IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

No. 9925 of 2006

DONALD JAMES FRASER, CAROL YIN PING FRASER AND MARGARET ANN FRASER — Plaintiffs

v

ANTHONY ROCCO DI PAOLO AND MARIA DI PAOLO — Defendants

JUDGE:	COGHLAN J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	19 and 20 February 2008
DATE OF JUDGMENT:	18 April 2008
CASE MAY BE CITED AS:	Fraser v Di Paolo
MEDIUM NEUTRAL CITATION:	[2008] VSC 117

Real property – Restrictive Covenant – Whether plaintiffs established circumstances fitting s. 84(1)(a) or s. 84(1)(c) of the *Property Law Act 1958*

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr G. Garde AO RDF QC and Mr M. Townsend	Baker & McKenzie
For the Defendants	Mr S. Horgan	Best Hooper

HIS HONOUR:

1 The plaintiffs, by originating motion filed on 23 November 2006, seek:

> An order that, insofar as the restriction imposed by Instrument of Transfer No. A130130 affects the abovementioned land, being the land in Certificate of Title Volume 10107 Folio 978, or any part thereof, the same to be discharged, or alternatively modified so as to permit the erection of four additional dwelling houses on Lot 1 on Title Plan 118324D (formerly known as Lot 130 on Plan of Subdivision 026812).

2 In paragraph 4 of his affidavit dated 23 November 2006 in support of the application, the then solicitor for the plaintiffs, Mr S.A.M. Maideen, said:

> 4. This, my affidavit, is in support of an application in this Honourable Court to remove, or alternatively modify, a restrictive covenant imposed on the land on the grounds set out in Section 84(1)(a), (b) and (c) of the *Property Law Act* (Vic) ("the Act").

3 Section 84(1)(a), (b) and (c) of the Act is in the following terms:

> 84 **Power for Court to modify etc. restrictive covenants affecting land**
>
> (1) The Court shall have power from time to time on the application of any person interested in any land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) upon being satisfied—
>
> (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Court deems material the restriction ought to be deemed obsolete or that the continued existence thereof would impede the reasonable user of the land without securing practical benefits to other persons or (as the case may be) would unless modified so impede such user; or
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> (b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction whether in respect of estates in fee-simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed have agreed either expressly or by implication by their acts or omissions to the same being discharged or modified; or

(c) that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction:

Provided that no compensation shall be payable in respect of the discharge or modification of a restriction by reason of any advantage thereby accruing to the owner of the land affected by the restriction unless the person entitled to the benefit of the restriction also suffers loss in consequence of the discharge or modification nor shall any compensation be payable in excess of such loss; but this provision shall not affect any right to compensation where the person claiming the compensation proves that by reason of the imposition of the restriction the amount of consideration paid for the acquisition of the land was reduced.

4 It was not suggested on behalf of the plaintiffs that s 84(1)(b) was of application in this case.

5 The application therefore turns upon either of the two limbs in s 84(1)(a) or s 84(1)(c).

6 It was argued on behalf of the plaintiffs that, "by reason of changes in the character of the property or neighbourhood … the restriction ought to be deemed obsolete."

7 The subject land known as 1 Highland Avenue, East Oakleigh was transferred out of the Parent Title on 20 March 1956. The land was then known as Lot 130 on Plan of Subdivision 26812 and was more particularly described in Certificate of Title Volume 8131 Folio 532. The land in the Parent Title was approximately 48 acres. The relevant Plans of Subdivision had been created in 1951 and 1952. The Instrument of Transfer No. A130130 of the subject land contained the covenant which leads to the present application. The encumbrance was noted on the Certificate of Title. The covenant is expressed as follows:

> *And the said Richard William Casley and Mary Alison Casley DO HEREBY for themselves their heirs executors administrators and transferees registered proprietor or proprietors for the time being of the said land or any part or parts thereof COVENANT with the said George Samuel Gordon his heirs executors administrators and transferees registered proprietor or proprietors for the time being of the land remaining untransferred in the said Certificate of Title and every and any part thereof that they the said Richard William Casley and Mary Alison Casley their heirs executors administrators and transferees registered proprietor or proprietors for the time being of the land hereby transferred or any part or parts thereof will not at any time use the said land for the purpose of any trade or business and <u>shall not erect nor allow nor permit to be erected on the said land hereby transferred or any part or parts therefore more than one dwellinghouse</u> with usual outbuildings and fencing nor excavate carry away*

> *or permit to be excavated carried away or removed any earth clay stone gravel or sand therefrom except as may be necessary in connection with excavating for the foundations of any building to be erected thereon.*

8 In this case it is the underlined section which is sought to be modified. Such covenants were common at the time of the creation of this subdivision in 1952.

