

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION
PROPERTY LAW LIST**

S ECI 2021/3444

IN THE MATTER of an application under section 84(2) and 84(1)(a) of the *Property Law Act 1958* (Vic)

IN THE MATTER of a restrictive covenant contained in Instrument of Transfer No. 1159026 registered in the Register Book at the Office of Titles and imposed upon the land known as 91 Shannon Avenue, Manifold Heights, and more specifically described in Certificate of Title Volume 10046 Folio 461 kept by the Register of Titles under the *Transfer of Land Act 1958* (Vic).

KATE EMMA POMROY

Plaintiff

OUTLINE OF SUBMISSIONS

Date of document:	18 October 2021
Filed on behalf of:	The Plaintiff
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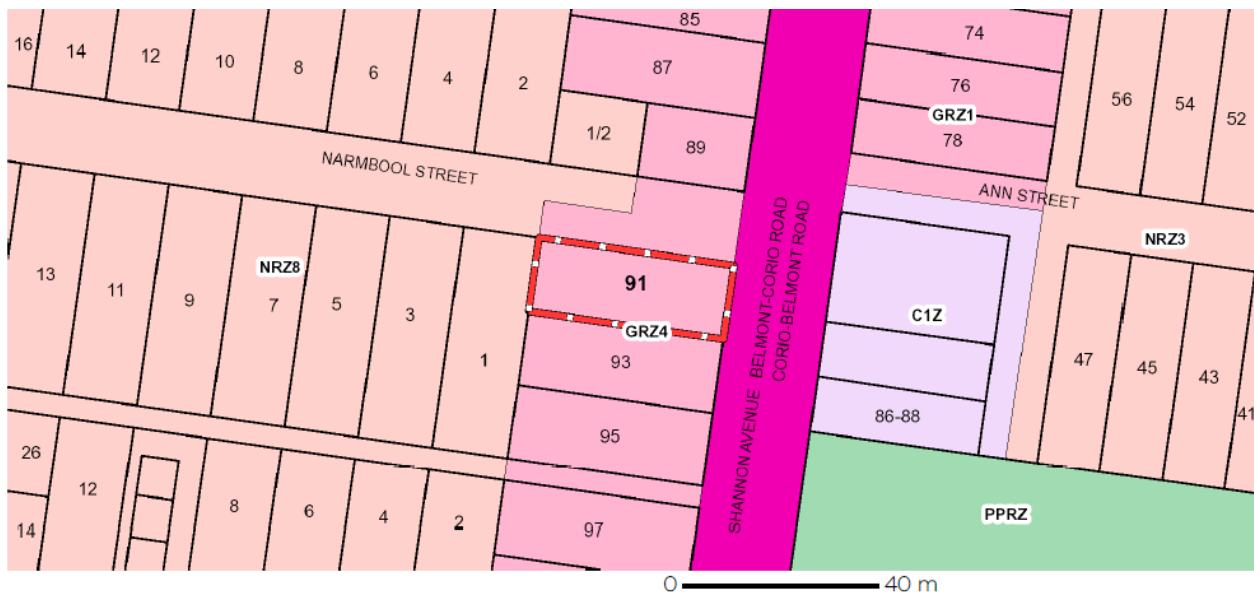
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INTRODUCTION

1. The Plaintiff is the registered proprietor of the land at **91 Shannon Avenue, Manifold Heights**, also known as:
 - a) **Lot 1 on Title Plan TP94451X**; and the land more particularly described in
 - b) **Certificate of Title Volume 10046 Folio 461**—
(Land).
2. The Land is burdened by the restrictive covenant contained in **Instrument of Transfer IT1159026 (Covenant)**.
3. The Land is shown highlighted on the following [Land Victoria zoning/cadastral plan](#):



NATURE OF THE APPLICATION

4. This matter concerns an application to the Court for Orders pursuant to section 84(2) and section 84(1)(a) of the *Property Law Act 1958* (Vic) (**Act**) that:
 - a) the Covenant is invalid on the basis that:
 1. the Covenant **does not affect the Land;**
 2. **no person can enforce the Covenant;**and
 - b) **the Covenant is obsolete—**
(Application).
5. The Application is commenced by way of Originating Motion, dated 21 September 2021 which seeks:
 1. A declaration pursuant to section 84(2)(a) of the *Property Law Act 1958* that the restrictive covenant contained in Instrument of Transfer No. 1159026 in the Register kept by the Registrar of Titles under the *Transfer of Land Act 1958* (Vic) does **not affect the land situated at 91 Shannon Avenue**, Manifold Heights, more particularly described as Certificate of Title Volume 10046 Folio 461 and also known as Lot 1 on Title Plan 094451X.
 2. A declaration pursuant to section 84(2)(b) of the *Property Law Act 1958* that the restrictive covenant contained in Instrument of Transfer No. 1159026 in the Register kept by the Registrar of Titles under the *Transfer of Land Act 1958* (Vic) is **not enforceable by any persons other than the Transferors named in the said Instrument of Transfer.**
 3. That the restrictive covenant contained in Instrument of Transfer No. 1159026 in the Register kept by the Registrar of Titles under the *Transfer of Land Act 1958* (Vic) be **discharged** pursuant to section 84(1)(a) of the *Property Law Act 1958* insofar as it is **obsolete** because it does not affect the land situated at 91 Shannon Avenue, Manifold Heights, more particularly described as Certificate of Title Volume 10046 Folio 461 and also known as Lot 1 on Title Plan 094451X, and is **not enforceable by any persons other than the Transferors named in the said Instrument of Transfer.**

ORDERS

6. At the hearing of the first return of the Application on 21 October 2021, the Plaintiff seeks orders to have the matter heard without the benefit of a contradictor consistent with the Court's ruling in *Re Hunt* [2017] VSC 779.
7. In *Re Hunt* [2017] VSC 779, Lansdowne AsJ discussed the Court's discretion to require notification of an application before making any order under section 84 of the Act. However, Her Honour went on to conclude that where a case is sufficiently 'clear' it is neither necessary nor appropriate to seek objectors:

- 12 Section 84(3) confers a discretion on the Court to require notification of an application before making any order under that section. In terms, that power extends to an application for a declaration under s 84(2). I have considered whether the plaintiff should be required to give notice of her application for a declaration to any person who may wish to argue against it. This is because if the application is permitted to proceed *ex parte* then there is no contradictor to the plaintiff's submissions, yet if the declaration is made it will be binding on those persons who may have wished to contend that they were beneficiaries of the restrictions. There is also the refusal by the Registrar to note on the Register that the Covenant is no longer enforceable to consider. This might suggest that the plaintiff's contentions would benefit from testing. ...
- 14 After consideration of the plaintiff's submissions, I have concluded that this is such a clear case that it is neither necessary nor appropriate to seek to elicit any contradictor. In any event, it would be difficult to identify any person with the standing to object to the declaration because such a person would need to have an interest in benefited land, and no land is identified as benefited. I observe that in other cases to which I have been referred, applications for a declaration that restrictions in a covenant are not enforceable have been on notice to potential beneficiaries, and so applicants in other proceedings should not assume that applications for such a declaration will necessarily proceed *ex parte*.

8. The Plaintiff therefore seeks the Court's discretion for no orders to advertise pursuant to section 84(3) of the Act.

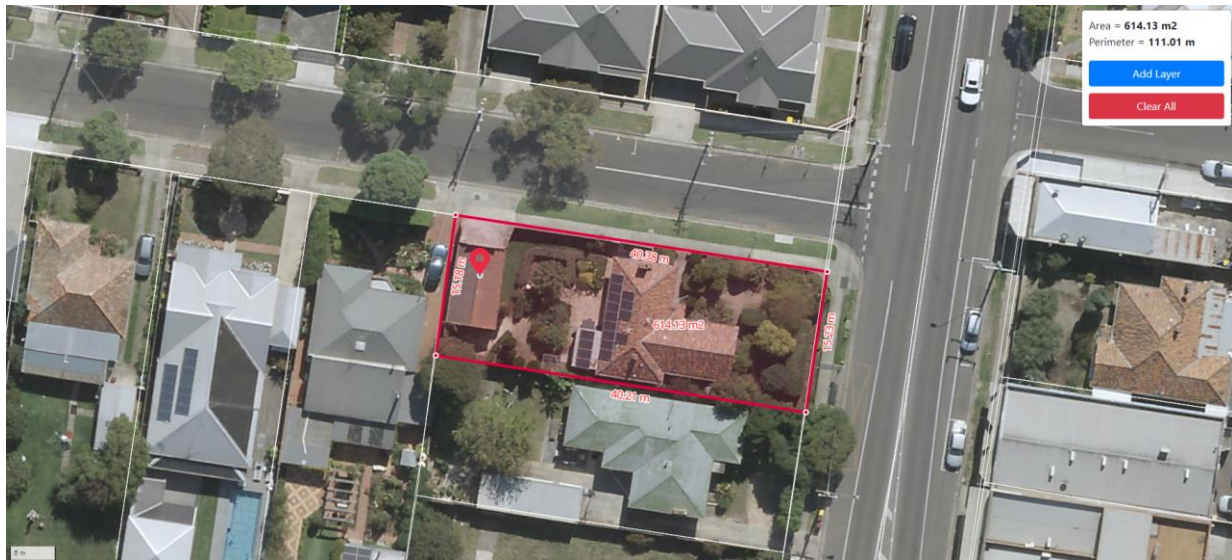
EVIDENCE

9. In support of the Application, the Plaintiff relies on the following documents:
 - a) [Affidavit of Tyrone Rath dated 11 October 2021:](#)
 1. At page 7, a copy of the register Search Statement and Title Plan of the Land;
 2. At page 9, a true copy of the Covenant;
 3. At page 15, a true copy of the Plan of Subdivision;
 4. At page 23, a true copy of the Head Title;
 5. At page 49, a true copy of Certificate of Title Volume 4915 Folio 896;
 6. At page 73, a copy of documents obtained from the Court's archives relating to the Clinton Application;
 7. At page 89, a copy of documents obtained from the Court's archives relating to the Case Application;
 8. At page 104, a copy of documents obtained from the Court's archives relating to the Riddle Application;

