IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

No. 6799 of 2005

GEORGE VRAKAS and KATHY VRAKAS — Plaintiffs

v

REGISTRAR OF TITLES and OTHERS — Defendants

JUDGE:	Kyrou J
WHERE HELD:	Melbourne
DATE OF HEARING:	17-18 July 2008
DATE OF JUDGMENT:	28 July 2008
CASE MAY BE CITED AS:	Vrakas v Registrar of Titles
MEDIUM NEUTRAL CITATION:	[2008] VSC 281

Real property – single dwelling restrictive covenant – application to discharge or modify – applicable legal principles.

Section 84, *Property Law Act 1958* (Vic).

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr P G Nash QC	John Dimitropoulos
For the Defendants	Mr G Garde QC and Mr J Samargis	Best Hooper

HIS HONOUR:

Introduction and summary

1 This is an application under s 84(1) of the *Property Law Act 1958* (Vic) ("PL Act") to discharge or modify single dwelling restrictive covenants burdening the plaintiffs' land which is located at 54 Riverside Avenue, North Balwyn and comprises the whole of lot 372 on plan of subdivision numbered LP6651 ("LP6651") and part of lot 371 in that subdivision.[1] I refer to this land interchangeably as "the plaintiffs' land", "the property" or "54 Riverside Avenue".

2 In 2006, Hargrave J determined, as a preliminary question in this proceeding, that there are persons who are entitled to the benefit of the single dwelling covenants burdening the plaintiffs' land.[2] Following an appeal to the Court of Appeal, consent orders were made which had the effect of identifying the beneficiaries of the covenants as Lyndy and Gregory Smart, the owners of 47 Cascade Street (lot 311 in LP6651), Kathryn Carberry, the owner of 49 Cascade Street (lot 312), David and Vivian Gung, the owners of 52 Cascade Street (lot 335), Vicky and Daniel Samargis, the owners of 39 Bulleen Road (lot 341), Thetis Makroyiannis, the owner of 37 Bulleen Road (lot 342) and the owner of 62 Cascade Street (lot 340), which, by the time of the hearing before me, became a company owned by the plaintiffs. That company bought lot 340 from the deceased estate of John Brotchie. The owners of all the lots referred to above (other than lot 340) oppose the plaintiffs' application and ultimately became defendants to the proceeding ("defendants"). The other defendant, the Registrar of Titles, did not participate in the proceeding.

3 The plaintiffs originally sought the discharge of the covenants, or alternatively, a modification that would permit the construction of five dwelling houses on their land. During the hearing before me, I granted leave to the plaintiffs to amend their originating motion to substitute as the relief sought, the discharge of the covenants or their modification to enable the construction of two dwelling houses.

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1 Although LP6651 has been superseded, for convenience I identify all the relevant properties by reference to that plan. The plaintiffs' land is now lot 1 on plan of subdivision numbered 57301 and is more particularly described in certificate of title volume 8424 folio 864.

2 See *Vrakas v Mills* (2007) V ConvR ¶54-773; [2006] VSC 463.

4 For the reasons appearing in this judgment, I have decided to dismiss the plaintiffs' application.

Facts

5 The events that gave rise to the covenants which burden the plaintiffs' land and the procedural history of this proceeding are set out in the judgment of Hargrave J.[3] I will not repeat the matters dealt with by his Honour, except to the extent necessary to explain my decision.

6 The land owned by the plaintiffs and the defendants is located within the "Riverside estate" in North Balwyn ("estate"). The estate is bounded by Burke Road to the west, Doncaster Road to the south, Bulleen Road to the east and parts of The Boulevard, Kyora Parade and a drainage reserve to the north. The estate was created in 1914 or 1915 by the subdivision of two farms. One farm was owned by Sarah Robinson and was the subject of LP6651 ("Robinson subdivision"). The other farm was owned by George Freer-Smith and was the subject of plan of subdivision numbered LP6652 ("Freer-Smith subdivision"). Of the total of 401 lots in the estate, 341 are in the Freer-Smith subdivision and 60 are in the Robinson subdivision. The whole of the Robinson subdivision lies to the east of The Boulevard and parts of the Freer-Smith subdivision also lie to the east of The Boulevard. The land owned by the plaintiffs and the defendants is in the Robinson subdivision. Annexed to these reasons is a drawing prepared by the defendants' town planning expert, Robert Milner, showing the land owned by the plaintiffs and each of the defendants. With the consent of the parties, I conducted a view of the relevant properties accompanied by my two associates.

7 The lots in the estate were sold progressively from 1923 until well into the 1940s. The usual practice was for each instrument of transfer by which a lot was sold out of the head title of either the Robinson subdivision or the Freer-Smith subdivision to contain a covenant which, relevantly, required "that no building shall at any time hereafter be erected on the Lot hereby transferred save one dwelling house with the usual and necessary outbuildings thereto and that such dwelling house shall not be of less value than Five Hundred Pounds". Each

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3 *Vrakas v Mills* (2007) V ConvR ¶54-773; [2006] VSC 463.

covenant enured for the benefit of each lot in the subdivision which remained unsold and thus formed part of the head title at the time the lot burdened by the covenant was sold. Nearly all of the lots in the estate were subject to a single dwelling covenant. Of the 60 lots in the Robinson subdivision, 56 of them, including lots 371 and 372 of LP6651, were and remain subject to a single dwelling covenant in the form set out above.

