *Real Property Act* 1900, the common law principles applied, then the benefit of the restrictions was extinguished in 1936, and, unless the deed of 1968 operated in some way to renew those restrictions, No 36 Parriwi Road now stands free of them.

I am unable to regard the deed of 1968 as renewing, or recreating — for that is what I understand the authorities (*James v Plant*; *Cuvet v Davis*; see also *M'Carthy v Cunningham* (1877) 3 VLR (L) 59) to require — the restrictions to which the property was subjected at the time of its being transferred to Mr Bennett — quite apart from the fact that the deed was not executed by Mr Gilkes, it does not purport to contain any covenant on the part of Mr Gilkes, and to the extent to which it has operation, it purports to operate only as a waiver of what was believed to have been a past infringement, or a release, pro tanto, of the restrictions. That the former common owner must — either expressly, or by necessary implication — recreate an easement which has been extinguished, or the former common owner or the transferee of the servient tenement must enter into a fresh covenant — rather than, as Mr Trew submitted, that there need only be a document which "recognised" the former easement or restriction — is, I believe, demonstrated by the following passage in the judgment of Tindal CJ in *James v Plant* (at 760-761; 971):

> "There will be no necessity for us to enter into the discussion of the principles of law, upon which the judgment of the Court below has proceeded; with respect to which principles there is no difference in opinion between this Court and the Court of King's Bench. We all agree that, where there is a unity of seisin of the land, and of the way over the land, in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way; and that, after such extinguishment, or during such suspension of the right, the way cannot pass as an appurtenant under the ordinary legal sense of that word. We agree also in the principle laid down by the Court of King's Bench, that, in the case of a unity of seisin, in order to pass a way existing in point of user, but extinguished or suspended in point of law, *the grantor* must either employ words of express grant, or must describe the way in question as one 'used and enjoyed with the land' which forms the subject matter of the conveyance";

(my emphasis) and by the following passage in the judgment of Stawell CJ in *Cuvet v Davis* (at 395-396):

> "The contention that the plaintiff was not entitled to the easement in question is only another mode of contending that no easement was given to those from whom the plaintiff deduced title. It was unquestionably given at one period; that is admitted, and it is also admitted that it was afterwards determined by unity of possession of the dominant and servient tenements. The question now is, was it subsequently renewed? and that depends on what is the proper construction to be put on the words in the deed of the 9th January 1881 'bounded on the south by a right of way twelve feet wide, reserved by the said D Nicholas'. The plaintiff's boundary is described as a 'right-of-way', which is further stated to have been reserved by Nicholas, 12 feet wide. These latter words might be unnecessary, if only used as descriptive of the plaintiff's boundary; but they are all essential to show what the easement was, and that it extended to the public street. It is enough to say that it is a recognition of a right, sufficient to sustain the plaintiff's claim; *a grant, or what is equivalent to a grant,* has been made by these words; they amount to evidence of such a recognition. And if *the grantor* could not resist the action, neither can those who derive title from him";

(again, my emphasis; see also *Roe v Siddons* (1888) LR 22 QBD 224; *Re Tiltwood, Sussex; Barrett v Bond* (at 280) per Foster J).

The question, thus, is: whether the fact that No 36 Parriwi Road is registered pursuant to the provisions of the *Real Property Act* 1900 and that the restrictions remain noted upon the relevant certificate of title takes the case out of the operation of these common law principles — as I have indicated, Mr Trew — relying upon the decisions of McLelland CJ in Equity in *Re Standard and the Conveyancing Act 1919* and *Margil Pty Ltd v Stegul Pastoral Pty Ltd* — both cases of easements — submitted that it did, while Mr Foster, who submitted that those decisions, if correct, ought to be limited to cases of easements, would have it that it did not, a view of which, as I have previously indicated, the judgment of Bryson J in *Gyarfas v Bray* would provide support.

Before turning to consider that question, I pause to set out what appear to be the relevant provisions of the *Conveyancing Act* 1919 and the *Real Property Act* 1980. They are as follow:

1. *Conveyancing Act 1919*:

> "Limitation of enforceability of easements and restrictions of user of land
>
> 88.(1) Except to the extent that this Division otherwise provides, an easement expressed to be created by an instrument coming into operation after the commencement of the Conveyancing (Amendment) Act 1930, and a restriction arising under covenant or otherwise as to the user of any land the benefit of which is intended to be annexed to other land, contained in an instrument coming into operation after such commencement, shall not be enforceable against a person interested in the land claimed to be subject to the easement or restriction, and not being a party to its creation unless the instrument clearly indicates —
>
> (a) the land to which the benefit of the easement or restriction is appurtenant;
>
> (b) the land which is subject to the burden of the easement or restriction:
>
> Provided that it shall not be necessary to indicate the sites of easements intended to be created in respect of existing

tunnels, pipes, conduits, wires, or other similar objects which are underground or which are within or beneath an existing building otherwise than by indicating on a plan of the land traversed by the easement the approximate position of such easement;

(c) the persons (if any) having the right to release, vary, or modify the easement or restriction, other than the persons having, in the absence of agreement to the contrary, the right by law to release, vary, or modify the easement or restriction; and

(d) the persons (if any) whose consent to a release, variation, or modification of the easement or restriction is stipulated for.

