**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**PLANNING AND ENVIRONMENT LIST**

VCAT REFERENCE NO. P528/2022
PERMIT APPLICATION NO. PP22/0113

## CATCHWORDS

Registered restrictive covenant – ongoing restrictions – planning permit application to remove covenant – Clause 52.02 Boroondara Planning Scheme – section 60(5) *Planning and Environment Act 1987* – enforceability of covenant – residual discretion – integrity of settlement outcomes

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| **APPLICANT** | Melissa Mirams |
| **RESPONSIBLE AUTHORITY** | Boroondara City Council |
| **RESPONDENTS** | David Stanford |
| | Malcolm Kennedy Shore |
| | Paula Michelle Walker |
| | Grace Park Residents Association Inc |
| | Philip Slattery |
| **SUBJECT LAND** | 14 Chrystobel Crescent<br>HAWTHORN VIC 3122 |
| **HEARING TYPE** | Preliminary Hearing |
| **DATE OF HEARING** | 14 July 2022 |
| **DATE OF ORDER** | 12 August 2022 |
| **CITATION** | Mirams v Boroondara CC [2022] VCAT 928 |

## ORDER

1 The decision of the responsible authority is set aside.

2 In permit application No. PP22/0113 a planning permit is granted for the land at 14 Chrystobel Crescent, Hawthorn for the removal of the restriction contained in Instrument No. 0547039 on Certificate of Title Volume 08177 Folio 348 subject to the following conditions:

**Plan for certification required**

1 Before the plan of removal of restriction can be certified, an application in accordance with the *Subdivision Act 1988* must be submitted to and approved by the Responsible Authority for the purposes of lodgement with Land Registry.

**Permit to expire**

2 This permit will expire if one of the following circumstances applies:

(a) The plan of removal of restriction is not certified within two (2) years of the issue date of this permit.

(b) The plan of removal of restriction is not registered within five (5) years of the date of certification.

3 The hearing listed in this proceeding at 10.00am on **18 August 2022** is vacated. No appearance is required.

Dalia Cook
**Member**

**APPEARANCES**

| | |
|---|---|
| For Melissa Mirams | Ian Pitt QC, Solicitor, of Best Hooper |
| For Boroondara City Council | Maria Marshall, Solicitor, Maddocks |
| For Paula Michelle Walker | Reto Hoffman, Solicitor, Rigby Cooke |
| For Malcolm Kennedy Shore | Joseph Monaghan, Solicitor, Holding Redlich |
| For David Stanford | Tyrone Rath, Solicitor, Planning & Property Partners Pty Ltd |
| For Philip Slattery | Philip Slattery, in person |
| For Grace Park Residents Association Inc | Robert Perkins, President |

## REASONS[1]

### INTRODUCTION

1 The applicant sought a planning permit under Clause 52.02 of the Boroondara Planning Scheme (planning scheme) to remove a registered restrictive covenant (Covenant) from title to the subject land.

2 Relevant purposes of this preliminary hearing included:

- to give directions about future conduct, including to consider who are parties to the proceeding or who may have a right to be heard;
- to consider whether the registered restrictive covenant in Instrument No. 0547039 has any legal effect; and
- to consider whether to make any declarations or final orders in the proceeding...

3 In an earlier determination following a practice day hearing, I accepted submissions on behalf of the applicant, as agreed by Boroondara City Council (Council), that there were no living beneficiaries of the Covenant. Instead, I found that the Covenant conferred a personal benefit to the transferees while alive.

4 In this preliminary hearing, the applicant further submitted that the Covenant is of no legal effect.

5 It sought final orders in the proceeding granting a permit to remove the Covenant since it may 'mislead' people seeking to rely on it, to the extent it purports to regulate aspects of the use or development of the land but would be ineffective to do so.

6 Council accepted that the Covenant constitutes a personal covenant in respect of beneficiaries who are no longer living or capable of enforcing the covenant, but urged me to still conduct a hearing on the merits before exercising the Tribunal's discretion under Clause 52.02. It considered that no permit should be granted having regard to the planning merits.

7 A number of neighbours objected to the grant of the permit. They sought to participate as respondents to this proceeding. The detail of their submissions varied as summarised below, but each opposed the making of final orders granting a permit at this stage of the proceeding.