8 The plaintiffs' land is a consolidation of two parcels of land, namely the whole of the land in lot 372 and a small portion of land at the southern end of lot 371, and has an inverted "L" shape. At the time lot 372 was transferred out of the Robinson head title on 22 June 1942, four lots remained in that head title, namely lots 311, 312, 340 and 342. The latter lots therefore took the benefit of the single dwelling covenant burdening lot 372. At the time of the initial transfer of lot 371 out of the Robinson head title on 26 April 1940, there were six lots left in that head title, namely lots 311, 312, 335, 340, 341 and 342 and they took the benefit of the single dwelling covenant burdening lot 371.

9 There was extensive affidavit evidence before me. The main evidence for the plaintiffs was given by Mr Vrakas and the plaintiffs' town planning expert, Ian d'Oliveyra. The main evidence for the defendants was given by Mrs Smart, Mrs Carberry, Mr and Mrs Gung, Mr and Mrs Samargis, Mrs Makroyiannis, Henry Spry (the former joint proprietor of the plaintiffs' land), Con Papadopoulos (the owner of 46 Riverside Avenue) and Mr Milner.

10 Mr Spry's wife bought lot 372 on 15 December 1944. Mr and Mrs Spry eventually became joint proprietors. They built their family home on the property in 1952. On 22 January 1962, they bought the rear portion of lot 371 and subsequently built a swimming pool on that land. Mr and Mrs Spry sold the property to the plaintiffs on 12 April 2003.

11 Mr Vrakas is a licensed real estate agent and has been since 1988. He gave evidence that he and his wife bought 54 Riverside Avenue at auction on 12 April 2003 without first inspecting the property. Mr Vrakas said that he arrived at the auction after it had commenced and did not hear any details of the restrictive covenants on that day. He said that he was not aware of the covenants until his solicitor told him about them in the week after the auction.

12 The plaintiffs have lived in the property since 13 August 2003. They have a young son. They applied to this Court to discharge or modify the restrictive covenants affecting their land so as to permit the construction of five dwelling houses, on 24 June 2005. In his affidavit sworn on 14 October 2005, Mr Vrakas deposed as follows:

> [This] is not an application seeking approval of a plan of subdivision or in anticipation of the lodging of a plan of subdivision. The subject land contains our matrimonial home where we reside with our young son. We have no intention to sub-divide the property in the immediate future. It is possible that in the future, we may wish to do so, but we have no such intention at present. We bring this application at the present time because we believe that the covenants are obsolete and redundant, particularly as the property lies within the City of Boroondara Planning Scheme and future development of the property should be controlled solely by that Scheme.
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> We also believe that should we wish to sell our property it would be more valuable without the restrictive covenants. We may also wish in the future to erect on our property a separate dwelling (sometimes called a "granny flat") for our parents or our children. This is a modern trend which we would like to have the freedom to follow untrammeled by the covenants.

13 In cross-examination, Mr Vrakas said that the building of a granny flat is no longer under consideration. He said that he and his wife do not have any specific plans or proposals in relation to the property and are pursuing the application to discharge or modify the covenants (now in relation to two dwelling houses) in order to "expand" their options. Mr Vrakas said that he has at no time prepared any concept plans or other plans in relation to the further development of the property. He agreed that part of his motivation for bringing the application to this Court is to increase the value of the property.

14 In November 2007, a company owned by the plaintiffs purchased 62 Cascade Street. This property is lot 340 on LP6651 and has the benefit of the restrictive covenants burdening the plaintiffs' land. Lot 340 is one of the four lots on the Robinson subdivision that is not subject to a single dwelling covenant. In November 2007, the plaintiffs' company also purchased 57 Riverside Avenue, which abuts the rear of 62 Cascade Street. The plaintiffs' company successfully applied to the Boroondara City Council to realign the boundary of 62 Cascade Street and 57 Riverside Avenue so as to increase the size of 62 Cascade Street. Mr Vrakas gave evidence that his company has not decided whether to replace the existing house on 62

Cascade Street with a single house or to pursue other options. Under cross-examination, Mr Vrakas denied that he is a developer. He described himself as an investor.

15 The defendants' evidence emphasised the special character of their neighbourhood and the estate generally, particularly the absence of town houses and units, the spacious homes with wide frontages and generous setbacks, the landscaped gardens and the quiet tree-lined streets which made living in the area enjoyable for them and their families. This special character attracted them to the estate in the first place. They attributed this special character largely to the single dwelling covenants that apply in the estate. There was evidence that it is well known within the estate that single dwelling covenants apply in the estate and that the covenants are always mentioned at auctions for properties in the estate. A number of defendants gave evidence that they often drive and go on walks around the estate. Mrs Samargis said that she walks along Riverside Avenue past the plaintiffs' land a few times a week.

