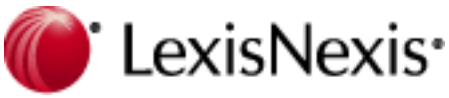
NOTE: Present Curb Level in 20's

So understood, the submission on behalf of the plaintiffs acknowledges the correctness of the submission on behalf of the defendant that it is not sufficient for the plaintiffs simply to establish that what they wish to do on the subject land, namely, construct part of a building nine storeys high is reasonable, but rather that they must establish that no reasonable user of the land is possible unless the restriction is extinguished. For this proposition counsel for the defendant relied upon the decision of Myers J in Heaton v Loblay [1959] SR (NSW) 332 at 335 where his Honour held as follows:



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[97767]

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COLES MYER NSW LTD and ANOTHER v DYMOCKS BOOK ARCADE LTD - (1996) 9 BPR 16,939

SUPREME COURT OF NEW SOUTH WALES -- EQUITY DIVISION
Simos J

6-8, 20 May, 28 June 1996
-- Sydney

Restrictive covenants -- Whether covenant survives the subdivision of the dominant tenement -- Reservation of right of projecting -- Whether plaintiff entitled to order extinguishing covenant and to release of right of projecting -- (NSW) Conveyancing Act 1919 s 89.

Part of the land owned by the plaintiff was subject to a restrictive **covenant** which created a light well by prohibiting the building of any structure exceeding 33 ft in height and requiring that the area above that height should be kept open to the sky as a light area. The **covenant** burdened an area 10 ft wide and 35 ft 7 inches long and was expressed to benefit the whole of the **dominant** tenement. The original **dominant** tenement had been subdivided and, at the time of these proceedings, part of that tenement was owned by the plaintiff and part by the defendant. The part owned by the defendant was 189 ft long and 30-1 ft wide. The plaintiff claimed that the **covenant** was invalid because it was not capable of benefiting the whole of the **dominant** tenement. In addition the plaintiff claimed that the **covenant** was intended to benefit the **dominant** tenement only as a whole and that once this land had been subdivided the **covenant** no longer applied. In the alternative, the plaintiff sought an order under s 89(1)(c) of the Conveyancing Act 1919 on the grounds that its continued existence would impede the reasonable use of the servient tenement without securing practical benefit to the defendant and also that its extinguishment would not substantially injure the defendant. The servient tenement and an adjoining area 5 ft wide and 35 ft 7 inches long was also subject to the reservation of a right to project architectural features such as cornices and window sills onto the northern and eastern side of the plaintiff's land adjacent to the light well. The defendant in its capacity as successor of the original transferors claimed the benefit of this reservation on the northern side. The plaintiff claimed that as an assign of the original owner of the land entitled to the benefit of the reservation and as an assign of the person with whose consent the reservation could be released, it was entitled to release the reservation.

Held:

(i) On its true construction the **covenant** was intended to benefit each and every part of the **dominant** land and therefore as it was clearly capable of benefiting part of the **dominant** land the **covenant** was valid and bound the servient tenement.

(ii) Because the **covenant** was intended to benefit each and every part of the land, it survived the subdivision of the **dominant** tenement.

(iii) An order extinguishing the **covenant** should be made both under s 89(1)(a) second limb, on the ground that its continued existence would impede the reasonable use of the servient tenement without securing practical benefit to the defendant and under s 89(1)(c) on the ground that its extinguishment would not substantially injure the defendant.

(iv) On its true construction the plaintiff was entitled to release the reservation and that, in any event, the plaintiff was entitled to an order wholly extinguishing the reservation on the basis of the second limb of ss 89(1)(a) and 89(1)(c) of the Conveyancing Act 1919 (NSW).

G C Lindsay SC and *R G McHugh* instructed by *Freehill Hollingdale & Page* for the plaintiffs.

B W Rayment QC and *R R I Harper* instructed by *Deacons Graham and James* for the defendant.

9 BPR 16,939 at 16,940

Simos J.

In these proceedings the plaintiffs seek declarations to the effect that they are not legally bound by a certain **covenant** for light in favour of the defendant, or alternatively, that the court should by order wholly extinguish that **covenant.** In addition they seek declarations or an order to the same effect in relation to a reservation in favour of the defendant of a right of projecting various items in the nature of decorative architectural features over the same land and certain other land owned by the plaintiffs.

The facts

The position in relation to the **covenant** for light is as set out in the following paragraphs which are drawn largely from the report dated 1 April 1996 of Frank Kevin Egan, an expert valuer, who gave evidence on behalf of the plaintiffs.

Coles Myer NSW Ltd is the registered proprietor of land bounded by George, Market and Pitt Streets in Sydney (the Grace Bros site) on which stands the Grace Bros retail store. The Grace Bros site comprises Lot 1 in deposited plan 846494. The Grace Bros site has a frontage of 59.95 m^2 to George St plus a splay corner, a southern boundary to Market St of approximately 91.695 m, excluding the splay corner, and an irregular frontage to the Pitt St Mall of approximately 71.65 m and an irregular northern boundary, part of which abuts the Dymocks building site. The area of the land is 6689 m⊃2; being Lot 1 in deposited plan 846494 comprised in FI 1/846494 within the City of Sydney Parish of St James County of Cumberland.

An extensive retail and hotel development is now proposed for the Grace Bros site involving demolition of the existing buildings (except for some heritage protected facades and two internal sections of the Way Building) and construction of a modern retail store and hotel complex. Demolition has begun in the north-west corner of the Grace Bros site.

Dymocks Book Arcade Pty Ltd (Dymocks), the defendant, is the registered proprietor of land adjoining the Grace Bros site on the northern boundary (the Dymocks site). On the Dymocks site stands the Dymocks building, housing, at street **level,** a book store and stationery store. The upper floors are largely tenanted by small specialty tenants although some part of it is used by Dymocks itself. Between the Dymocks building and the Grace Bros site is a lane (Dymocks lane) which is part of the Dymocks site. The proposed development will involve some nine storeys high along the northern boundary of the Grace Bros site adjacent to Dymocks lane. Improvements on the Dymocks site are situated approximately 3 m from the northern boundary of the Grace Bros land. This 3 m comprises a right of way over the Dymocks land in favour of the Grace Bros site.

A restrictive **covenant (covenant)** limiting building height to 33 ft, created by registered dealing A895502, is noted on the title to the Grace Bros site. The **covenant** was created in 1922 when the commissioners of the Government Savings Bank of New South Wales transferred to Edmund Richard Emil Resch a strip of land 10 ft wide by 37 ft long (the

covenant land) contained in certificate of title vol 3322 folio 79 and retained the residue for themselves (the retained land). The **covenant** restricts building height on the **covenant** land to a height of 33 ft from the kerb **level** of George St (as it existed in 1922) (the light well). The **covenant** is expressed to be for the benefit of the whole of the retained land part of which is included in the Dymocks land. The parties to registered dealing A895502 also created a similar restriction (reciprocal) burdening part of the retained land. That part (being a strip of land 5 ft by 37 ft adjacent to the **covenant** land) is now included in FI 1/846494. There are windows in the existing south wall of the Dymocks building. The Dymocks building has an approximate frontage of 33 m to George St with a regular site and rear boundary and has a site area of approximately 1930m².

George St is a major traffic thoroughfare through the Sydney business district and the development in the immediate area is of multi-**level** commercial buildings, generally with intense retail activity at the ground **level** of their George St frontages.

9 BPR 16,939 at 16,941

A full description of the proposed redevelopment is contained in the affidavit of Darrell Elwyn Morrow sworn 25 March 1996.

As stated above, the proposed redevelopment as presently planned will have a wall extending along the length of the northern boundary of the Grace Bros site adjoining the southern boundary of Dymocks lane to a height of nine storeys. This involves the construction of part of a building to a height of nine storeys on the **covenant** land (air space). To the extent that in respect of that area of land the nine storey building will be higher than 33 ft what is proposed would constitute a breach of the **covenant.** It appears that if it is necessary to redesign the proposed development to delete the floor area which would infringe the **covenant** there would be a loss of some 240 m² of floor space at department store rents of about $225 a square metre.

The position in respect of the right of the fefendant of projecting over the land of the plaintiffs will be described later.

The proceedings

The relevant declarations and orders are sought by amended summons. By that amended summons filed 20 May 1996 the plaintiffs claim as follows:

> 1. A declaration that the land described in Schedule 1 is not subject to the burden of the restriction contained in para (a) of Dealing No A895502 (the "**Covenant**").
>
> 2. In the alternative, a declaration that the **Covenant** is not enforceable by the defendant.
>
> 3. In the further alternative, an order extinguishing the **Covenant.**
>
> 4. A declaration that the land described in Schedules 1 and 2 is not subject to the burden of the reservation contained in para (b) of Dealing No A895502 (the "Reservation").
>
> 5. In the alternative, a declaration that the Reservation is not enforceable by the defendant.
>
> 6. In the further alternative, an order extinguishing the Reservation.
>
> 7. An order that the costs of the Proceedings be paid by the defendant.
>
> 8. Such further or other orders as the court thinks fit.

Schedule 1 to the amended summons contained the following description of the relevant land:

> That part of the land formerly in Certificate of Title 3322 Folio 79 which was transferred from the Commissioners of the Government Savings Bank of New South Wales to Edmund Richard Emil Resch by transfer A895502 dated 22 December 1922 and which is presently in FI 1/846494 of which Coles Myer NSW Ltd is the registered proprietor.

Schedule 2 to the said amended summons contained the following description of other relevant land:

> That part of the land formerly in Certificate of Title 3322 Folio 79 contiguous to and immediately adjoining the land transferred from the commissioners of the Government Savings Bank of New South Wales to Edmund Richard Emil Resch by Transfer A895502 dated 22 December 1922 having dimensions of 35 ft 7 inches in a north and south direction and about 5 feet wide east and west and which is presently in FI 1/846494 of which Coles Myer NSW Ltd is the registered proprietor.

The legal documentation

The whole of the land which was formerly contained in certificate of title vol 3322 folio 79 is the land edged green in diagram 1 of Ex A, a coloured copy of each of the five pages of which is annexed to this judgment. The land described in Sch 1 to the amended summons, being part of the land just described, is the land subject to the **covenant** for light and is the land subject to the **covenant** being the land edged pink in diagram 2 of Ex A. The land described in Sch 2 to the amended summons is the land 35 ft 7 inches long and 5 ft wide edged in green on its western side and immediately adjoining the land subject to the **covenant** being the land edged pink in diagram 2 of Ex A. This last described land

9 BPR 16,939 at 16,942

5 ft wide is part of the land described in diagram 2 of Ex A (and all the other diagrams in Ex A) as "SEC 36" and with the figure "2" in a circle in the middle of that land. The whole of this land (SEC 36) was ultimately transferred to Coles Myer NSW Ltd on 29 September 1986 together with the land subject to the **covenant** and being the land edged pink in diagram 2 of Ex A (as well as in diagrams 3 and 4 of Ex A) as appears from diagram 5 of Ex A in which the land edged pink in diagrams 2, 3 and 4 together with the land described as SEC 36 and with a "2" in a circle is edged yellow (in diagram 5).

What is described in the amended summons as "the restriction", and is given the abbreviated description of "the **covenant**", as well as what is described as "the reservation", and is given the abbreviated title of "the reservation", all arise from what is described as dealing no A895502.

That dealing no A895502, is a memorandum of transfer dated 22 December 1922 of part of the land comprised in certificate of title vol 3322 folio 79 being the land subject to the **covenant** and being the land edged pink in diagram 2 (as well as in diagrams 3 and 4) of Ex A.

By that transfer, by which the "**covenant**" for light and the reservation of the right of projecting were created, the transferee (Mr Resch) for himself, his executors, administrators and assigns covenanted with the transferors (the commissioners of the Government Savings Bank of New South Wales), their successors and assigns that he, the transferee, his executors, administrators and assigns, etc:

> ... shall not nor will at any time or times build erect or set up or suffer to be built erected or set up on the land hereby transferred and shown thereon on the plan annexed hereto and therein coloured red (being the land subject to the **covenant** and being the land edged pink in diagrams 2, 3 and 4 of Ex A) or any part or parts thereof, any building or structure of any class character or description whatsoever exceeding in height 33 ft from and above the present kerb **level** of George Street Sydney, as shown on the said plan attached hereto But shall and will at all times maintain and keep or cause to be maintained and kept the area above the said height of 33 ft open to the sky as a light area common to the transferors, their successors and assigns and the transferee his executors administrators and assigns ...

The full text of this **covenant** was in the following terms:

> **Covenant** A895502
>
> THE COMMISSIONERS OF THE GOVERNMENT SAVINGS BANK OF NEW SOUTH WALES (incorporated by the Government Savings Bank Act 1908) (herein called transferors) being registered as the proprietors of an estate in fee simple in the land hereinafter described, subject however to such encumbrances, liens and interests as are notified hereunder in consideration of FIVE HUNDRED POUNDS (500 Pounds.)(the receipt whereof is hereby acknowledged) paid to us by EDMUND RICHARD

EMIL RESCH of Sydney Brewer (herein called transferee) do hereby transfer to the transferee ALL SUCH our Estate and Interest in ALL the land mentioned in the schedule following:

County Parish State if whole or Part Vol Fol

Cumberland S James Part 3322 79 and being the land shown on plan annexed hereto and therein edged red.

(a) AND the Transferee for himself his executors administrators and assigns **covenants** with the Transferors their successors and assigns THAT he, the Transferee his executors administrators and assigns or any person or persons claiming or deriving title to the land hereby purchased by him or any part thereof through under or in trust for him shall not nor will at any time or times build erect or set up or suffer to be built erected or set up on the land hereby transferred and shown on the plan annexed hereto and therein coloured red or any part or parts thereof any building or structure of any class character or description whatsoever exceeding in height thirty three feet from and above the present kerb **level** of George Street Sydney as shown on the said plan attached hereto But shall and will at all times maintain and keep or cause to be maintained and kept the

9 BPR 16,939 at 16,943

area above the said height of thirty three feet open to the sky as a light area common to the transferors their successors and assigns and the Transferee his executors administrators and assigns AND for the purposes of S89 of the Conveyancing Act 1919 it is hereby agreed and declared that:-

(a) The land to which the benefit of this **covenant** (a) is intended to be appurtenant is the whole of the land comprised in Certificate of Title Volume 3322 Folio 79 other than the land hereby transferred.

(b) The land which is to be subject to the burden of this **covenant** (a) is the land hereby transferred.

(c) This **covenant** (a) may be released varied or modified with the consent of the said Transferrors their successors or assigns.

In para (b) of the said memorandum of transfer registered No A895502, by which the reservation of the right to project was created, the transferrors (the commissioners of the Government Savings Bank of New South Wales) thereby granted to the transferee (Mr Resch) his executors, administrators and assigns (but not to the exclusion of other grantees from the transferors):

Full rights of light and ventilation above the height of thirty three feet from the present kerb **level** of George Street aforesaid as shown on the said plan *over that part of the remainder of the land* comprised in the abovementioned Certificate of Title Volume 3322 Folio 79 *being the land contiguous to and immediately adjoining on the east the land hereby transferred having dimensions of thirty five feet seven inches in a north and south direction and about five feet wide east and west* as shown on the said plan -- (being the land described in Schedule 2 to the amended summons) the Transferrors reserving the right for themselves their successors and assigns to at any time -- and without reference to the said transferee or anyone claiming under him -- to build upon the said lastly described area to a height not exceeding thirty three feet above the present kerb **level** of George Street Sydney -- and thereafter shall (subject as hereinafter provided) *for the purpose of light and ventilation keep the said area lastly referred to open to the sky*-- it being hereby agreed between the Transferrors and the Transferee that *the two areas above referred to,* above the height of thirty three feet from the present kerb **level** of George Street Sydney as aforesaid *shall form a common light area fifteen feet wide east and west by lines running north and south thirty five feet seven inches and one quarter of an inch on the western boundary and thirty five feet seven inches on the eastern boundary and the transferrors hereby expressly reserve to themselves their successors and assigns the right of projecting upon the eastern and northern side of the said common light area such as cornices entablatures windows sills (in the original agreement (see later) the term used is "window-sills") or other decorative architectural features as they may deem fit and for* the purposes of S89 of the Conveyancing Act of 1919 it is hereby agreed and declared that:-

(a) The land to which the benefit of this grant, **Covenant** (b) and reservation is intended to apply is the land hereby transferred

(b) The land which is to be subject to the burden of this grant, **covenant** (b) and reservation is that part of the remainder of Certificate of Title Volume 3322 Folio 79 being the land shown on the said plan contiguous to and immediately adjoining on the east the land hereby transferred having dimensions of thirty five feet seven inches in a north and south direction and about five feet in an east and west direction

(c) This grant **covenant** (b) and reservation may be released varied or modified with the consent of the said Edmund Richard Emil Resch his executors administrators or assigns.

[Emphasis and words in brackets supplied.]

The land which is presently the subject of this reservation of the right of projecting (being the common light area) is the land described in Schs 1 and 2 of the amended summons, being about 35 ft 7 inches long ("in a north and south direction") and about 15 ft wide ("east and west").

9 BPR 16,939 at 16,944

So far as concerns para (a) it should be noted that it is, in form, a **covenant,** and that in each of the descriptions of matters required for the purposes of s 89 of the Conveyancing Act 1919 (NSW) reference is made to "this **covenant** (a)".

So far as concerns para (b) it may be noted that it includes what is in form "a grant", what is in substance a "**covenant**" and what is in form a "reservation", and that in each of the matters required to be stated for the purposes of s 89 of the Conveyancing Act 1919, reference is made to "this grant", to "**covenant** (b)" and to "reservation".

The detailed history of the various transfers of the relevant land is to be found, inter alia, in the affidavit of Bruce Leslie Mackinlay of 18 April 1996, but for present purposes it is sufficient to indicate that that part of the land comprised in certificate of title volume 3322 folio 79 which was transferred by memorandum of transfer registered no A895502 dated 22 December 1922 from the commissioners of the Government Savings Bank to Mr Resch, later became the whole of the land comprised in certificate of title vol 3419 folio 232, while the balance of the land contained in certificate of title vol 3322 folio 79, which was retained by the commissioners of the Government Savings Bank, later became the whole of the land comprised in certificate of title 3419 folio 233.