9 Certificate of Title Volume 10107 Folio 978 was later issued with respect to the land.

10 The application to remove or modify the covenant is so that five dwellings may be built on the subject land. Detailed plans have been submitted to the City of Monash for a Planning Permit to build five two storey units or townhouses on the subject land. The land is in excess of 1400 square metres in area but the development is a substantial one.

11 The defendants and three other owners of properties which had the benefit of the covenant objected. It followed that, unless the objections were vexatious, the planning authority could not make a decision which varied the covenant (see s 60(4) and (5) *Planning and Environment Act 1987*).

12 The application was refused in the following terms:

> In accordance with the provisions of Sections 60(4) and (5) of the *Planning and Environment Act 1987*, the Responsible Authority is not satisfied that the owners of the land benefited by the restrictive covenant applicable to the subject site; will be unlikely to suffer any detriment (including any perceived detriment) as a consequence of the removal of the restriction; or that the objections received are vexatious or not made in good faith.

13 It was that refusal which triggered the present application. Although the modification sought does not refer to the plans submitted to Council, it is common ground that the modification is for the purposes of obtaining a planning permit for the five units.

14 After proceedings were issued in this Court, Master Daly made orders directing the advertising of the application and for the sending of notice to some of those who had the benefit of the covenant (registered proprietors and mortgagees).

15 In response to the advertisements and notices, only the defendants have objected to the modification of the covenant.

16 The land which was originally subdivided is situated in South Oakleigh between Ferntree Gully Road and Dandenong Road. The subject land is at the Ferntree Gully Road end of the subdivision. At that end there are eight original lots facing onto Ferntree Gully Road, there is one lot immediately behind five of the lots facing Ferntree Gully Road. (These nine lots will be called the Ferntree Gully Road lots.) Highland Avenue runs north-south between Ferntree Gully Road and Dandenong Road. A short distance north of Albany Road, Highland Avenue is joined by Turnbull Avenue. The two streets form a "circle" with lots on both sides of each of the streets. After about 200 metres the two streets rejoin as Highland Avenue which then proceeds north to Ferntree Gully Road. I attach a copy of Plan of Subdivision LP 26812 which extends between Ferntree Gully Road and Albany Road.

17 Between the Ferntree Gully Road lots and the rest of this part of the subdivision is a drainage and sewerage easement and a recreation reserve. That area slopes down from Ferntree Gully Road and rises up again to the houses in the rest of that part of the subdivision. There is, therefore, a physical separation from the Ferntree Gully Road lots.

18 The subject land, No. 1 Highland Avenue (Lot 130), is the first lot on the south-western side of the reserve. In comparison with the eastern side of the reserve, the subject land and two lots adjoining it are almost, as it were, in the reserve.

19 Immediately adjacent to the subject land on the reserve is a Scout Hall with an outbuilding (prefabricated double garage). The intended focus of the proposed development is toward the reserve to which it has a "frontage" of about 56 metres.

20 Three distinct questions arise on this application:

1. Should the covenant be deemed obsolete (s 84(1)(a) of the Act)?

2. Would the continued existence of the covenant impede the reasonable user of the land without securing practical benefits to other persons or (as the case may be) would, unless modified, so impede such user?

3. Would the proposed modification substantially injure the persons entitled to the benefit of the restriction?

21 It is, I think, fair to say that the argument which was principally relied upon by the plaintiff is that the proposed modification, in terms of this actual proposal, would not substantially injure the person entitled to the benefit of the restriction and in particular the defendants i.e. in accordance with s 84(1)(c).

22 Evidence was led to support an argument that the covenant under consideration was obsolete. That argument was set out in written submissions. The matter, although relied upon, was not pressed in oral submissions before me.