16 The basic thrust of the evidence of the plaintiffs' expert, Mr d'Oliveyra, was that as a result of more effective modern town planning controls, the single dwelling covenants affecting the plaintiffs' land are outmoded and obsolete. He said that such covenants "are of a relatively superficial nature, and are aimed only at achieving a modest outcome in town planning terms", as they do not guarantee matters such as architectural style, bulk, height and setbacks. Mr d'Oliveyra said that unlike a single dwelling covenant, modern town planning controls can ensure outcomes such as minimum setbacks from the street, adequate parking and preservation of neighbourhood character and general amenity. He said that removal of the covenants to permit more than one dwelling house on the plaintiffs' land was unlikely to materially affect the defendants. He said that such removal would not adversely affect traffic flows and street parking and that stricter town planning controls would apply if two or more dwelling houses were built instead of one. His report identified a number of lots in the Robinson subdivision where the original house was demolished and replaced by a modern house. He said that the new houses occupy a substantial part of the relevant site, have limited setback from the street and limited landscaping, and are inconsistent with the established character of the area.

17 Although Mr d'Oliveyra's evidence supported the discharge of the single dwelling covenants, it did not support a modification of the covenants. This is made clear in the following statements in Mr d'Oliveyra's report, which he adhered to when he gave oral evidence:

> It is my opinion … that given the design-driven nature of current Planning Scheme controls for multi-unit housing development, it would not be appropriate to speculate on what number of dwellings might be able to be achieved in a redevelopment of the subject land, without the benefit of a detailed design proposal and accompanying site context material.
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> …
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> I agree with Mr Milner that a five-unit development of the subject land would probably be inappropriate and that consideration of that or some alternative development scenario without the benefit of a detailed design proposal and in the absence of the checks and balances of the planning permit process would be ill-advised.
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> …
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> In my opinion the Covenants involved in [t]his case are obsolete and should be discharged. It follows therefore that a modification of the Covenants in a way that would allow some particular form of multi dwelling development (whether this be for five dwellings or some lesser number) would not be appropriate.

18 The defendants' expert, Mr Milner, gave evidence that the Robinson subdivision is characterised by quality homes built in the 1930s, 1940s and 1950s, with generous setbacks from the street, a single cross-over and driveway, landscaped gardens and established trees. He said that although some modern homes were recently built on the Robinson subdivision, the houses in the subdivision had remained substantially intact. He attributed this to the single dwelling covenant which affects the vast majority of the properties in the subdivision. He said that although such a covenant does not directly require generous setbacks and landscaping, it indirectly produces these because it creates a low density living environment. Mr Milner's report of 27 September 2007 attached a series of aerial photographs of the estate which shows how the area was developed between 1945, 1975 and 2007. In 1945, there were many vacant lots in the Robinson subdivision and vegetation was limited. Since that time, houses were built on all of the lots in the Robinson subdivision and vegetation had increased considerably, including the creation of a park at the corner of Cascade Street and Bulleen Road.

19 Mr Milner said that the immediate neighbourhood for the purposes of the plaintiffs' land is bounded by Cascade Street to the north, The Boulevard to the west and to the south and Bulleen Road to the east. He said that the plaintiffs' land is at the heart of the Robinson subdivision and that the construction of more than one dwelling house on the plaintiffs' land would cause injury to all other properties in the neighbourhood, including those of the defendants, because it would represent the first significant departure from the single dwelling environment that characterises the neighbourhood and the estate. He said that the insignificant number[4] of departures from the single dwelling sites that have already occurred in the estate (on the few lots that are not subject to a single dwelling covenant) are all on the periphery of the estate and do not significantly detract from the overall single dwelling environment.

20 Mr Milner said that a departure from a single dwelling on the plaintiffs' land would be conspicuous and would significantly detract from the single dwelling environment of the neighbourhood. It would also set a precedent which would make other properties in the neighbourhood, particularly the properties with large land area such as 47 and 49 Cascade Street, vulnerable to subdivision with consequential impairment of the low density housing which residents of the neighbourhood enjoy. He said that departure from the prevailing single dwelling environment would change the character of the neighbourhood by leading to greater bulk, removal of vegetation and reduction in setbacks. This in turn would lead to higher density living, reduce the feeling of openness, detract from the garden character of the neighbourhood and reduce the amenity enjoyed by the defendants.

21 Mr Milner said that single dwelling covenants have not been superseded by modern town planning controls because those controls have discretionary elements that can result in multiple dwelling houses being constructed per lot whereas a single dwelling covenant guarantees a single dwelling per lot while the covenant remains intact.

Section 84 of the PL Act and relevant legal principles

22 Section 84(1) of the PL Act provides:

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4 It appears to be common ground that there are less than 10 such departures.