After various transactions, the effect of which may be seen in diagrammatic form in diagrams 3, 4 and 5 of Ex A, the whole of the land contained in certificate of title vol 3419 folio 232 and being the land subject to the **covenant** and being the land edged pink in diagrams 2, 3 and 4 of Ex A came into the ownership of Coles Myer NSW Ltd by memorandum of transfer registered no W534066 dated 29 September 1986 while the whole of the land described in diagrams 2, 3 and 4 of Ex A as "SEC 36" and having the figure "2" in a circle in the centre thereof, which land included the land 5 ft wide described in Sch 2 to the amended summons, came into the ownership of Coles Myer NSW Ltd (formerly Farmer and Co Ltd) by memorandum of transfer registered no B395150 dated 17 August 1926.

It follows that as from 29 September 1986 the first plaintiff, Coles Myer NSW Ltd, was the registered proprietor of the land subject to the **covenant** being the land edged pink in diagrams 2, 3 and 4 of Ex A, and being the land described in Sch 1 to the amended summons, as well as registered proprietor of the land described as "SEC 36" with the figure "2" in a circle in the middle thereof as contained in diagrams 2, 3 and 4 of Ex A which land (SEC 36) included the land 5 ft wide described in Sch 2 to the amended summons.

The **covenant** contained in para (a) of memorandum A895502 dated 22 December 1922 transfer pursuant to a memorandum of transfer registered no A895502 was contained in that agreement dated 7 December 1918 and registered no 845 book 1142 between the commissioners of the Government Savings Bank of New South Wales, Edmund Richard Emil Resch, John Bateman and Resch's Ltd.

The original grant of the **covenant** for light was contained in para (a) of the said memorandum of transfer A895502 pursuant to CLVI of that agreement which was in the following terms:

> VI. The Commissioners hereby agree to sell and the said Edmund Richard Emil Resch hereby agrees to purchase for the sum of Five hundred pounds sterling subject to conditions hereinafter defined the area of land marked "P" and coloured brown upon the said Plan attached hereto marked "A" ten feet wide in an East and West direction and about thirty five feet seven and one quarter inches in a North and South direction or thereabouts extending for the full length of the rear boundary of Bateman's Hotel property to be built upon if so desired by Edmund Richard Emil Resch for a height not exceeding thirty three feet above George Street kerb **level** above referred to and thereafter to be kept open to the sky as a light area common to the parties to this Agreement. The Commissioners hereby agree to bring the title to the said area of land marked "P" on the said Plan attached hereto agreed to be sold to the said Edmund Richard Emil Resch under
>
> *9 BPR 16,939 at 16,945*
>
> the provisions of the Real Property Act at the expense of the Commissioners and upon the Commissioners obtaining the Certificate of Title to the land so sold to Edmund Richard Emil Resch and notifying the said Edmund Richard Emil Resch in writing sent by

> post to his last known place of abode or business then the said Edmund Richard Emil Resch hereby agrees to submit within seven days of so being notified a Memorandum of Transfer for the Commissioners' execution at Edmund Richard Emil Resch's own expense and upon the Commissioners' execution thereof the said Edmund Richard Emil Resch will pay the said sum of Five hundred pounds in cash to the Commissioners.

The original grant of the right to light and ventilation was contained in para (b) of the said memorandum of transfer A895502 pursuant to CLVII of the said agreement which was in the following terms:

> VII. The Commissioners hereby agree to grant to Edmund Richard Emil Resch rights of light and ventilation over the area marked "N" and tinted blue on the said Plan attached hereto marked "A" having dimensions of about thirty five feet seven inches in a north and South direction and a dimension of five feet wide East and West adjoining Block "P" as shown on the said Plan attached hereto. The Commissioners reserving the right to build upon the area marked "N" aforesaid if they so desire to a height not exceeding thirty three feet above the kerb **level** in George Street above referred to and thereafter shall (subject to Reservation in CLXIII hereof) for the purpose of light and ventilation keep the said area marked "N" aforesaid open to the sky -- the two areas combined forming a Common light area "P-N"-- at the rear of Bateman's Hotel which shall be fifteen feet wide East and West by approximately thirty five feet seven inches long North and South.

The terms of the **covenant** for light and of the grant of rights to light and ventilation and, in particular, the dimensions of the relevant areas, being respectively, 10 ft wide and 5 ft wide running north-south, strongly suggest that the original purpose of the **covenant** and grant was to benefit the land to the east and west of those areas, rather than the land to the north which is the subject of the present application. There is, however, no direct evidence as to the circumstances existing as at the date of the creation of the **covenant** and grant and I have, accordingly, not taken any such circumstances into account.

The original reservation of the right of projecting was contained in para (b) of the said memorandum of to CLXIII of the said transfer A895502 pursuant agreement which was in the following terms:

> XIII. In respect of the said new or enlarged right of way the Commissioners (notwithstanding anything herein contained) hereby expressly reserve the right of projecting over such right of way cornices entablatures window-sills or other decorative architectural feature upon the northern and eastern sides of the said right of way or upon the eastern and northern sides of the said common light area marked "P-N" on the Plan attached hereto and the Commissioners also expressly reserve the rights of way already granted or agreed to be granted and the right to grant to other persons than the parties hereto rights of way over the land described in the schedule hereto and the said Edmund Richard Emil Resch agrees to these reservations.

As stated above, the land, subject to the **covenant** for light (the servient tenement), being part of the land comprised in certificate of title registered vol 3322 folio 79 (later being the whole of the land comprised in certificate of title registered vol 3419 folio 232), was originally transferred to Mr Resch by memorandum of transfer dated 22 December 1922 registered no A895502, while the land entitled to the benefit of the said **covenant** for light (the **dominant** tenement), being the balance of the land comprised in certificate of title registered vol 3322 folio 79 (which later became the whole of the land comprised in certificate of title vol 3419 folio 233) was retained by the transferrors of the land to Mr Resch, namely, the commissioners of the Government Savings Bank of New South Wales. The land subject to the **covenant** for light (the servient tenement) was transferred to Coles Myer NSW Ltd by memorandum of transfer dated 29 September 1986, "SEC 36"

9 BPR 16,939 at 16,946

as shown edged blue in diagram 4 of Ex A (which land edged blue in diagram 4 included the area of land subject to the 5 ft wide **covenant** for ventilation and light) having been transferred previously to Farmer and Co Ltd (now Coles Myer NSW Ltd) by memorandum of transfer dated 17 August 1926 registered no B395150.

In other words, the original **dominant** tenement entitled to the benefit of the **covenant** for light, as originally retained by the commissioners of the Government Savings Bank of New South Wales, and later transferred to Dymocks Book Arcade Ltd, was subdivided so as to create the land described as "Sec 36" and that parcel of land (SEC 36) was transferred by Dymocks Book Arcade Ltd to Farmer and Co Ltd (now Coles Myer NSW Ltd). The original servient

tenement was later transferred by Mr Resch to Coles Myer NSW Ltd.

Thus, in relation to the **covenant** for light, part of the original **dominant** tenement shown edged red on diagram 4 of Ex A is now owned by the defendant, while a further part (SEC 36) of the original **dominant** tenement shown edged blue in diagram 4 of Ex A is now owned by the first plaintiff. The whole of the original servient tenement is also now owned by the first plaintiff.

The whole of the relevant land presently owned by the first plaintiff is now contained within FI 1/846494 of which the first plaintiff is the registered proprietor, while the land owned by the defendant is the land contained in certificate of title registered vol 14760 folio 210 of which the defendant is the registered proprietor.

Plaintiffs' submission that the servient tenement is not subject to the covenant for light because the covenant was never validly annexed to the dominant tenement

The plaintiffs submitted that the land purportedly subject to the **covenant** for light, being the land 10 ft wide edged pink in diagram 2 of Ex A and described in Sch 1 to the amended summons, was "not subject" to the **covenant** because the **covenant** was never annexed to the **dominant** tenement. The plaintiffs submit, alternatively, that the **covenant** was not enforceable by the defendant, upon the basis that the **covenant** did not survive the subdivision of land. This alternative submission will be dealt with later.

In support of the first submission, it was submitted on behalf of the plaintiffs that, on its true construction, the **covenant** was, and was expressed to be, for the benefit of the whole of the land (meaning the land as a whole) which, at the time of the transfer creating the **covenant** was retained by the transferors, the commissioners of the Government Savings Bank of New South Wales (the **dominant** tenement). It was submitted that the **covenant** was, as at that date, not capable of benefiting the whole of that land (the **dominant** tenement, meaning the land as a whole), that the **covenant** therefore did not touch and concern that land, being the land as a whole, and that, because of this, it could not be annexed to the land to which the parties purported to annex it, that is, it could not be annexed to the whole of the land (meaning the land as a whole).

More specifically it was submitted on behalf of the plaintiffs that the benefit of a **covenant** could not be annexed to land unless it touched and concerned the whole of the land intended to be benefited (meaning the land as a whole) and to which it was expressed to be annexed, as regards its mode of occupation or directly affect the value of the land: *Rogers v Hosegood* [1900] 2 Ch 388. It was submitted, as stated above, that the **covenant** did not touch and concern the whole of the land (meaning the land as a whole) intended to be benefited by the **covenant,** because it could not benefit the whole of the land (meaning the land as a whole) intended to be benefited by the **covenant,** as expressly described in the **covenant** itself.

This was said to be so, in effect, because the only part of the **dominant** tenement which could be benefited was that part adjacent to, or perhaps, in the vicinity of, the land (air

space) subject to the **covenant** (the servient tenement). Those parts of the **dominant** tenement which were more remote from the servient tenement were not, it was submitted, capable of benefiting from the **covenant.**

The relevant approach in this connection has been stated as follows (A J Bradbrook and M A Neave, *Easements and Restrictive **Covenants** in Australia*, 1st ed, Butterworths, Sydney, 1981, at p 222):

> The **covenant** must touch and concern the land to which it is expressed to be annexed ... If the **covenant** does not touch and concern the land at the time the **covenant** is made, the benefit of the **covenant** cannot run. Moreover it has been held that if the whole of the land to which the benefit of the **covenant** is annexed cannot be benefited, the benefit of the **covenant** does not run with the land even if a part of it is touched and concerned. [Unless the **covenant** is made for the benefit of the whole of the land and each and every part of it.]

In *Re Ballard's Conveyance* [1937] Ch 473 at 481-2, Clauson J dealt with the question as it arose on the facts of that case as follows:

> The result seems to me to be that I am bound to hold that, while the **covenant** may concern or touch some comparatively small portion of the land to which it has been sought to annex it, it fails to concern or touch far the largest part of the land. I asked in vain for any authority which would justify me in severing the **covenant** and treating it as annexed to or running with such part of the land as is touched by or concerned with it, though as regards the remainder of the land, namely, such part as is not touched by or concerned with the **covenant,** the **covenant** is not and cannot be annexed to it and accordingly does not and cannot run with it. Nor have I been able through my own researches to find anything in the books which seems to justify any such course. In *Rogers v Hosegood* the benefit of the **covenant** was annexed to all or any of certain lands adjoining or near to the covenantor's land, and no such difficulty arose as faces me here; and there are many reported cases in which, for similar reasons, no such difficulty arose. But the requirement that the **covenant,** in order that the benefit of it may run with certain lands, must concern or touch those lands, is categorically stated by Farwell J in the passage I have cited, in terms which are unquestionably in accord with a long line of earlier authority.
>
> I would observe that the construction of the document and the intention of the parties to be gathered therefrom is material on the question what is the area of land to which the covenantor and the covenantee intended to annex the benefit of the **covenant,** or, in technical language, what is the land with which the parties intended the **covenant** to run; but that on the question whether, in the circumstances of the case, this **covenant** is capable of being annexed to or of running with the land to which it is sought to annex it, it is necessary first to ascertain whether in fact the **covenant** touches or concerns that particular land. [Footnotes omitted].

The submission on behalf of the plaintiffs assumes a particular construction of the words describing the land to which the benefit of the **covenant** is intended to be appurtenant, namely, the words "the whole of the land" etc, as meaning that land "as a whole".

Consideration of this submission, therefore, involves, first, consideration of what is the true construction or meaning of the **covenant** in so far as concerns the description of the land intended to have the benefit of the **covenant.**

The relevant provision of the **covenant** in this respect is as follows:

> ... for the purposes of S89 of the Conveyancing Act of 1919 it is hereby agreed and declared that:-
>
> (a) The land to which the benefit of this **covenant** (a) is intended to be appurtenant is the whole of the land comprised in Certificate of Title Volume 3322 Folio 79 other than the land hereby transferred.

It was submitted on behalf of the plaintiffs, in effect, that the words "the whole of the land" should be construed as meaning "the land as a whole", presumably because that was the ordinary meaning of the words "the whole of the land". It was submitted on behalf of

9 BPR 16,939 at 16,948

the defendant, in effect, on the other hand, that the words "the whole of the land" etc should be construed as meaning "the whole of the land, including any part of the land" or "the whole of the land and each and every part of it".

Issues of this kind have arisen most clearly in cases in which the **dominant** tenement has been subdivided after the original **covenant** or easement was created in favour of "the whole" of the land comprising the **dominant** tenement. Some of the authorities dealing with such issues in that context are considered in more detail later in this judgment in relation to the alternative submission of the plaintiffs.

One such case in relation to the grant of a right of way was *Short v Patrial Holdings Pty Ltd* (1994) 6 BPR 13,996 ; (1995) NSW ConvR 55-732 where the grant of the right of way was expressed to be appurtenant to "Lot 4" which lot was later subdivided. In that case, Meagher JA in the Court of Appeal held that, on the authorities, there is a prima facie presumption that an easement is intended to be appurtenant to the **dominant** tenement and every part of it, while in the case of restrictive **covenants,** there is a prima facie presumption that the benefit of the **covenant,** expressed to be for the benefit of a parcel of land, is annexed to the land as a whole, and not to each and every part of it.

Notwithstanding that the existence of such prima facie presumptions must be taken into account, there can be no doubt that each **covenant** or easement must, in the final analysis, be construed in the context of its own particular circumstances.

In *Short v Patrial Holdings Pty Ltd*, above, Mahoney JA expressed the view (at BPR 14,001; NSW ConvR 55,658) that he did not accept that the statement that the words "appurtenant to the said Lot 4", did not state "clearly" that the right of way might become appurtenant to or available for relevant parts of Lot 4 after the re-subdivision, and that if the law were as he indicated it to be, those words "clearly" indicated that the right of way was appurtenant to and available for the subdivided lots.

In construing the relevant words in the present case, a most important consideration, in my opinion, is the nature and terms of the **covenant** itself, involving a prohibition on building above the height of 33 ft in an area about 10 ft wide and 35 ft 7 inches long adjacent to the southern boundary of the **dominant** tenement. In my opinion, having regard to that consideration, the parties to the **covenant** must, on the probabilities, be taken to have been aware that the **covenant** was capable of benefiting only that part of the **dominant** tenement, adjacent to, or perhaps, in the vicinity of, the land (air space) subject to the **covenant,** and was not capable of benefiting more remote parts of the **dominant** tenement. That being so, I am of the opinion that the parties must have intended that the benefit of the **covenant** should be annexed to each and every part of the **dominant** tenement, as well as to the **dominant** tenement as a whole, and further, that the words used in this connection, namely, "the whole of the land" etc can bear that construction. I am further of the opinion that, even apart from the nature and terms of the **covenant** itself, in the present case, as was held in effect by Mahoney JA in the different but comparable, by analogy, context of a subdivision of the **dominant** tenement in *Short v Patrial Holdings Pty Ltd*, that the relevant words used, namely, "the whole of the land" etc do state the benefit of the **covenant** is appurtenant, not only to the relevant land (the **dominant** tenement) as a whole, but also to each and every part of that land (the **dominant** tenement). I also call in aid, also by analogy, and, more especially, having regard to the nature and terms of the **covenant** for light in the present case, the dissenting judgment of Sholl J in *Re Arcade Hotel Pty Ltd* [1962] VR 274, another case in which the **dominant** tenement had been subdivided, which dissent could have been justified, in my opinion, if it had related to a **covenant** of the nature here in issue. His Honour held as follows at 291:

> Is there then some particular virtue in the addition of the words "or any part thereof" to the description of the benefited land? Why should that be so? Unless there is something in the wording of the **covenant** clearly restricting those entitled to the benefit of it to the person or
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> *9 BPR 16,939 at 16,949*
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> persons from time to time holding a whole property in a single ownership, why should the benefit of the **covenant** not be understood to be distributed over the benefited land, in the same way as the burden over the burdened land? I can see no logical reason why not; and as a mere matter of language I can see no such reason. There may, of course, sometimes be words used that a court must construe as conditioning the right to enforce the **covenant** upon the single ownership of the whole of the benefited land.

Conclusion

Having regard to all these considerations, I am of the opinion that the **covenant** in the present case should be construed as providing that the land to which the benefit of the **covenant** is appurtenant is the whole of the land of the **dominant** tenement and each and every part thereof. In my opinion, the relevant words, namely, "the whole of the land" etc, as used in their context, do state "clearly" that the **covenant** is appurtenant to the whole of the land as described and to each and every part thereof.

It follows, in my opinion, that, to the extent that any part of the whole of the **dominant** tenement may be capable of benefiting from the **covenant,** the **covenant** touches and concerns that part of the **dominant** tenement, so that the benefit of the **covenant** is, at the very least, annexed validly to that part of the **dominant** tenement. It also follows, in my opinion, that the servient tenement is "subject to" the **covenant** in the sense that the defendant, as owner of the whole of the **dominant** tenement, is entitled to enforce the **covenant** for the benefit of that part of the **dominant** tenement which is capable of being benefited by the **covenant,** that is, for the benefit of that part of the **dominant**

tenement which the **covenant** touches and concerns. It follows, in my opinion, that the first submission on behalf of the plaintiffs must be rejected.

I am aware that there is no counterpart in New South Wales of s 79A of the Victorian Property Law Act 1958, to which I was referred in the written submissions on behalf of the plaintiffs. That section is in the following terms:

> 79A. Construction of **covenants** affecting land
>
> It is hereby declared that when the benefit of a restriction as to the user of or the building on any land is or has been annexed or purports to be annexed by any instrument to other land the benefit shall unless it is expressly provided to the contrary be deemed to be and always to have been annexed to the whole and to each and every part of such other land capable of benefiting from such restriction.