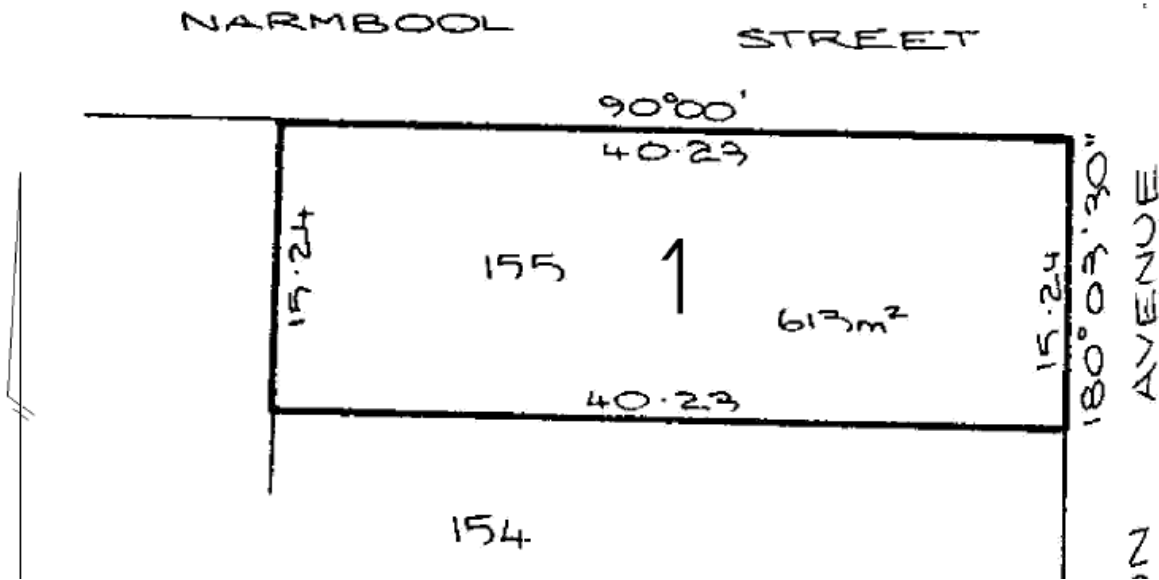
9. At page 127, a copy of additional orders of the Court in relation to the Covenant;
10. At page 303, a copy of a table summarising the basis on which other lots have previously had the Covenant modified or discharged.

LAND

10. The Land is otherwise known as:
 - a) Lot 1 on Title Plan [TP94451X](#); or the land more particularly described in
 - b) [Certificate of Title Volume 10046 Folio 461](#).
11. The Land is approximately 613sqm in size and is presently developed with a single dwelling and detached garage, as shown on the following satellite image:

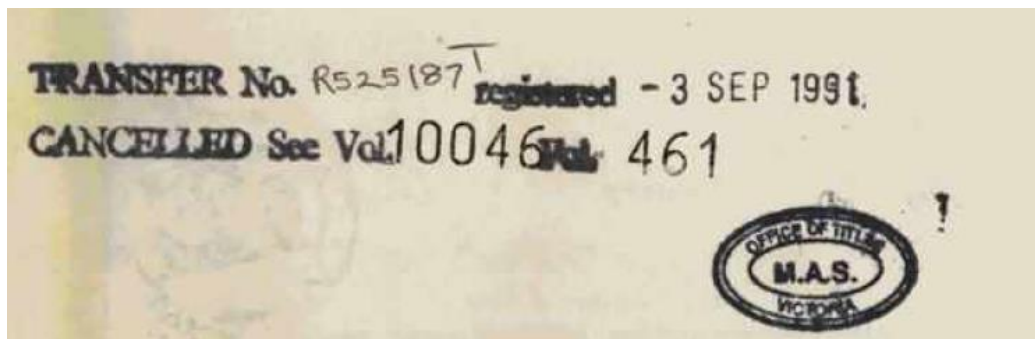


12. The Land is shown below on [Title Plan TP94451X](#), marked “1”:

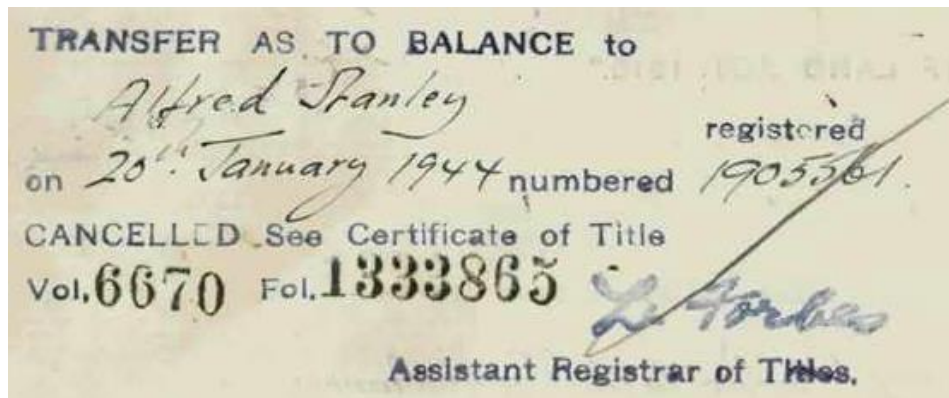


HISTORY OF THE LAND

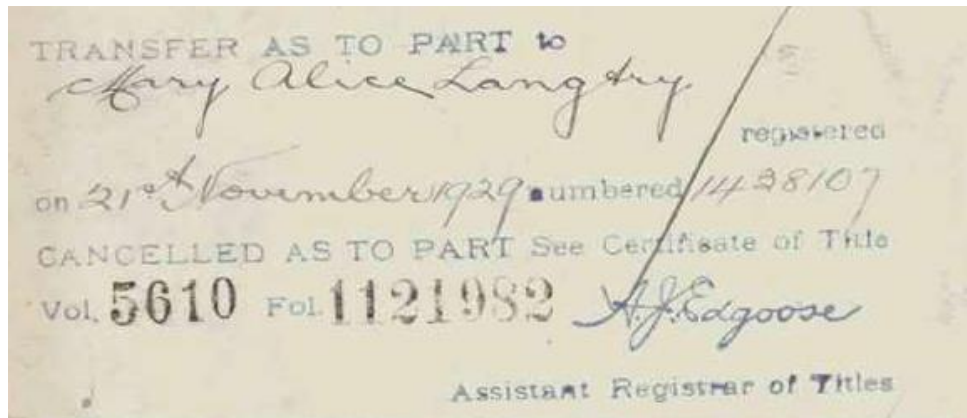
- 13. The Land is derived from [Certificate of Title Volume 6670 Folio 865 \(Parent Title\)](#) and was created pursuant to [Instrument R525187T](#) on 3 September 1991.



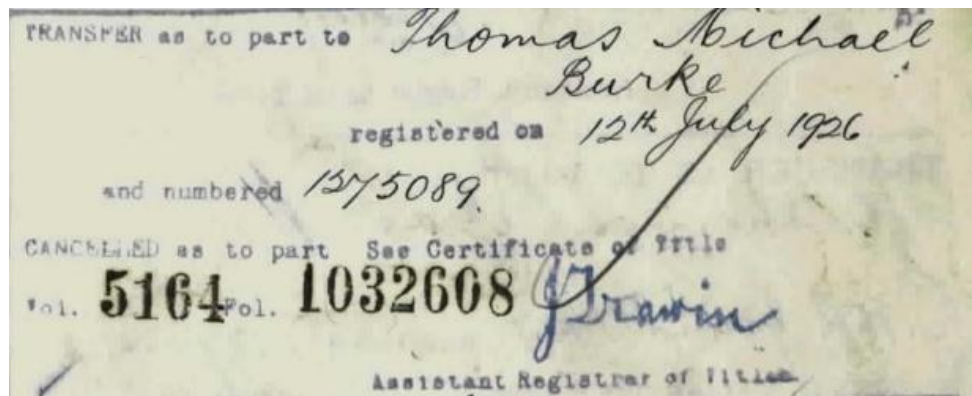
- 14. The Parent Title was derived from [Certificate of Title Volume 5610 Folio 982 \(Grandparent Title\)](#) and created pursuant to [Instrument of Transfer 1905561](#) on 20 January 1944.



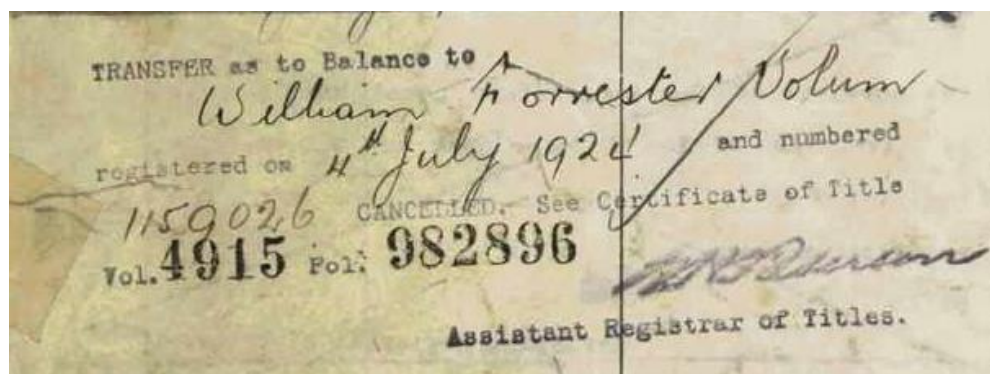
15. The Grandparent Title was derived from [Certificate of Title Volume 5164 Folio 608 \(Great Grandparent Title\)](#) and was created pursuant to [Instrument of Transfer 1438107](#) on 21 November 1929.