> 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 … upon being satisfied –
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> (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) …
>
> (c) that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction …

23 The principles that govern an application to discharge or modify a restrictive covenant under s 84 of the PL Act may be summarised as follows.

24 Section 84(1)(a) has two limbs. In essence, the first limb is that, due to changes in the character of the property or neighbourhood or other circumstances, the covenant is obsolete, and the second limb is that the covenant's continued existence would impede the reasonable user of the land without practical benefits to other persons.[5] An applicant need only establish one of these limbs in order to have a right to a remedy under s 84(1)(a), subject to the court's residual discretion (see below).

25 In relation to the first limb of s 84(1)(a), what is the "neighbourhood" must be determined as at the date of the hearing, rather than the date of the covenant.[6] What is the "neighbourhood" is a question of fact.[7]

26 A covenant is "obsolete" if it can no longer achieve or fulfil any of its original objects or purposes or has become "futile or useless".[8] A covenant is not obsolete if it is still capable of

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5 *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 7; *Re Alexandra* [1979] VR 55, 57-8; *Greenwood v Burrows* (1992) V ConvR ¶54-444, 65 192 ("*Greenwood*").

6 *Re Miscamble's application* [1965] VR 596, 597, 601 ("*Miscamble*"); *Re Pivotel Pty Ltd* (2001) V ConvR ¶54-635; [2000] VSC 264, [29] ("*Pivotel*").

7 *Miscamble* [1965] VR 596, 602; *Greenwood* (1992) V ConvR ¶54-444, 65 196.

8 *Miscamble* [1965] VR 596, 597, 601; *Re Markin* [1966] VR 494, 496; *Re Robinson* [1971] VR 278, 281; *Greenwood* (1992) V ConvR ¶54-444, 65 196 - 65 197; *Pivotel* (2001) V

fulfilling any of its original purposes, even if only to a diminished extent.[9] The test is whether, as a result of changes in the character of the property or the neighbourhood, or other material circumstances, the restriction is no longer enforceable or has become of no value.[10] If a covenant continues to have any value for the persons entitled to the benefit of it, then it will rarely, if ever, be obsolete.[11] A covenant could be held to be not obsolete even if the purpose for which it was designed had become wholly obsolete, provided that it conferred a continuing benefit on persons by maintaining a restriction on the user of land.[12]

27 Strictly speaking, the inquiry is as to whether the restriction of user created by the covenant is obsolete, rather than as to whether the covenant itself is obsolete.[13]

28 In relation to the second limb of s 84(1)(a), to establish that a covenant would impede the reasonable user of the land, it must be shown 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".[14] Whether this is so is essentially a question of fact.[15]

29 It is not sufficient merely to show that the continued existence of the covenant would impede a particular reasonable use which is proposed by the applicant.[16] The applicant must show that the restriction will impede all reasonable uses.[17]

ConvR ¶54-635; [2000] VSC 264, [31]-[33].

9 *Miscamble* [1965] VR 596, 597; *Greenwood* (1992) V ConvR ¶54-444, 65 197.

10 *Greenwood* (1992) V ConvR ¶54-444, 65 196. See also *Miscamble* [1965] VR 596, 601.

11 *Re Robinson* [1971] VR 278, 282; *Greenwood* (1992) V ConvR ¶54-444, 65 197.

12 *Greenwood* (1992) V ConvR ¶54-444, 65 197 - 65 198.

13 *Greenwood* (1992) V ConvR ¶54-444, 65 194.

14 *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 8; *Re Alexandra* [1979] VR 55, 58; *Pivotel* (2001) V ConvR ¶54-635; [2000] VSC 264, [34]; *Bevilacqua v Merakovsky* [2005] ANZ ConvR 504; [2005] VSC 235, [23] ("*Bevilacqua*").

15 *Re Alexandra* [1979] VR 55, 58.

16 *Miscamble* [1965] VR 596, 602-3.

17 See the cases referred to in *Stanhill Pty Ltd v Jackson* (2005) 12 VR 224, 233 [17] fn 15 ("*Stanhill*").

30 "Practical benefits" within the meaning of the second limb of s 84(1)(a) are any real benefits to a person entitled to the benefit of a restrictive covenant and are not limited to the sale value of the land benefited by the covenant.[18]

31 It must be established that the covenant is not necessary for any reasonable purpose of the person who is enjoying the benefit of it.[19]

32 If a relaxation of the restriction imposed by a covenant would be likely to lead to further applications of a similar nature, resulting in a detrimental change to a whole area, this "precedential" effect may be relevant in determining whether the restriction secures any practical benefits.[20]

33 Whether there are any practical benefits to other persons is a question of fact.[21]

34 In relation to s 84(1)(c), the test for whether a discharge or modification of a covenant would "substantially injure" a person entitled to the benefit of the covenant is similar to that in relation to "practical benefits" in the second limb of s 84(1)(a).[22]

35 Section 84(1)(c) requires a comparison between the benefits initially intended to be conferred and actually conferred by the covenant, and the benefits, if any, which would remain after the covenant has been discharged or modified – if the evidence establishes that the difference between the two (that is, the injury, if any) will not be substantial, the ground in s 84(1)(c) is made out.[23]

36 The injury must not be unsubstantial, and must be real and not a fanciful detriment.[24]

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18 *Re Robinson* [1971] VR 278, 283; *Pivotel* (2001) V ConvR ¶54-635; [2000] VSC 264, [36].