8 They expressed concerns about the appropriateness of removing the Covenant since they considered it played a role in establishing the character of the residential neighbourhood and assisted in maintaining its heritage values.

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[1] The submissions of the parties, any supporting exhibits given at the hearing, and the statements of grounds filed have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.

9 One purpose of this preliminary hearing was to consider the status of people who had objected to Council[2] and lodged statements of grounds with the Tribunal, paying the requisite fee. This included whether they should be regarded or joined as parties to the proceeding or should otherwise be given a right to be heard.

10 Council submitted that any person served with a copy of the application for review in accordance with the Tribunal's order and who lodged a statement of grounds in time should be allowed to be a party to the proceeding.

11 The applicant did not take issue with the status of the objectors as parties for the purpose of this proceeding having regard to the operation of section 83(2) of the *Planning and Environment Act 1987* or to Mr Slattery being granted leave to lodge a late statement of grounds.

## THE COVENANT

12 Instrument No. 054039 was recorded on title to the subject land on 2 May 1907 and relevantly provides:

> We Kate Lynch of Grace Park Hawthorn Widow, James Byrne of Flinders Lane, Melbourne Customs Agent and Harold Paul Dennehy of Beaconsfield Parade, St Kilda Gentleman being registered as the proprietors 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 two hundred and ten pounds ten shillings paid to us by George William Simpson of Edgevale Road, Kew Builder DO HEREBY TRANSFER to the said George William Simpson all our estate and interest in all those pieces of land being Lots 159, 160, 161, 162, 163, 164, 165 and 166 on Plan of Subdivision No. 4774 lodged in the Office of Titles and being part of Crown Portion 39 at Hawthorn and being part of the land more particularly described in Certificate of Title entered in the Register Book Volume 3009 Folio 601717 and the said George William Simpson hereby covenants with the said Kate Lynch, James Byrne, Harold Paul Dennehy and their transferees that the said George William Simpson will not erect on the said land hereby transferred any shops or terrace of dwelling houses and any dwelling houses which may be erected shall be built of brick with roofs of slate or tile and the plan thereof shall first be submitted to and approved by the said Kate Lynch, James Byrne and Harold Paul Dennehy and shall not cost less than Seven hundred and fifty pounds exclusive of Architect fees, and also that no more than one building shall be erected on each lot transferred and it is intended that this covenant shall be set out as an encumbrance at the foot of the certificates of title to be issued in respect of the said land and shall run with the said land.

13 In summary, whilst operative, the Covenant:

- prevented the use of the land for shops;

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[2] In the absence of any public notification being directed or given.

- limited the development of the land to one building per lot;
- prevented dwellings taking the form of terrace houses; and
- required a dwelling to have a minimum cost and to be constructed from brick with a slate or tiled roof, with plans to be approved by the transferors.

14 The Covenant evidences an intention that it would 'run with the land', to bind future owners.

## CONSIDERATION OF ISSUES IN RESPECT OF THE COVENANT

### Should the Tribunal make findings about the legal effect of the Covenant?

15 In answering this question, I distinguish between the legal effect of the Covenant and a subset of this - whether the restrictions within the Covenant constitute ongoing limitations on the use and development of the land.

16 In these reasons, I make findings about the latter question, but consider it is not necessary or appropriate for me to make a finding about the former.

Outline of party submissions

17 The applicant sought a finding that the Covenant has no ongoing legal effect. On its submission, any departure from the terms of the purported restrictions in the instrument would not constitute a breach of a registered restrictive covenant under the PE Act.

18 It submitted I was bound to follow the reasoning of the Supreme Court in *Beman Pty Ltd v Boroondara City Council*[3] (*Beman*) on the facts before me. That case involved a finding by the Court that a registered restrictive covenant in similar operative terms was of no legal effect. The Court determined to substitute its own decision and granted a planning permit to remove the covenant in its entirety.

19 The applicant urged me to adopt a comparable method of disposition in this proceeding.

20 Council submitted that the Tribunal should be careful to answer the right question. It supported findings that the Covenant:

a. has no living beneficiaries;

b. does not annex its benefit to identified land; and

c. is therefore not capable of being enforced by any person.