The effect of that section according to its terms is significant, but the view to which I have come in this connection, as stated above, results from my view as to the true construction of the relevant words of the **covenant** as used in the context in which they were used, and notwithstanding the absence in New South Wales of any counterpart of s 79A of the Victorian Act.

Plaintiffs' submission that the covenant for light was not enforceable by the defendant having ceased to have effect after subdivision of the dominant tenement

The plaintiffs further submitted that the **covenant** did not survive the subdivision of the **dominant** tenement because, as a matter of construction, the **covenant** was intended to enure only so long as the whole of the land benefited remained in one ownership. It followed, so it was submitted, that, when the **dominant** tenement was subdivided, as it was, the **covenant** ceased to have effect.

This was said to follow again from the fact that the benefit of the **covenant** was expressly stated to be annexed to the whole of the land (meaning the land as a whole) retained by the transferors (the **dominant** tenement), with the result that when the land (the **dominant** tenement) as a whole ceased to exist, as such, by reason of its subdivision, the **covenant** could no longer be operative in accordance with its terms.

9 BPR 16,939 at 16,950

On one view, this second submission on behalf of the plaintiffs is no more than a variation of the plaintiffs' first submission, which (second submission) should be rejected for the same reasons which led to the rejection of the plaintiffs' first submission, namely, simply because, on the true construction of the **covenant,** the land to which it was annexed at the time of creation of the **covenant** included each and every part of the **dominant** tenement, some at least of which parts were capable of being benefited, and necessarily remained in existence after the subdivision.

The second submission is, however, formulated in terms different from the terms in which the plaintiffs' first submission was formulated, the second submission being, in substance, to the effect that, on its true construction, the **covenant** could not survive a subdivision, by reason of the fact that it was intended to be for the benefit only of the land as a whole, and not for the benefit of any subdivided part of the original unsubdivided **dominant** tenement. Since that reason for the plaintiffs' second submission has already been rejected, it follows, as stated above, that the plaintiffs' second submission should also be rejected.

It is convenient, however, nevertheless, to deal with the plaintiffs' second submission also in the context of the authorities which have dealt expressly with situations in which the original **dominant** tenement had been subdivided.

The question for determination then, in the context of the plaintiffs' second submission, is the question whether, as a matter of the true construction of the **covenant,** the parties intended that the benefit of the **covenant** should enure in favour of the owners, and their successors, of subdivided portions of the original **dominant** tenement. More specifically, the question for determination in the present case is whether, having regard to the particular subdivision

which occurred in the present case, it was the intention of the parties to the **covenant** at the time of creation of the **covenant,** that the benefit of the **covenant** should enure in favour of the defendant as owner of the subdivided part of the original **dominant** tenement which was retained by the defendant.

The more important authorities dealing with the effect of subdivision of a **dominant** tenement have been concerned with easements, such as rights of way, rather than with restrictive **covenants.** Those authorities recognise that, although the effect of subdivision upon the enforceability of an easement or restrictive **covenant** depends upon the proper construction of the easement or restrictive **covenant,** there is, as referred to above, a prima facie presumption that an easement is intended to be appurtenant to the **dominant** tenement and every part of it, while there is a prima facie presumption that the benefit of a **covenant** expressed to be for the benefit of a parcel of land is annexed to the land as a whole, and not to each and every part of it.

In relation to easements, in the High Court case of *Gallagher v Rainbow* (1994) 179 CLR 624 at 633 ; 121 ALR 129 at 135, the majority of the court, comprised of Brennan, Dawson and Toohey JJ, held as follows:

> The principle is that an easement is no mere personal right; it is attached to the **dominant** land for the benefit of that land. To the extent that any part of the **dominant** land may benefit from the easement, the easement will be enforceable for the benefit of that part unless the easement, on its proper construction, benefits the **dominant** land only in its original form. [Footnotes omitted.]

(In that case the right of way was expressed to be for "for all purposes ordinarily incidental to or connected with domestic use and enjoyment of the **dominant** tenement or any part thereof".)

Their Honours supported this statement of principle by reference to the following considerations at CLR 632-3; ALR 134-5:

> The terms of the respective easements contain no prohibition against the transfer of a subdivided lot or the enjoyment of the easement by the purchaser of a subdivided lot. The
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> *9 BPR 16,939 at 16,951*
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> enjoyment of the easement by the registered proprietor of a subdivided lot is wholly consistent with the language of the grant. Whether the owners of subdivided lots of a **dominant** tenement are entitled to the benefit of an easement is a question of construction of the grant. Subject to a qualification relating to excessive user, the general principle is that stated by Jessel MR in *Newcomen v Coulson*:
>
> > "It was said that as this was a grant to the owner and owners for the time being of the lands, if the lands became severed the owners of the severed portions could not exercise the right of way. I am of opinion that the law is quite clear the other way. Where the grant is in respect of the lands and not in respect of the person, it is severed when the lands are severed, that is, it goes with every part of the severed lands. On principle, this is clear."
>
> Australian authority is in line with *Newcomen v Coulson*. Thus in *Re Mairorana and the Conveyancing Act*, Hope J said:
>
> > "Where a vendor owns a parcel of land and conveys part of it to a purchaser, and in the relevant conveyance also grants to the purchaser a right of way from some street or public road to a place within the land conveyed or contiguous with the land conveyed, there is a presumption that the **dominant** tenement is the land conveyed and every part of it ... prima facie the inference to be drawn is that the right of way is appurtenant to every part of the land retained and not merely to some part of it."
>
> Other Australian decisions supporting a presumption that an easement is appurtenant to the **dominant** tenement and to each part of it are mentioned in Butt, *Land Law*.
>
> The presumption favouring accommodation of each part of a **dominant** tenement when subdivided is also supported by the decision of the Supreme Court of Rhode Island in *Crawford Realty Co v Ostrow*. The Supreme Court there cited with approval a passage from *American Law of Property* stating that if a **dominant** tenement is subdivided, "the easements appurtenant to it become subdivided and attached to each separate part of the subdivided **dominant** tenement unless this result is prohibited by the terms of its conveyance". [Footnotes omitted.]

The principle enunciated by the High Court was applied by the Court of Appeal in *Short v Patrial Holdings Pty Ltd*,

above (a case relating to an easement being a right of way). In that case Mahoney JA (as he then was) held at BPR 13,998; NSW ConvR 55,655 ff, inter alia, as follows:

> The question whether a right of way is appurtenant to the whole of a lot as such or to every relevant part of it must in the end depend upon the construction of the grant of the right of way.
>
> ...
>
> ... if the present document be construed according to its terms, in my opinion there is nothing in it which warrants the inference that the parties intended one thing rather than the other in relation to the matter here in question; I see nothing in what they have done which requires or warrants the adoption of one view or the other upon the matter here in question.
>
> ...
>
> Accordingly, upon whatever be the correct approach to the construction of the terms used, the result is that it does not appear that it was the intention of the parties or that it was the effect of the words used that the benefit of the right of way was to be limited to Lot 4 in its original form. If any conclusion is to be drawn, it is that the parties did not direct their attention to the matter ... If that be so, then, in my opinion, the matter falls to be determined by the principle adopted by the majority of the High Court in *Gallagher v Rainbow*.

In the same case Meagher JA held (at BPR 14,003; NSW ConvR 55,659) as follows:

> I should only wish to add that in the case of easements there is, on the authorities, a prima facie presumption that an easement is intended to be appurtenant to the **dominant** tenement and every part of it. See *Callard v Beeney* [1930] 1 KB 353 and *Re Mairorana and the Conveyancing Act* (1970) 92 WN (NSW) 365. In the case of restrictive **covenants** on the other hand, there is a prima facie presumption that the benefit of the **covenant** expressed to be for the benefit of a parcel of land is annexed to the land as a whole, and not to each and every part of it; this rule was laid down in *Drake v Grey* [1936] Ch 451, a case which has been followed times without number both in England and in Australia. Exactly why there is a divergent approach between the two classes of
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> *9 BPR 16,939 at 16,952*
>
> case has never been satisfactorily explained. Although it may lie in the fact that the former are creatures of the common law, and the latter inventions of equity.

In *Drake v Grey*, above, Greene LJ stated (at 465) that the question was "whether on the true construction of the conveyance the benefit of a restrictive **covenant** is annexed to land as a whole or to the whole of this land". His Lordship later added (at 468) the following:

> I am quite unable to accept the view that where the intention is to annex the benefit of a **covenant** to land in such a way that it can be enforced by the owner of any part of it, it is necessary to have some form of words such as "the land and every part of it" or something of that kind. It may very well be that in some contexts, and in the use of certain phrases, the only way in which the desired result can be obtained is by introducing such words "and every part thereof".

In *Short v Patrial Holdings Pty Ltd*, above, Handley JA held at BPR 14,004; NSW ConvR 55,660:

> There is a further difficulty with the appellant's construction. If the right of way is only appurtenant to Lot 4 as a whole it would presumably become unenforceable if any part of that lot passed into separate ownership. Such an alienation might occur voluntarily or on a resumption. It would be extraordinary, in my opinion, if the alienation of some part of Lot 4 rendered the right of way unenforceable.

Conclusion

Having regard to these principles, and, in particular, to the prima facie presumption in relation to restrictive **covenants** referred to above, it is nevertheless my opinion, that the relevant words of the **covenant** in the present case, namely, the words: "The land to which the benefit of this **covenant** ... is intended to be appurtenant is the whole of the land"

(described), are to be construed as meaning the whole of that land "and each and every part thereof", for the same reasons, including, in particular, the nature and terms of the **covenant** itself, as were stated for my conclusion to the same effect arrived at in dealing with the plaintiffs' first submission. In the context of the plaintiffs' second submission here being dealt with, this involves rejection of the view that the relevant words should be construed as meaning "the land as a whole", with the result that once that land ceases to be a whole as a result of its subdivision, the **covenant** ceases to have effect.

In my opinion, the considerations to which I have referred in stating my reasons for construing the relevant words in the manner in which I have construed them as stated earlier in this judgment, including, in particular, the fact that, on the evidence before me, it must have been known to the parties that the **covenant** could not benefit the land as a whole, are sufficient to rebut the prima facie presumption to the contrary in the case of restrictive **covenants.** In this connection, having regard in particular to that matter, I do not consider that the capacity to benefit part of the land as a whole relevantly constitutes the capacity to benefit the whole of the land as a whole. Nor do I consider, for the same reasons, that this was the contemplation of the parties at the date of creation of the **covenant.**

I note, and reiterate, in particular, that in my opinion the fact that for the purposes of s 89 of the Conveyancing Act 1919 it is stated in the **covenant** that the land to which the benefit of the **covenant** is intended to be appurtenant is "the whole of the land comprised in Certificate of Title Volume 3322 Folio 79 otherwise than the land hereby transferred" is not, for the reasons referred to earlier, inconsistent with the benefit of the **covenant** being intended on its proper construction to be appurtenant to each and every part of the land so described.

An argument to the contrary was rejected by Mahoney JA in *Short v Patrial Holdings Pty Ltd* in which it was argued that the statement for the purposes of s 88(1)(a) of the

Conveyancing Act 1919 that the right of way was "appurtenant to the said Lot 4" justified the inference that the intention of the parties was that the right of way was to be appurtenant "only to Lot 4 as a whole and not to every relevant part of it." Mahoney JA (at BPR 14,001-2; NSW ConvR 55,658) in rejecting that submission held as follows:

> Two things may be said about this submission. First, I do not accept that the statement "appurtenant to the said Lot 4" does not state "clearly" that the right of way may become appurtenant to or available for relevant parts of Lot 4 of the resubdivision. If the law be, as *Gallagher v Rainbow* and the earlier cases there cited have evidenced it to be, that such words may have the effect that the right of way is appurtenant to and available for the resubdivided lots, then those words "clearly" indicate that fact.
>
> Second, that kind of argument involves a conclusion as to the actual intention of the parties at the time. It suggests that (as it assumes) "appurtenant to the said Lot 4" does not clearly state the land to which the benefit of the easement is appurtenant and that another form of words would do so; that the parties were conscious of this; and that, because they chose the existing form of words, they therefore had the actual intention to achieve the effect that the right of way should not be appurtenant to the resubdivided lots. Legal reasoning sometimes has relied upon such fictions. In my opinion, fictions have a limited use. Unless their use is required, then rights of parties should not depend upon them ... I would not draw from the terms used the inference here suggested.

(See also the dissenting judgment of Sholl J in *Re Arcade Hotel Pty Ltd*, above.)

In the present case it may also be noted, for what significance it may have, that the parties to these proceedings themselves must have taken the view as at 17 August 1926 (subsequent to the date of the original creation of the **covenant)** that the **covenant** was capable of benefiting at least some part of that part of the original **dominant** tenement now owned by the defendant, being the land retained by the defendant (the land retained being the land edged in black and red in diagram 4 of Ex A) when the defendant transferred to Farmer and Co Ltd (now Coles Myer NSW Ltd) the land edged blue in diagram 4 of Ex A by memorandum of transfer dated 17 August 1926 registered no B395150.

That this is so appears from the terms of that transfer which state that the land edged blue in diagram 4 of Ex A was transferred by the defendant to Farmer and Co Ltd (now Coles Myer NSW Ltd) "subject, however, to such encumbrances, liens and interests as are notified hereunder". The first of such encumbrances, liens and interests which

were notified thereunder in the said memorandum of transfer registered no B395150 was the agreement dated 7 December 1918 registered no 845 book 1142 between the commissioners of the Government Savings Bank of New South Wales and Mr Resch and others pursuant to which the subject **covenant** was originally created and later (12 February 1923) registered on the relevant titles.

It also follows from this, in my opinion, that quite independently of any other considerations, the **covenant** is binding as between the first plaintiff personally and the defendant personally as a matter of contract, even if, contrary to what I have held above, it was not relevantly binding between the parties in their capacities as respective owners of the defendant's **dominant** tenement and the first plaintiffs' servient tenement, following the memorandum of transfer dated 17 August 1926 registered No B395150.

I therefore conclude, as stated above, that the **covenant** for light did survive the subdivision of the original **dominant** tenement at least to the extent to which there was and is, as I have held, some part of the subdivided part of the original **dominant** tenement owned by the defendant which was and is capable of benefiting from the **covenant.** This finding is, in my opinion, sufficient to necessitate rejection of the submission of the plaintiffs to the effect that the **covenant** did not survive the subdivision of the original **dominant** tenement.

9 BPR 16,939 at 16,954

The finding is, however, also relevant to my determination of the issues arising under s 89 of the Conveyancing Act 1919 in so far as it means the extinguishment of the **covenant** will affect only those parts of the defendant's **dominant** tenement which are capable of benefiting from the **covenant.**

It should also be noted in that connection, that it does not necessarily follow that in the changed circumstances of today the continued existence of the **covenant** secures practical benefit to the defendant within the meaning of s 89(1)(a) of the Conveyancing Act 1919, nor that its modification or extinguishment would substantially injure the defendant within the meaning of s 89(1)(c) of that Act.

Section 89 of the Conveyancing Act

I now turn to consider the plaintiffs' applications under s 89 of the Conveyancing Act 1919. In this connection, so far as concerns the convenant, the plaintiffs rely upon the provisions of ss 89(1)(a) and 89(1)(c) of the Conveyancing Act 1919 which are in the following terms:

> 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.

The plaintiffs seek an order wholly extinguishing the **covenant** on the basis that, within the meaning of s 89(1)(a), the "continued existence (of the **covenant)** would impede the reasonable user of the land subject to (the **covenant)** without securing practical benefit to the defendant". Further, and in the alternative, the plaintiffs seek an order wholly extinguishing the **covenant** on the ground that, within the meaning of s 89(1)(c), its "extinguishment will not substantially injure the defendant".

Section 89(1)(a) -- second limb

Does the continued existence of the covenant impede the reasonable user of the land subject to the covenant?

The first question for consideration is whether the continued existence of the **covenant** would impede the reasonable user of the land subject to the **covenant.**

The land subject to the **covenant** is the land described in Sch 1 to the summons, which is described in the agreement dated 7 December 1918, between the commissioners of the Government Savings Bank of New South Wales and Mr Resch and others, in para VI, as:

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> ... the area of land marked "P" and coloured brown upon the said Plan attached hereto marked "A" ten feet wide in an East and West direction and about thirty five feet seven and one quarter inches in a North and South direction or thereabouts extending for the full length of the rear boundary of Bateman's Hotel property to be built upon if so desired by Edmund Richard Emil Resch for a height not exceeding thirty three feet above George Street kerb **level** above referred to and thereafter to be kept open to the sky as a light area common to the parties to this agreement.

The plaintiffs wish to build in the light area (air space) above 33 ft above George St kerb **level** to a height approximately nine storeys above George St kerb **level** and submit that not only would this be a "reasonable" use of the land which would be impeded by the continued existence of the **covenant,** but further, that there is no reasonable use of the land so long as the **covenant** remains in existence. Perhaps more precisely, this submission should be understood as a submission to the effect that, at the present time, and in the present circumstances, the only reasonable use of the air space above the surface of the land subject to the **covenant** above a height of 33 ft above the kerb **level** of George St is the use of that air space for purposes other than use as a light well. Expressed differently the submission might also be understood as being to the effect that the only permissible use of the land while the **covenant** remains in effect is its use for the purpose of erecting a building, or part of a building, 33 ft high, and that such use of the subject land is not only not reasonable but there is also no other reasonable use of the land possible within the confines of the **covenant.** Put positively, the submission might also be understood as being to the effect that, in current circumstances, and especially having regard to its location, the only reasonable use of the subject land would involve using the subject land for the building of a building, or part of a building, higher than 33 ft.