19 *Re Alexandra* [1979] VR 55, 59; *Pivotel* (2001) V ConvR ¶54-635; [2000] VSC 264, [35]; *Bevilacqua* [2005] ANZ ConvR 504; [2005] VSC 235, [23].

20 *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 9-10.

21 *Re Alexandra* [1979] VR 55, 59.

22 *Re Robinson* [1971] VR 278, 284; *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 10; *Pivotel* (2001) V ConvR ¶54-635; [2000] VSC 264, [37]; *Bevilacqua* [2005] ANZ ConvR 504; [2005] VSC 235, [24].

23 *Re Cook* [1964] VR 808, 810-11; *Fraser v Di Paolo* [2008] VSC 117, [36] ("*Fraser*").

24 *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber

37 It is not enough for the applicant merely to prove that there will be no appreciable injury or depreciation in value of the property to which the covenant is annexed.[25]

38 A lack of specific plans makes it more difficult for an applicant to show that there will be no substantial injury to persons entitled to the benefit of a covenant.[26]

39 The prospect that, if the application for the discharge or modification of a covenant were granted, that might be used to support further applications in a similar vein, may be relevant.[27] Such "precedent value" may, in an appropriate case, of itself be a factor demonstrating that an applicant fails to establish the requirements in s 84(1)(c).[28]

40 Whether a person entitled to the benefit of the covenant would be substantially injured within the meaning of s 84(1)(c) is a question of fact.[29]

41 Town planning principles and considerations are not relevant to the Court's consideration of whether an applicant has established a ground under s 84(1).[30]

42 The applicant has the onus of establishing the matters set out in a limb of s 84(1)(a), or in s 84(1)(c), upon which he or she relies.[31] In relation to s 84(1)(c), this means that the applicant must effectively prove a negative.[32]

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and Nelson JJ, 7 December 1976) 10; *Greenwood* (1992) V ConvR ¶54-444, 65 199.

25 *Re Cook* [1964] VR 808, 810.

26 *Stanhill* (2005) 12 VR 224, 246 [69]; *Bevilacqua* [2005] ANZ ConvR 504; [2005] VSC 235, [22].

27 *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 11; *Greenwood* (1992) V ConvR ¶54-444, 65 200; *Fraser* [2008] VSC 117, [49]-[57].

28 *Greenwood* (1992) V ConvR ¶54-444, 65 200.

29 *Re Alexandra* [1979] VR 55, 60.

30 *Re Robinson* [1971] VR 278, 285; *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 6; *Greenwood* (1992) V ConvR ¶54-444, 65 198; *Pivotel* (2001) V ConvR ¶54-635; [2000] VSC 264, [50]; *Bevilacqua* [2005] ANZ ConvR 504; [2005] VSC 235, [22].

31 *Re Cook* [1964] VR 808, 809, 812 (in relation to s 84(1)(c)); *Re Markin* [1966] VR 494, 496 (in relation to s 84(1)(a)); *Re Robinson* [1971] VR 278, 281; *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 7; *Greenwood* (1992) V ConvR ¶54-444, 65 192; *Pivotel* (2001) V ConvR ¶54-635; [2000] VSC 264, [28].

32 *Re Cook* [1964] VR 808, 812-13; *Greenwood* (1992) V ConvR ¶54-444, 65 199; *Bevilacqua*

43 The absence of objectors to the discharge or modification of a covenant will not, in itself, necessarily satisfy the onus of proof.[33]

44 Each case must be decided on its own facts.[34]

45 Even if the matters set out in a limb of s 84(1)(a), or in s 84(1)(c), are proved by the applicant, the Court has a discretion to refuse the application.[35]

46 Town planning principles and considerations may be relevant to the exercise of the Court's residual discretion.[36] "Precedential" issues similar to those discussed above may also be relevant in the exercise of that discretion.[37]

47 In *Stanhill Pty Ltd v Jackson*, Morris J, after considering the ordinary grammatical meaning of s 84(1), the history of the provision and the provision's policy basis, departed from what he described as the narrow traditional approach to s 84(1) in favour of a more "robust" interpretation of the provision and indicated that, in his view, "some of the restrictions adopted in earlier cases are without justification".[38] In essence, his Honour held: in relation to the first limb of s 84(1)(a), that "obsolete" should be given its ordinary meaning of "outmoded" or "out of date" (rather than meaning something that is futile or wholly unable to achieve its original purpose); in relation to the second limb of s 84(1)(a), that "the reasonable user of the land" means a user of the land acting reasonably, with what is reasonable to be gleaned from current attitudes and circumstances (including town planning issues), "impede" means to retard, obstruct or hinder (and does not mean "prevent"), and "practical benefits" are actual benefits having substance rather than purely theoretical or trifling benefits; and, in relation to s 84(1)(c), that it must only be shown that any harm caused to a person entitled to

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[2005] ANZ ConvR 504; [2005] VSC 235, [24].