21 However, Council urged me to refrain from making a specific finding about the *legal effect* of the Covenant by way of declaration or otherwise. It explained that 'to ask whether an instrument registered on a certificate of title has legal effect' is a broad question which involves questions of

[3] [2017] VSC 207.

property law. It therefore considered that the Supreme Court was the appropriate forum for such a determination.

22 To the extent it may be relevant to this proceeding, Council rejected the notion of the Covenant being of no legal effect, since it considered this would mean it was effectively a 'nullity'.

Role of the Tribunal and role of the Supreme Court

23 I acknowledge the specific jurisdiction of the Supreme Court to make declarations as to:

- whether or not particular land is affected by a restriction imposed by any instrument pursuant to section 84(2)(a) of the *Property Law Act 1958*; or
- the nature and extent of a purported restriction, whether this is enforceable and if so by whom pursuant to section 84(2)(b) of that Act.

24 At the same time, I am conscious of my obligation to act fairly and according to the substantial merits of the case pursuant to section 97 of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act).

25 Even in the absence of a specific power to make a declaration, Tribunal Members have the power to make necessary or concomitant findings when determining questions of law (or mixed fact and law) in a particular proceeding. This power is conferred upon judicial members or legally qualified members (such as myself) under section 107 of the VCAT Act.

26 Section 124 of the VCAT Act further provides a power to make a declaration 'concerning *any matter in a proceeding* instead of any orders it could make or in addition to any orders it makes in the proceeding' [Tribunal emphasis]. Once again, this power is broad and exercisable by a member who is an Australian lawyer.

27 While registered restrictive covenants generate property law rights, they are also afforded a particular status under the PE Act.

28 The Tribunal is often called upon to interpret and apply registered restrictive covenants, especially in the context of a permit application to remove such a restriction. It is not uncommon for the Tribunal to need to determine who are beneficiaries of a covenant (as outlined below), which land is bound by a restrictive covenant, what the operative terms of the restriction entail and whether these would be met in any given permit application.

29 The current proceeding seeks review of a failure to grant a permit for the removal of a registered restrictive covenant. In my opinion, it is at least relevant and potentially necessary for the Tribunal to make a finding about whether the Covenant benefits any land, imposes any ongoing restrictions or is enforceable by any person for two key purposes.

30 First, the Tribunal is obliged to comply with section 60(5) of the PE Act and therefore needs to identify whether there are any beneficiaries of the Covenant who have objected to the grant of the permit.

31 Section 60(5) of the PE Act would prevent the responsible authority and the Tribunal on review from granting a permit to remove this restriction (given its date of recording), unless it was satisfied that:

> (a) the owner of any land benefited by the restriction (other than an owner who, before or after the making of the application for the permit but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer any detriment of any kind (including any perceived detriment) as a consequence of the removal or variation of the restriction; and
>
> (b) if that owner has objected to the grant of the permit, the objection is vexatious or not made in good faith.

32 Second, beyond confirming whether there are any living beneficiaries of the Covenant, the question of whether the Covenant imposes any ongoing restrictions and is enforceable may have a direct bearing on whether discretion should be exercised to effect its removal.

33 This is a component of the broader issue identified by the applicant, being the legal effect of the Covenant. However, I refrain from making any concluded finding about the legal status of the Covenant beyond the more limited finding I make below.

34 In considering whether it is appropriate for me to make a finding about whether the Covenant creates any ongoing restrictions, I am conscious that *Beman* concerned an appeal from a decision of the Tribunal.

35 In the decision under appeal in *Beman*, the Tribunal refused to amend a planning permit to remove a restrictive covenant since it considered it was probable there were beneficiaries of the covenant, and this should have been investigated as part of the planning permit application.

36 Leave to appeal was sought on the ground that the Tribunal erred in law in holding that the covenant was enforceable in circumstances where the land to benefit from the covenant was not identified, either expressly or impliedly.

37 Ultimately, the Court overturned the Tribunal's finding in respect of the ongoing benefit/burden of the covenant, absent an application for declaration under the *Property Law Act 1958*.

38 In my opinion, it would be contrary to the Tribunal's duty to act efficiently in resolving the substantive merits of this proceeding to decline from making a relevant finding about whether the Covenant contains any ongoing restrictions or is otherwise enforceable, potentially necessitating a separate application to the Court.

39 This is particularly so when a covenant in the same terms was the subject of recent Supreme Court case authority and was found to have no legal enforceability, as referred to below.