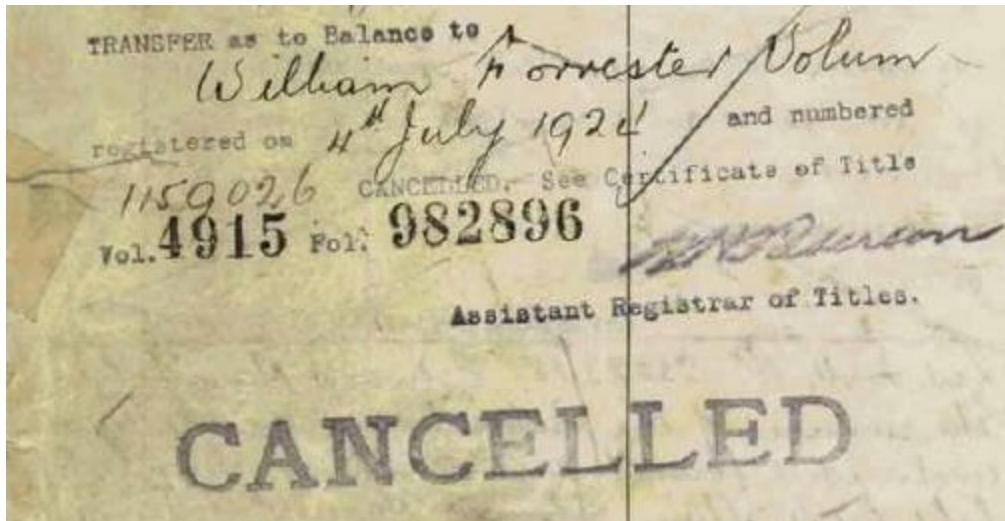
16. The Great Grandparent Title was derived from [Certificate of Title Volume 4915 Folio 896 \(Great Great Grandparent Title\)](#) and was created pursuant to [Instrument of Transfer 1275089](#) on 12 July 1926.



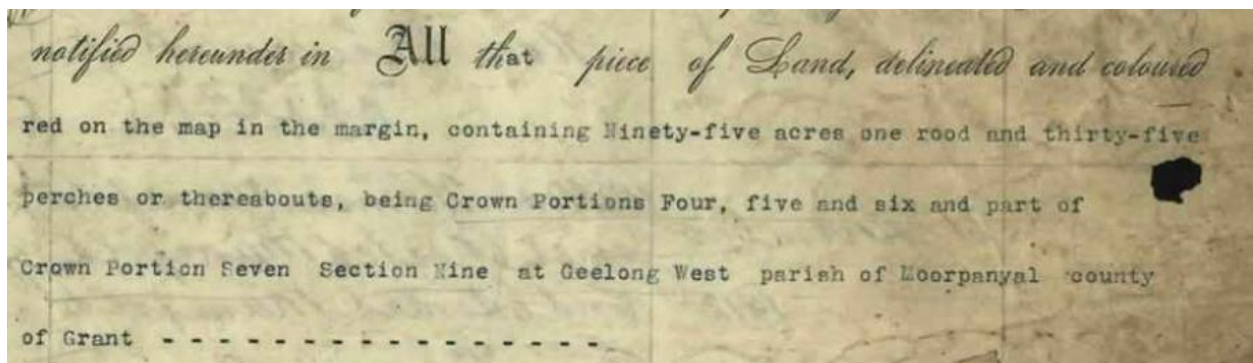
17. The Great Great Grandparent Title was derived from [Certificate of Title Volume 3543 Folio 461 \(Head Title\)](#) and was created pursuant to [Instrument of Transfer 1159026](#), which contains the Covenant, on 4 July 1924.



18. Notably, the Great Great Grandparent Title was created from the final transfer of land from the Head Title, which resulted in the cancellation of the Head Title:

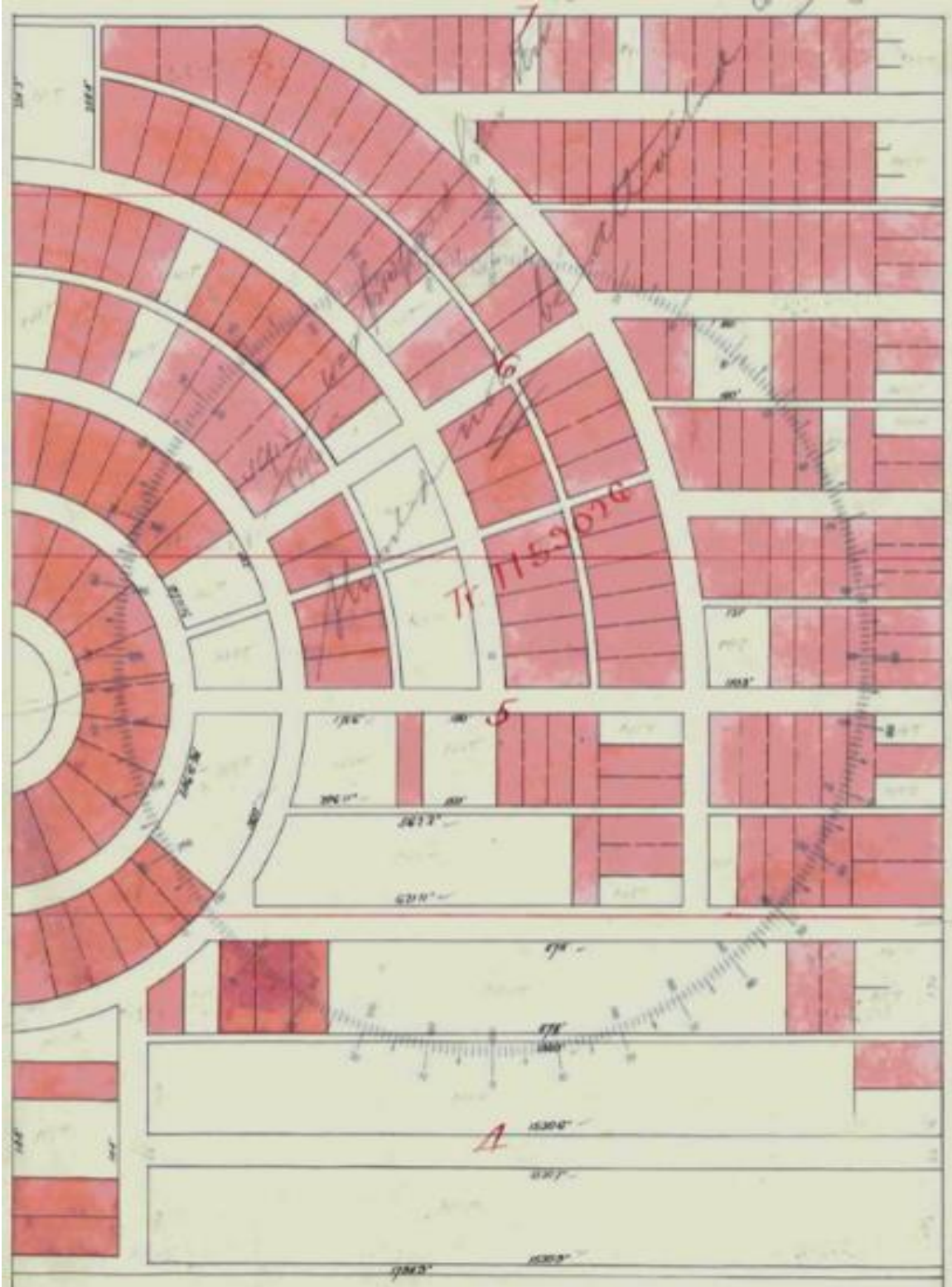


19. The [Head Title](#) was created on 15 November 1911 as a 95-acre parcel of land originally contained in Crown portions four, five, six and part of seven, section nine at Geelong West, parish of Moorpanyal county:



20. The Head Title contained a large parcel of land which was subdivided pursuant to [Plan of Subdivision LP5875 \(Plan of Subdivision\)](#).

21. A plan generally consistent with the Plan of Subdivision is contained within the Head Title. The lots shaded red are those lots that were transferred into the Great Great Grandparent Title, while the unshaded lots are those that transferred out beforehand, pursuant to other transfers:



22. In summary, it appears that:
- a) individual lots on the Plan of Subdivision were transferred out of the Head Title; and
 - b) these transfers occurred prior to [Instrument of Transfer IT1159026](#) (being the Covenant) affecting the transfer of the remainder of the land in the Head Title to the Great Great Grandparent Title.

CHAIN OF TITLES

The Head Title was created in November 1911

23. At this time, the land in the Head Title was owned by William Thomson Manifold, James Chester Manifold and Edward Manifold who each owned one equal undivided share and shared the fourth share equally:

WILLIAM THOMSON MANIFOLD of Purrumbete Weerite in the County of Hampden Grazier as to one equal undivided fourth part or share JAMES CHESTER MANIFOLD of Talindert Camperdown in the County of Hampden Grazier as to one equal undivided fourth part or share EDWARD MANIFOLD of Danedite in the county of Hampden Grazier as to one equal undivided fourth part or share and the said WILLIAM THOMSON MANIFOLD James Chester Manifold and Edward Manifold as to the remaining equal undivided fourth part or share are now the proprietors as tenants in common

24. The Head Title lists the following encumbrances, including the rights of William Forrester Volum, the covenantor, as purchaser under a contract of sale dated 8 March 1911:

Assistant Registrar of Titles
ENCUMBRANCES REFERRED TO.