...

(3) This section applies to land under the provisions of the Real Property Act 1900, and in respect thereof —

(a) the Registrar-General shall have, and shall be deemed always to have had, power to record a restriction referred to in subsection (1), in such manner as he considers appropriate, in the folio of the Register kept under that Act that relates to the land subject to the burden of the restriction, to record in like manner any dealing purporting to affect the operation of a restriction so recorded and to record in like manner any release, variation or modification of the restriction;

(b) a recording in the Register kept under that Act of any such restriction shall not give the restriction any greater operation than it has under the dealing creating it; and

(c) a restriction so recorded in an interest within the meaning of s 42 of that Act.

88B.

...

(2) A plan shall not be lodged in the office of the Registrar-General for registration or recording under Division 3 of Part 23 unless it indicates in the manner prescribed in respect of the plan by regulations made under this Act or the Real Property Act 1900 —

...

(d) what restrictions on the use or positive covenants, if any, are intended to be created benefiting or burdening land comprised in the plan.

(3) On registration or recording under Division 3 of Part 23 of a plan upon which any easement, profit à prendre, restriction or positive covenant is indicated in accordance with paragraph (a), (b), (c) or (d) of subsection (2) then, subject to compliance with the provisions of this Division —

...

(c) any other easement, profit à prendre or any restriction on the use of land (not being a restriction as to user of the type that may be imposed under section 88D or 88E) so indicated as intended to be created shall —

(i) be created;

(ii) without any further assurance and by virtue of such registration and of this Act, vest in the owner of the land

benefited by the easement or profit à prendre or be annexed to the land benefited by the restriction, as the case may be, notwithstanding that the land benefited and the land burdened may be in the same ownership at the time when the plan is registered and notwithstanding any rule of law or equity in that behalf; and

(iii) not be extinguished by reason of the owner of the land benefited by such easement, profit à prendre or restriction holding or acquiring a greater interest in the land burdened thereby; and ...

89.(1) Where land is subject to an easement or to a restriction or an obligation arising under covenant or otherwise as to the user thereof, the Court may from time to time, on the application of any person interested in the land, by order modify or wholly or partially extinguish the easement, restriction or obligation upon being satisfied —

(a) that by reason of change in the user of any land having the benefit of the easement, restriction or obligation, or in the character of the neighbourhood or other circumstances of the case which the Court may deem material, the easement, restriction or obligation ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land subject to the easement, restriction or obligation without securing practical benefit to the persons entitled to the easement or to the benefit of the restriction or obligation, or would, unless modified, so impede such user, or

(b) that the persons of the age of eighteen years or upwards and of full capacity for the time being or from time to time entitled to the easement or to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the land to which the easement or the benefit of the restriction is annexed, have agreed to the easement, restriction or obligation being modified or wholly or partially extinguished, or by their acts or omissions may reasonably be considered to have abandoned the easement wholly or in part or waived the benefit of the restriction wholly or in part; ...

(c) that the proposed modification or extinguishment will not substantially injure the persons entitled to the easement, or to the benefit of the restriction or obligation.

(2) Where any proceedings are instituted to enforce an easement, restriction or obligation, or to enforce any rights arising out of a breach of any restriction or obligation, any person against whom the proceedings are instituted may in such proceedings apply to the Court for an order under this section.

(3) The Court may on the application of any person interested make an order declaring whether or not in any particular case any land is affected by an easement, restriction or obligation, and the nature and extent thereof, and whether the same is enforceable, and if so by whom."

2. *Real Property Act 1900*:

"42.(1) Notwithstanding the existence in any other person of any

estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded except —

...

47.(1) Where an easement burdening land under the provisions of this Act is created for the purpose of being annexed to or used and enjoyed together with other land under the provisions of this Act, the Registrar-General shall, in addition to any other recording by this Act required, record particulars of the dealing creating the easement in the folio of the Register evidencing title to the land to which the easement is annexed or with which it is to be used and enjoyed.

...

(7) An easement recorded in the Register shall not be extinguished solely by reason of the same person becoming proprietor both of the land burdened and of the land benefited by the easement, notwithstanding any rule of law or equity in that behalf.

(8) The provisions of subsection (7) shall only apply to easements which, according to the Register, subsist at the commencement of the Real Property (Amendment) Act, 1970, and to easements recorded in the Register after that commencement."