40 That said, I do not consider that the finding needs to be enshrined in the form of a declaration in the current proceeding since it is open to me to grant a permit to remove the restriction.

Relationship with the PE Act and the nature of the application under review

41 The legislative regime (including sections 52, 60(5) and 61(4) of the PE Act) triggers administrative actions and specific considerations when a relevant permit application is made for land subject to a registered restrictive covenant on title.

42 Mr Stanford and Ms Walker submitted that the Covenant still has legal effect in planning law (if not in property law) even in the absence of any identified beneficiaries because:

- it meets the definition of a 'registered restrictive covenant' under the PE Act (i.e. meeting the definition of a 'restriction' under section 3 of the *Subdivision Act 1998*); and
- section 61(4) of the PE Act would therefore prevent a planning permit from being issued for a use or development that would result in a breach of a registered restrictive covenant.

43 With respect, I find this argument is only theoretical in the current proceeding, since it fails to give due regard to the entirety of section 61(4) which provides:

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

44 Significantly, the legislative regime and planning scheme provide an opportunity to remove a registered restrictive covenant.

45 The current proceeding involves review of Council's decision to grant a permit to remove the Covenant.

46 In these circumstances, section 61(4) is not invoked in the circumstances before me because there is no current application for a planning permit that would authorise anything that would result in a breach of the Covenant.

47 Likewise, the existence and potential operation of section 61(4) does not of itself confirm the validity of any operative restrictions within a covenant.

48 I also note this legislative provision did not prevent the Court in *Beman* from finding that the purported restrictions contained within that covenant had no legal effect.

49 In conclusion on this issue, I accept submissions from Council and the objectors that, whilst the Covenant remains recorded on title to the land, there may be flow-on consequences when applying the PE Act in a particular permit application.

50 In these circumstances, it may be premature to find that the Covenant is of no legal effect for all purposes.

51 By contrast, it is entirely valid to make findings in this proceeding about the efficacy of the written terms of the Covenant to control the use or development of the land on an ongoing basis i.e. as an operative restriction in and of itself.

### Does the Covenant create any ongoing restrictions?

52 The applicant relied principally on case authority of the Victorian Supreme Court in three types of proceedings to confirm that the restrictions within the Covenant have no ongoing effect:

- *Beman* – being an appeal on questions of law against a Tribunal decision to vary a restrictive covenant under Clause 52.02 of the planning scheme. This decision involved a restrictive covenant with two of the same transferors and included two lots in the same subdivision;
- *Re Hunt*[4] and *Re Ferraro*[5] – both declaration proceedings under section 84(2) of the *Property Law Act 1958.* The applicant explained that one of the covenants determined in *Re Ferraro* (recorded on title to Lot 106) applied to the same subdivision as the land in this proceeding and was in identical terms to the instrument now before me in terms of its operative provisions; and
- cases considering the requirement for transferor consent under a restrictive covenant – including *Lahanis v Livesay & Ors* (*Lahanis*)[6].

Case authority on the legal effect of a similar or identical covenant

53 There is substantial, recent Supreme Court case authority in respect of the effect of registered restrictive covenants in the same or similar terms as the one before me in this proceeding.

54 Emerton J (as she then was) confirmed in *Beman* that a restrictive covenant requires three key elements to run with land to burden a successor in title:

a the covenant must be negative;

b the burden of the covenant must be intended to run with the land; and

4 [2017] VSC 779.
5 [2021] VSC 166.
6 [2021] VSC 29.

c the covenant must be given for the benefit of land, not simply for the benefit of the covenantee, and the covenant must touch and concern that land.

