IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT

Not Restricted

S CI 2013 06581

IN THE MATTER of an application by ROBYN MARY MORRISON for the discharge or modification of covenants 0984695 and 1090117 pursuant to s 84(1) of the *Property Law Act 1958* (Vic)

BETWEEN:

ROBYN MARY MORRISON — Plaintiff

v

ARTHUR NEIL (and others according to the attaches schedule) — Defendants

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JUDGE:	DERHAM AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	14 & 15 October 2014
DATE OF JUDGMENT:	17 June 2015
CASE MAY BE CITED AS:	Morrison v Neil & Ors
MEDIUM NEUTRAL CITATION:	[2015] VSC 269

REAL PROPERTY – Restrictive covenant – Application for discharge or modification – Covenant restricting, amongst other things, the erection of more than one dwelling on the land – Proposed development involving subdivision and construction of single dwelling on one lot and 4 unit development on the other – Whether by reason of changes in the character of the neighbourhood the restriction ought to be deemed obsolete – Whether discharge or modification will not substantially injure the persons entitled to the benefit – Application refused – Applicable legal principles – *Property Law Act 1958*, s 84(1)(a) & (c).

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr N Jones	Subdivision Lawyers
For the Defendant	Mr M Townsend	King & Wood Mallesons

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HIS HONOUR:

Introduction

1 The plaintiff applies to modify or discharge two covenants insofar as they affect her property at 44 Beach Road, Mentone ('the Property').[1] The Property is lot 4 on plan of subdivision LP7955, and part of lot 3 on that subdivision. Lot 4 is the larger lot and fronts on Beach Road, Mentone. Lot 3 is a strip of land that connects lot 4 to Marina Road, Mentone. The plans in Annexure A show the location of the Property and the surrounding streets.

2 The two covenants are:

(a) the covenant in Transfer 0984695 dated 8 September 1920,[2] which relates to lot 3 on the plan of subdivision;

(b) the covenant in Transfer 1090117 dated 20 February 1923,[3] which relates to lot 4 on the plan of subdivision.

Plans showing the location of the Property and the properties having the benefit of the two covenants in question are attached in Annexure A.[4]

3 The covenants are substantially to the same effect. They provide that the land shall not be used for purposes other than residential purposes; that no stone, earth, gravel, clay or sand shall be dug or removed from the land; that no more than one dwelling house shall be erected on the land; and that the costs of such dwelling house when erected shall not be less than £200.

4 The plaintiff applies either for the discharge of each of the covenants insofar as they affect the Property, or for their modification so as to allow the construction of two separate buildings. One building will front on Beach Road and will consist of four apartments. The other building will be a single dwelling house at the rear of the

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1 The land more particularly described in Certificate of Title 06837 Folio 252.
2 Exhibit SL-2 to the affidavit of Simon Libbis sworn 18 December 2013 ('the first Libbis affidavit').
3 Exhibit SL-5 to the first Libbis affidavit.
4 They are taken from Appendices 1 and 2 to the first report of the plaintiff's expert, Mr Chapman (Exhibit MC-1 to the affidavit of Matthew John Chapman sworn 20 February 2014).

Property and will have driveway access to Marina Road over lot 3. The front building comprising four apartments will only have access onto Beach Road. The rear single dwelling house will only have access onto Marina Road. The rear allotment was estimated to be about half the size of the majority of the lots in the subdivision, being about 350 square metres.

5 After lunch on the first day of the trial the plaintiff abandoned her application to modify the covenant in Transfer 0984695 dated 8 September 1920,[5] which relates to lot 3 on the plan of subdivision. That is the strip of land at the rear of 44 Beach Road providing access to the rear of the Property.

Background

6 The Property has an area of approximately 1000 square metres. It is presently developed with a two-storey rendered brick house located towards the front, although well set back and provided with two cross overs to Beach Road and a curved driveway in front of the house. Thus, the Property enjoys vehicular access to both Beach Road and, in theory, also to Marina Road. The access to Marina Road, however, appears not to have been used for some years. Indeed, there is a garage at the rear of the Property, to which the Marina Road access over lot 3 led, which appears to have been partially converted into living space of some kind.[6]

7 The application came before me for directions on 24 February 2014. As is the usual course, directions were made for notice of the application to be displayed on the Property, and to be posted to the owners and mortgagees of the lots having the benefit of the covenants in the vicinity of the Property.[7] On the return of the matter after the giving of notices, a number of objectors came forward. They were added as defendants and directions were made for the filing and service of affidavits. At the commencement of the trial there were 36 defendants. Mr Townsend of Counsel for the defendants applied at that point to remove the sixth, fourteenth and twenty-third

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5 Exhibit SL-2 to the first Libbis affidavit.

6 This I observed on undertaking a view at the invitation of the parties at the end of the first day of the trial.

7 Order made 24 February 2014.

defendants, which application was unopposed.

8 The defendants, who are all owners of properties in the subdivision (LP 7995) having the benefit of the covenant, oppose the discharge or modification of the covenant. The subdivision extends from Beach Road in the South to Balcombe Road in the North. In its centre is Marina Road. Almost all the properties owned by the defendant objectors front onto Marina Road. I will call it the Marina Road Estate.

Summary of Conclusions

9 At the commencement of the hearing, the plaintiff abandoned any reliance on the second limb of s 84(1)(a) of the *Property Law Act 1958* ('the Act'). As a result, the central issues in the trial are:

(a) Whether by reason of changes in the character of the Property or the neighbourhood or other circumstances of the case that the Court deems material, the restriction ought to be deemed obsolete (s 84(1)(a) of the Act); and

(b) Whether the plaintiff has established that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction (s 84(1)(c) of the Act).

10 In my opinion, the plaintiff has failed to discharge the burden of proof in relation to both of the issues. As a result, the application under s 84(1) should be refused and the proceeding should be dismissed.

11 In addition, modification in accordance with this application has precedential value sufficient to demonstrate that substantial injury would be caused to the defendants if the covenant were to be discharged or modified.

Evidence

Affidavits

12 In support of the application, the plaintiff relies on the following affidavits:

(a) Simon John Libbis (plaintiff's solicitor) sworn 18 December 2013, 19 February 2014 and 16 April 2014;

(b) Matthew John Chapman (plaintiff's expert) sworn 20 February 2014, 26 May 2014 and 29 July 2014; and

(c) Robyn Mary Morrison (plaintiff) sworn 13 February 2014 and 8 October 2014.

13 The defendants rely on the following affidavits:

(a) Robert Milner (defendants' expert) sworn 30 June 2014;

(b) Gordon Gakovic (seventh defendant) sworn 30 June 2014 (3 Marina Road);

(c) Cameron Alistair Male (twenty-second defendant) sworn 30 June 2014 (35 Marina Road);

(d) Michael Clayton Slater (seventeenth defendant) sworn 30 June 2014 (28 Marina Road);

(e) Wendy Heatley (fifth defendant) sworn 20 June 2014 (1 Marina Road);

(f) John Anthony Dickson (third defendant) sworn 27 June 2014 (46 Beach Road- on the easterly corner of Marina Road and Beach Road);

(g) Judith Patricia Tant (eleventh defendant) sworn 27 June 2014 (8 Marina Road); and

(h) Douglas John Jowett (eighth defendant) sworn 30 June 2014 (4 Marina Road).

Expert Reports

First Chapman Report[8]

14 Mr Chapman, the expert retained on behalf of the plaintiff, is the managing director of Hellier McFarland, a land surveying and town planning company. He has

8 Exhibit MC-1 to the affidavit of Matthew John Chapman, sworn 20 February 2014 ('First Chapman Report')

a number of tertiary qualifications and professional associations to his name, and substantial experience in the town planning and land surveying industry.

15 In the introduction to his report, Mr Chapman states that:

> This report will consider the planning merits of discharging or modifying the covenants, and will consider the development potential of the properties having regard to [the grounds in s 84(1) of the Act] and to the current provisions of the Kingston Planning Scheme.[9]

16 Mr Chapman goes on to outline the covenants, to list the lots that have the benefit of the covenants, and to describe the history of the Property itself. He then turns to the definition of the 'primary neighbourhood', which he considers to be constituted by the properties along the northern side of Beach Road between Sea Parade to the west and Marina Road to the east. This neighbourhood contains a total of nine lots. He has defined the 'secondary neighbourhood' as encompassing those properties along the northern side of Beach Road to the immediate east and west of the primary neighbourhood – that is, between Charman Road and Sea Parade to the west, and between Marina Road and Mundy Street to the east.

17 This definition of the primary and secondary neighbourhoods is justified on the basis that the Property has a strong physical interface with Beach Road, as well as the other lots fronting onto Beach Road, and exudes a character that is very different from those lots located to the north on Marina Road. Mr Chapman states that the focus of the properties fronting Beach Road is towards the bay foreshore and the water to the south, with the prominent architectural style and built-form having a very distinct character. On the other hand, Mr Chapman finds the lots fronting onto Marina Road have their own character, with a more diminutive form.

18 Mr Chapman, in cross-examination, confirmed and made clear, that his assessment of the areas along Beach Road as separate neighbourhoods, primary and secondary as I have described, was based essentially on two factors. First the aspect, that is, the properties orient to and face Beach Road and do not orient to the hinterland north of

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9 Ibid [4].

Beach Road; and secondly, the built-form of the properties. He said:[10]

> My submission is that the properties which have the Beach Road frontage exude a different neighbourhood character in terms of built-form [and] aspect and they are removed and have a very limited interface with Marina Road, and that's …the basis of [*scil* on] which I've defined the neighbourhood.

19 Following an analysis of the suburb of Mentone and its facilities, Mr Chapman goes on to outline the applicable planning provisions and policy framework within the City of Kingston, as well as the applicable zoning and overlay. He then turns to a discussion of planning considerations, such as the proposed use and development of the land and compliance with relevant planning scheme provisions, concluding that the discharge or modification of the covenants relating to the Property would result in 'a built-form outcome that is consistent with the existing pattern and character of residential development occurring along the coastal strip'.[11]

20 Turning to the area defined in his report as the 'primary neighbourhood', Mr Chapman describes the development in this area as follows:

> Residential development along this stretch comprises of multi-unit development and often substantial houses with high site coverage on relatively smaller lots created as a result of subdivision of the original titles. There has been a predominant replacement of the original dwelling stock with very few of the original houses remaining. Side setbacks are narrow or non-existent and front gardens limited and generally enclosed by high solid front fences. Building scale is two storey and often features basement car parking to maximise the efficient use of these sites. Newer dwellings feature contemporary styling and varied roof forms. External finishes include face brick or rendered finishes. Large picture windows, wide upper level balconies and roof-top decks feature to take advantage of the impressive availability of bay views.
>
> There are only two properties featuring houses set in large gardens with deep front setbacks remaining along this stretch of road being the subject property and the property to the immediate east at 45 Beach Road, on the corner of Marina Road.
>
> Clearly there is a demand for more intensive residential development in this area of Beach Road. The properties at 44 and 45 Beach Road are seen as anomalies in the context of surrounding redevelopment and subdivision. It is likely that more intensive redevelopment of the properties in a similar manner to the properties to the west in particular has not occurred as [a]

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10 14 October 2015, T36.

11 First Chapman Report [76].

direct consequence of the presence of single dwelling covenants.[12]

21 From this perspective, Mr Chapman finds that the remaining practical benefits of the covenant with respect to the Property are negligible, given its location and distance from the majority of the benefiting lots. He argues that a modification or discharge of the covenant would have no real impact on the beneficiaries, as the form of development will be imperceptible from the vast majority of properties and has 'absolutely no impact on the Marina Road streetscape'.[13]

22 Mr Chapman finds that there will be no increase to traffic on Marina Road, as only the single-dwelling portion of the lot will have access via the 'battle-axe' style driveway. The four-dwelling development will front onto Beach Road, and will have no impact on Marina Road traffic. In addition, he maintains that the application of the planning code will be sufficient to meet any concerns relating to neighbourhood character and abutting amenity, etc. This process will also allow local property owners to make submissions to the Council regarding the proposed development.