As I have earlier recorded, Mr Foster has submitted, first, that even if the decisions in *Re Standard and the Conveyancing Act 1919* and *Margil Pty Ltd v Stegul Pastoral Co Pty Ltd* correctly state the law in so far as easements are concerned, they do not state the law in relation to restrictive covenants, first, because easements are noted on the certificates of title to both the dominant and servient tenements, whereas restrictive covenants are noted only on the certificate of title to the servient tenement; and, secondly, since, despite the — as he would have it — limited effect now given by s 88(3) of the *Conveyancing Act* 1919 to the notation of a restrictive covenant on the certificate of title to the servient tenement, the registered proprietor of the dominant tenement does not become the proprietor of any "estate or interest" in the servient tenement.

It is, of course, clear that an easement is conceptually different from a restrictive covenant, the former — put simplistically — being a right in the dominant owner to make some limited use of the property of the servient owner, while the latter — again put simplistically — is a right in the dominant owner to restrict the use made by the servient owner of his (the servient owner's) property. But even if that be so, it does not dispose of the matter, for s 88(3)(c) of the *Conveyancing Act* 1919 provides that a restrictive covenant *which complies with the provisions of s 88(1)* (see *Re Louis and the Conveyancing Act*; cp *Re Martyn),* and is noted on the certificate of title to the servient tenement, is an "interest" for the purpose of s 42 of the *Real Property Act* 1900, the consequence of which, in such case, must be that the servient owner holds his land subject to that "interest".

Next, Mr Foster submitted that the decisions in both *Re Standard and the Conveyancing Act 1919* and *Margil Pty Ltd v Stegul Pastoral Co Pty Ltd* ought

to be regarded as wrongly decided, or, in the case of the latter, capable of being upheld only because of the provisions of s 47(7) of the *Real Property Act* 1900.

I am unable to accept that either decision was wrongly decided. So far as the former is concerned, it seems to me that, even if it can be supported upon no other ground, the facts appear to demonstrate that there was a re-grant of the way (in the sense described in *James v Plant*) upon the severance of the previously jointly owned interests, while, in the case of the latter, it can clearly be upheld in the light of the provisions of s 47(7) of the *Real Property Act* 1900.

The real question thus is: are the decisions of McLelland CJ in Equity and Needham J, to the extent to which they appear to hold that the provisions of s 42 of the *Real Property Act* 1900 preclude the operation of the common law doctrine of extinguishment by merger in the case of land under the provisions of the *Real Property Act* 1900 to be regarded as correctly decided. With regard to this question, Mr Foster has pointed to the provisions of s 47(7) of the *Real Property Act* 1900, which were not introduced into the Act until 1970 — he could also have pointed to the provisions of s 88B(3)(c) of the *Conveyancing Act* 1919, which were not introduced into that Act until 1964 to support a similar argument — as demonstrating — as he would have it, clearly — the legislature's recognition, and acceptance, of the fact that, prior to 1970, the common law doctrine of extinguishment of easements by merger — and, since s 88 of the *Conveyancing Act* 1919 links easements and restrictive covenants, the like doctrine in relation to restrictive covenants — operated even in respect of land under the provisions of the *Real Property Act* 1900. Acceptance of this submission would seem to lead inevitably to the conclusion that, since the restrictions were, as Mr Foster would have it, extinguished in 1936, they were not later revived when the amendments were passed — because of the language of s 47(7) of the *Real Property Act* 1900, a different result would seem to follow in the case of easements which were still notified on the Register when the amendment was passed in 1970.

Regrettably, over the years since the Torrens title legislation was first introduced, the legislature has tinkered with the legislation in a way which suggests, first, that it does not fully understand the principle of indefeasibility which underpins the legislative scheme, and, secondly, that it does not fully appreciate that, while, in its original form, the legislation made no provision for the registration of equitable interests in land, it did not forbid their creation or transfer, those matters being left to the general law: see, eg, *Tietyens v Cox* (1916) 17 SR (NSW) 48 at 50-51; 34 WN (NSW) 10 at 11.

So far as the first of these matters is concerned, the received doctrine is (*Breskvar v Wall* (1971) 126 CLR 376 at 385-386):

> "The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what was the cause or reason for which the instrument is void."

A logical consequence of this view is that if certificates of title to a dominant and servient tenement bear a notification that the former is entitled to the benefit of, and the latter is subject to the burden of, an easement, there should be no room for dispute as to the continued existence of the easement, a view which commended itself to the Full Court of the Supreme Court of Victoria (Irvine CJ, Mann J and Macfarlan J) in *Webster v Strong* [1926] VLR 509 and to Gillard J in *Riley v Penttila* [1974] VR 547. Despite this:

1. when the legislature came to amend the *Conveyancing Act* 1919 in 1930, it introduced the present s 89, which extends to both easements and restrictive covenants — whereas s 88 which it replaced was limited to restrictive covenants — and provided, inter alia, that the court might order that an easement be varied or extinguished if, inter alia, the person or persons entitled to the benefit of it had agreed to the easement being varied or modified, or if, by the acts or omissions of that person or of those persons, the easement ought to be considered to have been abandoned in whole or in part — the effect of this amendment — which was applied not only to Old System land but also to land under the *Real Property Act* — upon the indefeasibility principle had been remarked upon by Hutley JA in *Pieper v Edwards* [1982] 1 NSWLR 336 at 339;