33 *Re Cook* [1964] VR 808, 812.

34 See *Fraser* [2008] VSC 117, [43], [58].

35 *Re Cook* [1964] VR 808, 810; *Re Robinson* [1971] VR 278, 285-6; *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 7; *Greenwood* (1992) V ConvR ¶54-444, 65 192, 65 200; *Stanhill* (2005) 12 VR 224, 239 [40].

36 *Greenwood* (1992) V ConvR ¶54-444, 65 200 - 65 201; *Bevilacqua* [2005] ANZ ConvR 504; [2005] VSC 235, [22].

37 *Greenwood* (1992) V ConvR ¶54-444, 65 201.

38 (2005) 12 VR 224, 231 [13], 239 [41]-[42].

the benefit of a covenant would not be of real significance or importance. In the recent decision of *Fraser v Di Paolo*, Coghlan J referred to, but found it unnecessary to express a settled view about Morris J's comments.[39]

48 In this case, I apply the longstanding principles to the interpretation of s 84(1). I note, however, that had I applied Morris J's interpretation of s 84(1) (which has much to commend it), the result would have been the same.

First limb of s 84(1)(a) of the PL Act

49 Mr Nash QC, who appeared for the plaintiffs, relied on the evidence of Mr d'Oliveyra in submitting that the covenants are obsolete. As I mentioned in paragraph 16 of this judgment, Mr d'Oliveyra's evidence was largely to the effect that the covenants are obsolete because they have been superseded by modern planning controls. However, as discussed above, it is well established that the advent of modern town planning controls does not, in and of itself, render single dwelling covenants obsolete.

50 Mr Nash relied on the consolidation of lot 372 with part of lot 371 as a change in the character of the property that rendered the covenants obsolete. He also relied on the fact that on 15 June 1965, O'Bryan J made an order permitting three dwellings to be constructed on two lots (lots 35 and 36 on plan of subdivision numbered LP6652) located at the corner of Burke Road and Cascade Street, in submitting that a modification of the covenants affecting the plaintiffs' land would permit the same result, namely two dwellings on 54 Riverside Avenue (lot 372) and one dwelling on 52 Riverside Avenue (that part of lot 371 that is not owned by the plaintiffs). Mr Garde QC, who appeared with Mr James Samargis for the defendants, pointed out that O'Bryan J's decision was made unopposed in chambers in relation to land on the periphery of the estate and that, in any event, the parcel of land previously in lot 371 that was annexed to lot 372 is a modest strip which is used for a swimming pool. I accept Mr Garde's submission. Lots 35 and 36 are part of the Freer-Smith subdivision and are on the north-west perimeter of the estate, and the order made by O'Bryan J was unopposed. The plaintiffs' land is centrally located within the Robinson subdivision of the estate and the discharge or modification of the covenants affecting their land is

39 [2008] VSC 117, [26]-[28], [32]-[36].

vehemently opposed by the defendants. The acquisition of part of lot 371 in 1962 for the purposes of a pool does not constitute a sufficiently material change to the character of the property to warrant discharge or modification of the covenants.

51 I accept the evidence of Mr Milner that, for the purposes of the plaintiffs' land, the immediate neighbourhood is bounded by Cascade Street to the north, The Boulevard to the west and to the south and Bulleen Road to the east. I reject Mr d'Oliveyra's evidence that each of Riverside Avenue, Bulleen Road and Cascade Street is a distinct neighbourhood. Between 1923 and the present time, the neighbourhood has undergone change, in the sense that a rural environment has become a suburban environment. Most of the changes occurred in the 1930s, 1940s and 1950s, when houses were constructed on the allotments in the neighbourhood and vegetation was planted. The houses that were built in the neighbourhood originally reflected a mixture of architecture. Most of the original houses, including the houses owned by the plaintiffs and the defendants, remain in their original form, with some modifications. The houses in the estate that have been demolished and replaced by modern houses are in a small minority. It follows from this that most of the houses are well set back from the street and are surrounded by trees and landscaped gardens.

52 There was considerable debate before me as to the purpose of the restrictive covenants that apply in the estate. Much of this debate was focused on an advertisement that was prepared in approximately 1914 for the sale of allotments in the estate. As this was what we would today describe as a "marketing document" and contained inconsistencies about the contemplated uses of the land, it does not assist me. In the absence of other contemporaneous evidence of purpose, the purpose can be inferred from the fact that a single dwelling covenant with a minimum construction cost of £500 per dwelling was imposed on nearly all of the allotments in the estate. That purpose was to establish an estate that is overwhelmingly dominated by good quality detached single dwellings and to create a low density housing environment with plenty of space for trees and gardens in each allotment. Further, irrespective of the purpose of the covenants and whether that purpose was legally enforceable in light of the then prevailing law,[40] they have in fact produced an estate having the above

40 Prior to the enactment of s 79A of the PL Act in 1964, the benefit of a single dwelling

characteristics and the benefits for the residents of the estate, including the defendants, resulting from those characteristics.