23 Under a heading stating that 'The Covenant is considered to be out-moded', Mr Chapman states that the covenant is out of step with current planning strategies. In particular, he considers that State planning policy has replaced the need for restrictive covenants and provides 'more equitable, merit based development outcomes'.[14] He goes on to say that:

> Whilst there is little doubt that the existence of single dwelling covenants on properties in Marina Road has influenced the pattern and character of development in the street, the same cannot be said for Beach Road to which the subject property more strongly relates.
>
> Removal or variation of the covenants as requested will not guarantee the property is redeveloped for multi dwelling housing as a planning permit will still be required to develop each lot for more than one dwelling.
>
> What it will do is ensure that the City of Kingston, as the responsible authority under the planning scheme, has have [sic] the opportunity to consider whether any new development proposal is appropriate when assessed against the relevant policy requirements, objectives and standards of the Kingston Planning Scheme including ResCode, and if not, to refuse the

12 Ibid [79]–[81].
13 Ibid [93].
14 Ibid [105].

application. There are sufficient control provisions to ensure that any development on this site is appropriate and in keeping with neighbourhood character without the need for a restrictive covenant.

The existence of the single dwelling covenants on the property is therefore unnecessary. Their continued existence on the property is contrary to the basic principle of land use planning that requires the responsible authority to consider land use proposals having regard to all relevant planning policies and provisions on a case by case basis. They serve to undermine the achievement of the wider state and local planning policy objectives as discussed and are therefore considered to be in a planning sense, out-moded and obsolete.[15]

Second Chapman Report[16]

24 Following the lodgement of objections to the application, Mr Chapman filed a supplementary expert report responding to the concerns raised by the objectors, as well as commenting on the extent, if any, to which those concerns are protected by the existing covenant and by the planning scheme. He begins by agreeing that the existence of the covenants has influenced the character of the Marina Road neighbourhood, which predominantly contains detached, single-storey family homes in a garden setting. On the contrary, however, he states that the Property is located in an entirely different neighbourhood, as defined in the First Chapman Report.

25 Having repeated his previous justification for the narrow definition of the neighbourhood adopted in the First Chapman Report, he goes on to reject the notion that the discharge or modification of the covenant with respect to the Property would have any impact on the value of other properties in the Marina Road Estate – saying that property values are affected by a range of factors of which restrictive covenants are only one – and states that the remaining concerns are appropriately dealt with as part of the planning process. In particular, he states that any impact on the amenity of adjoining properties would be subject to rigorous assessment under the Kingston Planning Scheme, and that the controls in the planning scheme are far more expansive and onerous than any controls set out in the applicable covenants.

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15 Ibid [106]–[109].

16 Exhibit MC-2 to the affidavit of Matthew John Chapman sworn 28 May 2014 ('Second Chapman Report').

26 Mr Chapman goes on to review the proposed development concept, finding that it is an appropriate development outcome for the site, 'having regard to the planning provisions and policies … as set out in the Kingston planning scheme'.[17] With respect to the covenants, Mr Chapman states that there are no restrictions relating to the height or extent of the single dwelling required, nor control over vegetation removal, maximum site coverage or minimum setbacks.

27 As a result, he finds that it would be possible to construct a single dwelling of the same proportions as the proposed four-dwelling development within the constraints of the covenants.[18] He concludes, on this basis, that no substantial injury would be caused to the beneficiaries by the discharge or modification of the covenants, saying:

> Having reviewed the objections raised by the defendants and the development concept commissioned by the plaintiff I remain of the opinion that the discharge or modification of the covenants from the property is justified on planning grounds.[19]

Milner Report[20]

28 Mr Milner, the expert retained on behalf of the defendants, is a strategic and statutory planner, and the director of 10 Consulting Group. He has extensive experience in urban and regional planning, as well as a number of professional memberships and a Diploma with first-class Honours in Town and Country Planning. He has appeared as an expert witness in a number of contested applications for the modification or discharge of restrictive covenants, including *Prowse v Johnstone*,[21] *Suhr v Michelmore*,[22] and *Vrakas v Registrar of Titles*.[23]

29 Mr Milner's report begins with an overview of the restrictive covenants and applicable legislation, as well as a consideration of the guidance given by the courts in cases relating to the modification and discharge of covenants restricting

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17 Ibid [31].
18 Ibid [36].
19 Ibid [44].
20 Exhibit RM-2 to the affidavit of Robert Milner, sworn 30 June 2014 ('Milner Report').
21 [2012] VSC 4.
22 [2013] VSC 284.
23 [2008] VSC 281.

development to a single dwelling on each lot. He provides a summary of his opinions as follows:

> In this report of evidence I find the covenants are not obsolete by reason of changes in the neighbourhood because:
>
> - The covenants were set in place to create a particular character, which was achieved and has been maintained.
> - The covenants do not impede the reasonable use of the land, and provide for it to be developed with a house, which is reasonable and appropriate in the location.
> - Maintenance of the covenants provides the beneficiaries with certainty regarding the character and amenity of the area.
>
> The discharge or modification of the covenants to facilitate the development of two residential buildings (and additional dwelling) would materially and detrimentally erode the character of the area created by the covenants; set an undesirable precedent for other covenant properties in the locality and would result in a loss of amenity and detriment to the beneficiaries.
>
> The proposal detailed in the concept plans would have a material and detrimental impact upon the character of the area and would substantially injure the amenity of adjoining properties and beneficiaries to the covenants.[24]

30 After describing the suburb of Mentone and the Property itself, Mr Milner turns to a definition of the relevant 'neighbourhood'. Mr Milner rejects the 'primary' and 'secondary' neighbourhoods advanced by Mr Chapman, stating that the neighbourhood 'cannot be limited to a single streetscape and one side of the street', which 'denies a full appreciation of the site's true neighbourhood context'.[25] Rather, he reasons that a site's primary neighbourhood would encompass land in close proximity around which one might walk, and the broader neighbourhood as encompassing the area through which one travels to access local shops or amenities.

31 On this basis, he defines the neighbourhood as constituted by both sides of Beach Road between Charman Road to the west and Plummer Road to the south, as well as the lots on Marina Road to the north, extending at least to the intersection with Rivoli Street and Wakool Avenue. He states that:

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24 Milner Report 6.
25 Ibid 17.

> This definition of boundaries embodies the attributes, noted above, about what constitutes a neighbourhood. It includes the surrounding and abutting properties and the land on the opposite side of the street. It includes the immediate expanse and view of Beach Road in either direction of the site. It includes the immediate intersecting street where a person might walk as an alternative to Beach Road and the foreshore, or might drive to go to Mentone and the shops or catch the train.
>
> I consider it reasonable to confine the analysis to Beach Road and Marina Road since these would be the two roads that would be most frequently part of the day-to-day experience.
>
> A further factor confirming the merit of including Marina Road is the existence of single dwelling restrictive covenants throughout this area. A person looking to purchase or live in this area could be attracted by the knowledge that that manner of development was assured in their neighbourhood of which the subject site forms part.[26]

32 Turning to the character of the neighbourhood, Mr Milner has considered a number of documents - including the Kingston Neighbourhood Character Guidelines - as well as matters including the pattern of development of the neighbourhood; the built-form, scale and character of surrounding development; and architectural and roof styles. The Kingston Neighbourhood Character Guidelines place the Property within Character Area 19, which extends well beyond even Mr Milner's more expansive definition of the neighbourhood. Mr Milner goes on to outline the relevant zoning and overlay requirements as impacting on the character of the neighbourhood.

33 Mr Milner emphasised the importance of identifying attributes that distinguish the neighbourhood for the purposes of s 84(1)(a) of the Act. He refers in this respect to a number of study plans attached to his report in Attachment 7. There are 4 study plans identifying within the neighbourhood, as he defined it:

(a) The properties with single dwellings and multiple dwellings. The only property within the neighbourhood which had multiple dwellings was 43 Beach Road. There are no others;

(b) The amount of site coverage for each property. This showed the overwhelming majority had a site coverage of less than 40%;

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26 Ibid.

(c) The size of the lots. In the neighbourhood the lot sizes varied between less than 649 M^2 to over 1250 M^2. The overwhelming majority of the lots in the neighbourhood are between 750 and 849 M^2. In the Marina Road Estate there are only 7 lots with a size of 850 or greater and 4 of these front Beach Road, one being the subject Property;

(d) The relative height of the developments on the properties measured by the number of storeys. This showed that in the Marina Road Estate there were 30 two-storey, and 42 single-storey, dwellings. In the neighbourhood this became 48 two-storey and 46 single-storey dwellings;

(e) The number of swimming pools and/or tennis courts. There were still a significant number of properties with a tennis court or swimming pool.

34 From this analysis Mr Milner to draw the following conclusions:[27]

(a) All of the lots in the relevant neighbourhood, with the exception of the lot to the immediate west of the Property, are developed with a single dwelling on its own lot;

(b) All properties in the Parent title (the Marina Road Estate) are occupied by a single dwelling house;

(c) The same is true of properties outside the Marina Road Estate, but within the relevant neighbourhood;

(d) The properties at 42 Beach Road (four single dwelling residences numbered 42^1, 42^2, 42^3 and 42^4) are consistent with the neighbourhood character, with a single house on a lot facing the street;

(e) With only one exception, development in the neighbourhood is one or two-storey, with no basements protruding above the ground;

(f) The proposed development on the Property is unique in the size of its rooftop

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27 Ibid 26.

garden and the fact that it is on top of a two-storey development with a protruding basement;

(g) The site coverage of dwellings on the lots contained within the Marina Road Estate is low, allowing for gardens, pools and tennis courts at ground level;

(h) Site coverage is greater on lots to the west of the Property on Beach Road, but not to the east; and

(i) There is a high degree of consistency of lot sizes within the neighbourhood, with relatively consistent setbacks, creating a 'consistent streetscape and a strong sense of homogeneity'.

35 Mr Milner rejects Mr Chapman's contention that the size and style of dwellings along Beach Road demonstrate a change in the character of the neighbourhood. He finds that the style, period and size of dwellings is not confined by the covenant, but that – nonetheless – the properties along Beach Road remain predominantly single dwellings in spite of subdivision creating multiple lots.

36 With respect to the proposed development, Mr Milner states that it is imprecise and insufficiently documented to allow for a proper consideration of its impact on amenity and any injury that would be caused to the beneficiaries. The amenity assessment that follows is introduced in this way:

> In the following analysis reliance has been placed upon the extent to which the concept plans would satisfy the requirements of Clause 55 of the *Kingston Planning Scheme*.
>
> It is relevant to note that the standards that apply under these provisions can be varied provided that the stated objectives are met. The standards that apply provide a compromise between a wish to enable urban consolidation while placing a boundary and measure on the amenity of an adjoining property. For instance, the standard for acceptable overlooking terminates at 9 metres from the face of a window but it does not follow that a person more than 9 metres from that window may still experience an invasion of their privacy. Accordingly, the above clauses should be accepted as one but not the only measure of an amenity impact.[28]

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28 Ibid 29.

37 He goes on to consider the proposed development with respect to a number of different amenities, concluding that the concept plans are poorly resolved and would be unlikely to secure planning approval. He finds that the proposed development would negatively impact the amenity of neighbouring properties 'by virtue of the excessive building form and bulk; limited opportunities for landscaping and excessive opportunities to [sic] overlooking'.[29]

38 The summary of his assessment of the neighbourhood character is important and conforms with my own view of the neighbourhood when I visited it:

> In summary the immediate neighbourhood is defined by roads and connections and by a clear and constant presence of residential use and dominance of single detached houses on lots used as dwellings. Even if a wider view was taken of neighbourhood extending north to Balcombe Road and west to Charman Road similar neighbourhood attributes are maintained.[30]

39 In his evidence-in-chief Mr Milner said that the critical characteristic was the single dwelling on each lot. He said that even if the boundaries of the neighbourhood were extended east to Plummer Street and west to Charman Road, then the result would be an extraordinarily low percentage of medium-density housing projects. He said '...you'd come away with this pervading sense it is principally an area of detached single houses'.