2. although, prior to that time, McLelland CJ in Equity had held (*Re Standard and the Conveyancing Act 1919*) that the doctrine of extinguishment by merger did not apply to easements registered under the *Real Property Act* 1900, when, in 1970, the legislature came to pass the *Real Property (Amendment) Act* 1970 it substituted the present s 47 for the former s 47, and, by including subs (7) provided the basis for an argument that, had it not done so, the doctrine of extinguishment by merger would have applied to easements registered under the *Real Property Act* 1900.

So far as the second matter is concerned, despite the fact that, in its original form, the *Real Property Act* was not intended to provide for the registration of any equitable interest in, or over, land registered under the Act; despite the fact that the doctrine which now, in an appropriate case, permits the enforcement of a covenant restrictive of the use of land against a purchaser of the servient tenement is one developed by the courts of equity; and despite the fact that, in its original form, the *Real Property Act* 1900 made no provision for the registration of such a covenant, or for the entry upon the Register of a notification of such a covenant:

1. when it came to pass the *Conveyancing Act* 1919:

(a) the legislature applied the original s 89 (the origin of the present s 88(1)) to land under the *Real Property Act* 1900; and

(b) the legislature applied the former s 88 (the original of the present s 89, but then limited to restrictive covenants) to land registered under the *Real Property Act*, grounds for an order extinguishing the benefit of a covenant — which order, in order to be effective, in relation to land registered under the *Real Property Act* seemingly had to be lodged with the Registrar-General — including an agreement to discharge, or acts and omissions amounting to waiver;

2. when it came to pass the *Conveyancing (Amendment) Act* 1930:

(a) the legislature validated the practice of the Registrar-General — which had been questioned — of recording in the Register of restrictions as to the user of land registered under the *Real Property Act* 1900 (s 88(3)(a));

(b) the legislature provided (s 88(3)(b)) that notification should not give the restriction any greater operation than it would have *under the instrument creating it*, a clear indication, one would think, first, that restrictions not falling within the *Tulk v Moxhay* [(1848) 2 Ph 774; 41 ER 1143] principle would not run with the land; secondly, that, unless it could be demonstrated that there was a common building scheme (see *Elliston v Reacher* [1908] 2 Ch 374; see also *Re Naish and the Conveyancing Act* (1960) 77 WN (NSW) 892) earlier purchasers (or their successors in title) from a common vendor will not be permitted to enforce a restriction against later purchasers (or their successors in title) from the common vendor; and, thirdly, that, depending upon the proper construction of the covenant in question, in cases in which the original dominant tenement has later been subdivided, purchasers of lots in that further subdivision may not be permitted to enforce the restrictions against the original servient tenement: cf & cp *Drake v Gray* [1936] Ch 451; *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 WLR 594; [1980] 1 All ER 371;

(c) the legislature constituted such restrictions, when notified on the Register, *as interests for the purposes of s 42* of the *Real Property Act* 1900, that is, *as something to which the title of the registered proprietor was subject*;

3. when it came to pass the *Local Government and Conveyancing (Amendment) Act* 1964, which (inter alia) introduced the provisions of s 88B (which applies to both Old System land and to land registered under the *Real Property Act* 1900) into the *Conveyancing Act* 1919, and *permitted the creation and, notification, of (inter alia) easements and restrictive covenants on the registration of a plan of subdivision and prior to sale, transfer or conveyance*, the legislature, by including in s 88B the provisions of subs (3)(c)(ii), (iii), provided the basis for an argument that, had it not done so, the fact of common ownership would have prevented the creation of the easements or restrictions in the first place, and would have resulted in their immediate extinguishment even if validly created in the first place.

It seems to me that a guide to the resolution of the difficulties to which I have referred is provided by the views expressed by Mason J, as he then was, in *Treweeke v 36 Wolseley Road Pty Ltd* (1973) 128 CLR 274 at 301-302; see also *Driscoll v Church Commissioners for England* [1957] 1 QB 330; *Re Ghey and Galton's Application* [1957] 2 QB 650 at 659-660 per Lord Evershed MR; *Re Cook*; *Pieper v Edwards*; cp *Re Rose Bay Bowling and Recreation Club Ltd* (1935) 52 WN (NSW) 77 that, even in cases in which the relevant jurisdictional facts have been shown to have been established, the Court retains a discretion to make, or to refuse to make, an order under s 89(1), or a declaration under s 89(3) of the *Conveyancing Act* 1919. If this be so, then, as it appears to me, while, in a case in which facts justifying a finding, at common law, that an easement has been abandoned or extinguished, or that a restriction has been waived or extinguished, are shown to exist the relevant notification is susceptible to an order or declaration which would lead to its being removed from the Register, until it is removed from the Register the servient tenement remains subject to, and the dominant tenement retains the benefit of, the easement or restriction — to put it in another way, it is not the facts, as found, which remove the burden of the easement or restriction, but

the administrative act — based on the appropriate order or declaration — of removing the notification from the Register. If, as I believe it to be, this is a correct assessment of the position, then one cannot but conclude that the doctrine of extinguishment by merger has no place in the law in so far as land registered under the provisions of the *Real Property Act* is concerned.