53 I accept Mr Milner's evidence (set out in paragraphs 18 to 21 of this judgment) that the covenants burdening the plaintiffs' land continue to enure, for the benefit of the defendants, low density housing with the advantages that this brings. Although Mr Milner conceded that the covenants do not, in themselves, require attributes such as generous setbacks and landscaping, in his opinion such covenants produce low density housing which in turn results in a spacious living environment with attributes such as generous setbacks and landscaping. I also accept the evidence of the defendants that they continue to enjoy the spacious living environment of their neighbourhood including when they walk or drive in the neighbourhood. The covenants burdening the plaintiffs' land, in conjunction with the other covenants applying in the neighbourhood, have facilitated, and continue to facilitate, that environment.

54 It follows that I reject Mr d'Oliveyra's evidence that the covenants burdening the plaintiffs' land are obsolete by virtue of modern town planning controls. Those controls do not provide a guarantee to the defendants that only a single dwelling house will be constructed on the plaintiffs' land whereas the covenants do provide such a guarantee. The covenants also guarantee that non-residential uses, which may otherwise be permitted under town planning controls, cannot be established on the plaintiffs' land. These guarantees constitute an important ongoing benefit for the defendants.

55 On the evidence, the plaintiffs have not satisfied me that, by reason of changes in the character of their property or the neighbourhood or other circumstances of the case, the single dwelling covenants ought to be deemed obsolete.

Second limb of s 84(1)(a) of the PL Act

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covenant in favour of an allotment was lost once the allotment was transferred out of the parent title unless, as a matter of construction, the covenant referred to each and every part of the dominant land in the parent title: *Re Arcade Hotel Pty Ltd* [1962] VR 274, 277-8, 279.

56 The plaintiffs sought a declaration that the continued existence of the single dwelling covenants would impede the reasonable user of the plaintiffs' land without securing practical benefits to other persons. Alternatively, they sought a declaration that the continued existence of the covenants would, unless modified to substitute for the expression "save one dwelling house" the expression "save two dwelling houses", impede the reasonable user of the plaintiffs' land without securing practical benefits to other persons.

57 The difficulty with this aspect of the plaintiffs' case is that they failed to give evidence of what use of the property was impeded by the covenants. The plaintiffs bought the property as a family home in 2003 and have continued to use the property as a family home since then. There was no evidence that, by reason of changed family circumstances, the property was no longer capable of being used as a family home. Nor was there any evidence about particular proposed alternative uses of the plaintiffs' land that were impeded by the single dwelling covenants. As an alternative to the discharge of the covenants, the plaintiffs sought their modification to permit the construction of two dwelling houses. Mr Vrakas' evidence was that he and his wife did not have any specific plans to build two dwelling houses on their land; rather, they wanted the covenants discharged or modified to give them the option of constructing two dwelling houses on the land.

58 It is of significance that the plaintiffs' expert, Mr d'Oliveyra, conceded that "the subject land will still be capable of reasonable beneficial use in future if the Covenants are retained". He also did not support any modification (as distinct from discharge) of the covenants burdening the plaintiffs' land.

59 Mr Garde described the plaintiffs' application to the Court as opportunistic, in the sense that it sought to discharge or modify the covenants to enhance the value of the plaintiffs' land and give them greater flexibility in using the land. I agree. It is not sufficient for a plaintiff to simply assert that land with a restrictive covenant provides less options than land without a restrictive covenant and therefore the restrictive covenant impedes a reasonable user of their land. Every applicant for the discharge or modification of a single dwelling covenant can make this assertion. By failing to present evidence that the single dwelling covenants

impeded a particular reasonable use of their land, the plaintiffs have failed to satisfy me of the second limb of s 84(1)(a).

60 Even if I were satisfied that the covenants impede the reasonable user of the plaintiffs' land, I am not satisfied that the covenants do not secure practical benefits to other persons. For the reasons discussed in paragraphs 52 to 54 of this judgment, the single dwelling covenants have facilitated the creation of low density living in the neighbourhood (and throughout the estate) which has secured, and continues to secure, practical benefits for the defendants.

61 For the above reasons, the plaintiffs have not made out their case under the second limb of s 84(1)(a).

Section 84(1)(c) of the PL Act

62 Mr Nash submitted that the proposed discharge or modification of the single dwelling covenants will not substantially injure the defendants. He emphasised that, as the defendants' land is on different roads than the plaintiffs' land, there is considerable distance between the relevant lots, and the plaintiffs' land is not visible from the defendants' land, a change in the number or size of new dwelling houses on the plaintiffs' land will not have any adverse impact on the defendants' land and therefore will not cause any substantial injury to the defendants.