So understood, the submission on behalf of the plaintiffs acknowledges the correctness of the submission on behalf of the defendant that it is not sufficient for the plaintiffs simply to establish that what they wish to do on the subject land, namely, construct part of a building nine storeys high is reasonable, but rather that they must establish that no reasonable user of the land is possible unless the restriction is extinguished. For this proposition counsel for the defendant relied upon the decision of Myers J in *Heaton v Loblay* [1959] SR (NSW) 332 at 335 where his Honour held as follows:

> The application is made on two grounds; first, under s 89(1)(a) of the Conveyancing Act, 1919-1954, on the ground that the continued existence of the restriction would impede the reasonable user of the land without securing practical benefit to the plaintiff unless it be modified in the manner sought and, secondly, under s 89(1)(c) on the ground that the proposed modification will not substantially injure the person entitled to the benefit of the restriction; namely, the plaintiff.
>
> There is a clear distinction between these provisions. Under para (a) the inquiry concerns the effect of the restriction or its effect if it is not extinguished or modified. Under para (c) the inquiry concerns the effect of the desired modification. *It follows that if application is made under* para (a) *it is not sufficient to show that what the applicant proposes to do is a reasonable user of the*

> *land. It must appear if extinguishment is sought that no reasonable user of the land is possible unless the restriction is extinguished or if modification is sought that no reasonable user is possible unless the restriction is modified.* The paragraph does not relate to the use which can be made of the land by the present owner, but to the use which can be made of it in the hands of any owner. This appears from the terms of the section itself and accords with the view taken by the Court of Appeal in *Re Ghey and Galton's Application*. [Emphasis supplied, footnotes omitted].

The passage referred to by Myers J in *Re Ghey and Galtons' Application* [1957] 2 QB 650 at 663 appears in the judgment of Lord Evershed MR at that page being as follows:

> The tribunal, equally, has not said that the continued existence of these **covenants** would impede the reasonable user of the land for any purpose, public or private, without securing practical benefit to other persons. Upon that matter we have been assisted by counsel on both sides to form a view what exactly those words which I have just recited indicate. It will be remembered
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> *9 BPR 16,939 at 16,956*
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> that at the end of the passage from Farwell J's judgment, read by Rome LJ, there is the phrase "the restriction is no longer necessary for any reasonable purpose of the person who is enjoying the benefit of it". I am not attempting an exposition of the section which would, so to speak, replace the parliamentary language by the language of my judgment. But I think it must be shown, in order to satisfy this requirement, that the continuance of the unmodified **covenants** hinders, to a real, sensible degree, the land being reasonably used, having due regard to the situation it occupies, to the surrounding property, and to the purpose of the **covenants.** [Footnotes omitted.]

The question whether an applicant must prove that no reasonable user of the relevant land is possible without extinguishment (or modification) of the restriction or whether it is necessary to prove only that some reasonable use of the relevant land would be impeded unless the restriction was extinguished (or modified) was left open by the Court of Appeal in *TZ Developments Pty Ltd v Rickman Pty Ltd* (unreported, NSWCA, Kirby P, Meagher and Sheller JJA, CA40521/91, 27 August 1993, BC9301832) in which Sheller JA (at 8) held as follows:

> Furthermore there could be no doubt, as I think the respondents accepted, that the continued existence of the right of way impeded the reasonable use of the servient tenement. This was so whether the appellant was bound to show that the restriction had virtually sterilised the servient tenement in that no reasonable user was possible unless the easement was modified (*Heaton v Loblay* (1960) SR (NSW) 332 at 335 where Myers J applied a dictum of Evershed MR in *Re Ghey and Galton's Application* [1957] 2 QB 650 at 663; *Stannard v Issa* [1987] AC 175 at 187) or whether it was sufficient for the appellant to show that there was a reasonable user of the land prohibited by the restriction (see *Morpath Pty Ltd v ACT Youth Accommodation Group Inc* (1987) 16 FCR 325 ; 74 ALR 121, particularly at FCR 341; ALR 138). Accordingly it is unnecessary to decide which of these approaches is correct.

It would appear, however, with respect, that the test laid down in *Morpath*, above, is inapplicable to s 89 by reason of the fact that the statutory provisions being considered in *Morpath* were materially different from the provisions of s 89 and, having regard to the fact that the decision of Myers J in *Heaton v Loblay*, above, has stood since 1959, I consider that I should follow that decision until it is overruled by an appellate court or by the legislature.

In *Morpath*, above, the relevant legislation was s 11A of the City Area Leases Ordinance 1936 (ACT) which provided in subs (1) that the Supreme Court of the Australian Capital Territory "may ... vary any provision, **covenant** or condition of a lease in relation to the purpose for which the land subject to the lease may be used". Subsection (2) of s 11A provided that:

> No such variation shall be made --
>
> (a) unless the Court is satisfied that there are such circumstances existing as in the opinion of the Court make it desirable to vary the provision, **covenant** or condition in order that the reasonable user of the land should not be impeded ...

Beaumont J held (at FCR 341; ALR 137-8) that the relevant authorities had held that "it is not necessary to show that the land would be sterilised unless the restriction is lifted" and that "The ground for jurisdiction stipulated in s 11A(2)(a) will be made out where the applicant case point to the existence of *a* reasonable user of the land which is prohibited by

the restrictive provision" [emphasis supplied].

Moreover, the approach of Myers J in *Heaton v Loblay*, above, is also supported, as indicated by Sheller JA, by the decision of the Privy Council in *Stannard v Issa* [1987] AC 175, in which case Lord Oliver of Aylmerton, in delivering the judgment of their Lordships in the Privy Council in relation to a comparable Jamaican section quoted with approval the dissenting judgment of Carey JA in the Court of Appeal in Jamaica as follows:

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> Carey JA in a powerful dissenting judgment observed:
>
> > "An applicant for modification or discharge of a restrictive **covenant** where his ground is that provided for in s 3(1)(b) has a burden imposed on him to show that the permitted user is no longer reasonable and that another user which would be reasonable is impeded ... Lord Evershed MR in *Re Ghey and Galton's Application* [1957] 2 QB 650 at 663 expressed the view that in relation to this ground --'it must be shown, in order to satisfy this requirement, that the continuance of the unmodified **covenants** hinders, to a real, sensible degree, the land being reasonably used, having due regard to the situation it occupies, to the surrounding property, and to the purpose of the **covenants**'. Put another way, the restrictions must be shown to have sterilised the reasonable use of the land. Can the present restrictions prevent the land being reasonably used for purposes the **covenants** are guaranteed to preserve? Accordingly, I would suggest that it would not be adequate to show that the proposed development might enhance the value of the land for that would demonstrate the applicant's proposals are reasonable and the restriction impedes that development."

His Lordship stated that their Lordships had "no hesitation in preferring the dissenting judgment of Carey JA".

His Lordship went on (at 186-7) to hold as follows:

> The corresponding provision of s 84 of the Law of Property Act 1925 was amended by s 28 of the Law of Property Act 1969 by substituting the word "some" for the word "the" in the expression "impedes the reasonable user" and if that had been done in the Jamaican statute it would, no doubt, be impossible to quarrel with the approach of the majority on any ground save that they paid too little attention to the actual benefit conferred by the restrictions. But it has not been done and the result at which they arrive can be achieved only by treating the section as if it had been amended and by disregarding the construction universally applied to it in its unamended form. Lord Evershed MR in *Re Ghey and Galton's Application* [1957] 2 QB 650 at 659-60 pointed out that in order to succeed in an application under s 84(1)(a) of the Law of Property Act 1925 an applicant has to go a great deal further than merely to show that, to an impartial planner, his proposal appeared a good and reasonable proposal. He must affirmatively prove that one or other of the grounds of jurisdiction has been established ... it is, in their Lordships' judgment, entirely clear that in propounding this test, Lord Evershed MR was very far from suggesting ... that all that had to be shown was that there was some use of the land which was (a) reasonable and (b) impeded to a sensible degree by the restriction sought to be modified. That submission, under legislation in all material respects similar to that with which this appeal is concerned, has been decisively rejected -- and in their Lordships' view -- rightly rejected -- in a number of decisions of the Lands Tribunal in England ... by the Supreme Court of Victoria and by the High Court of Jamaica ... In the instant case there was no evidence whatever of any difficulty in developing the applicant's land or in disposing of it for development within the framework of the existing restrictions and certainly there was no suggestion that they had the effect of sterilising the land. All that was said was that the applicant's proposal was one which made a reasonable user of the land having regard to current pressures of population and current notions of optimum density.

The defendant submitted that the plaintiffs were able to develop the whole of their land including the land subject to the **covenant,** reasonably, without building above a height of 33 ft above the kerb **level** of George St in the area of the land subject to the **covenant,** so that it could not be said that maintenance of the **covenant** would impede the reasonable use of the land of the plaintiffs. However, as counsel for the plaintiffs pointed out, the relevant question is whether any reasonable use of the land the subject of the **covenant** is possible while the **covenant** remains in effect and not whether the plaintiffs can make reasonable use of the whole of their land including but not limited to the land subject to the **covenant.**

In my opinion, the submission of the plaintiffs, as I have understood what it involves, is well-founded and must be upheld. In my opinion, it is established, on the evidence, that the continuance of the **covenant** "hinders, to a real

sensible degree, the land being

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reasonably used, having due regard to the situation it occupies, to the surrounding property and to the purpose of the **covenant**" (per Lord Evershed MA in *Re Ghey and Galton's Application*, above) in the sense that no "reasonable" use of the subject land is possible without extinguishment of the **covenant.** In other words, in my opinion, it is established on the evidence that the **covenant** has "sterilised the reasonable use of the (subject) land" (per Lord Evershed MR, ibid).

In my opinion, having regard to the location of the subject land in an area of the central business district of Sydney, surrounded by multi-**level** commercial buildings, generally with intense retail activity, especially at ground **level,** but also at upper **levels,** any reasonable use of the subject land in the hands of any owner would necessarily involve the use of the subject land for purposes other than for the purpose of building a building, or part of a building, no higher than 33 ft above the kerb **level** of George St. In other words, in my opinion, any reasonable use of the subject land, having regard to its location, would, in current circumstances, necessarily involve the construction on it of a building, or part of a building, in excess of a height of 33 ft, more particularly, having regard to the effective "cost" of maintaining a light well above a height of 33 ft (by limiting the height of any building to that height) assessed by reference to the value of the area of the light well if built over. In this connection I have had regard to the evidence of the value of the retailing area over a number of floors that could be contained in that part of a building built in the light well area.

In his affidavit of 2 April 1996 Mr Morrow indicated that to accommodate the terms of the **covenant** the area affected in the proposed development would be 40.88 m² on each of eight floors, the top two floors being plant floors. The affidavit of Michael Anthony Dowling of 2 April 1996 confirms that Myer Stores Ltd has entered into an agreement for lease of part of the proposed development with the net rent payable from completion of the development being $225 per square metre.

An expert valuer, Frank Kevin Egan, assessed the loss (cost) of 40.88 m² on each of six floors at $225 per square metre, at $690,000 being total loss of income per annum for 245.28 m² at $225 per square metre, namely, $55,188 per annum, capitalised at a rate of 8%.

I therefore conclude that, in my opinion, the plaintiffs have established, on the evidence, that no "reasonable" use of the subject land in the hands of any owner is possible in current circumstances without extinguishment of the **covenant.**

I note, however, that the question whether the continued existence of the **covenant** would impede the reasonable use of the land the subject of the **covenant** has no relevance to s 89(1)(c) as Myers J himself recognised in *Re PM Williams and the Conveyancing Act* (unreported, 1 October 1958) noted in (1959) 32 *ALJ* at 382.

In that case his Honour held, inter alia, as follows:

> There remains para (c). It provides that the court may extinguish or modify a restriction upon being satisfied that the proposed modification or extinguishment will not substantially injure the persons entitled to the benefit of it. The distinction between this provision and that part of para (a) with which I have dealt is this: under para (a) it is necessary for an applicant to show that the reasonable user of the land in the hands of any person is impeded by the existence of the restriction, and also that the continuation of the restriction will not secure any practical benefit to any person entitled to the benefit of it. Under para (c) it is not necessary to show that the existence of the restriction impedes the reasonable user of the land. It may not have that effect at all. All that an applicant needs to show is that the modification which he seeks will allow him to put the land to use which will not substantially injure the persons entitled to the benefit of the restriction.

In this connection I also note that the question whether the reasonable user of the land the subject of the **covenant** has been impeded is "essentially a question of fact": *Re Alexandra* [1980] VR 55 at 58.

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Would the continued existence of the covenant secure practical benefit to the defendant? (s 89(1)(a) second limb)

Would the extinguishment of the covenant substantially injure the defendant? (s 89(1)(c))

As stated above, s 89(1)(a) of the Conveyancing Act 1919 empowers the court to wholly or partially extinguish a **covenant** upon being satisfied that the continued existence of the **covenant** would impede the reasonable user of the land subject to the **covenant** "without securing practical benefit to the persons entitled" to the **covenant.**

This provision may be compared with s 89(1)(c) of the Act which provides that the court may wholly or partially extinguish a **covenant** upon being satisfied that the proposed extinguishment "will not substantially injure the persons entitled" to the **covenant.**

In *Re Henderson's Conveyance* [1940] Ch 835 at 846 Farwell J in applying the English counterpart of s 89 of the Conveyancing Act 1919 as contained in s 84 of the English Law of Property Act 1925 held as follows:

> If a case is to be made out under this section, *there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the person who is enjoying the benefit of it,* or that by reason of a change in the character of the property or the neighbourhood, the restriction is one which is no longer to be enforceable or has become of no value. [Emphasis supplied.]

This statement was quoted with approval by the Full Court of the Supreme Court of Victoria in *Re Stani* (unreported, 7 December 1976) as referred to by Menhennitt J in *Re Alexandra* [1980] VR 55 at 59.

His Honour also referred to another passage in the judgment of the Full Court in *Re Stani*, above, (at 59) as follows:

> As to the concepts in para (a) and para (c), viz in para (a) "without securing practical benefits to other persons" and the concept in para (c) of "substantially injuring the persons entitled to the benefit of the restriction", the Full Court said at 10: "In the long run the test to be applied"-- that is as to para (c) --"is similar to that to be applied in determining under para (a) whether the continued existence of the restriction would secure practical benefit to other persons: see *Re Ghey and Galton's Application* [1957] 2 QB at 659-60 and *Re Robinson*, supra, at 284.

His Honour then stated that:

> As to the former of those concepts, that is, "without securing practical benefits to other persons" the Full Court quoted with approval what is described as the final sentence from a well-known passage in the judgment of Farwell J, in *Re Henderson's Conveyance*, supra, at 846 ...

as set out above. In other words, the Full Court in *Re Stani*, above, held that both for the purposes of the concept of "without securing practical benefits to other persons" within the meaning of para (a), as well as for the purposes of the concept of "without substantially injuring the persons entitled to the benefit of the restriction" as contained in para (c), the applicant was required to satisfy the test laid down by Farwell J in *Re Henderson's Conveyance*, namely, that there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the person who is enjoying the benefit of it, or (in an appropriate case) that by reason of a change in the character of the property or the neighbourhood, the restriction is one which is no longer to be enforceable or has become of no value.

The test laid down by Farwell J in *Re Henderson's Conveyance* was cited with approval by Sheller JA in the Court of Appeal in *TZ Developments Pty Ltd v Rickman Pty Ltd*, above, where his Honour held (at 9) as follows:

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> The expression "without securing practical benefits to other persons" in the English equivalent of s 89(1)(a) was discussed by Farwell J in *Re Henderson's Conveyance* [1940] Ch 835. At 846 his Lordship said:
>
> > "If a case is to be made out under this section, there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the person who is enjoying the benefit of it.\t.\t."

Sheller JA (at 9) continued as follows:

> In *Re Alexandra* Menhennitt J at 59 took this as stating the test applicable to the concept of "without securing practical benefits to other persons". While I accept that there is always a danger in attempting an exposition of a section by replacing the parliamentary language with other language I think the use of the word "reasonable" does no more than recognise that an easement usually involves reasonable use and enjoyment in an ascertained way: see *Clifford v Hoare* (1874) LR 9 CP 362 at 370 per Lord Coleridge CJ. In *Stannard v Issa* Lord Oliver of Aylmerton at 186 quoted from Carey JA's dissenting judgment in the Jamaican Court of Appeal, a judgment preferred by the Privy Council to that of the majority. Carey JA said that if the evidence indicates that the purpose of the restriction is still capable of fulfilment the onus on the applicant for modification has not been discharged. If the question is posed whether reasonable use and enjoyment of the right of way over the servient tenement or the disputed section of it is still capable of fulfilment the answer in accordance with Bryson J's findings of fact must be in the affirmative. Accordingly in my opinion the appeal on this ground must fail.

In *Re Mason and the Conveyancing Act* [1962] NSWR 762 at 765-6 Jacobs J, having found that there was practical benefit by way of securing a view to the persons entitled to the benefit of the **covenant,** went on to hold as follows (at 766):

> Now, what I have said by my use of the word "substantial" deals also with the last matter to be considered, namely, whether the **covenant** could be modified without causing substantial injury. As I have said, I consider that there would be a substantial loss, a substantial injury. It has been submitted to me that the word "substantial" is a word which introduces a comparison between the disadvantage to the subject land and the disadvantage by modification of the **covenant** to the land having the benefit of the **covenant.** I do not take this view of the meaning of the word "substantial". I consider, in its context it does not mean large or considerable but it means an injury which has present substance; that is to say, not a theoretical injury but something which is real and which has a present substance. Mr Officer has pointed out that that view of the word means that very little is obtained by para (c) of s 89(1) of the Conveyancing Act 1919-1954. It would really cover the whole field of para (a) without having to find change in user in land having the benefit or change in the character of the neighbourhood or other circumstance the court may deem material. I realise this fact, but I do not consider that the introduction of the word "substantial" at the end of a section which goes into very considerable detail on what must be found before relief can be granted can, as it were, open the field for the modification of **covenants** not on the ground that they serve no purpose or that they are obsolete, but on the ground whereby the court can compare the disadvantage to the land subject to the burden of the **covenant** with the disadvantage to the land benefited if the restriction were modified. This would change the whole nature of s 89 as it has been applied in the cases, particularly the recent English cases to which I have been referred ... It is made clear in these cases that there is no general power given to the court to extinguish presently valuable rights of property. The purpose of the section is to enable **covenants** which have no practical utility to the land intended to be benefited to be removed and thus to clear the title. In other words, it is not a section which includes in any part of it any element of town planning.

His Honour said (at 766) that:

> ... I consider that the loss of view and the loss of privacy to the first floor by the erection of the block of home units would be a substantial loss. To use the words without referring to the cases to which I have been carefully referred in the argument, I would find that this **covenant** does afford a real protection to those who are entitled to enforce it ...

On the facts his Honour held that the **covenants** must be considered to have retained "practical benefit" and also that they could not be modified without causing "substantial injury".