I conclude, therefore, that the first attack upon the master's decision fails.

2. The construction of the various restrictive covenants:

(a) Affecting No 36 Parriwi Road:

It is clear enough that, if the proposed town-houses were built, there will be an infringement of the restrictions, if only because the western wall of the structure — which western wall is about 70 feet in extent — will be located at a distance of only about 20 feet from the "back boundary" of the lot. However, as the other questions were argued, it is as well that I express a view on them.

With respect, it seems to me that, in concentrating, as they did, upon the provisions of cl 6 of the covenant, Mr Foster's submissions were misdirected, for those submissions completely overlook the fact that the primary restriction is that contained in cl 1, that is, "a cottage building only shall be erected together with garage, if desired".

It would seem that, as originally used, " 'cottage' is a little house for habitation of poor men without any land belonging unto it; whereof mention is made in 4 Edw 1 c 1" (Termes de la Ley) or "cottage, cotagium, is a little house with land to it" (Co Litt 56 b), while a "cottager" denoted "a man occupying a cottage, as distinguished from a farm or mansion-house". While I would not, for one minute, seek to suggest that, in 1927 — and still less, in this day and age — the word "cottage" still bore its original meaning, it would, I believe be correct to say that, in 1927 — as today — the word bore the meaning of a comparatively small country or suburban residence, usually of one storey — perhaps with a room or rooms in the roof — and sufficient to accommodate a single family unit. But even if this be thought to be too modest a description of a modern "cottage", it seems to me that by no stretch of the imagination, could a structure, the external dimensions of which appear to be of the order of 130 feet by 70 feet, built on five levels — albeit stepped up a hill — containing within its external walls five separate residential units — one with four bedrooms, two with three bedrooms, and two with one large bedroom — *each* of which residential units was intended to have its own private terrace and garden, complete with swimming pool, be regarded as "a cottage".

(b) Affecting No 38 Parriwi Road:

Again, so it seems to me, by concentrating, as they did, on such matters as the nature of the roof of, and the permitted use of, what was to be erected on the land, Mr Foster's submissions were misdirected. In this respect, despite the fact that the covenant would not qualify as a shining example of the draftsman's art, it seems to me to be tolerably plain that the covenant sought to prohibit, first, the building on the land of any structure which did not qualify as a "house" — which house was to be so designed as to meet certain limitations as to height and roof design — or ancillary structures such as a garage, garden shed or the like; and, secondly, sought to restrict the use of "*the* house", when erected, to that of "*a* private residence".

While it may well be that a structure — such as one containing two semi-

detached cottages (*Munns v Watson*) or a duplex block of flats (see, eg, *Yorkshire Fire and Life Insurance Co v Clayton* (1881) LR 8 QBD 421 at 424-425 per Jessel MR) may qualify as "a house", and that such a structure, if occupied and used only for its intended purposes, may properly be described as being used "for the purposes of residence", or "for residential purposes", it seems to me that, when, as here, one finds a reference to "*the* house" and to "*a* private residence", one must conclude that what the draftsman had in mind was "a house" in the sense of a structure of a permanent character structurally severed from other such structures, under its own separate roof, adapted for, and used as, the place of residence of a single family or family group: see, eg, *Kimber v Admans* [1900] 1 Ch 412; *Rogers v Hosegood* [1920] 2 Ch 388; *Ilford Park Estates Ltd v Jacobs* [1903] 2 Ch 522; *Ex parte High Standard Constructions Ltd*; *Cobbold v Abraham* [1933] VLR 385; *Re Naish and the Conveyancing Act*. If this be so, then, for the purposes of the restrictions, the proposed structure must be regarded — as it has been described — as five (town) houses; and thus, as infringing the restrictions.

For these reasons, I conclude that although, when dealing with this aspect of the matter the master, with his usual inimitable economy of words, limited himself to the following:

> "Without therefore going into the semantics of expression used in the covenants or directing oneself to other general principal (sic) the development proposal clearly offends against the covenants";

he did not fall into error in so concluding.

3. The s 89 application:

Although, as will be obvious from what I have recorded above, it is clear that the character of the general neighbourhood in which the defendants' land is situated is in the process of change, I am unable to accept that the facts, first, that the area is now zoned so as to permit medium density housing, and, secondly, that advantage has been taken of the fact to built some town-houses and home units in Parriwi Road, are — whether separately or in conjunction — sufficient to conclude, either, that the restrictions on any of the three properties are obsolete, or, that their continued existence will impede the reasonable use of any of the properties without securing practical benefit to anyone.