23 Two expert witnesses were called, Mr R.W. Easton on behalf of the plaintiff and Mr G. Gattini on behalf of the defendant. There was some disagreement as to how "neighbourhood" should be defined but ultimately Mr Easton accepted that Mr Gattini's "neighbourhood" from Lawson Street to Ferntree Gully Road was reasonable. That would represent about two thirds of the land which had been involved in the Parent Title.

24 The changes in the neighbourhood are most marked in relation to the lots facing or close to Ferntree Gully Road. The changes more proximate to the subject land have been more modest with the largest number of units on the southern side of the reserve being three. The other nearby changes allow for dual occupancy or its equivalent. The site formerly occupied by the Oakleigh High School has been redeveloped. That development consists of a number of single dwellings although on smaller allotments than those contained in the original subdivision.

25 In general, however, this is an intact residential neighbourhood which has undergone a moderate degree of change which has the capacity of increasing population density. In the

absence of detailed a demographic study, it is not possible to say whether or not the population has increased to any marked degree.

26 As Morris J explained in *Stanhill Pty Ltd v Jackson & Ors*[1] the traditional view of the term "obsolete" was expressed by Adam J in *Re Robinson* when he said[2]:

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

27 For his part, Morris J would not restrict the meaning of "obsolete" in that way but rather, looked at the question by deciding whether or not the covenant was outmoded.

28 I am satisfied that whatever the test is, the restrictive covenant in this case should not be deemed to be obsolete.

29 As I indicated to the parties, I conducted an inspection of the land. I did so in the presence of my associate and tipstaff. We both drove and walked around the area. It assisted me in understanding the quite detailed evidence which emerged from both Mr Easton and Mr Gattini.

30 It is true to say that there have been changes in the neighbourhood. It has, however, retained its residential character and predominantly a character of single dwellings per allotment. I am prepared, for these purposes, to separate from the general consideration of the area, the Ferntree Gully Road lots.

31 I would go so far as saying that rather than being obsolete, the covenant in this case still came with benefits. The very existence of the provisions contained in sub-sections 60(4) and (5) of the *Planning and Environment Act 1987* demonstrate that.

32 When consideration is to be had to the second limb of s 84(1)(a) which has commonly been referred to as the reasonable user provision, there is also a debate as to what is the appropriate test to apply.[3]

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1 (2005) 12 VR 224 at 231.
2 [1972] VR 278 at 282.

33 This is not a case where the modification sought is for two or three dwellings on the lot. Given the size of the allotment I do not think that a use which involved two or three dwellings would be outside "reasonable" use. When five dwellings are being considered I am not satisfied that it has been demonstrated that such a proposal is a reasonable use of the land. Perhaps more importantly I am satisfied that the continued existence of the covenant to prevent the erection of five dwellings does secure practical benefits to the surrounding landholders, including the plaintiffs.

34 I have said earlier that this case really turns upon the question as to whether or not this particular modification, "will not substantially injure persons entitled to the benefit of the restriction".

35 There are a series of competing considerations as what is meant by, "substantially injure" in s 84(1)(c). It is important to note the similar English provisions did not contain the word "substantially".[4] Although Morris J in *Stanhill* expressly said:

> In my opinion, the language used in paragraph (c) does not require a case to be made that the proposed discharge or modification of a restriction will not harm the persons entitled to the benefit of the restriction. The hurdle is not this high. Rather it is sufficient to show that the proposed discharge or modification will not cause harm to the persons entitled to the benefit of the restriction which could be regarded as being of real significance or importance. This will require a judgment call in the particular circumstances being considered; it does not admit some universal answer based upon the attitude of the beneficiary, the original purpose of the covenant or any other similar factor.[5]

36 The extent to which that is in conflict with what is said by Gillard J in *Re Cook*[6] is moot. Gillard J said[7]:

> Such injury can only be properly assessed by a comparison between the benefits intended to be conferred and actually conferred by the covenant initially on the persons entitled thereto and the resultant benefits if any remaining to such persons after the covenant has been modified. If from the evidence it appears that the difference between the two will not be substantial, then the applicant

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3 *Stanhill Pty Ltd v Jackson & Ors* (2005) 12 VR 224 at 237, 245.
4 *Re Robinson* [1972] VR 278 at 285.
5 12 VR 224 at 238.
6 [1964] VR 808.
7 At 810.