55 The Court held:

> [25] It is necessary to carefully consider the words in the Covenant to ascertain whether the benefiting land is identified, either expressly or by necessary implication. The difficulty with the Covenant is that it does neither, even if surrounding circumstances are taken into account…
>
> [27] In my view, the words in the Covenant make it clear that the parties intended to burden the land acquired by Mr Greenshields. As a result, the Covenant satisfies the first two elements of a restrictive covenant identified above. Furthermore, the parties intended at least the first part of the Covenant to benefit persons taking title from Kate Lynch and James Byrne — 'their transferees'. However, even with the express acknowledgement that the Covenant (or at least the building materials covenant) was intended to benefit the transferees of Kate Lynch and James Byrne, the third element of a restrictive covenant remains unmet because it is unclear who are the relevant 'transferees' of Kate Lynch and James Byrne and therefore what land is to benefit from the Covenant. The transferees of Kate Lynch and James Byrne might be persons to whom land was transferred by Kate Lynch and James Byrne prior to the date of the Covenant or they might be transferees to whom land was transferred after the date of the Covenant. Indeed, they might be both.
>
> [27] The Tribunal accepted the submission that the 'transferees' in question were the transferees of the residual land in the area owned by Kate Lynch and James Byrne that still formed part of their main landholding at the time the Covenant was created in October 1909. That may have been a reasonable assumption, having regard to the likelihood that Kate Lynch and James Byrne would seek to protect the value of the land that they continued to hold and would have had less interest in the value of the land that they had already sold off. However, there is no compelling reason to limit the intended beneficiaries of the Covenant in this particular way. The words of the Covenant, construed in context, do not require any such a conclusion…
>
> [32] In this case, had the Covenant described the benefiting land as the un-transferred part or parts of the land owned by Kate Lynch and James Byrne on the relevant date, it may have served to create a restrictive covenant enforceable by the landowners from time to time of the previously un-transferred part or parts of the original parcel. In in the absence of some such specification, however, while it might be possible to speculate with a level of confidence about which land the parties intended should benefit

from the Covenant, the benefited land is not 'easily ascertainable'.

[33] Hence, notwithstanding that the Covenant expresses the intention that it 'run with the land' the subject of the transfer and records that the buyer, Mr Greenshields, covenants with Kate Lynch and James Byrne 'and their transferees', it does not satisfy the third element identified above: it does not specify which land held or previously by Kate Lynch and James Byrne 'and their transferees' is to benefit from the Covenant.

[34] In these circumstances, the words 'and shall run with the land' at the end of the Covenant are not 'game-changing'. They do not solve the problem of identifying the land to benefit from the Covenant.

56 Two other directly relevant cases were determined after *Beman* and followed its reasoning, albeit in the context of applications for declaration.

57 In all three Supreme Court cases, the essence of the Court's findings were that there was no identified land taking the benefit of the covenant because of a lack of specification in the relevant instrument. Consequentially, the covenants were found to not be enforceable by any person or had no ongoing legal effect.

58 In *Re Hunt*, the Court concluded:

[28] I conclude that it is only the terms of the Covenant itself that can annex its benefit to land, so as to confer its benefit on the successors in title to the transferor, by identification in the Covenant of the benefited land…

[47] The Covenant does not identify in its terms any land to which its benefit is annexed. In my view, it is unarguable that the Covenant does not annex its benefit to land, and so is personal only to the transferor and his executor, both of whom are now dead.

[48] It is sufficient to reach this conclusion to consider only the terms of the Covenant…

[49] The concluding words of the covenant in *Beman* were similar to the concluding words of this Covenant in evincing an intention that the *burden* of the covenant run with the land of the transferee. Emerton J held that the covenant did burden the land of the covenantor. The more difficult question before Emerton J was whether the covenant annexed its *benefit* to any land, so as to be enforceable by successors in title to the original covenantee. She held that it did not, despite the reference to the 'transferees' of the original transferors, because it was not made clear who the relevant 'transferees' were, and so what land was intended to benefit. It was not clear whether the intended 'transferees' were persons to whom land had been transferred prior to the subject transfer, or persons to whom land was transferred after the subject transfer, or both…

> [52] …It follows that the covenant in *Prowse v Johnstone* contained words identifying the benefited land as that land subsequently transferred out of the parent title. Those words did not appear in the covenant in *Beman* and do not appear in the Covenant.
>
> [53] For these reasons, I find that the Covenant does not by its terms annex its benefit to any land.

59 In *Re Ferraro*, the plaintiff applied for a declaration that the covenants affecting the land in question were invalid because no benefitting land was readily identifiable.

60 It appears that the declaration application was preceded by a decision by Council to refuse to grant a planning permit for partial demolition, alterations and additions to an existing dwelling since it would breach the materials component of the covenant.

61 Associate Justice Matthews considered that deeming provisions pertaining to covenants in the *Property Law Act 1958*[7] and other legislation did not apply given the date of creation of the covenants in question, one being 1907 - as is the case in the current proceeding.