Whether one regards the covenants as intended merely to preserve the view from the defendants' home, or as intended, as well, to preserve a substantial degree of privacy for the defendants' property by prohibiting the erection of substantial structures close to the eastern boundary of the defendants' land and in a position in which they would overlook the defendants' land, each of those objects can still be — and, indeed, is presently being — achieved: see *Re Truman, Hanbury Buxton and Co Ltd's Application*; *Heaton v Loblay*; *Re Mason and the Conveyancing Act*; *Re Robinson*. As I have earlier recorded — notwithstanding the fact that the alterations made to No 40 Parriwi Road in 1984 have deprived the defendants' home of the former view to the north towards Clontarf — the view, even from the ground floor of the defendants' home, to the north-east and to the east, remains, in a word, spectacular, while, notwithstanding the recent erection of town-houses or units on No 34 Parriwi Road, the rear garden area of the defendants' land remains a very private, tranquil and aesthetically pleasing place.

Nor can it possibly be said that there can be no possible reasonable user of the three properties unless the restrictions be extinguished or modified: *Heaton v Loblay*; *Re Callanan and the Conveyancing Act*; *Guth v Robinson*; *Re Alexandra*. Not only do the houses erected on each of the three properties — although elderly — appear to be in substantially good order, but, as best as I could judge it, there still remain in Parriwi Road — both to the north of the three properties on the western side of Parriwi Road, and to both north and south on the eastern side of Parriwi Road — a significant number of conventional homes.

Finally, there is the question of the alleged waiver of the restrictions in so far as they affect No 40 Parriwi Road, in respect of which alleged waiver, the plaintiffs, as I understand it, rely solely upon the conversation between Mr Reed and Mr Thorp prior to the commencement of the work. While it may be that, if Mr Reed's evidence as to this conversation stood alone, it might be open to a court to hold that the restrictions had been waived (but see *Heaton v Loblay*), the fact is that it does not. Rather, Mr Thorp's evidence — which was not denied by Mr Reed, nor, as I understand it, challenged in the course of cross-examination — was, first, that he had no authority to approve of the proposed alterations or to waive the restrictions; secondly, that the plans which he was shown by Mr Reed were not the plans finally approved; thirdly, that he at no time purported to approve either the original, or final, plans, or to waive the restrictions; and, finally, that, when he spoke to Mr Reed on 29 November 1989, he said to him "I gave you no approvals in our previous conversations and I do not have the authority to approve anything", Mr Reed's only reply being "I understand that". In these circumstances, I do not consider that a finding of waiver could be justified.

I therefore conclude that, when he determined that no ground for extinguishing, or modifying, the restrictions affecting any of the three properties had been made out, the master did not fall into error.

The cross-claim:

Before turning to deal with this aspect of the submissions I should record three further matters of fact, they being:

1. as the result of the alterations made to No 40 Parriwi Road in 1984, the building is now adapted for use as three self-contained dwelling units;

2. it is Mr Reed's wish that, in the future, the building be used as "three separate residences";

3. although the building is not occupied by Mr Reed as his home, and was not occupied by any tenant at the time of the hearing before the master, I was informed, during the course of the hearing before me, that the building, at that time, was occupied by a tenant.

I record these matters for the reasons:

1. that although the fact that the building is adapted for use as three separate residences may not constitute a further breach of the restrictions, it seems to me that, if the building were to be used as three separate residences, such use would constitute a breach of the covenant that it "be used as *a* private residence only";

2. that the fact that the building is, or may be, occupied by a tenant is a fact to which, so it seems to me, I ought to have regard in determining whether I ought to grant the injunction prayed, and, if I were to do so, whether the operation of that injunction ought to be stayed for a time.

I turn, then, to consider what, if any, relief ought to be granted on the cross-claim.

The history, and other matters, which I have recorded above, in my view justify the following findings of fact:

1. prior to, and at the time of, his taking title to No 40 Parriwi Road, Mr Reed was aware of the restrictions;

2. this notwithstanding, Mr Reed, had, prior to his purchase of the land being completed, determined to carry out the alterations which were intended to convert the existing building from a single dwelling to a building adapted for use as three separate residences, and, for that purpose, had plans prepared, and a building application lodged;

3. although he was aware of the restrictions, Mr Reed did not inform the defendants of his proposals, or seek their approval of it; the notice which the defendants received came from the council;

4. if not before, then by no later than his meeting with Mr Thorp, Mr Reed was made aware of the defendants' concern to ensure that any alterations conformed with the restrictions;

5. despite this, and despite the fact it was clear that the alterations would infringe the restrictions in at least two respects, Mr Reed did not seek the defendants' approval; nor did he believe that Mr Thorp, on behalf of the defendants, had given approval;

6. as soon as the defendants became aware of the true nature of what was being built, they consulted their solicitors, who sent an appropriate letter of demand to Mr Reed;

7. despite receiving the letter — to which he did not reply for a fortnight — Mr Reed had his company press on to complete the alterations;

8. the building as altered not only infringes the restrictions in at least two respects — and its use, in the intervening years, may have infringed the restrictions in a third respect — but it has effectively deprived the defendants of a significant part of their former view, the protection of which was at least one of the purposes for which the restrictions were originally proposed.