63 At first blush, there appears to be some force in Mr Nash's submission. However, the authorities establish that the beneficiaries of a single dwelling covenant do not have to own land that is contiguous to the servient tenement in order to suffer injury for the purposes of s 84(1)(c). The authorities make it clear that, depending on the evidence, impairment of the character of the relevant neighbourhood, including through the discharge or modification of a covenant potentially establishing a precedent, may suffice.

64 I have already found that the covenants have produced, and continue to produce, benefits for the defendants in that they have facilitated the creation of low density housing and a spacious and aesthetic environment. The discharge or modification of the covenants would directly affect the defendants' enjoyment of their land by altering the dominant single dwelling character of their neighbourhood. Some of the defendants regularly walk or drive past the

plaintiffs' land and their enjoyment of their neighbourhood would be adversely affected in a real rather than fanciful manner if there were a departure from a single dwelling on the plaintiffs' land.

65 In addition to these direct impacts, it can be inferred that if I were to accede to the plaintiffs' application, my decision may encourage developers to acquire other properties in the neighbourhood and apply to discharge or modify covenants affecting those properties, relying on my decision as a precedent in those applications. While each such application would be decided on its particular facts, and may not succeed, the fact is that the defendants would be in a weaker position in seeking to resist subsequent applications that affect their land. The defendants' concerns about the precedent value of a decision by this Court in favour of the plaintiffs, are well founded because their neighbourhood has large allotments which are attractive to developers and there has already been one instance (in 1993) where a developer attempted (unsuccessfully) to remove single dwelling covenants burdening two of those allotments (51 and 53 Cascade Street) under s 60(5) of the *Planning and Environment Act 1987* (Vic) for the purpose of constructing 14 dwelling houses. The abovementioned precedent value constitutes a substantial injury to the defendants for the purposes of s 84(1)(c).

66 For the above reasons, the plaintiffs have failed to make out their case under s 84(1)(c).

Discretion under s 84(1) of the PL Act

67 Even if the plaintiffs had succeeded on one of the three alternative bases upon which they argued their case, I would have refused them relief under s 84(1) in the exercise of my discretion.

68 Mr Vrakas' evidence was that he and his wife bought the property without first inspecting it or making other inquiries and therefore they were not aware, at the time of the purchase, that the property was burdened by the covenants. Mr Garde submitted that, as Mr Vrakas is an experienced real estate agent, it is unlikely that he did not know about the single dwelling covenants when he and his wife acquired the property. Alternatively, Mr Garde submitted that, if Mr Vrakas' evidence is true, his conduct was "close to recklessness". I accept Mr

Vrakas' evidence that he bought the property without inspecting it and without knowing that it was burdened by the covenants. I find that the plaintiffs bought the property for its development value rather than the attributes or intrinsic value of the existing house. The plaintiffs saw potential to develop the land and took a risk that there may be legal impediments to achieving that goal. Unfortunately for them, the restrictive covenants, which have burdened the property since the early 1940s, are an impediment to developing the land other than use for a single dwelling house. To that extent, they are the authors of their own misfortune. As a matter of discretion, I cannot see any compelling reason why the defendants should lose the benefit of the covenants in order to assist the plaintiffs to overcome the difficulties that they have created for themselves.

69 The plaintiffs' conduct is also relevant to my discretion. They bought the property in April 2003 and applied to this Court in June 2005 to discharge the covenants or modify them to permit the construction of five units on their land. Such a proposed modification had poor prospects of success from the outset. Two weeks before the hearing before me, they gave notice to the defendants that they would seek, in the alternative, a modification to enable the construction of two dwelling houses on the land. The proposed modification to enable the construction of five units was not formally abandoned until the first day of the hearing before me. Neither of the proposed modifications was supported by the evidence of the plaintiffs' town planning expert. Mr Nash conceded that Mr Vrakas was "pretty vague in the witness box" about what the plaintiffs were going to do with the property.

70 Persons who apply to this Court seeking relief that they perceive will bring them financial and other benefits and which they know is perceived by other parties to be detrimental to them should be as specific as possible about the proposals they have in mind so that the Court is placed in the best position to assess the impact that those proposals may have on all the parties. Plaintiffs who do not produce to the Court any specific plans but base their case on a general desire to optimise their options in relation to their property, as in this case, face the risk that the Court will not be satisfied, on the evidence, that they have made out their case.

71 Although Mr Vrakas denied Mr Garde's assertion that, in the absence of specific plans, the plaintiffs were seeking to test the Court's attitude to the covenants, he agreed that the

application was made to "confirm our position in regard to what … options I had". That is not a sufficient basis for relief under s 84(1). In any event, the plaintiffs' failure to produce any specific plans as part of their case made it very difficult for this Court to exercise its discretion in their favour if such discretion had been enlivened by a finding that the plaintiffs had satisfied one of the three bases upon which they argued their case under s 84(1) of the PL Act. As no such finding has been made, the discretion was never enlivened.

Proposed order

72 For the above reasons, I propose to make an order dismissing the plaintiffs' application. I will hear the parties on the precise form of the order and in relation to costs.