40 When Mr Milner brought into account the sizes of the lots, which were reasonably large on the whole, the mixture of one and two-storey houses and the number of properties that had either a swimming pool or tennis court and gardens, the sense of 'gardenness' and recreation is part and parcel of the defining characteristics of the neighbourhood. He said there was something distinctive about the single dwelling nature even when sub-division has occurred so that there was an 'intactness' and a distinguishing feature about it which enabled him to come to the conclusion that the covenant was not obsolete in any sense. The covenant has not been changed or removed to the extent he has found in some other cases nor has the essential

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29 Ibid 31.
30 Ibid 17.

character of the neighbourhood been compromised either marginally or significantly.[31] Indeed there is no evidence of any modification of a covenant in the Marina Road Estate or in the neighbourhood.

41 In response to questioning by Mr Jones, counsel for the plaintiff, Mr Milner agreed with the opinion of Mr Chapman that:

> It would be possible to redevelop the subject site and construct an excessively large dwelling of two storeys, with basement car park and rooftop deck, without contravening or seeking discharge or modification of the existing covenants and, subject to designing the dwelling within certain parameters set out in the planning and building regulations, without any need for council approval.[32]

42 Finally, Mr Milner agreed that a short definition of the neighbourhood character was that it has predominantly built-forms comprising detached single dwellings, often single-storey but not always, in a garden setting.[33]

Third Chapman Report[34]

43 In response to the expert report of Mr Milner, Mr Chapman filed a second supplementary expert report addressing the issues raised and the conclusions reached by Mr Milner. Mr Chapman agrees with Mr Milner's statement that the concept plans are not fully resolved and would be inadequate to support an application for planning approval. However, he considers that the plans are sufficient to allow the Court to determine the plaintiff's application.

44 The majority of Mr Chapman's disagreement with Mr Milner is a result of their differing definitions of what constitutes the relevant neighbourhood. This leads Mr Chapman to an opposing conclusion on whether the proposed development would be discordant with the character of the neighbourhood. He repeats his contention that the amenity concerns of the beneficiaries are best dealt with at the planning stage, and do not amount to substantial injury for the purposes of this

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31 14 October 2014 T101–102.
32 14 October 2014 T126.
33 14 October 2014 T114.
34 Exhibit MC-2 to the affidavit of Matthew John Chapman, sworn 31 July 2014.

application and, nonetheless, goes on to outline the ways in which the concept plan may be refined and adapted to meet the specific concerns raised by Mr Milner. He emphasises that a greater level of detail, tweaking and landscaping of the design will be required before the plans are suitable for submission to Council.

45 Finally, Mr Chapman outlines the additional concerns raised in the affidavits filed on behalf of the defendants, which were not raised in the objections considered in the Second Chapman Report. He finds that the majority of the additional concerns are appropriately addressed at the planning stage, and re-iterates that he considers the single dwelling at the rear of the lot to fit well within the established character of the Marina Road Estate, notwithstanding that the lot itself will be somewhat smaller. Again, he emphasises that the discharge or modification of the covenant with respect to the Property will not set a precedent for higher density development, as it is situated in a distinct neighbourhood.

Defendants' Evidence

46 There were seven residents in the Marina Road Estate who gave evidence of their objections to the modification of discharge of the covenant. Their evidence exposed similar themes, so I shall not address at length the evidence of all of them. One feature of most of the evidence given by the defendants was the value of the properties in the Marina Road Estate, and the effect of a modification of the covenant on those values. Objection was taken to all of this evidence as being, in effect, inexpert opinion evidence. I agreed with that objection and, rather than striking through the several references in the affidavits to opinions of value of the properties, I simply indicated to the parties that I would give it such weight as it deserved, which met with the agreement of counsel for the plaintiff and the defendants. I should add, however, that as Mr Dickson observed in the course of his cross-examination,[35] the question of an effect on the values of the properties by the modification of the covenant was a double edged sword as the precedential effect of the modification may well increase the development potential of other properties in

35 14 October 2014, T50.

the Marina Road Estate and thus increase the unimproved land value.

47 *John Anthony Dickson* lives at 46 Beach Road, on the corner of Marina Road. He is the registered proprietor. His property is subject to a restrictive covenant. He was raised at this address as it was his parents property. He lived in their house until he commenced work in the City. He has lived in Mundy Street in a house with the benefit of a similar covenant. He rebuilt on his parent's property, his present address, in 2009/2010. One of the main reasons for his return was the covenant, which gives him confidence that his neighbours cannot re-develop their properties into developments and that, importantly, the single-dwelling character of the area will remain. His view as a resident of the area is that the single-dwelling character is still dominant and is not obsolete. He recalls that there have been other attempts to modify similar covenants in the area that have failed.

48 Mr Dickson was concerned about the effect of a modification or discharge of the covenant because:

(a) It will be a precedent which will be followed by owners of other properties and that is the big issue from his perspective;[36]

(b) The effect on the amenity of the area, in particular on the traffic in Marina Road;

(c) The Property will be over developed and overshadow neighbours;

(d) The proposed development will detract from the treed and tranquil nature of the neighbourhood.

49 *Michael Clayton Slater* lives at 28 Marina Road. He and his wife are the registered proprietors. Their property is subject to the restrictive covenant. They purchased the property in 1981. When they purchased the property the covenant was the key selling feature used by the agent. The size of the lots and the ample gardens located in a quiet street made the area attractive. These features remain. Their children

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36 14 October 2014, T52.

grew up in Marina Road, they learned to ride their bikes and played in the spacious gardens. They played cricket and football in the street without the restriction of a street filled with on-street parking 'as a consequence of multiple dwellings'. He was concerned at the effect of the modification as a precedent for other applications. He was a bidder at an earlier auction of 44 Beach Road and it was made very clear that it was subject to the covenant.

50 It emerged in his cross-examination that Marina Road is now busy with traffic between 8 and 9.30 am and 3.30 and 4.40 pm because of the Mentone Girls' Secondary College at the top, north end of the street, and for on-street parking because of the lack of parking restrictions compared with Beach Road and the Council parking areas adjacent to the beach.

51 *Douglas John Jowett* lives at 4 Marina Road. He is the registered proprietor. His property is subject to a restrictive covenant. His parents previously owned the property. He has lived there most of his life and purchased the property after his mother died. The modification or discharge of the covenant will, in his view, take away the long-standing protection against higher density (multiple-dwelling)[37] developments in the area. He is concerned about the proposed development as a part of a trend to build bigger houses on smaller lots with minimal setbacks, which puts adjoining properties at risk of being built out, overshadowed and suffering a loss of privacy. He was concerned that there will be an increase in traffic to the driveway opposite his property.

52 *Wendy Heatley* was called to give evidence in place of her husband, Foster John Heatley, who had sworn an affidavit. She had prepared the affidavit jointly with him and it reflected her views as well as her husband's views. She and her husband live at 1 Marina Road and are the joint registered proprietors of the property, which is subject to a restrictive covenant.

53 Mrs Heatley objected to the modification or discharge of the covenant because:

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37 14 October 2014, T60.

(a) The existence of a single-dwelling covenant over their land and in the surrounding area played a significant role in their decision to purchase their property;

(b) The Heatley's property is situated immediately to the north of the plaintiff's Property, so the redevelopment of the plaintiff's Property will have a significant impact on the Heatley's property, in particular in relation to setbacks, landscaping, overlooking, overshadowing and the intense use and different character of the proposed development;

(c) She was concerned about the increased traffic to and from the Property and the effect of traffic and parking in Marina Road;

(d) She was concerned that the proposed development would lead to a type of cluttered development that occurs in other streets in Mentone which are not protected by such covenants; she referred to Latrobe and Collins Streets in Mentone as two examples where this has occurred;

(e) She was concerned that the modification and the discharge of the covenant will set a precedent which will directly affect their property and negatively impact on the neighbourhood; and

(f) She was concerned that the proposed development with its rooftop pool and garden would have a noise and amenity impact on the Heatley's property.

54 In cross-examination Mrs Heatley agreed that she would be equally concerned with overlooking and overshadowing if a large, single-dwelling were constructed on the Property. This would also lead to a loss of spaciousness and privacy.

55 *Cameron Alistair Male* lives at 35 Marina Road with his wife Tracey Natalie Male, and they are the joint registered proprietors of that property, which is also subject to a restrictive covenant. They purchased the property in 2010 with the specific knowledge that the covenants were in place throughout the neighbourhood. Mr Male and his wife understood that the existence of the covenants protected the

neighbourhood from the establishment of multi-dwelling redevelopments. It was the perfect location to raise their two young children. Mr and Mrs Male enjoyed the single-dwelling residential character of the Marina Road Estate, which has been maintained by the existence of the covenants. They particularly value the character, spaciousness, amenity and low density of Marina Road.

56 Mr Male expressed the view that 44 Beach Road performs an important part of the single-dwelling neighbourhood and that the proposed redevelopment by the plaintiff is not consistent with the characteristics of the neighbourhood given the size and scale of the buildings. In particular, the proposed second dwelling with access from Marina Road at the rear of the Property will be about one half of the average lot size compared with all of the other lots located in the Marina Road Estate which, with the exception of the lots fronting on Beach Road, are about 700 square metres. In addition, no other property in Marina Road is a battle-axe block.

57 The primary concern to Mr and Mrs Male was the precedent that might be set by the modification or discharge of the covenant. This was particularly relevant because many properties in the Marina Road Estate were older and their main value was land value, so that owners of these properties could take advantage of the precedent to redevelop the properties with multi-dwelling constructions.

58 In cross-examination, when confronted with the proposition that there were differences in the houses or developments on Beach Road when compared with Marina Road, Mr Male expressed the view that, with regard to the scale and type of house, he agreed, but not with regard to the single-dwelling aspect, with the exception of 43 Beach Road which is a multi-unit development. Importantly, he was primarily concerned with the precedent that would be set both in relation to the multi-unit development on the front of the Property and the creation of a battle-axe block of reduced footprint at the rear. He said there has been no other modification or discharge of the covenant in the Marina Road Estate. He gave evidence about multi-dwelling redevelopments in nearby streets to the east of Mundy Street from about Plummer Road eastwards to the station.

59 *Gordon Gakovic* lives at 3 Marina Road with his wife Tracey Kaye Gakovic. They are the joint proprietors of the property, which is also subject to a restrictive covenant. He and his wife objected to the modification or discharge of the covenant essentially for similar reasons that were advanced by the other witnesses called for the defendants. His concern, relevantly, was primarily that if this covenant:

> ...goes south and we don't protect it, then other builders will move in and Marina Road, as we know it, and the neighbourhood will not be the same, and that is not the reason I bought that home.[38]

Thus, the big concern for Mr Gakovic was the precedent.

60 *Judith Patricia Tant* lives at 8 Marina Road with her husband Kevin Gordon Tant. They are joint registered proprietors of the property, which is also subject to a restrictive covenant. Mrs Tant for herself and her husband objected to the modification for discharge of the covenant for similar reasons to those advanced by the other witnesses called for the defendants. In addition, she expressed the view that the proposed development would be an intrusion into the character of the neighbourhood and would increase the extent of building site coverage, reduce the rear and side setbacks and create issues with permeability. She disagreed with the proposition that a large single dwelling, if built with similar dimensions to the proposed multi-unit development, would give rise to the same concerns. She expressed the view that a single dwelling would not necessarily occupy as much space as an apartment block. She disagreed with the proposition that the character of Marina Road is different to Beach Road in the vicinity of Marina Road because there were no apartment styled buildings. The multi-dwelling development at 43 Beach Road is of the townhouse style. She expressed the concern that the covenant protects their interests and the feel of the neighbourhood, and that the sort of development proposed on the Property, even though fronting Beach Road, directly impacts on Marina Road.[39]

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38 14 October 2014 T79–80.