As is the case with most forms of equitable relief, the grant, or refusal, of an injunction of the type now prayed lies in the discretion of the court. However, that discretion, being a judicial, and not an unfettered, one must be exercised in accordance with accepted principle.

In the comparatively recent decision of the Court of Appeal in England in *Wakeham v Wood*, Waller LJ (at 43-45) said:

> "The authorities show that in the case of express negative covenants, that is where an agreement has been made that a particular thing is not to be done an injunction will be granted to restrain a breach. And where a defendant commits a breach of a negative covenant with his eyes open and after notice the court will grant a mandatory order, although there is and must be some limitation to this practice: eg see per Astbury J in *Sharp v Harrison*, and in that case the judge found reasons for awarding damages. In *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, a case dealing with actionable nuisance, Lindley LJ considered the circumstances in which damages would be awarded in lieu of an injunction and said (at 316):
>
> 'Without denying the jurisdiction to award damages instead of an injunction, even in cases of continuing actionable nuisances, such

jurisdiction ought not to be exercised in such cases except under very exceptional circumstances. I will not attempt to specify them or lay down rules for the exercise of judicial discretion. It is sufficient to refer, by way of example, to trivial and occasional nuisances: cases in which a plaintiff has shown that he only wants money; vexatious and oppressive cases; and cases where the plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief. In all such cases as these, and in all others where an action for damages is really an adequate remedy — as where the acts complained of are already finished — an injunction can be properly refused.'

And A L Smith LJ said (at 322):

'... whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction be made out.

In my opinion, it may be stated as a good working rule that —

(1) If the injury to the plaintiff's legal rights is small,

(2) And is one which is capable of being estimated in money,

(3) And is one which can be adequately compensated by a small money payment,

(4) And the case is one in which it would be oppressive to the defendant to grant an injunction: —

then damages in substitution for an injunction may be given.

There may also be cases in which, though the four above mentioned requirements exist, the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction.'

The present case does not in my view qualify in any particular with paragraphs (1) to (4) mentioned by A L Smith LJ. Here is a man who had been living in his house for 33 years with a view of the sea protected by a restrictive covenant. The defendant purchased the land subject to the restriction with knowledge of it at the time of purchase. He did not make any inquiry of the plaintiff either directly or indirectly, he did not inform his architect of the restriction, he took no notice of his builder telling him of the plaintiff's objection and he put the roof trusses up in spite of letters from the plaintiff's solicitor. A more flagrant disregard of the plaintiff's rights it is difficult to imagine. As I have already indicated the judge concluded that there was a serious interference with the plaintiff's legal right to a view of the sea. I find it difficult to say that where one has a view protected by covenant the denial of that view is capable of being estimated in money terms and therefore it seems to me it cannot be adequately compensated by a small money payment. Indeed in this case the judge awarded a substantial money payment. It no doubt will be oppressive to the defendant if a mandatory injunction is granted against him, but that is entirely his own fault for proceeding with the construction in breach of the covenant after warning. This court has to consider the case at the time of the hearing before the judge. Thereafter

the defendant knew that there was an appeal pending. Furthermore this is a case which falls foursquare within the last paragraph of the passage which I have quoted from A L Smith LJ.

In my judgment the judge in this case was in error in awarding damages in lieu of a mandatory injunction. The effect of so doing was to enable the defendant to buy his way out of his wrong. I have come to the conclusion that the only proper course for this court to take is to grant a mandatory injunction and I would allow this appeal";

while Watkins LJ (at 46-47) said:

"It must of course be acknowledged that in the vast majority of cases of breaches of restrictive covenants it will be inevitable, or almost inevitable, that the court will exercise its discretion so as to grant the mandatory injunction sought but that result will nevertheless have been achieved by the exercise of a discretion.

The kind of covenant broken by *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798; (1973) 27 P & CR 296, is essentially different from that which binds the plaintiff in the present case. It was for example nowhere near so restrictive upon the activities of adjoining occupiers of land and there were other considerations which caused the court to make an award of damages instead of granting an injunction, none of which are applicable to the exercise of discretion here.