62 As to the ex parte nature of the proceeding, she concluded:

> [43] After considering the evidence and the plaintiff's submissions, like Lansdowne AsJ in *Re Hunt*, I consider the plaintiff's case to be such a clear case "that it is neither necessary nor appropriate to seek to elicit any contradictor". As her Honour stated,
>
> > it would be difficult to identify such a person with 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…

63 The substantive findings of the Court were:

> [59] I accept the plaintiff's submission. The apposite parts of the Lot 106 Covenant are so similar, if not identical, to those in the *Beman* Covenant…that I am bound to follow Emerton J's decision in *Beman*. I should state that not only am I bound to do so, I find her Honour's reasoning and conclusion to be compelling. The benefiting land is not ascertainable from what appears on the Register of Titles, which is the applicable standard…
>
> [72] For the Lot 105 Covenant to run with the Subject Land and burden a successor in title, that is, the plaintiff, then as set out above it must identify the benefiting land. Otherwise, it is merely a personal covenant and does not burden the Subject Land in the hands of a successor in title.

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7 Sections 78, 79 and 79A.

Findings about the ongoing effect and enforceability of the Covenant

64 Key aspects of the restrictive covenant in this proceeding are directly comparable to those considered by the Court.

65 In this instance, George William Simpson covenanted with the transferors that he would either constrain the use and development of the land in a certain way, seek requisite approval or comply with specifications outlined.

66 The covenant is worded to be in favour of 'Kate Lynch, James Byrne, Harold Paul Dennehy and their transferees'. Equivalent terminology was used in the covenant considered by the Court.

67 However, significantly, as per *Beman*, *Re Hunt* and *Re Ferraro*, the Covenant did not identify any land that would take the benefit of the restrictions; as distinct from individuals who took the benefit whilst alive.

68 Likewise, it did not identify which transferees took the benefit of the restrictions.

69 To this extent, I find that the Covenant operated as a personal covenant with the transferors.

70 Similarly, while the Covenant contains the express intention that 'it is intended that this covenant shall be set out as an encumbrance at the foot of the certificates of title to be issued in respect of the said land and shall run with the said land', I follow the reasoning of the Court in *Beman* that the covenant failed to have this effect in practise as a consequence of not identifying any benefitting land by its terms.

71 I find that there are no relevant surrounding circumstances that would lean to a different outcome in respect of this Covenant.[8]

72 In line with relevant Supreme Court case authority directly on point, I conclude that the Covenant does not annex benefit to any land or person other than the original transferors, who are either deceased or expected to be deceased in light of the age of the instrument.

73 A necessary consequence of this finding is that the Covenant is not enforceable by any person. It does not run with the land to bind successors in title because it fails to meet all requirements for a valid restrictive covenant.

74 I accept Council's submission that this does not equate to a finding that the Covenant 'no longer exists'.

75 Clearly, it remains on the face of the title unless lawfully removed.

76 The more pertinent question in this proceeding is whether its purported provisions have any ongoing effect to control the use or development of the land in question. I find that they do not.

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[8] Bearing in mind the need to approach these circumstances with caution, as enunciated by the High Court in *Westfield Management Limited v Perpetual Trustee Co Limited* (2007) 233 CLR 528.

## Potential building scheme discounted

77 Another potential source of ongoing obligations in connection with a registered restriction may be the operation of a building scheme.

78 Parties did not advocate that a building scheme applied to the subject land, in the sense that the transferors entered into an arrangement with a number of purchasers to reciprocal benefits and burdens in respect of the subsequent use or development of the land.

79 In such a scheme, the restrictions would generally burden all the land and benefit the same land, irrespective of dates of transfer.

80 Consistent with the analysis of the Court in *Re Hunt*, I conclude it is very unlikely that a building scheme applies to the subject land and other land in the subdivision or sold by the transferors. If a building scheme is to bind a successor in title, case law as confirmed in *Re Hunt* establishes that it must be ascertainable from an examination of the land titles register.

81 In this instance, there is no reference to such a scheme on the relevant Plan of Subdivision 4774, the certificate of title or the parent title.