The critical passage in his Honour's judgment is the following statement (at 766) in relation to the meaning of the word "substantial":

> I consider, in its context it does not mean large or considerable but it means an injury which has present substance; that is to say, not a theoretical injury but something which is real and which has a present substance.

His Honour also rejected the submission that the word "substantial was a word which introduced a comparison between the disadvantage to the subject land and the disadvantage by modification of the **covenant** to the land having the benefit of the **covenant**".

It should also be noted that in relation to the concept of substantial injury as contained in s 89(1)(c) of the Act McLelland J (as he then was) in *Mogensen v Portuland Developments Pty Ltd* (1983) NSW ConvR 55-116 at 56,856 held as follows:

> I turn to the first issue which involves the concept of substantial injury to persons owning (or having an interest in) land having the benefit of the restriction. In this context "substantially" connotes injury which has substance in the sense of being real or appreciable (*Re Mason* (1960) 78 WN (NSW) 925 at 928). The kind of injury contemplated in the section is injury to the relevant person in relation to his ownership of (or interest in) the land benefited. The injury may be of an economic kind, eg reduction in the value of the land benefited or of a physical kind, eg subjection to noise or traffic, or of an intangible kind, eg impairment of views, intrusion upon privacy, unsightliness, or alteration to the character or ambience of the neighbourhood. These arbitrary categories, whilst serving to illustrate the ambit of the concept of injury for the purposes of this section, are neither mutually exclusive nor necessarily exhaustive, and what I have described as injuries of a physical or intangible kind could also well affect the value of the land in question. However, it is clear that a person may be "substantially injured" within the meaning of s 89(1)(c) notwithstanding that the value of his land would be unaffected or even increased by the proposed modification ... It is also clear, particularly in the case of injuries of what I have called an intangible kind, that the subjective tastes, preferences or beliefs of particular individuals may, within limits of reasonableness, give rise to injury in the relevant sense to those individuals ...

Accordingly, in the present case, it must be determined for the purposes of s 89(1)(a) whether there is "some proper evidence that the restriction is no longer necessary for any reasonable purpose of the person who is enjoying the benefit of it" (per Farwell J in *Re Henderson's Conveyance*, above. If there is such evidence it will follow that the restriction secures no practical benefit to the defendant. It must also be determined for the purposes of s 89(1)(c) whether the extinguishment of the **covenant** would or would not substantially injure the defendant by means of an injury which is not a theoretical injury but (which is) something which is real and which has a present substance (per Jacobs J *Re Mason*, above).

It was submitted on behalf of the defendant that the continued existence of the **covenant** secured practical benefit to it within the meaning of s 89(1)(a) and that the proposed extinguishment of the **covenant** would substantially injure it within the meaning of s 89(1)(c).

In the original undated written submissions it was submitted on behalf of the defendant as follows:

> Not only would the extinguishment of the easement render the defendant's land less valuable by an amount exceeding $1 million but the extinguishment of the easement would deprive the defendant of practical benefits relating to their ability to air-condition on a floor by floor basis, relating to the aesthetic and consequent psychological effects of a break in a canyon which will be created if Coles Myer erect their proposed new building conformably with the restrictions
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> *9 BPR 16,939 at 16,962*
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> arising under the memorandum of transfer and moreover the extinguishment of the easement would deprive the plaintiff of flexibility in relation to its possible future development of its site. The development of the plaintiff's land in disregard of the restrictions arising under the instrument of transfer would substantially injure the defendant in the same respect.

The plaintiff's evidence-in-chief

The plaintiffs relied, inter alia, upon a report of Simon Nicholas Hayman, a lecturer in architectural science at the University of Sydney which dealt with the following matters:

1. the benefit which the Dymocks land with its present building would derive if the light well were preserved and the buildings comprising the new development built around it;
2. the benefit which the Dymocks land would derive if the light well were preserved and the building on the Dymocks land extended to the southern boundary of the Dymocks site; and
3. the loss which the Dymocks land would suffer if the light well were built upon to the height of the proposed development.

Mr Hayman's report considered these matters as at four representative points as identified in annexure F to his report attached to his affidavit of 28 March 1996 and his measurements at these points were accepted as correct by the experts retained on behalf of the defendant. The results of his investigation in relation to the existing Dymocks building were set out in his report as follows:

> **Existing Dymocks Building**
>
> Relative to the existing vertical plane of the Dymocks Building the maximum reduction in daylight availability at the George Street **level** by removal of the **covenant** will occur directly opposite the area of that **covenant** and will be of the order of 6.7%. The percentage loss decreases rapidly with horizontal distance away from this area until there is negligible loss (less than 1%) at the two ends of the land. The percentage loss increases with the height above George Street. The reason for this small reduction in daylight availability is due to the fact that the majority of light comes from the sky exposure of the existing laneway between the Dymocks Building and the Grace Bros Site.

The loss of available daylight at each of points A, D and C of annexure F are set out in a table in Mr Hayman's report and at the George St **level** range from 6.7% at point A to 0.7% at point C, at 18.2 m above George St from 11% at point A to 0.8% at point C, and at 28 m above George St from 12.6% at point A to 1% at point C (the values at point B being less than at point C).

In relation to these figures Mr Hayman commented that "A good rule of thumb in interpreting such data is that in average daylight conditions most persons would not detect a difference in available daylight of less than 10%". Mr Hayman also observed that the figures in his table were made as at the face of the Dymocks building and that the influence of the available daylight inside the building would typically extend only to the average size room.

It seems reasonable to conclude that both at George St **level** and 18.2 m above George St **level** most persons would not detect a difference in available daylight (treating the figure of 11% as practically equivalent to the figure of 10%) whereas at point A 28 m above George St the loss of daylight available at point A of 12.6% might just be detectable by most persons.

Mr Hayman's report also dealt with the hypothetical redevelopment of the Dymocks building to the boundary between the Dymocks land and the Grace Bros site and concluded as follows:

9 BPR 16,939 at 16,963

> **Redevelopment of Dymocks to the boundary between Dymocks land and the Grace Bros site**
>
> Opaque enclosure of the light well, such as the redevelopment of the Dymocks Building to the boundary, will result in 100% loss of daylight to the whole of the southern face of the redeveloped (Dymock's) building except for the light well. Filling in the light well would then have the same effect on the remaining 3 metres [being the light well].

The thrust and substance of Mr Hayman's report is, therefore, to the effect that the proposed building in the area of the light well to the proposed height of nine storeys will have a negligible effect (that is, not detectable to most persons) so far as concerns loss of light to any part of the existing Dymocks building. So far as concerns the hypothetical development of the Dymocks building to the boundary between the Dymocks land and the Grace Bros site the report concludes that "filling in the light well" will result in 100% loss of daylight on that area of the southern face of the redeveloped Dymocks building corresponding to the width of "the light well" in common with that same result in respect of the whole of the southern wall of a redeveloped Dymocks building on this assumption. In this connection the plaintiffs relied upon, inter alia, the evidence of an expert valuer, Mr FK Egan, to the effect that this loss of daylight in respect of the area of the light well would cause no relevant loss to the defendant (see later).

The plaintiffs also relied upon the report dated March 29 1996, of Professor Kevin James Rice, a chartered architect and a visiting professor of architecture at the University of Sydney. In his report Professor Rice expressed the view, similar

to Mr Hayman's, that "the light well increases by only an insignificant amount the light available to the Dymocks land above that provided by the existing right of way located on the Dymocks site remaining open to the sky". Professor Rice also noted that "this 3 metre length (of the light well) lies opposite a substantial masonry pier in the wall of the Dymocks building, not directly opposite a glazed area". Professor Rice also expressed the following view:

> As the Dymocks land lies to the north of Grace Bros no significant benefit will accrue to it, or to the Dymocks building which occupies part of it, because of the depth (that is the north/south dimension) of the light well. Had the light well lain on the northside of the Dymocks land so that the sun shone through it, there would have been some added benefit to a limited length of the boundary.

In relation to a possible redevelopment of the Dymocks land Professor Rice expressed the following view:

> I understand that under the terms of the right of way the possibility exists for Dymocks to build above it and so eliminate all source of natural light except that provided by the narrow slot of the light well on the Grace Bros site, should it remain. *The benefit to such a building of a light well three metres wide would not be worth consideration in the design of a new building on the Dymocks site*. To obtain any benefit, the new building could include, opposite the three-metre wide slot, a fire window protected by external wall-washing sprinklers. Natural light would be gained through this window only from the sky to which the light well is open and to a minor degree from reflection off the light well walls. This light would diminish rapidly floor by floor towards the bottom of the light well and also at each floor of the Dymocks building as distance from the window increased; it would be further decreased by furniture or partitions on the floor inside the window. Within the possible exception of one or two of the top floors, the artificial light **level** required at each **level** within the Dymocks building to satisfy minimum standards of light for the occupants would completely overpower the very small quantity of natural light from the light well. In contemporary commercial buildings, windows are provided principally for vision out for psychological reasons rather than to provide light. In office buildings lighting systems are seldom, if ever, designed on the assumption that natural light is a significant component of the working environment. In retail premises natural light is considered more a problem than an asset because its variable quantity compromises the display lighting of merchandise. In both cases potential daylight usage is negligible. Should the construction of a "matching" light well in a new Dymocks building be contemplated, any natural light gained would be solely from its exposure
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> *9 BPR 16,939 at 16,964*
>
> to the sky; the existing light well on the Grace Bros site would contribute no more in proportion than has been described above. [Emphasis supplied.]

Professor Rice then dealt with the implications involved in a redesign of the existing proposed development so as to accommodate the continued existence of "the light well" and observed that, in that connection, there would be a direct net loss of approximately 30 m² on each of nine **levels** resulting from "constructing around the light well". The correct figure is perhaps six **levels** but in any event I acknowledge and accept that this matter is not relevant to any issue of "practical benefit" or "substantial injury" since those issues do not include any consideration of disadvantage to the plaintiffs (see *Re Mason*, above, at 766).

Professor Rice's conclusion was as follows:

> Having considered the matters outlined above, I am unable to identify any practical benefit to the Dymocks land from the retention of the light well while, in my opinion there is a very real disadvantage to the proposed development and would be a significant restriction on the arrangement of function and space in any other contemplated development.

I reiterate that I acknowledge that consideration of relative advantages and disadvantages of the owners of the **dominant** and servient tenements is irrelevant for present purposes and I have not taken into account any of Professor Rice's comments on that matter.

The plaintiffs also relied upon a report of Mr Egan's annexed to one of his two affidavits of 2 April 1996 in which his comment and conclusion was as follows:

> In practical terms the estimate of possible loss to Dymocks land would be any reduction in income caused through the loss of the light **covenant** to either the existing building or any proposed new building which would be constructed to the Grace Bros boundary. Having regard to the conclusions of Professor Rice and Mr Hayman, it is evident that there would be no material damage to the amenity of occupants of the Dymocks building through the loss of the light well, either in the present building or any

> proposed new building which would be constructed on the boundary. On this premise the rental income or earning capacity of the Dymocks building would not be diminished and therefore I would conclude that the loss of the **covenant** for light would result in no measurable diminution in value of the Dymocks land.

The defendant's evidence

The evidence filed on behalf of the defendant in opposition to the plaintiffs' claim included a report of an architect/planner Darrel Conybeare, an architect/planner who is a principal of Conybeare Morrison International, Architectural, Urban and Graphic Design Consultants. As stated in his report Mr Conybeare was requested "to provide a statement related to urban design/planning regarding the provision of a **covenant** for lighting benefiting Dymocks".

In his report Mr Conybeare referred to the several ways in which the Dymocks site could be redeveloped, ranging, as he said:

> ... from total demolition of the existing building and complete restructuring of the development, through partial demolition and incorporation of elements of the existing building (ie its George Street facade) to retention and refurbishment of the existing building and selective additions over the adjoining laneways together with additional upper floors, to bring the building up to its maximum allowable floor. He expressed the view that it was space potential.

He expressed the view that it was essential "in preserving this important Dymocks asset to ensure that all redevelopment options are maintained". His report continued as follows:

> The covenanted light well is a significant advantage for any redevelopment option that could be considered for this site. The light well establishes a strategic focus for redevelopment, for this is a deep site which is being built out by the Myers development and the psychological presence
>
> *9 BPR 16,939 at 16,965*
>
> of daylight in this part of the floor plate will enhance the design quality and has the rental income from activities located on the various floors served by the light well. The optimum highest and best use for the Dymocks redevelopment would be I believe, for vertical retail activities throughout all **levels** in keeping with the historical design intent of The Block (another description of the Dymocks building) and other recent retail developments in the CBD ...

Mr Conybeare went on to express his view that the "redevelopment of Dymocks should, for the benefit for the City Retail Precinct as a whole be more closely integrated with the Myers proposal" and expressed the belief that there would be "clear commercial advantages for both Dymocks and Myers in forging a closer integration that could incorporate a link on several **levels** between the two retail centres". According to Mr Conybeare:

> Such a link could be appropriately located at or adjoining the covenanted light well as this would introduce an uplifting as well as orienting experience for shoppers towards the centre of redevelopment embracing both Dymocks and Myers.

He stated that he would envisage:

> ... that Dymocks redevelopment as a specialist vertical shopping arcade providing a range of goods and services which complement and extend the retail outlets in the Grace Brothers Store. This symbolic relationship would be enhanced by linkages at multiple **levels** with the light well forming a centrepiece of this integrated retail complex.

Under the heading "Commercial Benefits of a Light Well to Myers and Dymocks" Mr Conybeare stated as follows:

> The psychological benefit of daylight in a retail environment is recognised in virtually every retail development in city centres everywhere. Daylight is a fundamental ingredient -- not so much its quantity as the quality its presence gives to a place where shopping (and) other related business activity occurs. The capacity for this covenanted light well to throw its light into an extensive area of the redevelopment on both Myers and Dymocks sites will improve the rental returns on all areas illuminated by this daylight. Clearly this would incorporate multi-**level** linkage to integrate the two sites.

Mr Conybeare envisaged that in the future the "release of the southern laneway as a service way" opened the way "for this space to become an interesting pedestrian retail mall (over several **levels)** off George Street" and added that "The covenanted light well would, in this context fulfil the role of a terminus for such a retail arcade" and that "It would be vital for an arcade of this nature to have as much light as possible at its eastern focus and this would be provided by the light well which would also be used to articulate the physical design of a multi-**level** pedestrian link".

It may be noted at this point that the evidence of the plaintiffs indicated that they were not interested in and had no intention to participate in some integrated development of the Grace Bros site and the Dymocks site.

Mr Conybeare also gave oral evidence and Professor Rice gave evidence in reply to Mr Conybeare's Report.

Although there can be no doubt, as I think counsel for the plaintiffs conceded, that a **covenant** may be of practical benefit to a person entitled to its benefit if there is a real potential for the **covenant** to confer some benefit in relation to some potential future development of the **dominant** tenement, I find myself unable to conclude from Mr Conybeare's evidence that there is any real present or potential benefit of any substance arising from the **covenant** available to the defendant in respect of proposed redevelopments of its site of the kind described by Mr Conybeare. This is principally, but not exclusively, because of the very general nature of Mr Conybeare's comments relating to the existing and potential benefits said to be conferred upon the defendant by the **covenant.** I found Mr Conybeare's evidence difficult to follow with any precision largely

9 BPR 16,939 at 16,966

because of the fact that, as it appeared to me, the general concepts he put forward as possible extensions to or redevelopments of the Dymocks building lacked sufficient specific detail and substance.

Mr Conybeare was somewhat more specific during cross-examination but, at the end of the day, I was left with the impression from his evidence both written and oral only that, to some extent, in some imprecise, non-specific and unquantified way the daylight which would come from maintenance of the **covenant** in the completed proposed redevelopment of the plaintiffs' land might, in theory, possibly be of some benefit to the defendant in the event that the Dymocks building was to be extended or redeveloped in one or other of the ways envisaged by Mr Conybeare. His evidence did not satisfy me that the **covenant** was necessary for any actual or potential reasonable purpose of the defendant. To the contrary, as appears later upon a consideration of the whole of the evidence, especially the evidence of Professor Rice, I am satisfied that the **covenant** is no longer necessary for any actual or potential reasonable purpose of the defendant.

The possible extensions to or redevelopments of the defendant's building referred to by Mr Conybeare were very general concepts combined with general statements to the effect that natural light was psychologically beneficial to occupants of offices and was desirable in public areas of retail developments, and even in some cases in the retail shop areas, and, in addition, would have the effect of increasing the rent payable in respect of offices which somehow had the benefit of natural light which might come from the light well protected by the **covenant.** Mr Conybeare is not a qualified valuer and I could not, of course, act on his general assertions in that respect.

In any event his evidence in that regard does not address the consideration that in any extended Dymocks building extended to the southern boundary of Dymocks lane there would be many fewer rooms with natural light than is presently the case.

I do not intend to be critical in these respects of Mr Conybeare, and I am fully conscious of the shortness of the time which was available to the parties and their advisers for the preparation of this matter for hearing on an urgent basis. Mr Conybeare's oral evidence was, however, to the effect that his work over the past 3 years in respect of the possible redevelopment of the Dymocks building having regard, in particular, to its likely listing as a heritage building, had not resulted in any specific proposals for particular redevelopments.

Indeed, Mr Conybeare said in evidence that, during that period of about 3 years, the concepts that he had looked at had

been associated with "the idea of redevelopment in the form that the building is, at the present time, to preserve its heritage status, or in some hypothetical redevelopment, very preliminary notional ideas that have been generated". Some examples of the nature of Mr Conybeare's oral evidence appear in the following paragraphs.

One possible development of the defendant's building which was dealt with by Mr Conybeare involved, as I understood it, the creation of an atrium passing through every floor of the Dymocks building, with a skylight above the top floor in the roof. He also considered, as I understood it, the possibility of using the current Dymocks laneway as an arcade, after it ceased to be required as a laneway. In that connection Mr Conybeare gave evidence as follows:

> In the scenario we would look at a light well that is an arcade, open to the sky, that didn't have the truck movement in this but was pedestrians and the idea of light at the end of that arcade which would be afforded by the light well, by the **covenant** light well would create, I think, a very important focus, as I have said, and an end attraction that would bring customers off George Street and into such a development, would create that important sense of differentiation of light because there would be added light at that transect of the **covenant** light well and the laneway.