39 14 October 2014 at T90.

Applicable Law

Legislative Provisions

61 The Plaintiff relies on s 84(1)(a) and (c) of the Act. Section 84 provides, so far as relevant:

> (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 ... 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
>
> (b) ...
>
> (c) that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction ...
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> ...
>
> (4) Any order made under this section shall be binding on all persons whether ascertained or of full age or capacity or not then entitled or thereafter capable of becoming entitled to the benefit of any restriction which is thereby discharged, modified or dealt with and whether such persons are parties to the proceedings or have been served with notice or not.

62 Section 84(1)(a) of the Act has two limbs, the first of which is that changes in the character of the property or the neighbourhood (or other circumstances of the case) have rendered the covenant obsolete. The second limb is that the reasonable user of the land is impeded by the continued existence of the covenant, without securing any corresponding practical benefits to other persons. These limbs are listed in the alternative, meaning that a plaintiff may rely on one or the other, or both, in support of an application under s 84(1)(a).

63 As noted above, the plaintiff relied only on the first limb of this provision from the commencement of the trial. The principles governing an application under this limb

of s 84(1)(a) were helpfully summarised by Kyrou J (as His Honour then was) in *Vrakas v Registrar of Titles*.[40] That summary was adopted by Macaulay J in *Rosenwald v Hogg*,[41] who listed the principles governing the first limb, as set out below.[42]

- What is the 'neighbourhood' is a question of fact and must be determined as at the date of the hearing, rather than the date of the covenant.
- A covenant is 'obsolete' if it can no longer achieve or fulfil any of its original objects or purposes, or if it has become 'futile or useless'.
- A covenant is not obsolete if it is still capable of fulfilling any of its original purposes, even if only to a diminished extent. Also, a covenant is 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.
- 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.
- If a covenant continues to have any value for the persons entitled to benefit under it, then it will rarely, if ever, be obsolete.
- 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.

64 In addition, the plaintiff relies on s 84(1)(c) in support of her application. The principles governing this provision were summarised by in *Vrakas* as follows:

(a) Whether a person entitled to the benefit of a covenant would be substantially injured within the meaning of s 84(1)(c) is a question of fact;[43]

(b) Each case must be decided on its own facts;[44]

(c) The applicant has the onus of establishing the matters set out in s 84(1)(c) upon which he or she relies.[45] This means that the applicant must effectively

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40 [2008] VSC 281 [25]–[27] ('*Vrakas*').
41 [2015] VSC 199 [19].
42 Ibid [20] (citations omitted).
43 *Vrakas* [2008] VSC 281 [40] citing *Re Alexandra* [1980] VR 55, 60.
44 *Vrakas* [2008] VSC 281 [44] referring to *Fraser v Di Paolo* [2008] VSC 117, [43], [58] ('*Fraser*').
45 *Vrakas* [2008] VSC 281 [42] citing *Re Cook* [1964] VR 808, 809, 812 (in relation to s 84(1)(c)); *Re Robinson* [1972] VR 278, 281; *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976); *Greenwood v Burrows* (1992) V ConvR ¶54-444, 65 192; *Re Pivotel Pty Ltd* (2001) V ConvR ¶54-635; [2000] VSC 264, [28] ('*Pivotel*').

prove a negative;[46]

(d) 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' test in the second limb of s 84(1)(a);[47]

(e) The question of whether the proposed discharge or modification 'will not substantially injure the persons entitled to the benefit of the restriction' requires a comparison between the benefits initially intended to be conferred and actually conferred by a covenant, and the benefits – if any – that would remain after that covenant had 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;[48]

(f) The injury must not be 'unsubstantial' and must be real and not a fanciful detriment;[49]

(g) It is not enough for the applicant to merely prove that there will be no appreciable injury or depreciation in value of the property to which a covenant is annexed;[50]

(h) 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;[51] and

(i) The prospect that, if the application for the discharge or modification of a covenant were granted, might be used to support further applications in a

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46 *Vrakas* [2008] VSC 281 [42] citing *Re Cook* [1964] VR 808, 812-13; *Greenwood* (1992) V ConvR ¶54-444, 65199; *Bevilacqua v Merakovsky* [2005] VSC 235 ('*Bevilacqua*'), [24].

47 *Vrakas* [2008] VSC 281 [34] citing *Re Robinson* [1972] 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* [2000] VSC 264, [37]; *Bevilacqua* [2005] VSC 235, [24].

48 *Vrakas* [2008] VSC 281 [35] citing *Re Cook* [1964] VR 808, 810-1; *Fraser* [2008] VSC 117, [36].

49 *Vrakas* [2008] VSC 281 [36] citing *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 10; *Greenwood* (1992) V ConvR ¶54-444, 65199.

50 *Vrakas* [2008] VSC 281 [37] citing *Re Cook* [1964] VR 808, 810.

51 *Vrakas* [2008] VSC 281 [38] citing *Stanhill Pty Ltd v Jackson* (2005) 12 VR 224, 246 ('*Stanhill*'); *Bevilacqua* [2005] VSC 235, [22].

similar vein, may be relevant.[52] Such precedential 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).[53]

65 To this can be added that the emphasis is on the injury suffered by the persons entitled to the benefit. Due to the nature of the proprietary right arising from a covenant, the injury must occur in relation to the person's enjoyment of his or her property.[54]

66 The following principles apply generally to any consideration under s 84(1).

(a) 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).[55] However, town planning principles and considerations may be relevant to the exercise of the Court's residual discretion.[56] 'Precedential' issues may also be relevant in the exercise of that discretion;[57]

(b) A lack of objectors to the discharge or modification of a covenant will not, of itself, necessarily satisfy the onus of proof;[58] and

(c) Even if the applicant proves the matters set out in any ground of s 84(1), the Court has a discretion to refuse the application.[59]

67 In *Stanhill*, Morris J, took a different approach to s 84(1). As Kyrou J (as His Honour

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52 *Vrakas* [2008] VSC 281 [39] citing *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].

53 *Vrakas* [2008] VSC 281 [39] citing *Greenwood* (1992) V ConvR ¶54-444, 65, 200.

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

55 *Vrakas* [2008] VSC 281 [41] citing *Re Robinson* [1972] VR 278, 285; *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 6–7; *Greenwood* (1992) V ConvR ¶54-444, 65, 198; *Pivotel* [2000] VSC 264, [50]; *Bevilacqua* [2005] VSC 235, [22].

56 *Vrakas* [2008] VSC 281 [46] citing *Greenwood* (1992) V ConvR ¶54-444, 65,201; *Bevilacqua* [2005] VSC 235, [22].

57 *Vrakas* [2008] VSC 281 [46] citing *Greenwood* (1992) V ConvR 54-444, 65, 201.

58 *Vrakas* [2008] VSC 281 [43] citing *Re Cook* [1964] VR 808, 812.

59 *Vrakas* [2008] VSC 281 [45] citing *Re Cook* [1964] VR 808, 810; *Re Robinson* [1972] 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. See also, for example, *Vrakas* [2008] VSC 281 [67]–[71]; and *Suhr v Michelmore* [2013] VSC 284 [47]–[48].

then was) described in *Vrakas*[60] Morris J 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'.[61]

68 In relation to s 84(1)(a), Morris J emphasised the ordinary grammatical meaning of 'obsolete' as being 'outmoded' or 'out of date'. As a result, his Honour concluded that, in order for s 84(1)(a) to be made out, it does not need to be shown that the covenant is either no longer of any use or is no longer suitable for its original purpose.[62] In relation to s 84(1)(c), his Honour concluded, in effect, that it must only be shown that any harm caused to a person entitled to the benefit of a covenant would not be of real significance or importance.[63]

69 After noting that in the decision of *Fraser*,[64] Coghlan J referred to, but found it unnecessary to express a settled view about Morris J's comments, Kyrou J in *Vrakas* applied the long standing principles regarding s 84(1) in preference to Morris J's interpretation[65]. In *Prowse v Johnstone* ('*Prowse*'), Cavanough J declined to adopt the approach of Morris J in *Stanhill*, saying that in his view the longstanding principles should be followed by single judges of this Court unless and until the Court of Appeal or the High Court rules otherwise.[66] As a result, subsequent cases have typically relied on the test and general principles set out in *Vrakas*, rather than departing from the approach favoured by Morris J.

Plaintiff's Submissions

Changes in the Character of the Property or Neighbourhood

70 In relation to the first limb of s 84(1)(a), the plaintiff submits that the covenant has been rendered obsolete by virtue of the fact that the Property is no longer in the

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60 *Vrakas* [2008] VSC 281 [47].
61 *Stanhill* (2005) 12 VR 224, 231, 239–40.
62 Ibid 237.
63 Ibid 238.
64 *Fraser* [2008] VSC 117, [26]–[28], [32]–[36].
65 *Vrakas* [2008] VSC 281 [48]
66 *Prowse v Johnstone* [2012] VSC 4 [99].

same neighbourhood as the remaining lots in the plan of subdivision.

71 The plaintiff submits that the Property is geographically remote and separate from the lots in Marina Road, emphasising the differing character of the lots on Beach Road as being larger and with a different orientation when compared with the lots on Marina Road. The focus of the properties fronting Beach Road is towards the bay foreshore and water to the south. The predominant architectural style and built-form of the properties along Beach Road also have a very distinct character. There is a very limited interface between the subject Property and Marina Road. The properties which have primary frontage to Marina Road have their own character, with a predominant built-form which is more diminutive to those properties fronting Beach Road.

72 On this basis, it is submitted that the character of the neighbourhood should be assessed with reference to the properties along Beach Road.

73 In this respect, the plaintiff submits that the properties along Beach Road are being redeveloped into larger houses, as well as being subdivided to provide for multiple dwellings on each lot. For example, the plaintiff submits that 43 Beach Road, immediately to the west of the Property, has been developed into a block of eight double-storey townhouses. It also seems that 42 Beach Road has been subdivided into 4 narrow lots and a single dwelling has been erected on each lot.

74 The plaintiff submits it is thus evident that the character of the discrete neighbourhood of the Beach Road area in which the Property is situated has changed. The built-form of the structures are large, architecturally distinct, overbuilt on the lot and 'shouting at the Bay'.[67] The covenant is thereby, the plaintiff submits, valueless and obsolete.

75 Finally, the plaintiff relies on the following bases as evidence that the covenant no longer has any value when considered in the context of the Beach Road neighbourhood:

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67 15 October 2014, T145.

(a) The covenant does not impose any height restriction;

(b) The covenant does not control the size of any single dwelling;

(c) The covenant does not impose any setbacks;

(d) The covenant does not disclose any intention to create a low-density neighbourhood or dwellings with large areas of open space;

(e) The covenant does not protect amenity by regulating overlooking or overshadowing; and

(f) The beneficiary lots are geographically remote from the plaintiff's lot.

76 It is submitted by the plaintiff that this is in contrast, in part, to the covenant at issue in *Prowse*, which did have a set-back restriction, as well as single-dwelling and no sub-division restrictions.

77 The plaintiff submits the predominant aspects of the amenity of the neighbourhood that the defendants wish to protect are not protected by this covenant. Even if it is right to say that the neighbourhood is characterised by 'single detached dwellings in a garden setting',[68] in the Beach Road area that is not the norm, as the houses are so built that the garden setting is substantially absent, and there is a multi-unit development at 43 Beach Road.

Substantial Injury

78 With respect to the ground advanced under s 84(1)(c), the plaintiff relied upon Morris J's comments in relation to that provision in *Stanhill*. In particular, the plaintiff noted that these comments were approved of by Dixon J in *Koller v Rice* ('*Koller*'), who said:

> I agree with observations made by Morris J in *Stanhill* that the language used in s 84(1)(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 evident policy of the section, as the whole of his Honour's reasons demonstrate, is to confer on the court ample power to

68 15 October 2014, T144.