1) The SPECIAL RAILWAY CONDITIONS contained in the Crown Grants to William Buddes John Manifold and Peter Manifold and Thomas Forster

2) As to part
The rights of William Forrester Volum as purchaser under Contract of Sale dated 8th March 1911 and Abd. 309748 in the Record Book

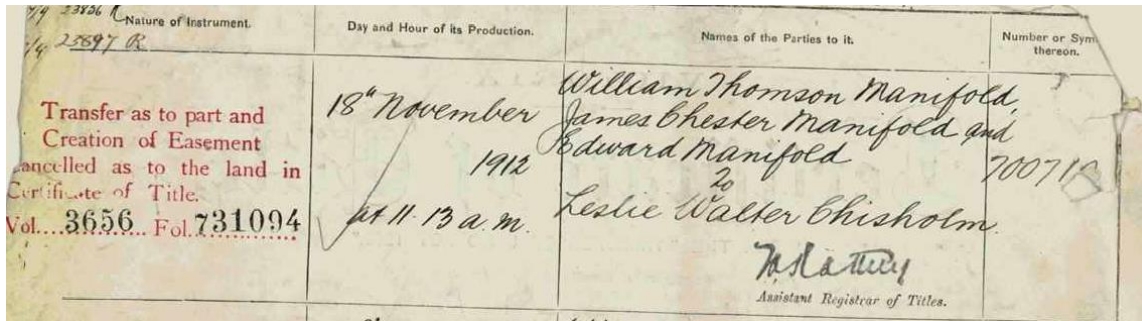
3) As to the equal undivided fourth part or share of William Thomson Manifold James Chester Manifold and Edward Manifold The rights of persons claiming under the will of Thomas Peter Manifold deceased

25. Curiously, a search of Landata for instrument [309748](#) returns a document for an apparently unrelated transfer of land in Trentham, Victoria.

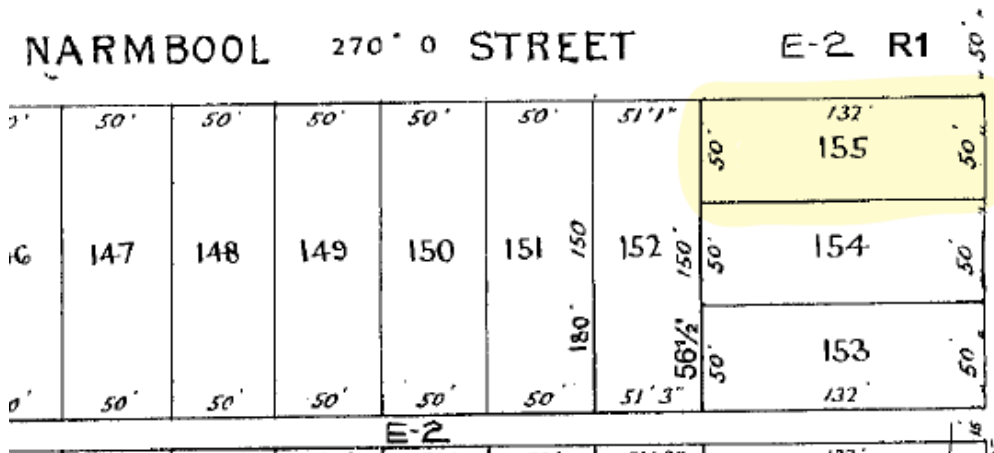
The Plan of Subdivision was lodged on 5 October 1912

26. Edition 7 of the Plan of Subdivision, which saw the land contained in the Head Title subdivided into a series of consistently sized residential lots, was lodged on 5 October 1912, between:

- a) 15 November 1911, when the land originally contained in the Head Title was acquired; and
- b) 18 November 1912, when the first lot was transferred from the Head Title, being the land contained in Lot 76 on the Plan of Subdivision:



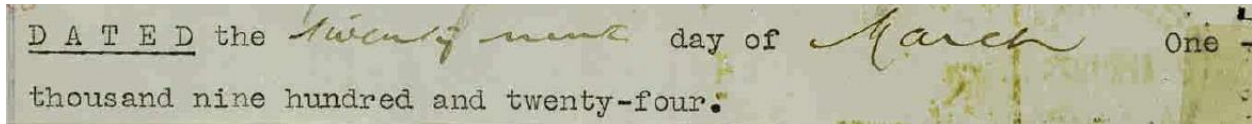
27. The Land was originally known as lot 155 on the Plan of Subdivision:



28. Between November 1912, and the Head Title's cancellation in favour of the Great Great Grandparent Title in July 1924, numerous lots on the Plan of Subdivision were subject to individual transfers from the Head Title, thus reducing the overall size of the estate.

The Covenant was signed in March 1924

29. The Covenant, contained in [Instrument of Transfer IT1159026](#), was signed on 29 March 1924:

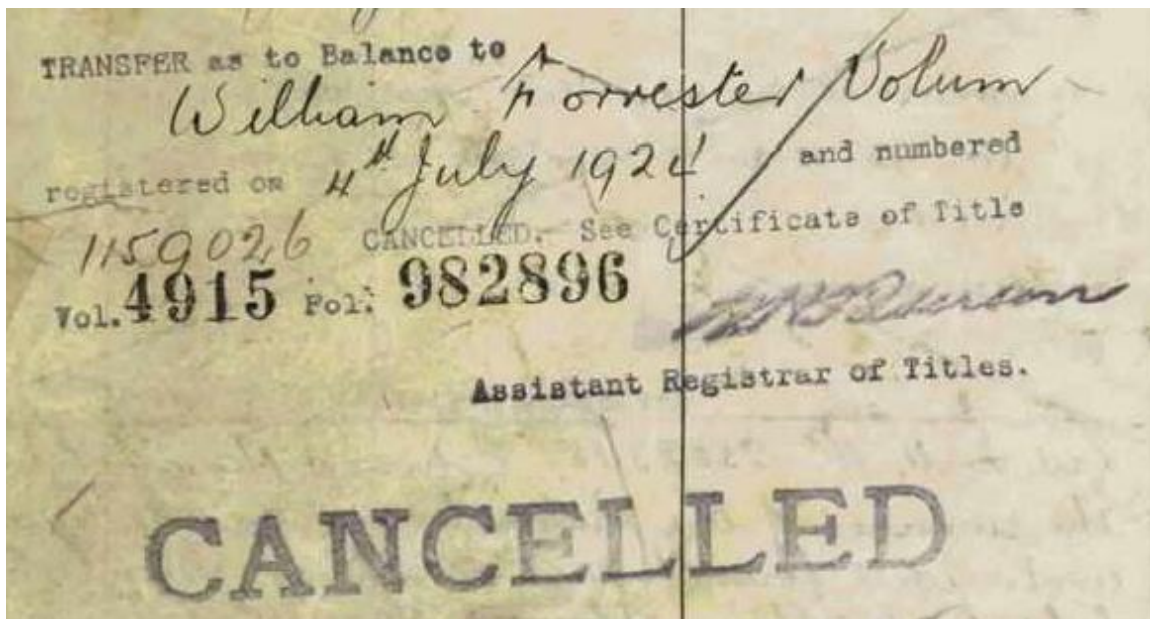


DATED the *twenty-ninth* day of *March* One thousand nine hundred and twenty-four.

30. At this time, only the land to be transferred to the Great Great Grandparent Title remained in the Head Title.

The Great Great Grandparent Title was created in July 1924

31. The land in the [Great Great Grandparent Title](#) was created pursuant to [Instrument of Transfer IT1159026](#), which contains the Covenant, on 4 July 1924:



TRANSFER as to Balance to
William Kinross
registered on *4th July 1924* and numbered
1159026 CANCELLED. See Certificate of Title
Vol. **4915** Fol. **982896**
[Signature]
Assistant Registrar of Titles.
CANCELLED

32. The land in the Great Great Grandparent Title was all the land remaining untransferred in the Head Title at this time, including the Land. This transfer of land into the Great Great Grandparent Title resulted in the cancellation of the Head Title.
33. Edward Manifold, John Manifold, Edward Walford Manifold, William Kinross Mackinnon and Leland James Greene were the proprietors of the remaining land in the Head Title:

W E EDWARD MANIFOLD of Danedite in the County of Hampden Grazier
 JOHN MANIFOLD of *Parrumbite Wevite Grazier*
 and EDWARD WALFORD MANIFOLD of *Koudilibi Kootlake Grazier*
 as to one equal undivided fourth part or share the said Edward ---
 Manifold WILLIAM KINROSS MACKINNON of Marida Yallock in the County
 of Hampden Grazier and LELAND JAMES GREENE of Camperdown in the ---
 County of Hampden Accountant as to one equal undivided fourth part
 or share and the said EDWARD MANIFOLD as to one equal undivided --
 fourth part or share and the said EDWARD MANIFOLD as to the remain-
 :ing equal undivided fourth part or share being registered or en-
 :titled to be registered as the proprietors as tenants in common -
 of an estate in fee simple in the land hereinafter described subject
 to the encumbrances notified hereunder IN CONSIDERATION of the --
 sum of One thousand five hundred and thirteen pounds eleven shillings
 and fivepence paid to us by WILLIAM FORRESTER VOLUM of "Roxby" near

34. William Forrester Volum, the covenantor, became the sole proprietor of the land contained in the Great Great Grandparent Title:

William Forrester Volum of "Roxby" near Murgheboluc Grazier is ---
now the proprietor of an Estate in Fee-simple, subject to the Encumbrances
notified hereunder in All that piece of Land, delineated and coloured
 red, blue and green on the map on the sheet annexed hereto being part of Crown ---
 Portions Four, Five, Six and Seven Section Nine ~~at Geelong West~~ Parish of -----
 Moorparryal County of Grant - - - - -

35. Part of the land in the Great Great Grandparent Title was subject to the Covenant, as described as an encumbrance on the face of the title:

As to part of the land ---

THE COVENANT contained in Instrument of -
 Transfer No. 1159026 in the Register Book
 that not more than one house or shop with
 respective necessary outhouses may be ---
 erected or built on any one of the Lots -
 subject to the said Covenant which Lots -
 are (inter alia) on Plan of Subdivision -
 No. 5875 lodged in the Office of Titles--
 and are also (inter alia) shewn on the --
 said map - - - - -

36. Between July 1924 and July 1926, further lots were transferred from the Great Great Grandparent Title. The remainder of the estate was contained in the single title.