9 BPR 16,939 at 16,967

Mr Conybeare was then asked to assume it was 33 ft above George St, would that matter? His response was as follows:

> I don't believe so. I believe the way in which that would be developed, that arcade or lane, one would be looking at creating a **level** of change in it as one moved to what the light well was, because as you move up in a development the possibility of an interaction on both sides of the arcade becomes definitely possible. At the lower **levels** you do have a problem in the Myer development that there is a serviceable access way coming in, so as you rise it becomes possible for this arcade to become more double sided.

In relation to what I understood to be a multi-**level** arcade, Mr Conybeare was asked, in effect, what benefit would be obtained by a light well commencing 33 ft above George St. His response was as follows:

> At that point I see the possibility being that one would be able to create the sense of a focus at the point in a linear arcade that would be surmounted by a lantern of some kind at the transect of the **covenant** light well and the arcade, one would be dragging light in at that point and creating a focus at that point.

Mr Conybeare also stated that an architect would seek if he could to provide rooms with windows rather than rooms without windows because, as a matter of course, it would always be desirable to obtain natural light in essentially office type rooms so that there could be some ability for people working in those rooms to enjoy natural light and the prospect of looking out of a window, even a light well.

It should be borne in mind in this context that what was being referred to was a light well 10 ft wide and about 37 ft long commencing at a height 33 ft above George St in an otherwise solid wall nine storeys high extending from the George St frontage of the plaintiffs' land along the southern boundary of the Dymocks laneway.

I interpolate to note that, in this connection, the plaintiffs' valuer, Mr Egan, gave evidence that such rooms on each relevant floor would not command any higher rent in any proposed extension or redevelopment of the Dymocks building to extend it to the southern boundary of the Dymocks laneway immediately adjoining what would be the northern wall of the proposed Grace Bros redevelopment. Moreover, in its present location, the Dymocks building has rooms with windows along the whole of the southern boundary of the building overlooking the existing laneway, and, if it be the fact that such rooms with windows and access to some natural daylight command a higher rent, any extension of the southern boundary wall of the existing Dymocks building to the southern boundary of the Dymocks laneway, abutting the northern wall of the proposed Grace Bros redevelopment, would result in a diminution in the rental value of the rooms in the presently existing Dymocks building along the southern boundary of the laneway, which would then have no windows or access to natural light, except those adjacent to the 10 ft wide light well. I note that Mr Conybeare did not dispute the light measurements made by Mr Hayman on behalf of the plaintiffs.

In relation to a redevelopment of the Dymocks building involving use of the Dymocks laneway the following questions

and answers appear in the evidence of Mr Conybeare:

> Q -- You wouldn't redevelop the Dymocks land around that 10 metre light well, would you?
>
> A -- It would be specifically the laneway itself you would be looking at from the point of view of benefits to Dymocks, but the light-well is a factor because it intersects that laneway. It is the laneway that is of benefit to Dymocks.
>
> Q -- And the laneway is the primary focus of any development that may take place in that area?
>
> A -- If that was to be pursued, yes it would be ...
>
> Q -- Is it likely that you would consider a development along the lines you have indicated in your diagram if the light well wasn't there at all?
>
> A -- I think the answer to that is yes. The light-well is something that adds to its viability as a development concept.

9 BPR 16,939 at 16,968

The following questions and answers are perhaps the most specific that Mr Conybeare gave:

> Q -- What I am asking you is, and assuming the light well is built around by Myers with no windows openings, what have you?
>
> A -- Yes.
>
> Q -- What are you envisaging will happen to the southern wall on the southern boundary of the Dymocks laneway of the southern building, is going to happen when it arrives at that point which is three metres wide and is the northern opening of the light well area?
>
> A -- I would seek for it to be open.
>
> Q -- Totally open or glassed in?
>
> A -- If it was an unattractive view into that light well, such as you describe, it would be glassed in with opalescent, non see through glass.
>
> Q -- For the width of the light well?
>
> A -- Yes.
>
> Q -- And a solid wall would resume?
>
> A -- Yes.
>
> Q -- Would that make much difference to anything?
>
> A -- I think it would make a great deal of difference of the admission of light into that section of the laneway.
>
> Q -- I can't see myself what difference it would make if you had artificial light everywhere else?
>
> A -- I think that the orientation of this light well in a north/south direction introduces the possibility of this being more light diminishing as it descends into the building, if one takes Mr Hayman's evidence to be correct, and I have no reason to dispute it, while it is diminishing it is important nonetheless in the concept of redeveloping the laneway, because the light that can come from the light well is of benefit in the perception, the psychological conception of the use of that laneway, because there is more light as you look up into it that is coming from the light well. If the solid wall goes across there, you are not getting that benefit, all you are getting is the benefit above the laneway itself. But because of there being some 30 m² of additional light that can be introduced, then that light can be taken advantage of.

Mr Conybeare at this point in his evidence seemed to be answering on the basis that the southern wall of the Dymocks building remained in its present location, and was hypothesising what difference there would be as between a completely solid wall, without any light well, along the southern boundary of the laneway on the Grace Bros site and

such a wall with the light well 10 ft wide and about 37 ft long above a height of 33 ft kept open.

In that connection I accept, as does Mr Conybeare, the evidence contained in the report of Mr Hayman, and conclude that in the context of the existing southern wall of the Dymocks building the difference in light falling on the southern wall of the Dymocks building as between a solid wall erected on the southern boundary of the Dymocks laneway without any light well on the one hand, and such a wall with the covenanted light well on the other hand, would, at all relevant points, not be noticed by most persons, as Mr Hayman said.

Finally, in relation to Mr Conybeare's evidence I state that I accept the following evidence and comments from Professor Rice in relation thereto as contained in his affidavit of 6 May 1996:

> **Paragraph 2 redevelopment opportunities.**
>
> The whole report is focussed on this issue. It does not deal with the effect of the **covenant** on the existing Dymocks building. It contends that the "light well establishes a strategic focus for redevelopment". I strongly disagree that this could be so. The Dymocks site has a total perimeter in the order of 178 metres ... The covenanted area at its north end measures about 3 metres, that is approximately 1.68% of the total boundary length. Considering this and other characteristics of the covenanted area such as:
>
> - its narrowness in relation to the boundary it adjoins.
>
> *9 BPR 16,939 at 16,969*
>
> - its orientation and proportion restricting the time for which direct sunlight illuminates it.
> - the irrelevant contribution which light from it makes at present to the light available to the south wall of Dymocks especially at low **levels;**
>
> it is my opinion that no architect who is experienced in the design of multi-storey commercial buildings would allow the design of a building on such a large and important site, indeed on any site, to be driven or given "focus" by such an inconsequential consideration rather than by truly strategic matters ...
>
> The consideration of if and how to make effective use of the rights conferred by the **covenant** would be one of many factors to be taken into account in design of a new building but would in no sense be a "strategic focus"... I agree that a significant quantity of daylight is an essential component of a retail environment in public areas. However, the proposition that a light well of 32.4 square metres in area could "throw its light into an extensive area of both Dymocks and Grace Bros buildings" especially when it presents only a three metre width to the Dymocks boundary is unsustainable.
>
> Paragraph 5 The relevant aspect of this proposal for a single sided, single **level** arcade is its dependence for "focus" on the **covenant** to provide "as much light as possible". It is apparent from experience and observation on site and from Mr Hayman's report that this will be very little at the low **level** where it is needed and that whatever light there is will terminate ten metres above the George Street entrance to the proposed arcade, confounding the proposal ...
>
> Paragraph 7 A number of points are made in conclusion in relation to which I comment that:
>
> - The assertion that there will be a "great benefit" to Dymocks development by retention of the **covenant** is not demonstrated or illustrated;
> - the light well as a "distant focus" of an arcade from George Street is impossible because of relevant floor and **covenant** area **levels;**
> - the influence of a 3 metre light well in a building perimeter in excess of 178 metres could not be a significant factor in considering the redevelopment of this site;
> - in my opinion, the intrusion of the light well is a significant detriment to the effective planning for retail purposes.
>
> This is not a "narrow concern"...

In the final analysis, as it seemed to me, Mr Conybeare's evidence reflected the inherent difficulty of trying to establish that the **covenant** was necessary for the purpose of any actual or potential reasonable defendant and, in my opinion, his evidence did not establish that that was so.

The defendant also relied upon the report of Dr John Richard Cooke, a senior lecturer in the School of Architecture at the University of New South Wales.

In his report Dr Cooke sketched what he described as five proposals being schemes 1 to 5. Scheme 1 was a diagram showing the Dymocks building in its existing form together with the proposed Grace Bros modified so as to accommodate the **covenant** for light. Scheme 2 was similar to scheme 1 "with the *suggestion* of some new balconies on alternate floors on the southern side of the Dymocks Building and a lattice screen at the northern end of the light well to exploit the light well area as a point of interest on the south side of the building". [Emphasis supplied.] In relation to scheme 1 and scheme 2 Dr Cooke's report stated as follows:

> 5.4 Scheme 1 and Scheme 2 assume no additions to gross floor space. Although the light well is relatively narrow (about 3 metres or 10 feet) in relation to the total length of the south side of the Dymocks Building in my view the shaft of light at that point would provide useful visual relief and additional south light to the office areas in its vicinity. When measured as a proportion of the total lighting requirements of office space the additional daylight provided by the light well may not be great but in my opinion the presence of that natural light source is psychologically beneficial to the building users, particularly when the outlook from the southern windows is restricted by the new Grace Bros centre ...
>
> 5.6 Apart from the daylight itself the shaft of light provided by the light well would provide an area of some visual interest to the outlook from that side of the Dymocks Building.
>
> *9 BPR 16,939 at 16,970*
>
> 5.7 In Scheme 2 I have *suggested* that the visual interest of the light well could be increased by the addition of balconies (*perhaps* to alternate floors) and the use of an open screen which is also intended to increase the visual interest of the light well without greatly reducing the amount of daylight obtained from it. [Emphasis supplied.]
>
> 5.8 Another possibility would be to convert the laneway on the south side of the Dymocks Building into a paved pedestrian area similar to Rowe Street (as it once was) and, with minor modifications to the openings in the southern wall of the Dymocks Building, to create access from the laneway to retail space within the existing floor space. The light well would give useful natural light and a focus or visual termination to the laneway space.

One has only to read these paragraphs, in my opinion, to appreciate that what is being referred to are no more than theoretical (not real) "suggestions" without present substance, even allowing that potential benefits may have real and present substance, reflecting the artificiality of the attempt to establish the existence of real potential benefits having a present, although potential, substance.

In this connection Dr Cooke gave evidence in cross-examination as follows:

> Q -- The exercise that you have undertaken in your report is designed to deal with a hypothetical situation?
>
> A -- Except in scheme 1, which assumes that there is no development of the Dymocks land at all.
>
> Q -- The exercise you have undertaken otherwise deals with a series of hypothetical situations, is that correct?
>
> A -- That is correct.
>
> Q -- What you do in the context of those hypothetical situations is to discuss possibilities?
>
> A -- That is correct.

In addition Mr Forsyth, the Chairman of Directors of the defendant, gave evidence that the possibility of redevelopment of the Dymocks building had been given thought at board **level** probably for 10 years or more, but accepted in cross-examination that what had been discussed was some future possibility that might or might not happen, although in examination-in-chief he referred to the possibility of building above Dymocks laneway and to two of the possibilities referred to by Dr Cooke.

Further, Mr Parker referred to a set of sketches done by Andrew Wyatt, architect, in about 1992/93 contemplating an arcade between the Grace Bros site and the Dymocks building but these sketches were not currently available and Mr Parker was unable to comment on whether those plans made any allowance for the **covenant** for light as he was not involved in the relevant discussions.

I have already held above that, in my opinion, based principally upon the reports of Mr Hayman and Mr Egan, the situation shown in Dr Cooke's scheme 1, which simply represents the proposed Grace Bros building with provision for the **covenant** for light maintained and the Dymocks building in its existing form, that no practical benefit enures to the defendant from having the area of the **covenant** for light open as compared with having that area built over as presently proposed by the plaintiffs. In my opinion, having regard, in particular, to the evidence of Mr Hayman and Professor Rice, the "useful visual relief and additional south light to the office areas in its vicinity" which, according to Dr Cooke, would be provided by modifying the presently proposed Grace Bros building to accommodate the light well secures no real practical benefit to the defendant. Nor, in my opinion, on the same basis, coupled with the evidence of Mr Egan, would the building over by the plaintiffs of the light well area result in a real (as opposed to theoretical) injury to the defendant having a present substance. In my opinion, within the meaning of the principles enunciated by Jacobs J in *Re Mason*, above, if what is described as scheme 2 by Dr Cooke, is made impossible by the plaintiffs utilising the whole of the area of the

9 BPR 16,939 at 16,971

light well for building purposes, the defendant will not have suffered a real injury having present (albeit potential) substance. That scheme is no more than a "suggestion" by Dr Cooke, as were his other schemes as to all of which Dr Cooke stated in para 5.14 of his report:

> As with any scheme the final decision would be a matter for the proprietor, taking into account questions of architectural and structural design, mechanical services design, cost, and likely return on capital.

I am of the same view in relation to Dr Cooke's schemes 3, 4 and 5 and for the same reasons. As Dr Cooke conceded in cross-examination the exercise he had undertaken in his report was, with the exception of scheme 1, designed to deal with a series of "hypothetical situations" and to discuss "possibilities" in the context of those "hypothetical situations". I also note that in cross-examination when asked whether the availability of what he described as a psychological factor would be one very clear reason on his assessment why he would not extend the Dymocks building along the length of Dymocks lane over to the Coles building he replied:

> Well it is certainly an important factor to be considered in the total consideration of possibilities.

In assessing the substance of the evidence of Dr Cooke I have also had regard to the comments of Professor Rice which I accept in relation to Dr Cooke's report as contained in Professor Rice's affidavit in reply of 6 May 1996. In particular, I have had regard, inter alia, to Professor Rice's evidence to the effect that the balconies shown in certain of the schemes of Dr Cooke would effectively/eliminate any small benefit of the **covenant** area by:

- Eliminating any view of the sky through the narrow slot of the light well from any floor below the top
- Significantly reducing light from the area of sky above the light well reaching windows opposite the light well beneath the balconies.
- Reducing the effectiveness of the air space of the lane as a light source by closing an area off from the sky.
- Reducing further the light reaching the south wall of the Dymocks building by reflection off the walls of the "light well" by building lattice screens at the northern end of the light well at the balconies.

These proposals indicate a lack of understanding of the light **levels** involved.

I also accept the following comments of Professor Rice on Dr Cooke's evidence in relation in particular to para 5.5 of Dr Cooke's report in relation to which Professor Rice commented as follows:

> The "outside scene" referred to in the quotation from Steed and Woodhead will in this case be the masonry walls of the Grace Bros building. Should the **covenant** be retained, the views from those few parts of the Dymocks floors able to see into the **covenant** area will be of masonry walls a little further away. From the top two, or perhaps three floors, of Dymocks a narrow portion of sky will be visible. To evaluate the issue of vision out of the Dymocks building it is necessary to understand from what a limited area of any

> floor **level** it will be possible to see into any part of the **covenant** area either directly or obliquely. By scaling dimensions from Dr Cooke's sketches, I estimate the maximum floor area from which vision out to the confined slot of the new light well could be said to benefit the occupants to be: Scheme 3 = 103 sq metres or about 6% of the total floor area. Scheme 4 = 112 sq metres or about 6.25% of the total (larger) floor area. Dr Cooke proposes embellishing the extension of the **covenant** area with balconies to increase visual interest and the provision of lattice screens which effectively prevent or curtail vision from Dymocks into the **covenant** area. This indicates that he places little value on being able to see beyond the common boundary.
>
> *9 BPR 16,939 at 16,972*

I have accepted the evidence of Professor Rice generally, and in the particular respects which I have indicated, principally because I found his views supported by what appeared to me to be sound analysis and reasoning based upon exceptionally wide experience.

The evidence of Dr Cooke in relation to the supply of air to air-conditioning systems is dealt with later in this judgment.

The defendant also relied upon the report of Dr John M Hutcheson, a visiting professor and researcher in the School of Building in the Faculty of Architecture at the University of New South Wales.

Professor Hutcheson's report dated 3 May 1996 included the following paragraphs:

> 5.5 If the Dymocks Building is not extended to the boundary, then the impact of the Coles development will be the creation of a canyon. Even, as suggested in para 6.1, if countered by the renovation and enhancement of Dymock's southern facade this canyon will have a negative effect on Dymock's rents. However, if the light area is built over by Coles there will be a substantial impact on Dymock's rents, even after renovation of their southern facade.
>
> 5.6 *Conclusion* The current and foreseeable relationship between the Dymocks Building and the light area is so unique that the value in use of the light well is infinite. Viz Dymocks are not a willing seller; there are no valid current comparable sales; the value of the psychological impact of light is infinite etc.

The first two sentences of para 5.5 appear to take account of the whole of the proposed development of the plaintiff's land along the northern boundary and are not limited to the effect of the "building over" of the light well. I therefore find those sentences of little or no assistance in relation to the questions for my determination in these proceedings. I also note that Professor Hutcheson was not qualified as a valuer in New South Wales, although he stated that he "can value in other States". He accepted that in his report he had not dealt with any specific development proposal.

So far as concerns the statement in the last sentence of para 5.5, in the absence of a statement of reasons or any analysis in support of that statement I find it of no assistance in the determination of the relevant issues in the present proceedings. The same is true in relation to para 5.6 of that report.

Paragraph 6.1 of Professor Hutcheson's report dealing with the use of the "light area" in relation to fire protection I find to be irrelevant since, in my opinion, the use of the "light area" for that purpose is not conferred by the **covenant** and in my opinion, for present purposes, I am concerned only with what rights the **covenant** confers upon the defendant and not with any other use the defendant may be able to make of the area of the light well not authorised by the **covenant.** As appears hereafter I have taken this same approach in relation to any use by the defendant of the air contained in the light well area as intake for air conditioning in the defendant's building.

So far as concerns para 8 in the report "Psychological Value of Light", I do not doubt that light may have a "psychological value" along the lines suggested by Professor Hutcheson, but, in the absence of any attempt to apply those considerations to the specific issues involved in the present proceedings, and in the light of all the other evidence in thee proceedings on that issue, particularly the evidence of Mr Egan, I am unable to give that paragraph any relevant weight for present purposes.