> avoid the use of land being unnecessarily constrained. It is sufficient to show that the proposed discharge or modification will not cause harm, which could be regarded as being of real significance or importance, to the persons entitled to the benefit of the restriction. This is a question of fact 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.[69]

79 The plaintiff argues that the principal objection raised by the defendants is the issue of precedent. With respect to the remaining objections, the plaintiff submits that the majority of the amenity issues do not arise from the proposed discharge or modification of the covenant. In particular, any issues relating to overlooking, loss of privacy, overdevelopment and the size of the development are not in any way regulated under the current form of the covenant. Indeed, the plaintiff submits that the development complying with the covenant could be devised that raises many similar issues. As a result, the plaintiff submits that the defendants cannot rely on these objections at this stage, but would need to object during the planning process in the event that this application is successful.

80 The plaintiff relies on the comparison test adopted in *Vrakas* and other cases. That is, the question of whether the proposed discharge or modification 'will not substantially injure the persons entitled to the benefit of the restriction' requires a comparison between the benefits initially intended to be conferred and actually conferred by a covenant, and the benefits – if any – that would remain after that covenant had 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.[70]

81 The plaintiff also relies on my decision in *Wong v McConville* ('*Wong*')[71] as authority for two propositions:

(a) First, that if, without any modification to the covenant, the Property can be developed with a single-dwelling of substantially the same dimensions and

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69 *Koller v Rice* [2011] VSC 346 [29] (citations omitted).

70 *Re Cook* [1964] VR 808, 810-1; *Fraser* [2008] VSC 117 [36]; *Vrakas*, [2008] VSC 281 [35].

71 [2014] VSC 148 [73]–[74].

with the same characteristics as the proposed development of a multi-unit apartment building, then there could be no substantial injury to those proprietors with the benefit of the covenant by the proposed development. This is because the question whether the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the covenant 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 in the manner proposed; and

(b) Secondly, that restrictive covenants have been open to change under the legislation for a substantial period of time, and thus defendants purchasing properties that receive the benefit of a restrictive covenant are taken to accept that the covenant may be modified or discharged where it will not substantially injure them.

82 It was common ground between the experts that the planning laws did not restrict the size and bulk of a single-dwelling on the Property in the way in which the current dwelling has been constructed. Thus, a large two-storey dwelling could be erected on the Property which has the same characteristics as the proposed multi-unit building proposed to be erected, with a second storey having shadowing and overlooking characteristics the same as the proposed development.

83 The plaintiff relied on the observations of Dixon J in *Koller*.[72] The covenant in that case included a single-dwelling restriction and also a minimum living floor area. Dixon J noted:[73]

> In undertaking a comparison between the benefits initially intended to be and actually conferred by the covenant and the benefits, if any, which would remain after the covenant has been modified, I accept the evidence of Ms Spinks. Leaving aside the issue of the materials used in construction, which is not presently relevant, the intention of the covenant appears to be to ensure single, large dwellings are constructed on the land. That intention is not to preserve large private open space areas or space around buildings.

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72 [2011] VSC 346.
73 Ibid at [31]–[32].

> Had that been intended, other controls or restrictions would be found in the covenant.
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> The distinction between the size and configuration of the form of a single building, observing the restrictions of the covenant, compared with that the size and configuration of the form of two dwellings, if allowed, is negligible. The restrictive covenant impedes the use of the land for more than one dwelling but in practical terms does not limit the building footprint for a single dwelling. A permitted single dwelling could, in compliance with planning laws, be larger in form, bulk and plot coverage than two dwellings on the lot. While observing the restrictive covenant, the plaintiff's land could be further developed with building extensions and/or other works that would be similar in form to a second dwelling.

84 The plaintiff also relied on *Bevilacqua*, in which an argument that modification would open the floodgates was rejected on the basis that the relevant property was geographically separate from the lots benefitting under the covenant and close to other lots in relation to which the covenant had been discharged. Similarly, the plaintiff argues that in this case, even if the relevant neighbourhood is as Mr Milner defined it, the discharge of the covenant in relation to a property on Beach Road would not set a precedent for the lots on Marina Road.

85 The plaintiff conceded that in *Bevilacqua* there were other instances of modification of the covenant in the relevant sub-division or locality of the subject land, but submitted there would be no precedent in this case because of the geographical differences arising from the locality of the Property on Beach Road. Thus if any owner of land in Marina Road were to make an application to modify their covenant, the other owners would still be entitled to argue that their neighbourhood character with its garden setting, and other features mentioned in this case, would be threatened.

86 In relation to the proposal to subdivide the Property and create a battle axe lot at the rear, having regard to the withdrawal of the application to modify the covenant affecting the part of Lot 3 that comprises, in substance, the handle of that battle-axe (the driveway), from a visual point of view, the plaintiff submitted there really would be no difference. Given that that is an unusual configuration in itself (there is no other block of land in the Marina Road Estate that has that peculiar or unique slither of land that connects a lot across another lot to a road) it is unique and so, from

that point of view could be readily distinguished from other blocks in Marina Road. They are regulation-size blocks with no unusual distinguishing features of that nature. In order to have a battle-axe block, they would have to have a subdivision and a construction at the back. In contrast, the Property has an existing battle axe configuration. For that to be used as a point of access to a single-dwelling would not set a precedent for the other properties on Marina Road.

87 Moreover, there are only four lots in the Marina Road Estate that front onto Beach Road and they are all of a different built-form and character to those in Marina Road. If the owners of one of those lots were to apply to modify the covenant affecting their land, that would not create a precedent for the lots in Marina Road for the same reason.

88 In response to the defendants' reliance on the implicit benefits conferred by the covenant, the plaintiff submitted that it is not permissible to construe the covenant so as to imply benefits that are not expressly stated. In this respect, the plaintiff relied on the following statement by Cavanough J in *Prowse*:

> First, the words of a restrictive covenant are generally to be given their meaning "in common vernacular use", that is to say, they are generally to be interpreted in their "colloquial or ordinary sense, not in any technical or legal sense". In other words, as the plaintiff submits, the words of a restrictive covenant are generally to be given their "ordinary and everyday meaning". Second, the words of a restrictive covenant must always be construed in their context and upon a reading of the whole of the instrument.[74]

89 The plaintiff submits that the words of the covenant in this case are clear, and that there is no basis for the implication of the words suggested by the defendants. There is no need to look at extrinsic material and, indeed, no extrinsic material to which the defendants have pointed in support of their interpretation of the covenant. As a result, the plaintiff argues that the defendants cannot rely on these implicit benefits.

90 Finally, the plaintiff addresses the defendants' concern that the ultimate buildings developed may not in any way correspond with the plans that have been submitted

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74 *Prowse* [2012] VSC 4 [52] (citations omitted).

for the purposes of this application. In response to this submission, the plaintiff contends that the Court has the power to impose conditions as part of its power to modify or discharge a covenant, and could easily require the plaintiff to substantially comply with the plans submitted to the Court. In particular, the plaintiff relies upon *Bevilacqua*, in which Ashley J imposed conditions on the modification of a covenant.

Defendants' Submissions

Changes in the Character of the Property or Neighbourhood

91 In relation to the first limb of s 84(1)(a) of the Act, the defendants rely principally on the report of Mr Milner and on the cases of *Prowse* and *Freilich v Wharton* ('*Freilich*')[75] in support of their contention that the relevant 'neighbourhood' is constituted by the entirety of the Marina Road Estate, including those lots on Beach Road and to the east and west of the subdivision. Given that this neighbourhood remains almost exclusively single-dwelling properties, the defendants argue that this ground cannot be made out.

92 The defendants emphasise the similarity between the facts in *Prowse* and those in this case, including the fact that the relevant property in *Prowse* was located on an arterial road, away from the bulk of the properties that constituted the Coonil Estate. Notwithstanding this geographical separation, the Court accepted the objections advanced by the defendants in that case, many of which were identical to those advanced by the defendants in this case. In particular, arguments in *Prowse* were based on the precedential effect of a modification or discharge of the covenant, loss of privacy and overlooking, loss of spaciousness and the bulk and dominance of the proposed development.

93 Ultimately, Cavanough J in *Prowse* accepted these and various other objections and held that the covenant was not obsolete, saying that:

> As mentioned above, one purpose, at least, of the restriction is to ensure that

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75 *Freilich v Wharton* [2013] VSC 533.

> there would be only one residence on each block, so as to control the density of population in the neighbourhood. Notwithstanding the presence of Cabrini hospital on the western side of the Coonil Estate and the influx of people and traffic associated with the hospital, it is clear that the covenant still has a role to play in achieving its object. There remain a very large number of single dwellings on large allotments in the neighbourhood. At present, there is a complete absence of blocks of units within the Coonil Estate, in contrast to surrounding areas.[76]

94 In *Freilich*, the application was for the discharge of a covenant requiring the relevant property to be used only for residential purposes. The defendants rely on the following passage of Bell J relating to the definition of the neighbourhood:

> I do not accept the plaintiff's submission that I should apply the narrow concept of neighbourhood which is used in planning cases. Nor do I find that the relevant neighbourhood is to be confined as the defendants' expert said it should be, albeit on a wider basis. In my view, the neighbourhood is constituted by the Coonil Estate, for three related reasons: first, in cases under s 84(1), the court does not apply a preconceived concept of neighbourhood; second, where relevant, the court should have regard to the concept of neighbourhood which is reflected in the benefits conferred by the covenant; and third, a broader concept of neighbourhood is demanded by the evidence in this case.[77]

95 The defendants submit that, applying these principles to the case at hand, the value of the covenant to those living in Marina Road cannot be discounted on the basis that they allegedly live in a distinct neighbourhood from the Property itself. Further, the defendants submit that Mr Chapman has effectively conceded the remaining value of the covenant by stating that:

> [i]t is likely that more intensive redevelopment of the properties in a similar manner to the properties to the west in particular has not occurred as a direct consequence of the presence of the single dwelling covenants.[78]

96 In relation to the two experts, the defendants submit that their expert, Mr Milner, should be preferred on this point on the basis of his superior experience and due to Mr Chapman having acted as an advocate for the plaintiff in related proceedings. Nonetheless, the defendants submit that the definition of the neighbourhood is not decisive, as the plaintiff has failed to prove there have been sufficient 'changes' to meet the requirements of the first limb of s 84(1)(a).

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76 *Prowse* [2012] VSC 4 [107].

77 *Freilich* [2013] VSC 533 [51]

78 Mr Chapman's first report at [81].

97 In particular, the defendants point to the fact that there are only three lots in the vicinity of the Property that contain more than one dwelling. Of these, two are only two-dwelling lots. The lot to the immediate west of the Property, containing eight two-storey townhouses, is the first and only multi-dwelling development in its section of Beach Road. That land is outside the Marina Road Estate, or subdivision, and there is no evidence that there was any restrictive covenant affecting that land.

Substantial Injury

98 With respect to the precedential impact of a discharge or modification of the covenant as it applies to the Property, the defendants relied on the evidence of Ms Heatley, Mr Dixon, Ms Tant, Mr Gakovic, Mr Male and Mr Milner, all of whom expressed concern in this respect. In response to the plaintiff's argument that the application cannot set a precedent as the relevant Property is in a different neighbourhood from the rest of the Marina Road Estate, the defendants rely on the following passage from *Freilich*:

> While Wattletree Road is different to the interior of the estate in significant respects, those wanting to build on the precedent would seek to compare the plaintiff's house with other houses in Thanet Street and the nearby streets and distinguish them from houses in the deep interior of the estate. The house stands as a soldier guarding the residential character of the Coonil Estate against commercial encroachment from the south. I accept the evidence of the defendants' expert town planner that, for those and other reasons, any subsequent planning approval of the proposed commercial use would have real precedential value.
>
> As the plaintiff submitted, some might regard certain features of the modification as creating a good precedent. For example, the house is to be retained and the proposed commercial use would be relatively low-impact. But the defendants have much more to fear than the loss of an unprotected house with heritage character and some other business use with higher impact. On the evidence, approving the modification would make significantly more likely the happening of the very thing which the covenant seeks positively to prevent, namely the diminution of the residential character of the Coonil Estate by the use of houses not as residences but for trade or business. When this central purpose of the covenant is considered, the precedential value of the modification would be bad indeed.[79]

99 The defendants emphasise that the modification in this case would be the first of its

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79 *Freilich* [2013] VSC 533 [71]–[72].

kind for the Marina Road Estate, in that the estate remains as intact today as when it was first created. They submit that the precedent set by allowing any modification in this case would take a number of forms, including:

(a) The subdivision of a new lot allowing more than one-dwelling;

(b) The creation of a battle-axe lot, in particular one onto Marina Road; and

(c) The creation of a multi-unit development.