Moreover, the judge did not have the opportunity and benefit of looking at the range of authorities which were displayed before us including especially *Shelfer v City of London Electric Lighting Co* [1895] Ch 287. Had he done so although that was a case concerned with actionable nuisance, I believe that he would have exercised his discretion differently. This is not a conclusion which I have arrived at as I have said without some original hesitation but time for reflection has persuaded me that for the reasons provided by Waller LJ this defendant has clearly debarred himself from enjoying the benefit of paying money only for a wilful breach of a restrictive covenant. I therefore would also allow this appeal";

and Eastham J (at 47) added:

"I have had the advantage of having been able to consider a copy of the judgment delivered today by Waller LJ with which I am in complete agreement. I add a few words of my own out of respect to the trial judge as this appeal is concerned solely with the way in which he exercised his discretion.

On the facts found by the judge the defendant was guilty of a flagrant disregard of the plaintiff's legal rights and his breach of the restrictive covenant has caused serious injury to those rights.

In those circumstances the proper exercise of the discretion which undoubtedly was vested in the judge required him to grant the mandatory injunction sought by the plaintiff and not to exercise his discretion in favour of the defendant by awarding damages so as to enable him to buy his way out of his breach.

Substantial personal and financial hardship will undoubtedly be suffered by the defendant by the grant of the injunction but in my judgment by his conduct in acting with a total disregard for the

plaintiff's rights, he had disentitled himself from asking that damages should be assessed in substitution for an injunction, and for that situation he has only himself to blame. I, also would allow the plaintiff's appeal."

These observations, read against the background of the facts which I have set out above and the master's view — which I share — that the defendants did not waive the benefit of the restrictions, would seem to indicate that unless — as is put — the defendants are disentitled, by reason of laches, acquiescence and delay, to the exercise of the courts' discretion in their favour, the injunction prayed must go.

In this respect, as I understood Mr Foster's submissions, the only matter relied upon is that it is now five years since the alterations were completed. However, since, as I understand it, the essence of a successful defence of laches acquiescence and delay is that, *by reason of the inaction of the party now asserting the right*, the other party entered upon a disadvantageous course of action, or has been placed in a disadvantageous position (see *Lamshed v Lamshed* (1963) 109 CLR 440; *York Bros (Trading) Pty Ltd v Commissioner of Main Roads* [1983] 1 NSWLR 391) the fact that the passage of the years played no part in bringing about the position in which Mr Reed now finds himself would seem to deprive Mr Foster's submission of its substance, and, no other matter apparently being relied upon, this suggested defence fails, and the injunction prayed should go.

It is appropriate that Mr Reed be allowed a time within which to comply with that injunction. Since the demolition of the alterations will, almost inevitably, mean that a fresh building approval will need to be obtained in respect of such works as will thereby be rendered necessary in order to make the building weatherproof, or to restore it to its former condition, and since it may be that, to enable the necessary work to be done, steps will need to be taken to regain possession of the building from any tenant who may now be occupying it, I think that a period of twelve months should be allowed for compliance with the order which I propose.

For these reasons I make the following formal orders:

1. ORDER that the appeal against the judgment of Master Hogan delivered on 30 June 1989 be dismissed.

2. CONFIRM the orders made by Master Hogan on 30 June 1989.

3. ORDER that the plaintiffs/appellants pay the costs of the defendants/respondents of the appeal.

4. ORDER that within twelve months of this day, or within such further or other time as may be agreed upon between the parties, or allowed by the court, on application made in that behalf, the plaintiff Geoffrey Vere Reed do demolish, or cause to be demolished, such of the alterations to the building known as No 40 Parriwi Road as were carried out in or about November and December 1984 in pursuance of the building approval granted by the Council of the Municipality of Mosman on or about 28 September 1984 and as comprise the alterations depicted on sheet 1 of the plans approved by the said Council as "Level 3".

5. ORDER that the plaintiff Geoffrey Vere Reed be perpetually restrained from, by himself, his servants or agents, without the consent in writing of the defendants, constructing, or causing or permitting to be constructed, upon the lands now comprised in certificate of title, registered vol 8448, fol 91 (the said land) any building which does not comply with the restrictions contained in memorandum of transfer registered No B559734 as varied by the agreement or deed referred to in the application given dealing number B608642 and noted on the said certificate of title.

6. ORDER that the plaintiff, Geoffrey Vere Reed be perpetually restrained from, by himself, his servants or agents, without the consent in writing of the defendants, using any building on the said land, or causing or permitting any such building to be used, otherwise than as a private residence or for purposes necessarily appurtenant to a private residence.

7. ORDER that the plaintiff Geoffrey Vere Reed pay the costs of the defendants of the cross-claim.

8. ORDER that, unless, within twenty-eight days, an appeal is lodged, exhibits may be returned; in the event of an appeal being lodged, exhibits to be retained until the disposition of the appeal.

9. LIBERTY to apply.

So ordered.

Solicitors for the appellants: *Dunhill Madden Butler.*

Solicitors for the respondents: *Duncan Barron & Co.*

N J HAXTON,
Barrister.