Paragraph 9 in the report headed "REDESIGN for RENT INCREASES" contains the statement in para 9.1 that "The

terminal light from the light area consolidates and increases the rents payable along the Dymocks lane facade". This section of the report also contains in para 9.2 the statement that:

> ... the designers of the Dymocks Building saw the advantages to tenants along this Southern facade and in particular the advantages of the light terminus available from the light area.

9 BPR 16,939 at 16,973

These statements and others contained in this section of the report are, in my opinion, general assertions unsupported by specific reasons or analysis and with no attempt made to apply them or indicate their relevance to the specific questions to be determined in the present proceedings. Accordingly, I find them of little assistance in determining the questions which require determination in the present proceedings. I am of the same view and for the same reasons in relation to that part of the report headed "Conclusion".

The assertions as to "increases" in rent are, in substance, contradicted by the evidence of Mr Egan, which, as stated above, I accept and prefer. Those assertions also have no regard to the diminution in the number of rooms with natural light that would occur along the southern boundary of the Dymocks building if it was extended to the southern boundary of Dymocks laneway adjacent to the northern boundary of the proposed Grace Bros development.

In addition in relation to Dr Hutcheson's report I have had regard to the various comments contained in the affidavit in reply of Professor Rice of 6 May 1996. In particular, I am persuaded of the relevant accuracy of, inter alia, the following comments made by Professor Rice in relation to Dr Hutcheson's report:

- Any atrium or larger light well in the Dymocks building will, if it is to be of any use at all, be so much larger than the area presented by the **covenant** area as to make its (the **covenant** area) contribution, if any, marginally relevant. Any such atrium or light well would be planned to provide maximum benefit to Dymocks whether or not it joined the Grace Bros light well and so secured its marginal contribution.
- The "morgue-like canyon", if that is intended to describe the area between the existing Dymocks south wall and the new Grace Bros north wall, will be little influenced by retention of the existing light well for all the reasons of its relative size and the behaviour of light previously put forward.
- I do not agree that an effectively designed "shopping mall or malls" can be economically provided as asserted.

So far as concerns the report dated 3 May 1996 by Mr IM Anderson of Bassett Consulting Engineers relied upon by the defendant, concerning the air-conditioning implications for the defendant at being able to use the area of the light well to intake air for air-conditioning purposes in the event of the Dymocks building being extended to the southern boundary of the Dymocks laneway, I am of the opinion that such considerations are irrelevant for present purposes. This is because, as stated above, in my opinion, the only relevant issue for the purposes of this application is related to the benefit (if any) obtained by the defendant in respect of the light from the light well the subject of the **covenant.** In this connection I note by way of contrast that "the **covenant**" contained in para (b) of memorandum of transfer registered no A895502 grants "full rights of light *and ventilation*" [emphasis supplied], whereas the **covenant** contained in (a) requires maintenance of the relevant area only as a "light area".

In any event, even if this matter is assumed to be relevant for present purposes, I accept the evidence of Graeme David Thwaite, a consulting engineer, as contained in his affidavit of 6 May 1996, to the effect that in the proposed Grace Bros development there would be cooling towers associated with the air-conditioning system which would be discharging moisture laden air at roof **level** next to the light well and that there would be a potential, depending upon the prevailing breeze, for "drift" from that moisture to be deposited into the light well. Because, according to Mr Thwaite, drift contains corrosive chemicals and biocides as required by the relevant Australian standard, and because in certain locations and circumstances drift has also been a carrier of biological agents such as the bacterium which causes Legionnaire's Disease, it is not desirable to locate fresh air intakes in a space which may be exposed to drift, even though this is not prohibited by the relevant standard. Nevertheless in Mr Thwaite's opinion, which I accept, from a design and engineering

perspective it would be undesirable to locate air intakes in proximity to a cooling tower. I also have regard to Mr Thwaite's view that one possible use which Coles Myer could make of the light well would be for "discharges not deemed objectionable" within the meaning of the relevant Australian standard which include toilet and kitchen exhaust of less than 1000 litres per second. The use by the plaintiffs of the light well for those permitted purposes would be an additional factor tending against any decision by the defendant to use the light well for fresh air intakes. I also accept Mr Thwaite's evidence to the effect that any overall difference to available floor space as between the defendant being able to use the area of the light well for air-conditioning intake and not being able to do so on the other hand, is marginal.

In those circumstances, on the assumption, contrary to my view, that the question of the availability of the area of the light well for the purpose of intake of air for air-conditioning purposes is relevant, I am of the opinion that if the defendant were unable to do so it would not have lost any practical benefit it would otherwise have had, nor would it have been substantially injured within the meaning of the relevant section. I also agree with Mr Thwaite's disagreement with the conclusion of Dr Hutcheson that "automatic pressure release smoke vents could be located opposite the light-well" for the reasons given by him (Mr Thwaite).

The report of Mr VJ Lupton of Alcorn Lupton and Associates Pty Ltd dated 3 May 1996 is based upon the assumption that there will be "a loss of rentable space of the order of 106 m² within a building extended as described in Assumption 1 caused by relocation of air-conditioning plant". Assumption 1 states that "Dymocks are entitled to extend the building on the Dymocks building land over the Dymocks lane land such that the building may extend to the boundaries of the Dymocks land with the Coles land".

Since I have, as stated above, accepted the evidence of Mr Thwaite that there will be no loss of rentable space relevantly caused by relocation of air conditioning plant, that part of Mr Lupton's report dealing with this matter is irrelevant for present purposes.

In relation to Mr Lupton's opinion, which is really no more, in my view, than an unsupported assertion (see later) that "a tenancy of 50 m² with a window over a light well would attract approximately twice the rent of the 50 square metre tenancy with no windows", I prefer, as stated above, the contrary evidence of Mr Egan, the valuer called on behalf of the plaintiffs having regard, inter alia, to the consistency with which and manner in which he gave his oral evidence in cross-examination (see below) and to his extensive qualifications and experience.

I also note that part of the loss which Mr Lupton says would be suffered by the defendant is based upon Mr Lupton's assumption 5, relating to loss of rentable office space caused by relocation of air-conditioning plant, the correctness of which assumption I have rejected upon the basis of preferring the evidence of Mr Thwaite.

I note further that although Mr Lupton stated that his assertion that a tenancy of 50 m² with a window over a light well would attract approximately twice the rent of a tenancy of 50 m² with no windows, was based upon rents "currently being achieved at Dymocks at this stage in time", he gave no details of such rents, and referred in his report only to an "analysis" of Dymocks rentals. This analysis indicates what I infer to be a composite net rate of $225 per square metre per annum for a typical "small area tenancy", which I infer was for composite areas including rooms with views over Dymocks laneway as well as internal rooms. This was confirmed, as I understand it, in cross-examination (at transcript p 123) when Mr Lupton stated that his rate of $112.50, being half his (composite) rate of $225 was for space in a hypothetical new development with no windows. Such composite rents in Dymocks building are not shown to be apportioned as between the two types of room, and are, I infer, likely to have been negotiated upon the basis of a composite rent. In any event those figures are really relevant only in respect of

a redevelopment of Dymocks building extended to the southern boundary of Dymocks laneway in which redevelopment many fewer rooms would have natural light than is presently the case in the existing Dymocks building (see later). In all these respects, and generally, in relation to Mr Lupton's evidence, I have had regard also to the

affidavit in reply of Mr Egan of 6 May 1996 containing various criticisms of Mr Lupton's evidence, some of which criticisms accord with my own views as set out above, and with the remainder of such criticisms I am in general agreement.

In cross-examination Mr Lupton agreed that, having regard to his view of the importance of natural light, an important factor in deciding whether or not to extend across Dymocks lane would be that some areas within the Dymocks building as extended would lose their present access to windows with natural light, and that that was something which would have to be measured on his assessment on a cost-benefit analysis as against the availability or otherwise of the light well. In this connection, the defendant's position seems to be in effect that there would be a diminution of rent in respect of rooms in a redeveloped Dymocks building extended to the southern boundary of Dymocks lane which did not adjoin the light well, and that the area of rooms which did not adjoin the light well would be far greater than the area of the rooms which did adjoin the light well 10 ft wide. In those circumstances, on the defendant's own case, it seems a reasonable inference that the loss of rental in respect of rooms which previously enjoyed the benefit of a window and natural light would exceed the additional rental obtained on this view for rooms adjoining the 10 ft wide light well in an extended Dymocks building.

Moreover, as I have said, I prefer the evidence of Mr Egan to the effect that no additional rental would be paid for those rooms abutting the 10 ft wide light well in a redevelopment or extension of the Dymocks building to the southern boundary of the Dymocks laneway.

Mr Egan, as appears from his cross-examination, accepted the premise that if someone was designing a building on the Dymocks site, they would rely on artificial light rather than natural light and that therefore it did not matter that they might lose a quantity of daylight. In cross-examination Mr Egan also expressed the view that in his opinion the "filling in" of the light well in the proposed Grace Bros redevelopment, as compared with a Grace Bros development making due allowance for the light well, would make no difference at all to the value of the building. In this connection he referred to the tenants of the 95% of the building that had windows now that would lose those windows if the Dymocks building was to be extended up against the new Grace Bros development on the southern boundary of Dymocks lane. He was not prepared to express a view on the psychological attitude of tenants in relation to a window over a light well, but, in answer to the question whether it was his view that a fully enclosed room has precisely the same rental value as a room with a view merely over a light well he expressed the following view:

> Well, normally commercial premises in the city aren't let room by room, but only a few island blocks have light in their surroundings. But construction of internal offices still maintain the same rental **level** ... I don't think it would make any difference for a ... 3 metre strip of light.

He was of the view that most air-conditioned buildings did not have opening windows but his view would not change if the windows could be opened. He was of the view that a fully enclosed room of 50 m² was not different for rental purposes as compared to one with natural light coming in through a window. When asked whether there was no psychological difference for the average person between such rooms he replied "I can't answer about the psychological difference, but it would have no monetary difference in rental capacity". He stated that he could not answer "on a psychological basis" and added "All I can tell you is what the market does".

9 BPR 16,939 at 16,976

As to the psychological aspects of access to natural light coming from the light well it is, in my opinion, on the evidence, of no practical benefit in relation to the existing Dymocks building, nor would its absence cause any substantial injury to the defendant, having regard, inter alia, to the evidence of Mr Hayman and Professor Rice. In relation to any hypothetical development or redevelopment of the Dymocks building to extend it to the southern boundary of Dymocks laneway, its significance is, in my opinion, limited to a 10 ft width referable to those rooms in any such redeveloped Dymocks building opposite the northern end of the light well. However, in my opinion, any such significance is more than neutralised by the loss of daylight to the many other rooms along the southern wall of the existing Dymocks building (which on the defendant's case would cause a reduction in rental from the present rentals)

and by the evidence of Mr Egan to the effect that the rental value of rooms in the redeveloped Dymocks building opposite that 10 ft wide light well would be no greater than the rental value of rooms without access to natural light.

Christina Margaret Malcolm, a leasing negotiator, gave evidence on behalf of the defendant in respect of rental of office space with and without windows with natural light. She stated that she had never in her experience sought to obtain tenants for office space without windows and that she had never actually been involved with a tenant who had actually leased a room that did not have natural light, or even a larger area that did not have natural light. Notwithstanding this she expressed an opinion that:

> ... from dealing with prospective tenants, when we are looking at various options natural light is a fundamental factor to the tenants making decisions to actually lease premises and if I actually had to organise one with natural light, identical in size and location, and one without natural light, the tenant would always, without doubt, go for the room with natural light.

She did not, however, say in her evidence that the rental value of a room with natural light would be greater than the rental value of a room without natural light. She said that in her experience rooms that did not have natural light were usually vacant for many, many years.

In answer to further questions she stated that there would be an instance where a larger area would have, for example, one area of windows and possibly the rear of those premises may have been lacking in natural light; there was a rear portion that lacked natural light. She said that she had had experience with leasing such a combined area as one unit which would have to be one area with one portion of natural light coming through to the premises and the tenants tended to incorporate glass in their fit-out to enhance the natural light going to the darker portion of that room.

Ms Malcolm's experience in that connection being limited to one occasion only, and otherwise generally being as described by her, I found her evidence of limited assistance only, more especially having regard to the fact that she gave no evidence to the effect that the rental value of rooms without windows or natural light would be lower than the rental value of comparable rooms with windows and natural light. Nor, it seems from her limited experience, would she have been able to do so. Moreover, her evidence was not specific to the facts of this particular case where extension of the existing building to the southern boundary of Dymocks laneway, adjoining the proposed new Grace Bros development, would, on the evidence, result in many more rooms along the southern wall of the extended Dymocks building being without natural light (such natural light being limited to a width of 10 ft) than is the case at the present time along the southern wall of the existing Dymocks building.

I add, in this connection, that I do not consider that the internal room, of which there is only one in the Dymocks building, being approximately 1/3 the size of a standard room, being a room without a window to the outside of the Dymocks building, as referred to by Mr Parker as being difficult to let, is any way representative in relation to the rental

9 BPR 16,939 at 16,977

potential of other rooms, as it appears to be an isolated room which could only reasonably be expected to be let as part of a larger area which would also include rooms with windows having natural light.

In addition to the various matters to which I have referred above, I am in general agreement with the criticism of the reports relied upon by the defendant made by Professor Rice in his affidavit in reply of 6 May 1996 to the effect that those reports:

> ... fail to demonstrate an understanding of the quantity of light potentially available from the **covenant** area either now, as a supplement to the light available from above the lane, or in a notional extension or redevelopment of Dymocks ...

and further that:

> ... an appreciation of the insignificance of the **covenant**'s contribution can be gained from considering the dimensions of the **covenant** at the Dymocks boundary in relation to the dimensions of the Dymocks building site and the quantitative analysis presented by Mr Hayman.

Miscellaneous submissions

Alleged value of the covenant as a "bargaining chip"

The parties adduced evidence of negotiations for the release of the **covenant** by the defendant in consideration of a payment of money which might be made by the plaintiffs to the defendant. This evidence was relied upon by the defendant to support its submission that the **covenant** had a value to the defendant as a "bargaining chip" which increased the value of its land having the benefit of that **covenant.**

Mr Lupton expressed the view that "a benefit of the easement being noted on the title is that the adjoining owner (presently Coles) would be likely to pay the proprietor of the Dymocks building money for the release of the easement".

In this connection, however, I accept the evidence of Mr Egan and his reasons therefor to the effect that the value of the defendant's land is not increased in this way by reason of it having the benefit of the **covenant.**

Mr Egan whose evidence I accept in this connection also, rejected the suggestion that the existence of the right to the light well was a "bargaining chip" which would increase the value of the **dominant** tenement (the Dymocks land) on the basis that, in his view, a prospective purchaser of the Dymocks land would simply not be prepared to pay an increased amount for the Dymocks land on the basis that he would recover the amount of that increase from the owner of the servient tenement, since such a purchaser would not only be no better off financially, but would have incurred additional stamp duty referrable to that increased amount. This view was, of course, consistent with Mr Egan's view that the value of the Dymocks building would be the same whether or not it had the benefit of the **covenant** for light, that is, whether or not in the proposed Grace Bros building the area of the light well was built over.

"Canyon effect"

I am of the opinion that the so-called "canyon effect" of the proposed Grace Bros development without any light well on the southern side of the existing Dymocks building would not be "relieved" by the presence of a 10 ft wide light well above a height of 33 ft to any extent to which it could be described as being of "practical" benefit to the defendant nor to cause "substantial" injury to the defendant if the light well were not maintained.

I am of this opinion, inter alia, principally because of the evidence of Professor Rice and Mr Hayman and also because I infer from the evidence from Mr Egan that the rental value of rooms looking across the width of Dymocks laneway to the blank wall of the proposed Grace Bros development would not have a lesser rental value; but also because I am of the view that the nature and magnitude of such alleged "relief" from the "canyon effect"

9 BPR 16,939 at 16,978

provided by a light well 10 ft wide surrounded by solid walls would be, if not de minimis, at least of no relevant substance or weight for present purposes.

Relevance to future development application by defendant

It was, in effect, submitted on behalf of the defendant, that the existence or absence of the light well from the proposed Grace Bros development would be a material matter to be considered by the relevant council (or other consent authority) in relation to any future application by the defendant for development consent and/or building approval made by the defendant in relation to some unspecified hypothetical future redevelopment of the Dymocks building. In this connection it was submitted that the council (or other consent authority) would look more favourably on any such application if the light well were maintained in the proposed Grace Bros development. Professor Rice was cross-examined in relation to this submission and in effect rejected its implications for reasons which I accept (and which appear at transcript pp 57-9). In any event, the context of the cross-examination was, as I have indicated, some unspecified hypothetical future redevelopment of the Dymocks building, and, as such, was not sufficient to establish

that the maintenance of the light well would secure any practical benefit to the defendant in respect of any such application nor to establish that the absence of the light well would cause the defendant "substantial" injury in that connection. To the contrary, I am satisfied from the whole of the evidence, that the defendant would not lose any practical benefit nor be substantially injured in that connection by reason of the absence of any light well in the proposed Grace Bros development.

I am of the same opinion in relation to any right that the defendant may have, upon the basis of its entitlement to the benefit of the **covenant,** to object against any future building application by the plaintiffs, including its right to object to the alleged air-conditioning implications for the defendant of the presence or absence of the light well, as to which I accept generally the evidence of Mr Thwaite, to some of which evidence I have referred earlier.

The defendant's failure to object to the plaintiffs' development application

It was submitted on behalf of the plaintiffs that I should have regard to the fact that the defendant did not object to the development application of the plaintiffs which made no provision for the light well and that this fact constituted evidence to the effect that the defendant did not regard the **covenant** as being of any benefit to it. There is, however, evidence which I accept, to the effect that the relevant officers of the defendant were unaware at the relevant time that no provision had been made to maintain the **covenant.** I have, accordingly, not taken into account for the purposes of my decision, the fact that the defendant made no objection to the granting of the consent to the plaintiffs' development application.