100 In particular, it is submitted that such a precedent will logically lead to similar applications from the owners of the remaining Beach Road properties. The creation of battle-axe lots onto Marina Road is of particular concern, as well as the development of multi-dwelling buildings on the streets on either side of Marina Road on the basis that they are not part of the same 'neighbourhood'.

101 Additional amenity impacts with which the defendants are concerned include:

(a) The height and bulk of the proposed development;

(b) The increase in site coverage and consequential loss of garden area;

(c) Loss of spaciousness and privacy;

(d) Perceived overlooking into 1 Marina Road;

(e) A different character to the established pattern of housing;

(f) Diminution in potential views to 1 Marina Road and other allotments;

(g) Increase in traffic;

(h) Increase in noise and lighting;

(i) The presence and activity of five households instead of one; and

(j) Lack of setbacks.

102 The defendants argue that these concerns cannot be addressed through the planning process, relying on the following passage from *Freilich*:

> It is not to the point that traffic issues are not examined in this way in town planning cases. This is a case about whether the plaintiff has established that the defendants would not be substantially injured by the modification sought. The court should not deny itself the benefit of evidence which may be relevant when determining that question.[80]

103 Similarly, the defendants emphasise that planning standards are a compromise intended to facilitate other objectives of social policy, and would not adequately protect their interests, relying on the following statement by Cavanough J in *Prowse*:

> I am not satisfied that all substantial injury would be prevented by the operation of the provisions of the planning scheme. The plaintiff relies in particular on clause 55 of the Stonnington Planning Scheme, commonly known as ResCode. However, those provisions represent a legislative compromise between the interests of developers and the interests of surrounding residents. They leave considerable discretion to the planning authorities. They cannot be regarded as a substitute for the proprietary rights of the defendants pursuant to the restrictive covenant.[81]

104 As mentioned above, the defendants are additionally concerned by the prospect that the plaintiff may alter the plans for the proposed development after the modification or discharge of the covenant, so as to cause additional injury to the defendants not contemplated in this application.

105 Finally, the defendants argue that Mr Chapman's evidence is coloured by his assessment that restrictive covenants generally are outmoded on the basis that they are inconsistent with planning policy. The defendants rely on a number of cases in which the courts rejected such arguments, including *Pivotel*,[82] *Re Robinson*,[83] and *Greenwood*.[84] They further submit that such authority is even more pertinent following the amendment of the *Planning and Environment Act 1987* in 2000, resulting in the present s 61(4), which provides that:

> If the grant of a permit would authorise anything which would result in a breach of a registered restrictive covenant, the responsible authority must

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80 Ibid [41].
81 *Prowse* [2012] VSC 4 [118].
82 [2000] VSC 264 [50].
83 (1972) VR 278, 285.
84 (1992) V ConvR ¶54-444, 65,198-203.

refuse to grant the permit unless a permit has been issued, or a decision made to grant a permit, to allow the removal or variation of the covenant.

Consideration

Section 84(1)(a) – Changes in the Character of the Property or Neighbourhood

106 As indicated above, I do not consider Morris J's construction of the term 'obsolete' as meaning 'outmoded' or 'out of date' to be applicable in this case. His Honour's decision in *Stanhill* is contrary to established principle and has not been accepted or applied in subsequent cases, with the sole exception of *Koller*. As a result, the following analysis has been conducted on the basis that, in order for me to find that the covenant is 'obsolete', the plaintiff will need to demonstrate that it has become futile or useless, no longer achieving any of its original objects or purposes.

Neighbourhood

107 The question of whether this ground has been made out depends in the first place on the definition of 'neighbourhood' that is adopted. While the expert reports were of some assistance in this respect, I consider the authorities on point to be enlightening, particularly with respect to the rejection of an overly narrow description of the neighbourhood.

108 The plaintiff's submission that there is a discrete neighbourhood or neighbourhoods comprising properties with frontage to Beach Road, which should be considered to be separate from the properties with frontage to Marina Road, was based on two factors. The built-form of the houses on Beach Road compared with the built-form of the houses in Marina Road and the geographical separation of houses or properties on Beach Road from the properties in Marina Road. The fact that the Property was one of the few properties in the Marina Road Estate that fronted onto Beach Road was a point of significance. The evidence of Mr Milner, my own impressions of the area around the Property gleaned from the photographic evidence and the view that I undertook (with the consent of the parties, a view conducted on my own) and the approach adopted by the Court in both *Prowse* and *Freilich* make it difficult to accept these arguments.

109 Although it is true that the built-form of the properties on Beach Road is different from many properties in the Marina Road Estate, the built-form is not, in my opinion, a proper or appropriate descriptor to distinguish a neighbourhood when the task at hand is to do with identifying the character of the neighbourhood for the purpose of deciding whether the restriction in a 'single residential dwelling' covenant is obsolete. The built-form of the properties on Beach Road is a product of the aspect and, in some cases, the size of the lot. The built-form is designed in part to capture the views over Port Phillip Bay.

110 What is important for the purpose of identifying the relevant character of the neighbourhood, and thus the identification of the relevant neighbourhood, is the character of single versus multi-dwelling residences. The only property with multi-dwelling residences is 43 Beach Road, immediately to the west of the subject Property, where there is an eight unit development on a very large area of land. Immediately to the west of this development there is further evidence of subdivision - 42 Beach Road has clearly been subdivided.[85] My own observation of this subdivision is, however, that each lot has a discrete frontage to Beach Road and is itself a single residential dwelling. They have street numbers 42[1], 42[2], 42[3] and 42[4].

111 Both *Prowse* and *Freilich* concerned proposed developments in the Coonil Estate, one of which was a plan for an 18-unit development and one of which was a plan to convert the existing residential property to make it suitable for the provision of private medical services. Both proposed developments related to properties that were located on an arterial road, which was situated away from the majority of the lots comprising the Coonil Estate. Nonetheless, in both cases, the relevant property was considered to be part of the wider neighbourhood comprised of the Coonil Estate, and – no matter where their lots were situated in the wider neighbourhood – the Court took the interests of the owners of lots entitled to the benefit of the covenant into account.

112 Looking at *Freilich* in particular, I accept the proposition put forward by Bell J that

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85 See First Chapman Report [39] figure 6.

the Court should take into account the benefits intended to be conferred by the covenant in determining what constituted the neighbourhood for the purposes of a s 84(1) application. I also accept his Honour's statement that the narrow concept of neighbourhood applied in planning cases is inapplicable in applications for the modification or discharge of restrictive covenants.

113 Looking at the expert reports, it is clear that Mr Chapman had a primary focus on planning considerations, considering his emphasis on restrictive covenants generally being an out-moded form of controlling development that had been largely rendered redundant by the introduction of planning schemes. His definition of the neighbourhood was narrow, encompassing some nine lots. It encompassed only one frontage, and did not extend beyond the intersecting roads on either side of the Property.

114 Mr Milner, on the other hand, thoroughly examined the relevant principles and considerations in his discussion of the relevant neighbourhood, applying a common-sense approach in reaching a final neighbourhood that still did not encompass the entire Marina Road Estate. Consistent with the authority of *Prowse*, he considered the benefits intended to be conferred by the covenant and the zoning and overlay mechanisms in his analysis.

115 Despite the persuasive reasoning of Mr Milner, I am not satisfied that Mr Milner's definition of the relevant neighbourhood as encompassing the lots to the east and west of the Property—extending to Charman Road and Plummer Road, as well as those to the north on Marina Road, extending to the intersection with Wakool Avenue and Rivoli Street—is the appropriate neighbourhood. In my view the approach taken in *Freilich v Wharton* properly reflects the appropriate neighbourhood. In that case, as I have said,[86] Bell J defined the neighbourhood as the area comprised by the Coonil Estate. He did so for three related reasons:

(a) First, in cases under s 84(1), the Court does not apply a preconceived concept

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86 See above at paragraph 94.

of neighbourhood;

(b) Second, where relevant, the Court should have regard to the concept of neighbourhood which is reflected in the benefits conferred by the covenant; and

(c) Third, a broader concept of neighbourhood was demanded by the evidence in that case.

116 In this case the same considerations apply. In particular:

(a) Stopping the relevant neighbourhood at Wakool Avenue and Rivoli Street completely cuts out of the neighbourhood a great many of the lots in the subdivision that have the benefit of the covenants over the Property;

(b) Extending the neighbourhood along Beach Road to the east and west of the lots in the subdivision encompasses properties not having the benefit of the covenant and properties that are not restricted by a covenant in similar terms. This is to be contrasted with the properties within the subdivision, the majority of which have the benefit of the covenant and apparently all of which are burdened by the covenant; and

(c) The evidence of the residents in the area shows the relevance of the restriction in the covenant beyond the cross streets (Wakool and Rivoli), as does the evidence of Mr Milner of the study plans referred to in paragraph 33 above. They show the attributes that distinguish the neighbourhood in an acutely relevant way, because substantially all the lots in the subdivision share the burden and the benefit of the same covenant. The lots that do not have the benefit of the covenant applicable to the Property in this case are those transferred out of the parent title before the subject Property.

117 Accordingly, I consider the relevant neighbourhood to be the Marina Road Estate, that is the properties in the subdivision (LP 7995).

Level of Change

118 With respect to the question whether the character of the neighbourhood, as I have defined it, has changed sufficiently to render the covenant obsolete, I accept the defendants' submissions that this ground has not been made out, regardless of the characterisation of the neighbourhood itself. As noted above, there are only three lots in the area surrounding the Property that contain developments of more than one-dwelling. Two of these lots contain only two-dwellings, and are situated some distance from the Marina Road Estate.

119 The only lot that can be considered to be relevant for these purposes is the lot to the immediate west of the Property, which has been developed to consist of eight double-storey townhouses. This lot is not within the Marina Road Estate, which is the neighbourhood as I have defined it, and is the only development of its kind in the immediate vicinity of the Estate, with the possible exception of 42 Beach Road which is also outside the Marina Road Estate. As the only example of such a development, it cannot be considered to be part of a larger change in the character of the neighbourhood itself. This is so regardless of whether the plaintiff's or the defendants' characterisation of the neighbourhood is adopted, or the one I have found to be applicable.

120 While I accept the plaintiff's contention that the lots to the west of the Property, prior to Sea Parade have been subdivided so as to allow for additional dwellings, this has nonetheless resulted in properties (particularly the four properties at 42 Beach Road) that retain the predominant characteristic of having one separate dwelling per lot, facing onto Beach Road. The Property itself, in its current form, retains the characteristics that dominate the Marina Road Estate, having a single-dwelling on a large plot with gardens and a swimming pool. Even the lot to the immediate east of the Property – on the corner of Beach Road and Marina Road – which the plaintiff points to as a demonstration of the larger built-form, greater site coverage and differing 'architectural style' creating the distinct character of its narrow definition of the neighbourhood, nonetheless retains a large rear garden complete with swimming pool. The lot on the opposite side of the corner of Beach Road and

Marina Road has both a swimming pool and a tennis court in spite of the large single-dwelling development on that lot.

121 With respect, I would adapt the words of Cavanough J in *Prowse* in finding that there remains a complete absence of multi-unit developments in the Marina Road Estate, as well as a large number of single-dwelling allotments in much of the surrounding area. By the admission of Mr Chapman, this is a direct consequence of the covenant itself. On this basis, I cannot conclude that there have been changes in the character of the property or the neighbourhood sufficient for the covenant to be deemed obsolete on any understanding of what constitutes the relevant neighbourhood for the purposes of this case.