37. The Great Great Grandparent Title was eventually cancelled in 2018 by way of [Dealing AR068471H](#):

Produced: 06/07/2021 01:06:43 PM

Dealing Number: AR068471H

Rectification Date: 29/05/2018

Rectification Category: Folio: Create New Folio

Status: Registered

RECTIFICATION

Raised By: REGISTRAR OF TITLES
 DX 250639 MELBOURNE

Folio Affected	CofT Supplied	Controlling Party
4915/896	No	

4915/896

No

Details of Rectification

CREATE NEW FOLIO FOR ROAD R1 ON LP5875 CANCELLING PARENT FOLIOS AS PART OF THE LAND REMAINING UNTRANSFERRED RECTIFICATION PROJECT

The Great Grandparent Title was created in July 1926

38. The [Great Grandparent Title](#) was created pursuant to [Instrument of Transfer 1275089](#) on 12 July 1926, following the transfer of land from William Forrester Volum to Thomas Michael Burke:

1275089
I WILLIAM FORRESTER VOLUM of Roxby near Murgheboluc
Grazier being registered as the proprietor of an estate in
fee simple in the land hereinafter described subject to the
encumbrances notified hereunder in consideration of the sum
of THREE THOUSAND SEVEN HUNDRED AND EIGHTY POUNDS paid to me
by THOMAS MICHAEL BURKE of No, 403 Collins Street Melbourne
Auctioneer DO HERSEBY TRANSFER to the said Thomas Michael --

39. As set out in [Instrument of Transfer 1275089](#), the land transferred to the Great Grandparent Title still contained a significant number of lots in the Plan of Subdivision, including the Land:

1275089
Auctioneer DO HERSEBY TRANSFER to the said Thomas Michael --
Burke All my estate and interest in ALL THOSE pieces of land
being Lots 96, 102, 103, 104, 111, 119, 121, 125, 126, 127, 129, 130, -
134, 135, 137, 140, 143, 145, 154, 155, 159 to 163 (both inclusive),
166, 167, 168, 170, 171, 173, 176, 178, 179, 181, 182, 183, 196, 197, 198,
200, 201, 204 to 208 (both inclusive), 210 to 215, (both inclus-
-ive), 222, 223, 224, 228, 229, 231, 232, 233, 234, 235, 238, 241, 242, 244,
245, 246, 247, 251, 252, 253, 259, 260, 264, 266, 267, 283 to 287 (both
inclusive), 289, 290, 293, 294, 317, 322, 323, 324, 340, 341, and 343, -
on Plan of Subdivision lodged in the Office of Titles and ---
Numbered 5875, and being part of Crown Portions Four, Five Six

40. The Covenant is listed as an encumbrance on both:
- [Instrument of Transfer 1275089](#):

BERNARD NOLAN
Solicitor
MELBOURNE

ENCUMBRANCES REFERRED TO

The Covenant contained in Instrument of Transfer Numbered 1159026 in the Register Book that not more than one house or shop with respective necessary outhouses may be erected or built on any one of the said Lots.

new title 34535

and

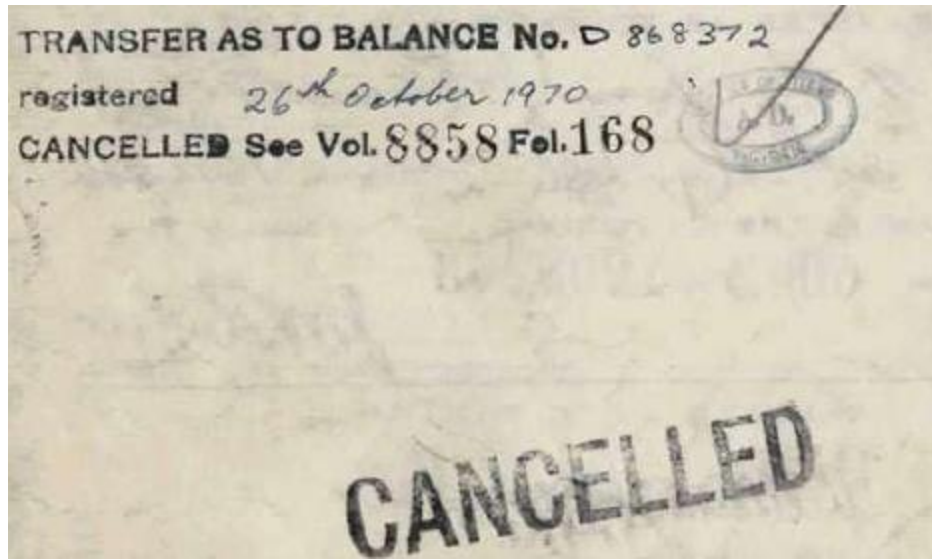
b) the [Great Grandparent Title](#):

Assistant Registrar of Titles.

ENCUMBRANCES REFERRED TO.

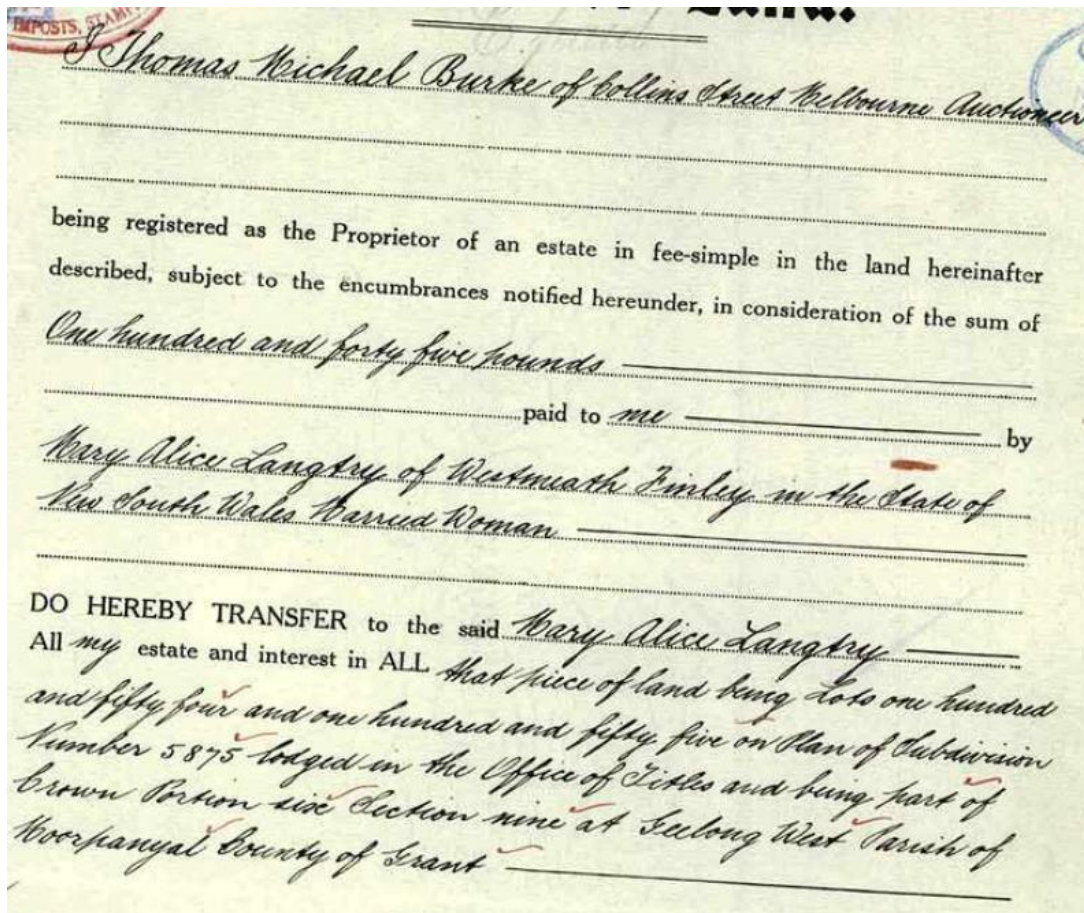
THE COVENANT contained in Instrument of Transfer No. 1159026 in the Register Book that not more than one house or shop with respective necessary outhouses may be erected or built on any one of the Lots on Plan of Subdivision No. 5875 lodged in the Office of Titles which are shown on the said map- - - - -

41. However, it is worth noting that the burden of the Covenant is expressed in these documents as being for all lots on the Plan of Subdivision, which is in slightly different terms to the burden as expressed in the Covenant itself.
42. The remaining land in the estate was transferred from the Great Grandparent Title between 1926 and 1948, before the Great Grandparent Title was eventually cancelled on 26 October 1970:



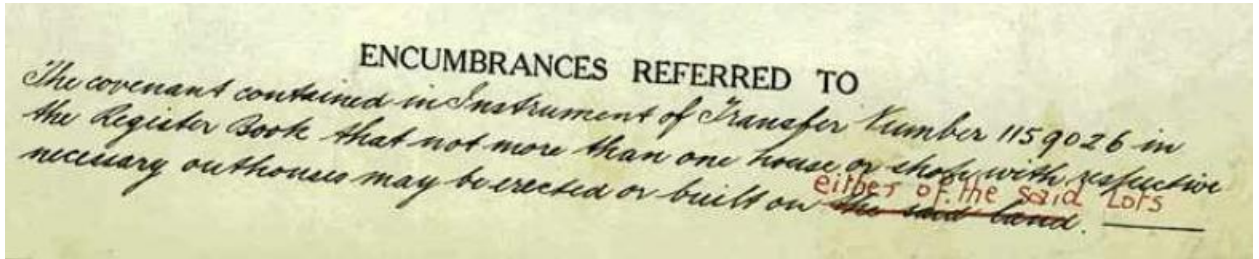
The Grandparent Title was created in December 1929

- 43. The [Grandparent Title](#) was created pursuant to [Instrument of Transfer 1438107](#) on 21 November 1929, following the transfer of lots 154 and 155 from Thomas Michael Burke to Mary Alice Langtry:



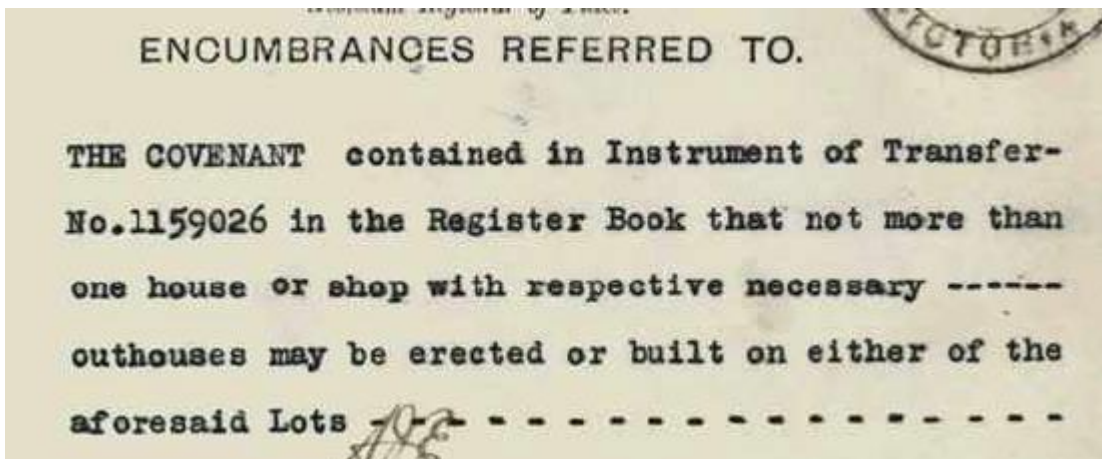
44. The Covenant is listed as an encumbrance on both:

a) **Instrument of Transfer 1438107:**



and

b) the **Grandparent Title:**



45. The Grandparent Title was cancelled following the transfer of lot 155 to Alfred Stanley, as set out below.

The Parent Title was created in January 1944

46. The [Parent Title](#) was created pursuant to [Instrument of Transfer 1905561](#) on 20 January 1944, when lot 155 was transferred from Mary Alice Langtry to Alfred Stanley:

I MARY ALICE LANGTRY formerly of Westmeath Finley in the State of New South Wales but now of Lincoln Road Essendon Married Woman - being registered as the proprietor of an estate in fee simple in the land hereinafter described subject to the encumbrances notified hereunder in consideration of the sum of ONE HUNDRED AND EIGHTY THREE POUNDS paid to me by ALFRED STANLEY of 30 Lascelles Avenue Manifold Heights Geelong West Railway Employee' DO HEREBY TRANSFER to the said Alfred Stanley all my estate and interest in ALL THAT piece of land being Lot 155 on Plan of Subdivision Number 5875 - lodged in the Office of Titles and being part of Crown Portion Six Section Nine at Geelong West, Parish of Moorpanyal County of Grant and being ~~part of~~ the land now comprised in Certificate of Title entered in the Register Book Vol 5610 Folio 1121982.

47. The **Covenant is expressly listed as an encumbrance on** both:
a) **Instrument of Transfer 1905561:**

ENCUMBRANCES REFERRED TO.
The Covenant contained in Instrument of Transfer Number 1159026 in the Register Book that not more than one house or shop with respective necessary outhouses may be erected or built on ~~either~~ of the aforesaid Lot~~s~~.

- b) **the Parent Title:**

Assistant Registrar of Titles.
ENCUMBRANCES REFERRED TO.
THE COVENANT contained in Instrument of Transfer- No.1159026 in the Register Book that not more than one house or shop with respective necessary ----- outhouses may be erected or built on the above --- described land - - - - -

The Land was created in September 1991

48. The **Land was created pursuant to Instrument R525187T on 3 September 1991.**

49. The Covenant is referred to indirectly on :

a) **Instrument R525187T:**

Subject to the encumbrances affecting the land including any created by dealings lodged for registration prior to the lodging of this instrument the transferor for the consideration expressed transfers to the transferee all his estate and interest in the fee simple in the land described. (Notes 1-4)

and

b) **more directly on the certificate of title to the Land:**

ENCUMBRANCES, CAVEATS AND NOTICES

MORTGAGE AT922814B 05/01/2021
WESTPAC BANKING CORPORATION

COVENANT 1159026 20/11/2001

COVENANT

50. **The Covenant, contained in Instrument of Transfer IT1159026, was signed on 29 March 1924 and registered 4 July 1924.**

51. The Covenant restricts the construction of more than one house or shop, with necessary outhouses, with such house or shop to have a street frontage and area of not less than that shown on the Plan of Subdivision:

...will not at any time erect or build or cause or suffer to be erected or built on any one of the lots on the said Plan of Subdivision hereby transferred except as aforesaid more than one house or shop with respective necessary outhouses AND FURTHER that the land to be enclosed with such house or shop with respective necessary outhouses shall have a frontage of not less than the frontage and an area of not less than the area shown on the said Plan of Subdivision in connection with each Lot...

52. As set out in the Covenant, the original covenanting parties appear to be:

a) **William Forrester Volum (Covenantor);** and

b) **Edward Manifold, John Manifold, Edward Walford Manifold, William Kinross Mackinnon and Leland James Greene (Covenantees).**

Burden

53. The Covenant states that the land to be burdened is **“the land hereby transferred”**, which is **“the land now comprised in Certificate of Title Volume 3543 Folio 461”**, being the **Head Title:**

DO HEREBY TRANSFER to the said William Forrester Volum All our and each of our estate and interest in ALL THAT piece of land being those parts of Portions Four Five

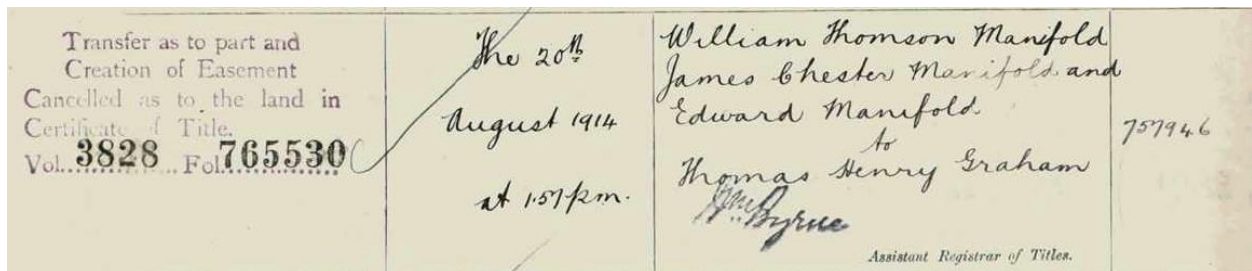
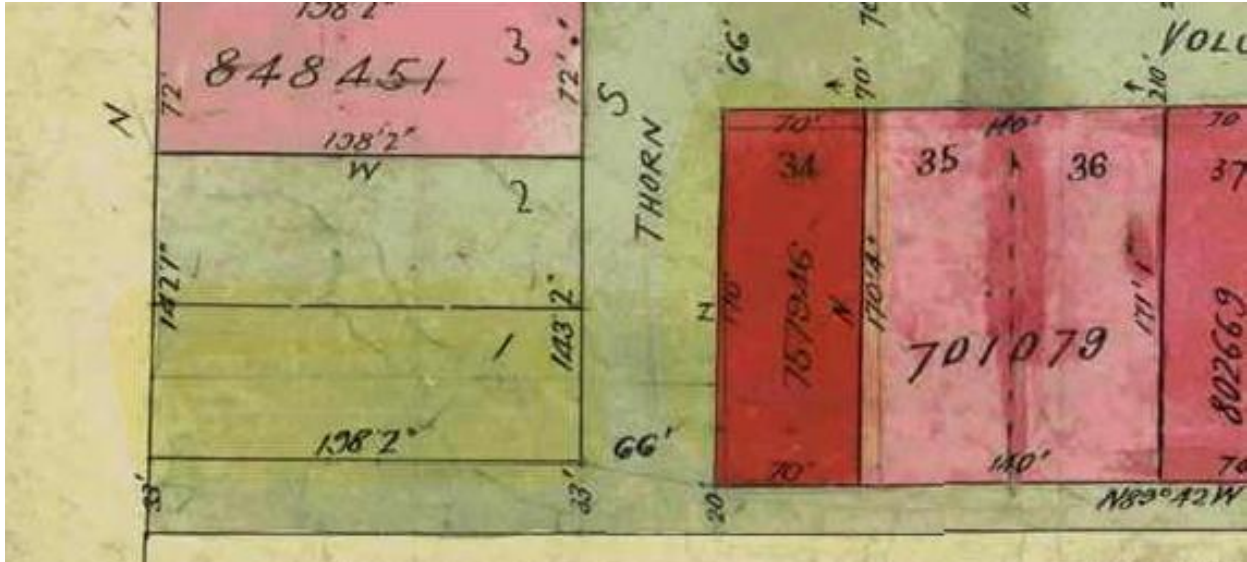
Six and Seven of Section Nine at Geelong West Parish of Moorpanyal County of Grant and being the land now comprised in Certificate of Title Volume 3543 Folio 708461...and that the burden of this covenant shall be annexed to and run at law and in equity with the land hereby transferred except as afore said...