> will have established a case for the exercise of the court's discretion under paragraph (c). In order to make this comparison it is proposed to consider what benefits the covenant over the subject land may have conferred upon the persons entitled thereto, and then to assess whether the modification of such covenant would or would not substantially diminish the benefit so discovered.

In my view, Gillard J was doing no more than describing the way by which the injury to the beneficiary might be measured. The injury which must be looked at is injury to benefit of the restriction. If that is to be established, the comparison must be between the benefit originally enjoyed and the effect that this modification will have upon it. Almost any modification of the restriction will diminish the benefit enjoyed. Some diminution will be slight, others will be substantial. It is a matter to be established by an examination of all the material.

37 The following matters are urged upon by the plaintiffs:

(a) The town planning considerations have been or appear to have been resolved in favour of the plaintiffs.

(b) Much of what has happened in the area has already diminished the benefit to be enjoyed by the defendants.

(c) There is very little, if any, direct impact upon the defendants by the erection of these five dwellings.

38 It was submitted on behalf of the defendants who live at 12 Highland Avenue (Lot 127) that the matters relating to the bulk of the proposed buildings, landscaping, effect on the recreation reserve, traffic, parking and increased density are to their disadvantage . The defendants are not the only persons who have the benefit of the covenant. A large number of the properties in the "circus" area of Highland Avenue have the benefit of the covenant and whether objectors or not, I must have regard to the effect on them.

39 The defendants, however, are the only beneficiaries to object in this Court, although some of the other beneficiaries did object to the local Planning Authority (City of Monash).

40 One feature of this case is that Gillard J in *Re Stani*[8] refused an application to modify this very covenant with respect to Lot 94 on this Plan of Subdivision. That decision was approved by the Full Court[9]. Gillard J said in dismissing the application:[10]

> The question is, "What was the purpose of the plan of the sub-divider and what practical benefits flow from it?" Having arrived at an answer to these questions, the next matter to look at is how will these practical benefits be affected by the modification proposed.
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> I repeat, the real benefit of this design and the reason for the imposition of the covenant seems to be to ensure a quiet residential area with plenty of light and air. It follows, therefore, anybody who owns property in that area and resides there, have these practical benefits. Any erosion of that plan, as I have said, must lead to an injury in the sense that the benefit must be eroded. I further, however, believe that if one were to approve of the modification in the way that the applicant proposed, it would constitute a substantial injury. It must diminish the beneficial nature of the covenant. Substantial injury would be suffered by a modification to the present scheme. Without finding affirmatively that that is necessarily so, my state of mind is such that I would choose to express it that the applicant has not satisfied me that no substantial injury will be suffered by the modification proposed.

41 The Full Court said:[11]

> Having considered the application insofar as it was based on s.84(1)(a), we turn to the submission under s.84(1)(c). It is to be observed that the Victorian legislature introduced the word "substantially" in paragraph (c), thus differing from the equivalent English statute. Whether the addition of the word "substantially" changes the nature of the test to be applied in considering the possible injury to the persons entitled to the benefit of the restriction has been the subject of some divergence of views. Adam J in *Re Robinson* (1972) VR 278 at 284, was of the opinion that in the case before him it made no difference. He referred to *Ridley v Taylor* (1965) 1 WLR 611, where Russell LJ at p.622 pointed out that the purpose of paragraph (c) was "to preclude vexatious opposition cases where there is no genuineness or sincerity or bona fide opposition on any reasonable grounds." Having regard to the purpose of paragraph (c) it may well be that this is the correct view, that in other words any injury sufficient to prevent the Court modifying the restriction must be something more than unsubstantial, must be real and not a fanciful detriment: *Re Cook* (supra). In the long run the test to be applied is similar to that to be applied in determining under paragraph (a) whether the continued existence of the restriction would secure practical benefit to other persons: see *Re Ghey and Galton's Application* (supra) at pp.659-660, and *Re Robinson* (supra) at p.284.

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8 Unreported, 25 March 1976.

9 Unreported, 7 December 1976.

10 At page 9.

11 At page 10.

42 These decisions were made more than 30 years ago but they do give an insight into the importance of the rights which go with a covenant beyond town planning rights .