Substantial Injury

122 The plaintiff relies on Morris J's opinion in *Stanhill* to the effect that it is sufficient if the plaintiff demonstrates that no harm of real significance or importance would be caused to those entitled to the benefit of the covenant in order for this ground to be made out. Again, I do not consider that this statement is in line with prior or subsequent authority in relation to this ground of s 84(1). In particular, the one of the most persuasive authorities decided since *Stanhill* is *Vrakas*, which has been cited on numerous occasions since it was decided and utilises the traditional narrow approach to the analysis of this ground.

123 In *Prowse*, Cavanough J explicitly stated that such a departure from authority should not be undertaken by a single Judge of the Trial Division, but rather by the Court of Appeal or the High Court. As a result, I do not consider that Morris J's remarks constitute authority on this issue, and will apply the principles as set out in *Vrakas* and adopted in subsequent cases.

Comparison Test

124 The reliance by the plaintiff on the comparison test adopted in *Vrakas* and other

cases[87] raises some difficulty.

125 It is clear that without any modification to the covenant affecting Lot 4 (which is now the only covenant sought to be modified), that part of the Property can be developed with a single-dwelling of substantially the same dimensions and with the same characteristics as the proposed development of a multi-unit apartment building. That would mean, ignoring the subdivision of Lot 4 that is contemplated by the creation of a lot at the rear of the Property, that there could be no substantial injury to those proprietors with the benefit of the covenant by the proposed development.

126 This is because the question whether the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the covenant 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 in the manner proposed.

127 It is not possible, however, to ignore the necessary subdivision of Lot 4 to create a lot at the front and the battle axe lot at the rear of the Property. That involves the potential creation of the four unit apartment building on the front lot and a single-dwelling on the rear lot. The comparison test as applied in *Wong* is not easily applied in this situation. In that case, and in *Koller* and *Hermez v Karahan*,[88] the modification was to build two single-dwellings in place of the one single-dwelling, and for that purpose to subdivide the land. Because the comparison test did not reveal any substantial injury to those entitled to the benefit of the restriction (because a single-dwelling with substantially the same bulk and other qualities as the two-dwellings could be built on the land anyway), the modification was allowed. Here the position is different because it seems highly likely that the construction of both buildings giving rise to five dwellings will go well beyond what might be constructed on the Property if it were not subdivided as proposed.

128 The onus is on the plaintiff to establish that the persons having the benefit of the

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87 See paragraph 80 above.

88 [2012] VSC 443 (Daly AsJ).

restriction will not be substantially injured in relation to the person's enjoyment of his or her property. I consider that the burden has not been discharged, so far as the comparison test is concerned, because what is proposed to be constructed on the subdivision goes beyond what might be constructed as a single-dwelling on the Property if not sub-divided.

Precedent

129 If I am wrong in that conclusion, it is necessary to consider whether the modification sought would open the floodgates; that is, create a precedent for the modification of covenants affecting other properties in the Marina Road Estate.

130 There are two arguments relied upon by the plaintiff in this respect that do not convince me that there is no precedential value in this case. Relying on my decision in *Wong*, the plaintiff first argued that the defendants had purchased their properties on the understanding that it may be discharged or modified in accordance with the legislation. While this is true, the fact that the covenant is able to be discharged or modified in the circumstances set out in the legislation does not mean that the defendants are not entitled to rely on its precedential value in opposing such a discharge or modification.

131 Rather, the very purpose of the legislation is to allow this to occur only in circumstances in which the covenant no longer serves any useful purpose, or where the discharge or modification would not cause substantial injury to the beneficiaries. In purchasing properties within the Marina Road Estate, the defendants were certainly entitled to rely on the fact that the covenant would not be discharged or modified so long as it conferred a substantial benefit on them. If it is held that the discharge or modification of the covenant in this case would set a precedent for the remainder of the estate, this is certainly a substantial injury on which the defendants are entitled to rely, as it will compromise the benefit their properties presently enjoy of being in a neighbourhood comprised only of single residential dwellings. It would make it easier for subsequent applicants to have the covenant discharged or modified with respect to their lots.

132 It would make it easier, even though it might be said that the area on Beach Road is discrete and different in built-form and architecture, simply because those lots continue to be in the Marina Road Estate. The argument of the plaintiff that there was no precedent by a modification to a covenant burdening a Beach Road property because of the difference in the built-form, aspect and architecture is in my view not persuasive. The relevant character for the purpose of considering the precedential effect of modification is the single residential dwelling character, and that remains a feature of the Beach Road properties in the Marina Road Estate.

133 With regard to the plaintiff's reliance on *Bevilacqua*, I consider that case to be distinguishable on the facts. In particular, in that case, the argument on the basis of precedent was rejected as the relevant lot was geographically separate from the remaining lots benefitting under the covenant and close to other lots in relation to which the covenant had been discharged. Moreover, in that case the subject property had been used for a very long time (possibly since established in 1928) in breach of the covenant as four self-contained apartments. The reasoning of Ashley J (as he then was) in *Bevilacqua* is undoubtedly sound, but the facts distinguish it from this case. In this case the covenant has not been discharged or modified in relation to any other lots in the Marina Road Estate and, so far as the evidence establishes, the Property is still, and always has been, a single residential dwelling.

134 In fact, the reasoning in *Bevilacqua* strengthens the defendants' argument on precedent, as the decision in that case demonstrates that a discharge or modification of the covenant in this case would likely lead to the success of any future application in relation to the other properties in the Marina Road Estate with frontage onto Beach Road. Such a precedent could also lead, by analogy, to removal or modification of the covenant as it applies to those lots in the Marina Road Estate with frontage onto Balcombe Road. It may even lead to such applications in relation to those properties on the corners of Marina Road and Wakool Avenue and Rivoli Street. In particular, a number of properties in the vicinity of Wakool Avenue consist of multi-dwelling developments. Adapting the wording of Bell J in *Freilich*,

those willing to build upon the precedent established in this case could easily draw a comparison, between the Property and other lots fronting onto Beach Road or Balcombe Road.

Amenities

135 Other than the precedential value of the application, the defendants rely on a number of amenities that they say will be affected by the discharge or modification of the covenant to allow for the construction of two separate buildings containing five dwellings in total. These are listed in the summary of the defendants' submissions, above. The plaintiff relies on two arguments in this respect, the first of which is that these concerns are best dealt with through the planning process.

136 Although it is not strictly necessary to address this matter in the light of my conclusions on the 'comparison' test and the precedential value of the modification if made, however, I do not consider that the plaintiff's response is apt.

137 In *Freilich v Wharton*, Bell J explicitly rejected an argument in line with planning considerations, stating that:

> It is not to the point that traffic issues are not examined in this way in town planning cases. This is a case about whether the plaintiff has established that the defendants would not be substantially injured by the modification sought. The court should not deny itself the benefit of evidence which may be relevant when determining that question.[89]

138 Similarly, in *Prowse*, Cavanough J stated that:

> I am not satisfied that all substantial injury would be prevented by the operation of the provisions of the planning scheme. The plaintiff relies in particular on clause 55 of the Stonnington Planning Scheme, commonly known as ResCode. However, those provisions represent a legislative compromise between the interests of developers and the interests of surrounding residents. They leave considerable discretion to the planning authorities. They cannot be regarded as a substitute for the proprietary rights of the defendants pursuant to the restrictive covenant.[90]

139 These passages are directly on point, considering the analogous factual

89 *Freilich* [2013] VSC 533 [41].
90 *Prowse* [2012] VSC 4 [118].

circumstances of those cases. Ultimately, the planning process is a separate process with different objectives and considerations to be taken into account. As pointed out by the defendants, restrictive covenants are given explicit priority over the planning process in s 61(4) of the *Planning and Environment Act 1987* (Vic). On the basis of these authorities, I do not consider that the amenity concerns of the defendants can be appropriately met through application of the planning scheme.

140 The plaintiff's second argument in relation to the amenity concerns was that the majority of the amenities sought to be protected do not arise from the proposed discharge or modification of the covenant. Again, I do not agree with this reasoning. The plaintiff relied on a passage of the judgment of Cavanough J in *Prowse* in support for her contention that the covenant was to be construed in accordance with its actual wording, and that there was no basis for the implication of the words suggested by the defendants.

141 This argument is misplaced, in that it confuses the construction of the covenant so as to imply terms into the covenant – as one may imply warranties into a contract for the purposes of business efficacy – with an identification of implied benefits of the actual terms of the covenant. In this case, the relevant restriction contained in the covenant prevents the construction of more than one dwelling on any lot within the Marina Road Estate. This explicit restriction has some, if not many, implied benefits, one of which is that it is less likely that a large number of people will live on a single lot. Although it is possible that a lot-owner may construct a large single-dwelling and live there with 20 members of their extended family, it is un-realistic to suppose that will occur. It is far more likely that a single-dwelling lot will be occupied by a family of four to five people, thereby reducing traffic etc in the neighbourhood.

142 There may be other implied benefits of single-dwelling residential lots.[91] But in this case, it is unnecessary to consider the extent of these beyond saying that the single residential dwelling inevitably brings with it less density of dwellings, population

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91 In *Prowse*, Cavanough J accepted a large number of the benefits raised in these proceedings as relevant to his consideration of the obsolescence ground under s 84(1)(a) of the Act: *Prowse* [2012] VSC 4 [109].

and traffic and none of the clutter of a neighbourhood with multi-unit developments. These were matters that many witnesses testified to and which I observed in the course of my view of the area. The sense of spaciousness and the 'gardenness' that some witnesses spoke of may not survive, however, because of the tendency that is already evident in the Marina Road Estate for new very large houses to be built, taking up much more of the land than the older houses have done. The plaintiff is right when she submits that the covenant cannot control this development because it does not regulate the size, height, set back or footprint of a single residential dwelling built on a lot burdened by the covenant.

143 As mentioned above, the assessment of any substantial injury that may be caused by discharge or modification of the covenant must be assessed by comparison of the benefits either intended or actually conferred by the covenant and those that would remain in the event that the application was successful. Again, as stated above, 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' test in the second limb of s 84(1)(a).[92]

144 In this case, the plaintiff's expert has conceded the practical benefits conferred by the covenant, stating that '[i]t is likely that more intensive redevelopment of the properties in a similar manner to the properties to the west in particular has not occurred as a direct consequence of the presence of the single dwelling covenants'. As a result, this practical benefit of avoiding such intensive redevelopment within the Marina Road Estate, as well as protecting the implicit amenity benefits at least in relation to the immediately surrounding lots, would be lost to the beneficiaries in the event that this application was successful.

145 Finally, *Vrakas* and *Prowse* show the importance of specific plans to show that there will be no substantial injury to persons entitled to the benefit of a covenant.[93] The

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92 *Vrakas* [2008] VSC 281 [34] citing *Re Robinson* [1972] VR 278, 283; *Re Stani* (Unreported, Full Court of the Supreme Court of Victoria, Young CJ, Barber and Nelson JJ, 7 December 1976) 10; *Pivotel* [2000] VSC 264 [37]; *Bevilacqua* [2005] VSC 235 [24]; *Prowse* [2012] VSC 4 [97].

93 See also *Stanhill* (2005) 12 VR 224, 246 ; *Bevilacqua* [2005] VSC 235 [22].

plaintiff argues that the concept plan is sufficient for the purposes of this application, and in spite of the fact that it is open to the Court to impose the condition that the plaintiff comply with the plans submitted to the Court in this case, it is important to note that it is the plaintiff's responsibility to discharge the onus under s 84(1)(c). The proposed plans, if adhered to, involve the construction of both a four-unit apartment building and a single dwelling on the rear of the Property. For the reasons I have given above in relation to the application of the comparison test, these proposed plans show substantial injury to the beneficiaries of the covenant.