54. In other words, the Covenant purports to burden the land remaining untransferred in the Head Title at the relevant time.
55. This form of wording is unconventional, in that rather than identifying the new certificate of title to be issued as the burdened land, it identifies the title to be cancelled.

Benefit

56. The Covenant describes the benefit as being for all the lots in the Plan of Subdivision, other than lots 1, 34–36, 39–48, 50–68, 75–76, 80, 85–87, 98–99, 100–101, 184–186 and 342 (**Benefitting Land**):

...DOTH HEREBY TRANSFER to the said William Forrester Volum All our and each of our estate and interest in ALL THAT piece of land being those parts of Portions Four Five Six and Seven of Section Nine at Geelong West Parish of Moorpanyal County of Grant and being the land now comprised in Certificate of Title Volume 3543 Folio 708461 AND the said William Forrester Volum with the intent that the benefit of the covenant shall be attached to and run at law and in equity with every Lot on the Plan of Subdivision lodged in Office of Titles Number 5875 other than Lots One Thirty-four Thirty-five Thirty-six Thirty-nine to Forty-eight (both inclusive) Fifty to Sixty-eight (both inclusive Seventy-five Seventy-six Eighty Eighty-five Eighty-six Eighty-seven Ninety-eight Ninety-nine One hundred One hundred and one One hundred and eighty-four One hundred and eighty-five One hundred and eighty-six and Three hundred and forty-two...
57. There is no obvious correlation between the lots excluded from the benefit of the Covenant and those transferred out of the Head Title prior to the Covenant being signed.
58. For instance, the Covenant excludes lot 1 and lot 34 on the Plan of Subdivision from the benefit of the Covenant, however:
 - a) Lot 1 was transferred pursuant to [Instrument of Transfer IT1159026](#) to the Great Great Grandparent Title; while
 - b) Lot 34 was separately transferred pursuant to Instrument of Transfer 757946 on 20 August 1914:



Existence of a building scheme

59. Purporting to assign the benefit to all lots in the Plan of Subdivision, except those noted, raises the issue considered in [Re Mack and the Conveyancing Act \[1975\] 2 NSWLR 623](#)—that the benefit of a covenant can only attach to land owned by the covenantee:

The covenant clearly states the land to which the benefit of the restriction is intended to be appurtenant, and the only question is whether the benefit is in law so appurtenant, i.e. whether the restriction is validly created. There is ample authority that a vendor of land in respect of which he takes a restrictive covenant cannot, by the covenant, annex the restriction to land which he does not own, unless the covenant is given as part of a building scheme or development scheme... In the present case, the vendor purported to annex the benefit of the covenant to the whole of the land comprised in deposited plan No. 16,724, other than the land transferred.

60. The Victorian case of [Xu v Natarelli \[2018\] VSC 759](#) affirmed the need for privity between the covenantee and the benefitting land, and where this privity fails, so too does the benefit:

105. However, contractual principles of privity exclude the registered proprietors of the lots transferred out of the parent title before the covenant was made. Equity does not extend the benefit of the covenant to them although it does extend the benefit to proprietors (and their successors in title) of the lots transferred out of the parent title, that is subdivided and sold, after the restrictive covenant was made.¹

¹ [Xu v Natarelli \[2018\] VSC 759](#)

61. Importantly, a breach of privity may be rectified through the establishment of a building scheme. As set out by Derham AsJ in [Randell v Uhl \[2019\] VSC 668 \(Randell\)](#), under the Torrens system of land registration in Victoria, a building scheme will only be valid where it is discoverable on the face of the Certificate of Title to the land or on the documents referred to thereon:

- (j) the result is that there is nothing in a search of the title to the plaintiffs' land which either directly, or by reference to some instrument or other document referred to in a search of the title, indicates the existence of the scheme;
- (k) the reasoning of Hargrave J does not mean that it is enough that some other document, not referred to in a search of the title to the plaintiffs' vendors' land, contains notice of the building scheme. The fact that a wider search of the Register might reveal the Head Title is not sufficient. A wider search of the Register does not accord with the reasoning and logic of Dennerstein, from which Hargrave J drew the statement of conclusion to which I have referred above at [Error! Reference source not found.].² Nor is a wider search in accordance with conveyancing practice or what I would expect a purchaser of land in Victoria to undertake by way of searches;
- (l) If it were sufficient notice that the Head Title in this case bears the notification of a building scheme, it would require a person interested in purchasing the Land to search the Register further than the title search indicated and to go back to the Head Title and the original, or first edition, of the Subdivision. That would render conveyancing a hazardous and cumbersome operation beyond what is reasonable to expect.³

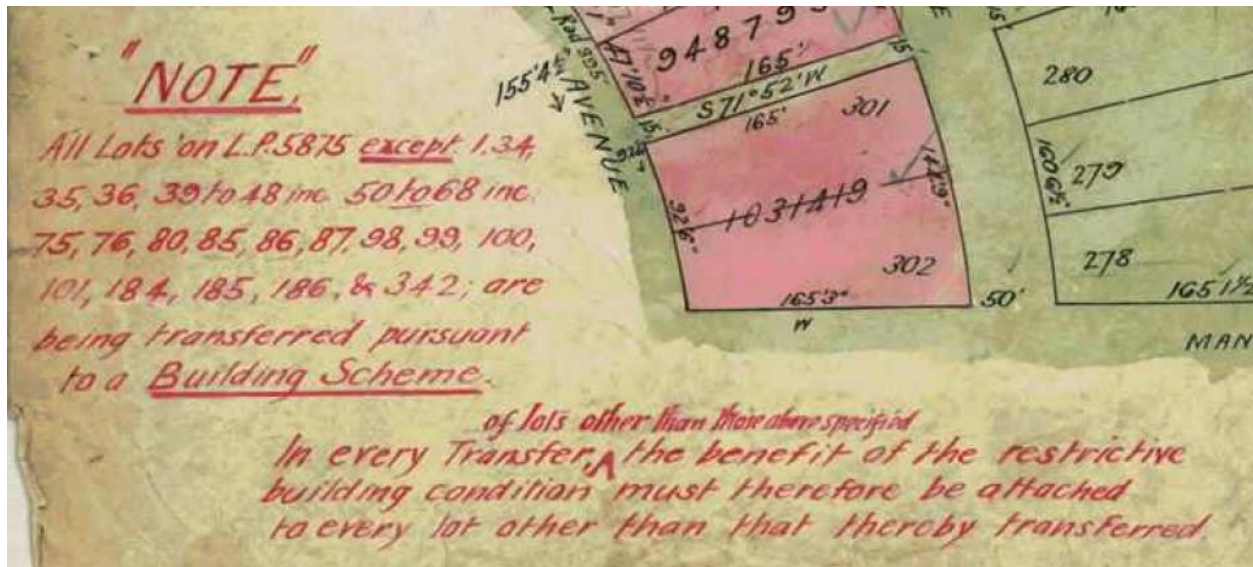
62. In the present case, there is no building scheme listed on the:

- a) Certificate of Title to the Land;
- b) Parent Title;
- c) Title Plan TP94451X; or
- d) Covenant.

63. However, the Head Title does contain a 'note' that all the land on the Plan of Subdivision, except for those lots specified, is transferred subject to a building scheme:

² In original.

³ *Randell v Uhl* [2019] VSC 668 at [82].



64. Importantly, there is no further notification of a building scheme on the:
- a) [Great Great Grandparent Title](#);
 - b) [Great Grandparent Title](#);
 - c) [Grandparent Title](#);
 - d) [Parent Title](#); or
 - e) [Plan of Subdivision](#).
65. The relevant head title in *Randell* also contained a similar undated notation of a building scheme, which the Court held was insufficient to bring notice of the building scheme to the attention of a potential purchaser of the land:
- (1) If it were sufficient notice that the Head Title in this case bears the notification of a building scheme, it would require a person interested in purchasing the Land to search the Register further than the title search indicated and to go back to the Head Title and the original, or first edition, of the Subdivision. That would render conveyancing a hazardous and cumbersome operation beyond what is reasonable to expect.
- 83 In summary, I am satisfied that a building scheme was established but the notification of it was not sufficient to give notice of it to the plaintiffs because a search of the title of the Land by the plaintiffs did not, and would not, reveal the existence of the scheme either directly, or indirectly by reference to any instrument referred to in the search of the title.
66. It is therefore unlikely that the Land will be considered subject to an effective building scheme.

PROPOSAL

67. As detailed in the Affidavit of Tyrone Emmet Rath, dated 11 October 2021, the Plaintiff seeks to **demolish the existing dwelling on the land and construct five residential developments in a townhouse type configuration.**

SECTION 84(2) OF THE ACT—DECLARATION APPLICATION

68. The Application before the Court is made pursuant to section 84(2) of the Act, which relevantly provides that the Court may declare whether a restrictive covenant is enforceable:

84 Power for Court to modify etc. restrictive covenants affecting land

- (2) The Court shall have power on the application of any person interested—
- (a) to declare whether or not in any particular case any land is affected by a restriction imposed by any instrument; or
 - (b) to declare what upon the true construction of any instrument purporting to impose a restriction is the nature and extent of the restriction thereby imposed and whether the same is enforceable and if so by whom.