43 Each of these cases has to be decided on its own facts. At the time of the decision of Gillard J the only "modifications" in the area appeared to be unlawful. They had occurred on Lots 149 and 74. There have since been many changes in the area.

44 I am satisfied that it can be said that the present proposal is one which would be likely to increase population density. Although it should be noted that the present house on Lot 130 has been used for semi-institutional purposes and that there are seven bedrooms in the house.

45 The other matter to be considered is the size and position of the subject land. The lot is much bigger than many of the lots in the subdivision. The lot faces onto the recreation reserve. The amenity of the recreation reserve, in one sense of lot 130 in particular, has been affected by the erection of the Scout Hall and the outbuilding associated with it.

46 The plans which have been provided indicate that the facing of the development is out towards the reserve. The local planning authority regards the proposal as acceptable in planning terms.

47 I am satisfied that there will be some detrimental effect to the local owners including some of those having the benefit of the covenant as a result of the usual bulk of the development. Although the recreation reserve, an important community resource, is somewhat "spoiled" by the presence of the Scout Hall, the proposed development would dominate the area of the reserve nearest to many of those who have the benefit of the covenant. In that regard it affects the defendants, despite the fact that they live 120 metres away. The proposed development will represent a large visual bulk along almost the whole of the 56 metre boundary facing the reserve.

48 The plaintiffs must satisfy me that those who have the benefit of the covenant would not suffer substantial injury as a result of the modification of the covenant.

49 The next question is whether or not a decision to modify the covenant would be a precedent which affected other lots. Lot 130 is very large, over 14,000 square metres and abuts the

recreation reserve. Where it abuts the reserve is very close to the Scout Hall. The proposed development does not impact on the reserve as it otherwise might. The overall facing of the development is towards the Ferntree Gully Road lots over the recreation reserve.

50 The major difficulty I have is that associated with a modification to allow for four additional dwellings. One, if not the most important, benefit of this covenant is to limit the density of housing. I have already pointed out that I do not regard what has happened on the Ferntree Gully Road frontage as being relevant to this application. The focus of these lots is away from Highland Avenue.

51 The most substantial modification which has occurred in Highland Avenue is that on Lot 132 where three dwellings have been constructed.

52 The issue becomes whether or not the special features of Lot 130 would diminish the injury likely to be suffered by those who have the benefit of the covenant.

53 These are not only matters of fact, they are questions of degree. A modification of the covenant does diminish the benefit which it confers. The question is whether the plaintiffs have satisfied me that either there is no injury or that the injury is other than substantial.

54 Although there are some special features which attach to Lot 130, namely its size and position, the granting of a modification to allow four additional dwellings would have a great impact upon the future enforcement of the covenant together with matters adverted to in paragraph 47.

55 It does not seem to me that just because the proposal is or would be acceptable in town planning terms that that consideration can overwhelm the issues which arise because of the existence of the covenant. The argument that a single dwelling with less restriction as to set back and landscaping does not advance the matter either.

56 I am satisfied that the immediate impact of this proposal on the amenity of the defendants would not be great but what would be diminished is the value of the covenant.

57 It would be difficult to maintain the covenant if the proposed modification were allowed.[12] That is not to say that modifications equivalent to the proposed modification would be readily made but it would undermine the single dwelling covenant to a large degree.

58 Counsel for the plaintiffs referred me to a number of decisions of judges of this court, in particular the decisions in *Milbex Pty Ltd* (ACN 109 687 952)[13] and Michael *Bevilacqua v Merakovsky and ors*[14]. Each case falls to be decided on its own facts. There is nothing in those cases which would lead me to decide this case differently.

59 I would not otherwise exercise my discretion in favour of the proposal. In this case because the proposal has been so specific I would not make any other modification to the covenant. In any event that possibility, although canvassed in passing by Mr Townsend for the plaintiffs, was not addressed by the defendants. It may be that some of the other owners who have the benefit of the covenant might have views although, given the history of this matter that is unlikely.

60 It follows from what I have just said that the plaintiffs have not satisfied me that substantial injury would not occur to those having the benefit of the covenant as a result of the proposed modification.

61 It is the order of the Court that the application be dismissed.

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12 (See Eames J *Greenwood v Burrows* (1992) VCLP 65, 183, 65, 200).
13 [2006] VSC 298.
14 [2005] VSC 235.