146 The defendants came to the trial of this proceeding to meet the case presented in the evidence and the development in the proposed plans. They have done that. It would be inappropriate for me to consider some other alternative development, or the imposition of some conditions, that would alter the application the defendants have come to court to meet.

Conclusion

147 On the basis of the above analysis, I do not consider that the plaintiff has discharged the onus of proving the requirements under either the first limb of s 84(1)(a) or s 84(1)(c). I reject the narrow characterisation of the neighbourhood advanced by the plaintiff's expert and, even if I am wrong in that conclusion, I do not consider that there is any real change in the character of the neighbourhood sufficient to justify the conclusion that the covenant is obsolete or lacking in any real value.

148 The application of the comparison test does not establish the negative for the purposes of s 84(1)(c) of the Act. That is, the proposed development of the front of the Property (with a four-unit apartment building) and of the rear of the Property (with a single residence) is not shown by the comparison test not to substantially injure those who have the benefit of the restriction.

149 On the basis of the conception of neighbourhood that I have adopted, I consider that modification in accordance with this application has precedential value, sufficient to demonstrate that substantial injury would be caused to the defendants if the

covenant were to be discharged or modified. Even on the more narrow characterisation of the neighbourhood advanced by Mr Chapman, future owners of the remaining lots in the Marina Road Estate with frontage onto Beach Road within both the primary and secondary neighbourhoods as defined by Mr Chapman could build on the precedent by comparing their lots with that of the plaintiff. This could lead to further applications by lot owners whose properties front onto Balcombe Road, resulting in further encroachment of multi-unit developments into the Marina Road Estate.

150 Although less important in the context of the determination of this application, I consider that the amenity benefits I have identified that are conferred by the restriction in the covenant are sufficiently significant to constitute substantial injury if the covenant were to be discharged or modified.

151 Accordingly, I will dismiss the application. I will, if necessary, hear the parties on the formulation of the appropriate orders.

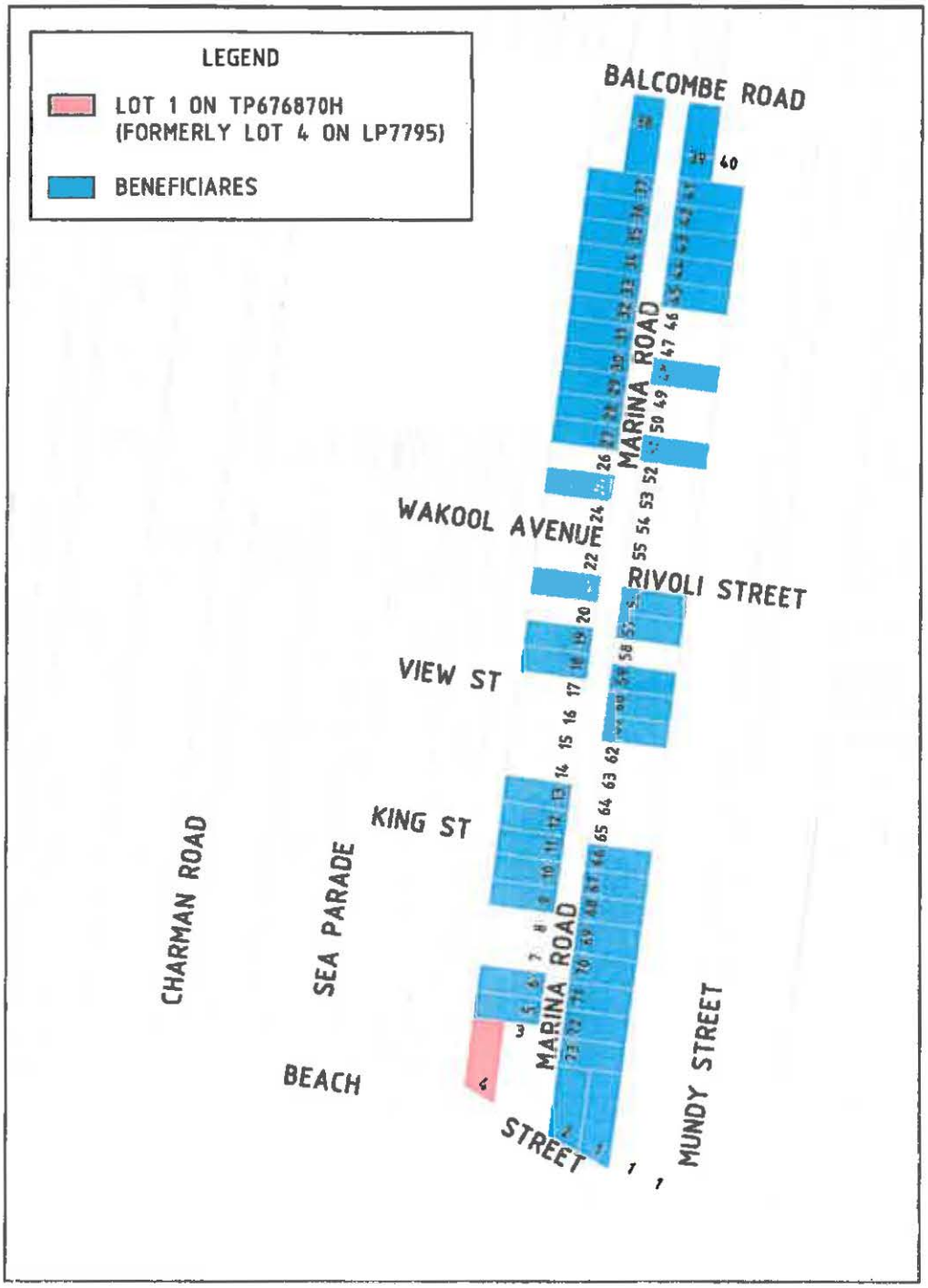
CERTIFICATE

I certify that this and the 51 preceding pages are a true copy of the reasons for Judgment of Derham AsJ of the Supreme Court of Victoria delivered on 17 June 2015.

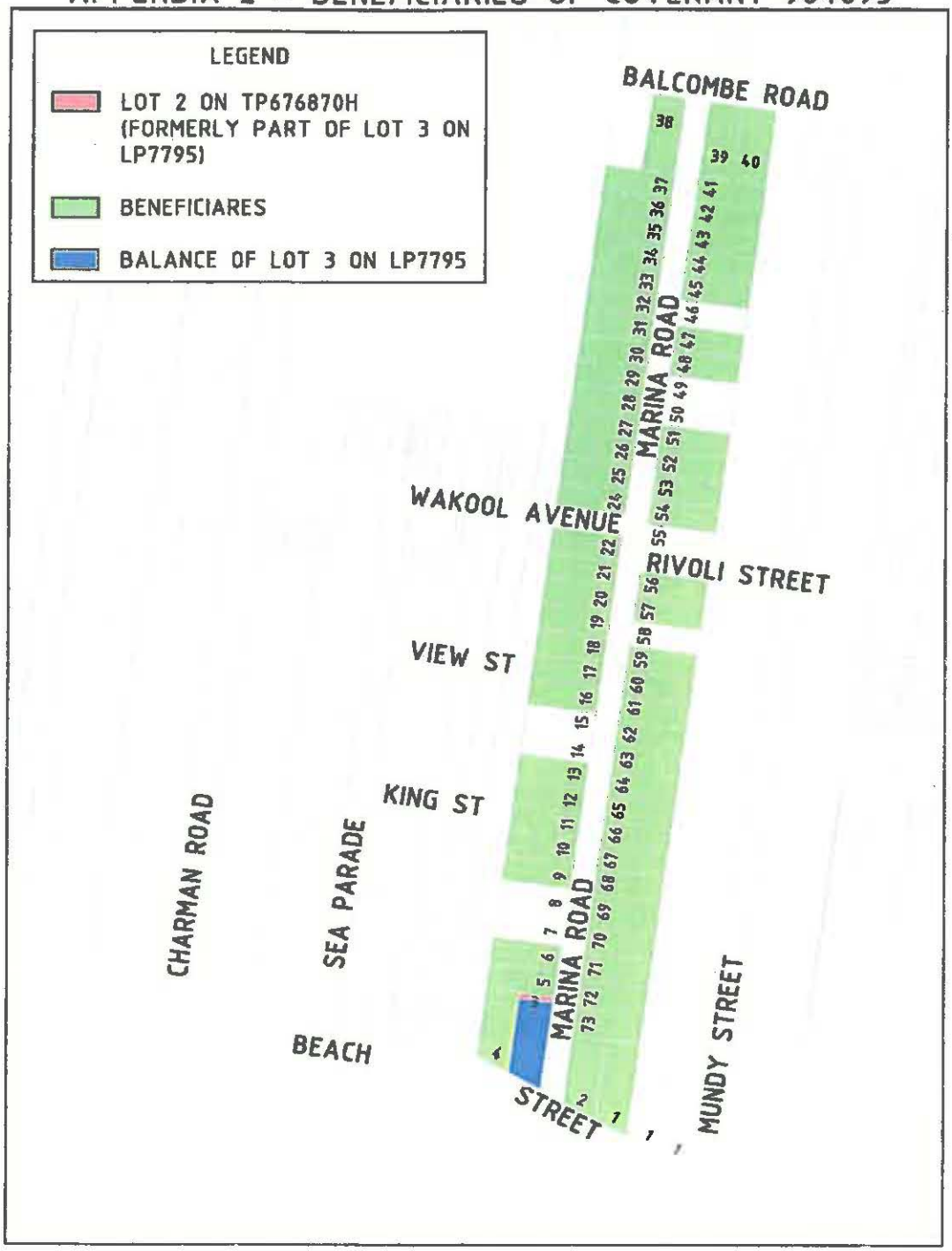
DATED this seventeenth day of June 2015.

ANNEXURE A

APPENDIX 1 - BENEFICIARIES OF COVENANT 1090117



APPENDIX 2 - BENEFICIARIES OF COVENANT 984695



SCHEDULE OF PARTIES

S CI 2013 06581

BETWEEN:

ROBYN MARY MORRISON	Plaintiff
- AND -	
ARTHUR NEIL	First Defendant
SUELLEN WRAY	Second Defendant
JOHN DICKSON	Third Defendant
FOSTER HEATLEY	Fourth Defendant
WENDY HEATLEY	Fifth Defendant
~~NL FARMS PTY LTD~~	~~Sixth Defendant~~
GORDON GAKOVIC	Seventh Defendant
DOUGLAS JOHN JOWLET	Eighth Defendant
JAMES PULLAR	Ninth Defendant
KEVIN TANT	Tenth Defendant
JUDITH TANT	Eleventh Defendant
DAVID BARBER	Twelfth Defendant
SHEENA BARBER	Thirteenth Defendant
~~FIONA DIXON~~	~~Fourteenth Defendant~~
JUDY PULLAR	Fifthteenth Defendant
ANTHONY HAMMOND	Sixteenth Defendant
MIKE SLATER	Seventeenth Defendant
DEBBIE SLATER	Eighteenth Defendant
JIM GONIS	Nineteenth Defendant

CASSNADRA GONIS	Twenteeth Defendant
NORMAN BECK	Twentyfirst Defendant
CAMERON MALE	Twentysecond Defendant
~~TRACY MALE~~	~~Twenythird Defendant~~
JANET MACAULAY	Twentyforth Defendant
LANCE MACAULAY	Twentyfifth Defendant
ALEXANDER ATRAN	Twentysixth Defendant
NATALIA PEDAN	Twentyseventh Defendant
YVONNE HONEY	Twentyeighth Defendant
ALASDAIR MACDONALD	Twentyninth Defendant
JACK PYZIAKOS	Thrityth Defendant
KATHLEEN THOMPSON	Thirtyfirst Defendant
RALPH BLAICH	Thirtysecond Defendant
WOUTER BOS	Thirtythird Defendant
THEA BOS	Thirtyforth Defendant
ANGELA LITTLE	Thirtyfifth Defendant
JENNIFER PARKES	Thirtysixth Defendant