PREVIOUS DECISIONS OF THE COURT

69. Annexed to the [Covenant](#) itself is a series of orders and similar court documents under which previously burdened lots in the Plan of Subdivision have either had the Covenant discharged or modified via applications to the Supreme Court pursuant to section 84 of the Act.
70. These additional orders of the Court are provided as part of the Covenant document and a table summarising the reasoning behind the Court’s orders is set out in the Affidavit of Tyrone Emmet Rath, dated 11 October 2021.
71. In summary, **26 other lots on the Plan of Subdivision have been able to modify/remove the Covenant on the following bases:**
- a) for six lots, the Court found that the Covenant does not affect the land as **“no person other than Transferors at the time were entitled to enforce the benefit”, or “no person[s] [are] entitled to the benefit”;**
 - b) for three lots, **the Court only varied the Covenant but did not remove it;**
 - c) **for 17 Lots, the Court removed the Covenant on the basis that it does not affect the land, however no reasoning as to why the Covenant was removed has been found.**
72. The Plaintiff’s Solicitors have obtained further documentation in relation to the following previous decisions of the Court:

- a) No. G21244, registering the order of the Court dated 18 December 1975, where Clinton Constructions Propriety Limited was applicant, related to the land known as Lot 343 on Plan of Subdivision 5875 ([Clinton Application](#));
- b) No. G763694, registering the order of the Court dated 10 June 1974, where Kendall Edward Case and Betty Florence Case were applicants, related to the land known as Lot 213 on Plan of Subdivision 5875 ([Case Application](#)); and
- c) No. J695984, registering the order of the Court dated 28 September 1981, where Ronald Douglas Riddle and Nita Elizabeth Riddle were applicants, related to the land known as Lot 231 on Plan of Subdivision 5875 ([Riddle Application](#)).

Case Application

- 73. Kendall Edward Case and Betty Florence Case applied to the Court for the Covenant to be discharged from Lot 213 on Plan of Subdivision LP5875.
- 74. An affidavit of Kendall Edward Case and Betty Florence Case, dated 11 April 1974, stated that:
 - a) **because Instrument of Transfer 1159026 affected the transfer of all remaining land in the Head Title** (and therefore all remaining land owned by the Covenantees);
 - b) **no land was thus retained by the Covenantees upon creation of the Covenant;** and
 - c) **thus, no land has the benefit of the Covenant:**
 - 6. BY the said Instrument of Transfer Number 1159026 all the lots remaining untransferred in the said Plan of Subdivision 5875 were transferred to the transferee under the said transfer and no land was retained by the transferors to have the benefit of the said covenant.
- 75. Consequently, Master Jacobs declared on 10 June 1974 that the covenant did not affect the land in Lot 213, stating *inter alia* that upon reading the affidavit of Kendall Edward Case and Betty Florence Case, he was satisfied that there was **no person entitled to the benefit of the Covenant insofar as it affected Lot 231:**

...IT APPEARING from the said affidavit and exhibit the said Instrument of Transfer and the said file that there is no person entitled to the benefit of the restrictive covenant contained in Instrument of Transfer Number 1159026...
- 76. **The Case Application is of further relevance in that it does not appear that Master Jacobs required advertising of the application to potential beneficiaries of the Covenant.**

Clinton Application

- 77. Clinton Constructions Pty Ltd applied to the Court for the Covenant to be discharged from Lot 343 on Plan of Subdivision LP5875.

78. An affidavit of Trevor Young, Managing Director of Clinton Constructions Pty Ltd, dated 7 November 1975, stated that:
- a) because Instrument of Transfer 1159026 affected the transfer of all remaining land in the Head Title (and therefore all remaining land owned by the Covenantees);
 - b) no land was thus retained by the Covenantees upon creation of the Covenant; and
 - c) the Covenant was ineffective as to each lot thereby transferred:
 7. I verily believe and I have been informed by my solicitors, Messrs. Harwood & Pincott of 77 Moorabool Street, Geelong that the said Transfer No. 1159026 was a Transfer of all the remaining land held by the said Transferor to the said William Forester Volum of any description and that on the 4th of July, 1924 the said Transferee was registered as the proprietor of the said land. As no land was retained by the Vendors of the said Lots the covenant was totally ineffective as to each of the Lots thereby transferred...
79. Consequently, Master Jacobs declared that **the covenant did not affect the land in Lot 343, stating *inter alia* that upon reading the affidavit of Trevor Young, he was satisfied that the covenant was not enforceable by anyone other than the Covenantees:**
- “upon reading...the affidavit of Trevor Winston Young...satisfied that no persons other than the Transferors named in the said Instrument of Transfer were at any time entitled to enforce the covenant that is contained therein and that the said Transferors are not now entitled to any estate or interest in the land...”
80. The Clinton Application is of additional relevance in that:
- a) like the present Application before the Court, the applicant in the Clinton Application sought to develop Lot 343 with five single storey strata title units:
 13. That the Company desires to have five single storey strata title units erected on the said Lot and has obtained a town planning permit No. 147 from the Council of the City of Geelong West to carry out the works.and
 - b) **it does not appear that Master Jacobs required advertising of the application to potential beneficiaries of the Covenant.**

Riddle Application

81. Ronald Douglas Riddle and Nita Elizabeth Riddle applied to the Court for the Covenant to be discharged from Lot 231 on Plan of Subdivision LP5875.
82. An affidavit of Ronald Douglas Riddle and Nita Elizabeth Riddle, dated 18 August 1981, stated that:

- a) because Instrument of Transfer 1159026 affected the transfer of all remaining land in the Head Title (and therefore all remaining land owned by the Covenantees);
- b) no land was thus retained by the Covenantees upon creation of the Covenant; and
- c) thus, no land has the benefit of the Covenant:
 - 6. BY the said Instrument of Transfer Number 1159026 all the lots remaining untransferred in the said Plan of Subdivision 5875 were transferred to the transferee under the said transfer and no land was retained by the transferors to have the benefit of the said covenant.

83. Consequently, Master Brett declared on 28 September 1981 that that the Covenant did not affect the land in Lot 231, stating *inter alia* that upon reading the affidavit of Ronald Douglas Riddle and Nita Elizabeth Riddle, he was satisfied that Lot 231 was not affected by the Covenant:

...upon reading the Affidavit of Ronald Douglas Riddle and Nita Elizabeth Riddle and the exhibits therein referred to and the Affidavit of Paul Bernard Jens and the exhibits therein referred to I DECLARE that Lot 231 on Plan of Subdivision 5875 ...is not affected by the restrictive covenant contained in the said Instrument of Transfer numbered 1159026...

SUBMISSIONS

The Covenant fails for a lack of privity and is not saved by the existence of a building scheme

84. For a restrictive covenant to run with the land, a nexus of privity must exist between the original covenantees and the land to which the benefit is to attach. In other words, the benefit of a covenant can only run with land which is owned by the covenantees at the time the covenant is signed:

The covenant clearly states the land to which the benefit of the restriction is intended to be appurtenant, and the only question is whether the benefit is in law so appurtenant, i.e. whether the restriction is validly created. There is ample authority that a vendor of land in respect of which he takes a restrictive covenant cannot, by the covenant, annex the restriction to land which he does not own, unless the covenant is given as part of a building scheme or development scheme... In the present case, the vendor purported to annex the benefit of the covenant to the whole of the land comprised in deposited plan No. 16,724, other than the land transferred.⁴

85. As detailed above, [Instrument of Transfer IT1159026](#), which contains the Covenant, affected the transfer of all remaining land in the Head Title, and therefore the transfer of all remaining land in the subdivision owned by the Covenantees.

86. The practical effect of this is that no land was retained by the Covenantees upon the creation of the Covenant, and therefore there is no land that has the benefit.

⁴ [Re Mack and the Conveyancing Act \[1975\] 2 NSWLR 623.](#)

87. As detailed above, an exception of this rule is where the land is subject to a scheme of development or building scheme, such as the one noted on the Head Title.
88. However, based on the Court's decision in *Randell*, which requires notice of a building scheme to be discoverable on the face of the certificate of title to the land or documents referenced thereon, the notation of a building scheme on the Head Title is unlikely to be regarded as effective notice and therefore unlikely to be binding on the Plaintiff.

There are no persons capable of enforcing the benefit other than the Covenantees

89. The effect of this is that no land has the benefit of the Covenant and there are therefore no persons, other than the original Covenantees, capable of enforcing the restrictions.
90. As set out above, there was no land remaining in the Plan of Subdivision at the time of transfer creating the Covenant, aside from the Land and balance of the burdened lots. That is, all lots apart from the burdened land had been transferred out of the Head Title prior to the Covenant being signed.
91. Due to this established lack of privity between the Covenantees and the land purported to take the benefit, there is no land that takes the benefit of the Covenant.
92. For this reason, the Covenant can only be said to have applied personally to the original covenanting parties and that now, given the passage of time since the Covenant was signed, there is now no person capable of enforcing the benefit.

The Covenant does not affect the Land

93. As the benefit of the Covenant is unenforceable by any persons other than the Covenantees, it can no longer be said to affect the Land.

SECTION 84(1)(A) OF THE ACT—OBSOLESCENCE APPLICATION

94. The first limb of section 84(1)(a) of the Act provides the Court the power to modify or discharge a restrictive covenant on the basis that it is obsolete:
- (1) The Court shall have power from time to time on the application of any person interested in any land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) upon being satisfied—
 - (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Court deems material the restriction ought to be deemed obsolete or that the continued existence thereof would impede the reasonable user of the land without securing practical benefits to other persons or (as the case may be) would unless modified so impede such user; or

95. With respect to section 84(1)(a), it is submitted that if the Court is of the view that the Covenant is ineffective and therefore no longer has any work to do, it would be appropriate to issue an order for its removal from title to the Land.

Matthew Townsend
Owen Dixon Chambers

Instructed by
Planning Property Partners

18 October 2021