Open offer by plaintiffs to pay $50,000

I record that I have had no regard, in reaching my decision, to the letter dated 6 May 1996 from the solicitors for the plaintiffs to the solicitors for the defendant, undertaking to the court to pay $50,000 to the defendant if the court makes an order extinguishing the **covenant** and also offering payment of the same amount, in effect, as compensation for any "material practical benefit" that would be lost, or for any substantial injury that might be suffered by the defendant if the **covenant** were to be extinguished. I would add that I very much doubt, although I express no concluded view, that the court could properly have regard to such an offer of compensation, not expressly provided for in the statute (cf s 88K of the Conveyancing Act 1919), in a context involving deprivation of existing rights of the party entitled to the benefit of the **covenant.**

9 BPR 16,939 at 16,979

Costs to plaintiffs of having to alter existing design

I have had no regard, in reaching my decision, to the fact that the plaintiffs would incur considerable expense in relation to the redesign of the proposed Grace Bros development to accommodate maintenance of the **covenant** since, as the defendant submitted, if this were to be necessary, such expenditure would have been self-inflicted, but more importantly, because the exercise of jurisdiction under s 89 does not involve consideration of any relevant advantages or disadvantages to the parties: see *Re Mason*, above.

Port of Melbourne Authority v Anshun Pty Ltd

It was submitted on behalf of the defendant, based upon the decision of the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 ; 36 ALR 3 that the plaintiffs were estopped from seeking the relief sought in the present proceedings upon the ground that that relief was so closely connected with the issues raised in earlier proceedings between the same parties (No 1411 of 1996) that it was unreasonable for the plaintiffs to have refrained from seeking that relief in those earlier proceedings.

In my opinion a comparison between the issues and evidence in those earlier proceedings and the issues and evidence in the present proceedings makes it plain that they were quite different and in my opinion it was not unreasonable for the plaintiffs to have refrained from seeking in those earlier proceedings the relief sought in the present proceedings.

Accordingly, this submission on behalf of the defendant must be rejected.

Discretion

Both parties accepted that even if the necessary conditions for relief under s 89 had been satisfied, the court retained what might be called a residual discretion, nevertheless, to refuse any order. In my opinion, the plaintiffs, having discharged their onus or proof of the matters entitling them to an order extinguishing the **covenant,** there are no discretionary matters which would cause me to consider refusing such an order.

Conclusion

For all the above reasons I conclude that, within the meaning of the relevant legal principles set out above, the plaintiffs have, on the evidence before me, discharged their onus of proving that the subject **covenant** secures no practical benefit to the defendant and that it is no longer necessary for any reasonable purpose of the defendant, and further, that its extinguishment would not substantially injure the defendant, in the sense that its extinguishment would not result in the sustaining by the defendant of any real (as opposed to theoretical) injury having a present substance.

Before proceeding to deal with the present application in relation to the defendant's right to project, I should return to a matter to which I adverted earlier in this judgment and record my view that what I consider to be the artificiality of the attempts on behalf of the defendant to justify the maintenance of the **covenant** in favour of the land to the north of the servient tenement, suggests very strongly that the original purpose of the **covenant** in conjunction with the associated right to light and ventilation 5 ft wide to form a "common area 15 feet wide" was to benefit the land to the west and east of that common area rather than the land to the north of that area, and that this was probably the case having regard to the terms of the **covenant** and grant and to the dimensions of the relevant areas. A **covenant** for light along the back of a building (Bateman's Hotel) on the western side of the **covenant** land approximately 37 ft wide, is readily understandable, while a **covenant** for light 10 (or even 15) ft wide along a small section only of the boundary of an adjoining building or land is not so readily understandable. If that had been the effect of the evidence, namely, that the original purpose of the **covenant** was to benefit the land to the east and west of the **covenant** area, rather than the land to the north presently owned by

the defendant, the case of the plaintiffs would have been strengthened immeasurably. However, there was no direct evidence as to the relevant surrounding circumstances in this connection and accordingly, I have not taken any such matters into account.

The reservation of the right of projecting

It remains to consider whether the plaintiffs are entitled to relief in respect of the reservation, contained in memorandum of transfer registered no A895502, of the right of projecting upon the eastern and northern side of the said "common light area", "such cornices, entablatures, windows, sills (or window-sills) or other decorative architectural features as they may deem fit" [words in brackets supplied]. The defendant, in its capacity as a successor or assign of the original transferors, claims to be entitled pursuant to this reservation, to the right of projecting as described upon the northern side only of the common light area, since the defendant now owns no land on the eastern side of that common light area.

First plaintiffs' right to release the reservation of the right of projecting

Attention was drawn on behalf of the plaintiffs to the fact that the relevant memorandum of transfer dated 22 December 1922 registered no A895502 provided, for the purposes of s 89 of the Conveyancing Act 1919, that "The land to which the benefit of this grant, **covenant** (b) and reservation is intended to apply is the land hereby transferred" (being part of the servient tenement in respect of this reservation and also being the area of land subject to the **covenant** for light and being the land edged pink in diagram 2 of Ex A), and to the fact that that land was land presently owned by the plaintiffs. It was also pointed out on behalf of the plaintiffs that it was provided in subpara (c) of para (b) of that memorandum of transfer that "This grant, **covenant** (b) and reservation may be released, varied or modified with the

consent of the said Edmund Richard Emil Resch, his executors, administrators or assigns" and that as the assign of Mr Resch in respect of the land transferred to Mr Resch by that memorandum of transfer, the first plaintiff, was also the party with whose consent the reservation could be released, varied or modified.

It was submitted, accordingly, on behalf of the plaintiffs that, in their capacity as owners of the land to which the benefit of the reservation of the right of projecting was stated to apply, and also in their capacity as the assign of the person with whose consent the reservation can be released, varied or modified (in the capacity of the first plaintiff as assign of Mr Resch) the plaintiffs were entitled to release the reservation of that right.

This submission on behalf of the plaintiffs involves construing the word "assigns" contained in subpara (c) of para (b) of the memorandum of transfer as meaning "assigns of the land hereby transferred", rather than as meaning "assigns of Mr Resch of his personal right to consent or to refuse to consent to the release, variation or modification of the reservation by the owner of the land entitled to the benefit of the reservation".

Prima facie, the words of subpara (c), referring to Mr Resch by name rather than to "the transferee", are apt to confer the relevant right upon Mr Resch personally, rather than in his capacity as transferee of the land being transferred to him. If that were the correct construction, the result would be that, if it were desired to release, vary or modify the reservation at some time in the future, after Mr Resch had ceased to be the owner of the relevant land, it would be necessary to identify the relevant executor or administrator of Mr Resch or the assign of Mr Resch's personal right to consent or refuse to consent; the relevant person might at that time have no connection with or interest in the land whatsoever. Such a result has been said to be, arguably, in conflict with the fundamental principles relating to the enforcement of **covenants,** as was adverted to in the following passage quoted from Woodman, *The Law of Real Property*, 1980, vol 1, pp 340-2:

> Generally, the owners of lands to be benefited by a restriction as to user being the persons who have the right to enforce the restriction, they would be necessary parties to any release, variation
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> *9 BPR 16,939 at 16,981*
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> or modification of the restriction. Section 88(1) is designed, inter alia, to cover the situation where some other persons are given rights in regard to such release, variation or modification, and there seems to have been no great consistency in the approach made to this problem by conveyancers -- to comply with the subsection there should be a clear identification of such persons ...
>
> These examples show that craftsmen of **covenants** did not always have a clear idea of the intention of the legislation and did not read the subsection with sufficient care. Paragraph (c) only requires that mention be made of persons, if any, other than the persons having, in the absence of agreement to the contrary, the right by law to release, vary or modify the restriction. The latter persons are the persons who have the right to enforce the **covenant,** and is a reference to the owners for the time being of the lands benefited; if it is desired that some other person has this right, then there should be a clear identification. Paragraph (d) amplifies this by requiring identification of any person whose consent to a release, variation or modification is stipulated for in the **covenant.**
>
> It is suggested that, in the majority of cases, a statement that the **covenant** may be released, varied or modified by the "transferor or his successors" is probably intended to mean that the action may be taken by the transferor whilst he is still the owner of the land benefited, or by his successors in title when he has disposed of that land. If this is the intention, the words "transferor or his successors" indicate the persons having by law the right to release, vary or modify the restriction, and there is no need to include such statement in the restriction. The examples given above indicate that, in the absence of very clear drafting, the identification of the person or persons who may have rights in regard to the release, variation or modification of a restriction may prove rather difficult. With some diffidence, it is suggested that, whenever the word "transferor" is used, either alone or in conjunction with other words, all persons holding land benefited by the **covenant** are necessary parties to its release, variation or modification.
>
> Technically under s 88(1)(c) there appears to be no objection to the right of release being given exclusively to the covenantee or some third party, and, if so, an appropriate form of release, variation or modification will be effective: *Whitehouse v Hugh* [1906] 1 Ch 253 ; [1906] 2 Ch 283; *Mayner v Payne* [1914] 2 Ch 555; *Jones v Sherwood Hills Pty Ltd* [1975] NSWSC (unreported); and this applies also in the case of a scheme of development: *Elliston v Reacher* [1908] 2 Ch 374 ; [1908] 2 Ch 665. However, it can be argued that to give rights, in regard to restrictive **covenants,** of any kind to a third party is in conflict with the fundamental principles relating to the enforcement of such **covenants.** It has already been stated that a covenantee must retain some land which can be protected by the restrictive **covenant,** at any rate to enforce the **covenant** against an assignee of the covenantor; *Formby v Barker* [1903] 2 Ch 539; *Chambers v Randall* [1923] 1 Ch 149 at 157; and an independent third party would not come within such description. There is also the further practical consideration that a purchaser of land, to which the benefit of a restrictive **covenant** is annexed, will show a marked lack of enthusiasm for a situation in which that **covenant** may be released, varied or modified

> without any reference to him, and the appropriate warning is found in *Jones v Sherwood Hills Pty Ltd* [1975] NSWSC (unreported); ; (1978) 52 Australian Law Journal, 223.

In the present case, as stated above, the relevant reference is to Mr Resch by name (as well as to his executors, administrators and assigns) and this suggests that the rights being conferred upon him were being conferred in his personal capacity rather than in his capacity as transferee of the land. This was the approach taken by Waddell J in *Jones v Sherwood Hills Pty Ltd* (unreported, SC(NSW), Waddell J, 8 July 1975) where the relevant provision was as follows:

> **Name of person empowered to release vary or modify restrictions secondly referred to in abovementioned plan**
>
> Lend Lease Homes Pty Ltd until 31st December 1985 and thereafter by the person or persons in whom the legal estate in fee simple is at the time vested in the land having a common boundary with the lot in respect of which such restrictions are proposed to be released varied or modified.

9 BPR 16,939 at 16,982

It will be observed, however, that in that case the right was given to the nominated party only for a limited time and that thereafter it was given to persons having a relevant fee simple interest in relevant land.

(See also the discussion in Bradbrook and Neave, 1981, p 362.)

In the present case I am of the opinion that, having regard, in particular, to the considerations adverted to by Mr Woodman, and having regard to the fact that the decision of Waddell J related to a provision under which the right was given to a party personally only for a limited time, the better view is that the word assigns in the present case should be construed as meaning assigns of Mr Resch in respect of ownership of the subject land, that is, should be construed as meaning the assigns of Mr Resch in his capacity of transferee. On that basis the first plaintiff is relevantly the assigns of Mr Resch for the purposes of subpara (c) of para (b) of the memorandum of transfer.

Conclusion

It follows, in my opinion that the submission in this connection on behalf of the plaintiffs, to the effect that the first plaintiff is entitled to release the reservation, should be upheld, and I will make a declaration accordingly.

I observe, and attention has been drawn to the fact that, it is, to say the least, somewhat unusual, that in a document in which the transferors reserve to themselves, their successors and assigns the right of projecting upon the eastern and northern side of the common light area, it should be provided that the land to which the benefit of that reservation was intended to apply was the land transferred to the transferee, being part of the servient tenement in respect of the reservation, rather than the land retained by the transferors. It might even have been arguable, although it was not argued, that the right of projecting over the servient tenement could not be said to be capable of benefiting the servient tenement. Equally unusual, so it seems, is the provision that the reservation of the right to project may be released, varied or modified by the transferee, Mr Resch, being the transferee of the land, or at least part of the land, which according to the terms of the reservation itself is to be subject to the transferor's right of projecting. In other words, in those circumstances, it would seem more logical that the land to which the benefit of the reservation was intended to apply should be the land retained by the transferors, that is, the land contained in the relevant certificate of title other than the land being transferred, and that the reservation could be released, varied or modified with the consent of the transferors, their successors or assigns, rather than by Mr Resch, the transferee, his executors, administrators or assigns. I note, however, in this connection that no claim has been made for rectification of the memorandum of transfer.

I observe in passing that, notwithstanding the terms of the reservation referring as it does to the said "common light area", that the land which is later expressly stated to be subject to the burden of the reservation is the land described in subpara (b) of para (b) of the relevant memorandum of transfer, being the land "contiguous to and immediately and

joining on the east the land hereby transferred having dimensions of 35 feet 7 inches in a north and south direction and about 5 feet in an east and west direction", which land is presently in the ownership of the first plaintiff. It is, on one view, only in respect of the northern end of that area, about 5 ft wide, that the defendant has the right of projecting, having regard to the fact that the first plaintiff is now the owner of the land on the eastern side of the land so described. Alternatively, on the theory that the operational part of the grant of the reservation prevails, the defendant has the right of projecting upon the northern side of the common light area which is 15 ft wide.

9 BPR 16,939 at 16,983

Right of first plaintiff to an order wholly extinguishing the reservation of the right of projecting

Although I have not heard any specific evidence directed to this matter, I note that I would also be prepared to find from the material in evidence that the defendant's right of projecting the items described, on either view as to the land burdened, secures no practical benefit to the defendant and further, that the defendant would not suffer any substantial injury if the reservation reserving that right of projecting was wholly extinguished.

I record that in this connection I have construed the words "cornices, entablatures, windows, sills (window-sills) [words in brackets supplied]" as ejusdem generis with the words "decorative architectural features" (although my conclusion would be the same if those words were not to be so construed ejusdem generic), and further that what is being referred to is decorative architectural features in the nature of architectural ornament on the side of a building erected across the northern boundary of either the 5 ft wide or the 15 ft wide land referred to. In this connection I have used the following definitions of those words taken from the *Concise Oxford Dictionary*, 8th ed, Clarendon Press, Oxford, 1990, having assumed no material change in the meaning of those words since 1922:

> Cornice: "a horizontal moulded projection crowning a building or structure, esp the uppermost member of the entablature of an order, surmounting the frieze".
>
> Entablature: "the upper part of a classical building supported by columns or a colonnade, comprising architrave, frieze and cornice".
>
> Sill: "a shelf or slab of stone, wood or metal at the foot of a window or doorway".

Having regard to the fact that it is now proposed that the side of the proposed Grace Bros development on the southern boundary of Dymocks lane will be a solid wall, except for the light well if it is not extinguished, and that the light well will be surrounded on three sides by solid walls, there would, in my opinion, be very few vantage points from which any such decorative architectural features on the southern side of any building erected on the Dymocks land could be observed. Arguably, from any such vantage points, such features might make any such building more attractive visually over that width of 10 or 15 ft. I would, however, not regard that fact as securing any practical benefit to the defendant and I would consider that the defendant would not be substantially injured if the reservation was wholly extinguished. Further, on the evidence, I find that there would be no other practical benefit to the defendant flowing from the right of projecting, that that right is not necessary for any reasonable purpose of the defendant and that its extinguishment would not in any way cause substantial injury to the defendant. Moreover, in my opinion, the existence of the reservation would also impede the only reasonable use of the affected land in the current circumstances as referred to earlier in this judgment.

Conclusion

I therefore conclude that the reservation of the right of projecting impedes the reasonable user of the subject land without securing practical benefit to the defendant and further, that its extinguishment would not substantially injure the defendant within the meaning of the relevant provisions of s 89 of the Act.

Accordingly, pursuant to the provisions of that section, I would, if asked, be prepared to make an order wholly extinguishing that reservation although it seems unnecessary to do so having regard to my finding that the reservation

may be extinguished by the first plaintiff.

I add that I would be of the same view, and for the same reasons, whether the defendant's right of projecting was, on its true construction, in respect of the whole of the so-called common light area being 15 ft wide or only in respect of the area 5 ft wide.

I also add that, should it be or become material, in my opinion, the land described in Schs 1 and 2 of the amended summons (being the two strips of land 10 ft wide and 5 ft

9 BPR 16,939 at 16,984

wide respectively) is subject to the reservation of the right of projecting of the defendant as contained in the memorandum of transfer dated 22 December 1922 registered no A895502, and also that that right is enforceable by the defendant, for the same reasons, mutatis mutandis, as I have held the **covenant** for light to be enforceable by the defendant.

I will hear argument as to costs on a future date convenient to the parties and to the court.

Declarations and orders

[1] The court makes the following declarations and orders:

[2] (1) A declaration that the land described in Sch 1 is subject to the burden of the restriction imposed by the **covenant** contained in para (a) of the memorandum of transfer dated 22 December 1922 and registered no A895502.

[3] (2) A declaration that the **covenant** referred to in para 1 is enforceable by the defendant.

[4] (3) An order that the **covenant** referred to in para 1 be wholly extinguished.

[5] (4) A declaration that the reservation of the right of projecting contained in para (b) of memorandum of transfer dated 22 December 1922 and registered no A895502 may be released varied or modified by the first-named plaintiff.

Schedule 1

That part of the land formerly in certificate of title 3322 folio 79 which was transferred from the commissioners of the Government Savings Bank of New South Wales to Edmund Richard Emil Resch by transfer A895502 dated 22 December 1922 and which is presently in FI 1/846494 of which Coles Myer NSW Ltd is the registered proprietor.

Schedule 2

That part of the land formerly in certificate of title 3322 folio 79 contiguous to and immediately adjoining the land transferred from the commissioners of the Government Savings Bank of New South Wales to Edmund Richard Emil Resch by transfer A895502 dated 22 December 1922 having dimensions of 35 ft 7 inches in a north and south direction and about 5 ft wide east and west and which is presently in FI 1/846494 of which Coles Myer NSW Ltd is the registered proprietor.

Editor's Note: Diagrams in Ex A cannot be reproduced.

MARGARET STONE
SOLICITOR

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Email Request: Current Document: 32
Time Of Request: Sunday, August 19, 2012 18:31:50