## Recording or registration not a complete answer

82 While the recording or registration of an instrument on title containing a restriction is an important administrative act with legislative consequences, it does not of itself establish or confirm whether that instrument creates ongoing restrictions.

83 I agree with submissions for the applicant that the decision of the Supreme Court in *Fitt & Anor v Luxury Developments Pty Ltd*[9] is authority for the proposition that, having regard to the operation of section 88(3) of the *Transfer of Land Act 1958*, the recording of a restrictive covenant, easement or right in a register is[10]:

> …no more than notification of the claim that there is a restrictive covenant burdening the land, and the recording does not in any way establish or effect the validity or otherwise of the restrictive covenant.
>
> What the recording does is to give notice to anybody who wishes to acquire an interest in the burdened land that a claim is made by another that there is a valid restrictive covenant affecting the land. But it is viewed as a claim only and the recording on the folio in the Register for Land does not establish its validity.

## Requirement for consent

84 A further reason why the Covenant may create ongoing restrictions is the need to obtain consent for certain actions in connection with the use or development of the land.

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9 [2000] VSC 258.
10 At [178-179].

85 In *Lahanis*, the Court held that a requirement for the approval of a plan by a transferor to a covenant could not be obtained if that transferor no longer exists (in that instance, a cooperative), and should be considered to have been discharged.

86 Generally comparable findings were arrived at in *196 Hawthorn Road Pty Ltd v Duszniak*[11] (finding that the restrictions became obsolete on the death of the transferor) and in *Stockfeld & Anor v Hendon & Ors*[12] (concluding the approval requirement was 'spent and no longer had any work to do'; being time-limited).

87 The applicant submitted a comparable conclusion should be reached upon the death of the last transferor referred to in the Covenant.

88 I accept this analysis. Having regard to the wording of the Covenant, there is no ongoing requirement (or opportunity for) consent from any transferor to any plan for a proposed building on the subject land following the death (or presumed death) of the original transferors.

89 This element of the Covenant has become nugatory.

### Are there any beneficiaries of the 'restriction' as distinct from the restrictive covenant?

90 Mr Rath submitted that Mr Stanford was a beneficiary of a registered *restriction* on title for the purposes of section 60(5) of the PE Act, even though the restriction did not meet the necessary characteristics of a *restrictive covenant*.

91 He suggested that Mr Stanford had lodged an objection and that he would be caused detriment or perceived detriment from the removal of the restriction, and that his objection was made in good faith and not vexatious.

92 If this were true and he was a beneficiary within the meaning of this provision, the legislation would prevent the grant of a permit allowing removal of the restriction.

93 The applicant contested this interpretation of the legislative provision, urging me to find that section 60(5) of the PE Act does not constitute a limitation on the grant of a permit in this instance because there is no land benefitted by the restriction, including Mr Stanford's property. It submitted that:

> The Covenant does not confer a benefit, practical or otherwise…because the restrictions in it are unenforceable and of no legal effect.

94 Council agreed that section 60(5) was not a barrier to the grant of a permit to remove the Covenant.

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11 [2020] VSC 235 at [131].
12 [2021] VSC 133 at [42-43].

95 In terms of the mechanism by which the restriction attaches to the land, the applicant submitted that the instrument was 'recorded' on title rather than being 'registered' on title.

96 In line with submissions for Council, I am not persuaded that there is any substantive practical difference between these two concepts on the facts before me, given the alternative forms of wording used in section 60(4) of the PE Act and cross references to section 3 of the *Subdivision Act 1988*. Relevantly, that section defines a 'restriction' as *either*:

> A restrictive covenant or restriction which can be registered, or recorded in the Register under the *Transfer of Land Act 1958*.

97 I have already confirmed my finding that the Covenant was in the nature of a covenant personal to the transferors. On its wording, the benefit of the Covenant did not pass to any other land or person after the death of all transferors, despite its recorded intention to 'run with the land'.

98 The residual question is whether Mr Stanford can demonstrate that he is the owner of land which benefits from another type of registered restriction as contained within the relevant instrument, other than a registered restrictive covenant.

99 In answering this question, I have had regard to numerous cases of the Tribunal which examine potential meanings of this definition of 'restriction' in the context of restrictive covenant cases.[13]

100 I accept there may be other restrictions capable of being recorded or registered on title which are not defined as registered restrictive covenants. An example of such a restriction used in planning practise is a registered building envelope that may be recorded on a plan of subdivision.

101 However, there is no indication in the wording or application of section 60(5) by the Court or Tribunal in cases of which I am aware that it is intended to create a separate category of restriction that would capture registered restrictive covenants that are not enduring.

102 In *Gray & Ors v Colac Otway SC*[14], Gibson DP (as she then was) held:

> In my view, the correct interpretation of the way in which the definition of restriction in the *Subdivision Act* 1988 should be read is:
>
> Restriction means:
>
> - a restrictive covenant; or
> - a restriction which can be registered, or recorded in the register under the *Transfer of Land Act* 1958.

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13 Including *Van Der Heyden v Mansfield Shire Council* [2003] VCAT 102 and *Plentie Pty Ltd v Banyule CC* [2003] VCAT 750.

14 (Red Dot) [2005] VCAT 2266, [34]. This was a case involving a different set of facts where an instrument had been signed but not registered on title to land and was held not to constitute a registered restriction.

> The second leg of the definition deals with restrictions that are not restrictive covenants but that can be registered or recorded under the *Transfer of Land Act* 1958.

103 In addition, Hansard in respect of the *Planning and Environment (Restrictive Covenants) Bill* 2000 does not refer to any other innominate category of restriction.

104 Irrespective of the way 'restriction' is defined, I find that Mr Stanford has been unable to make out a requisite connection between the restriction and his land in a way that would give his land the benefit of the restriction, sufficient to make him the owner of benefitting land for the purpose of section 60(5) of the PE Act.

105 In this instance, the restriction constitutes a limitation that derives from a property law instrument, attaching to the land upon its transfer.

106 In my opinion, it follows that the concept of *benefitting land* in section 60(5) must mean more than simply the owner of any land taking a perceived practical benefit in terms of the use or development of land. It must derive from the terms of the restriction under consideration.

107 The concept of perceived detriment in section 60(5) is a distinctly different one from amenity, which is used elsewhere in the PE Act and planning scheme. It is contingent on a particular relationship created with other land by the instrument itself. It is not sufficient for him to allege that he purchased his land with notice of the restriction.

108 Mr Stanford must demonstrate that he is a person who falls within the class of an owner of land benefitted by the restriction.

109 The process for identifying beneficiaries of a covenant is a technical one, which often involves a specialist investigation of relevant titles by reference to relevant dates of transfer, relevant titles, subdivisions and the like.

110 Absent the establishment and delineation of benefitting land in the instrument or any building scheme involving broader titles, I cannot see how any other benefitting land can be identified.

111 As a litmus test, Mr Stanford has not been able to identify through evidence or submissions the way or ways in which his *land* benefits from this restriction above and beyond other land in the neighbourhood.

112 Some objectors including Mr Shore submitted that the Court in *Beman* had not considered submissions about the interaction with section 60(5) of the PE Act and that this was a relevant point of distinction from the current proceeding.

113 I am unable to accept these submissions. The same legislative limitation applied in *Beman* and was a mandatory consideration before a permit could be granted.

114 I conclude that section 60(5) is not a bar to the grant of a permit in this proceeding.

## IS THERE A NEED TO HEAR FURTHER PLANNING MERITS OF THE APPLICATION?

### What is the scope of Clause 52.02?

115 The application seeks review of the failure of Council to grant a planning permit under Clause 52.02 of the planning scheme within the relevant statutory timeframe.

116 The stated purpose of Clause 52.02 is to:

> To enable the removal and variation of an easement or restrictions to enable a use or development that complies with the planning scheme after the interests of affected people are considered.

117 In this instance, the 'trigger' for a planning permit is:

> A permit is required before a person proceeds:
>
> - Under Section 23 of the *Subdivision Act 1988* to create, vary or remove an easement or restriction…

118 Council and objectors submitted it would not be appropriate to entirely remove the Covenant, especially in circumstances where this was not required to 'enable' an identified use or development (referring to terminology in the purpose of the control).

119 Council advised the Tribunal it would have refused to grant a permit on the following grounds:

> 1. The proposed covenant removal is not supported as it operates to support and protect the neighbourhood character, cultural identity, and sense of place.
> 2. The proposed covenant removal is not supported as it operates to retain and enhance the character attributes that contribute to the precincts preferred character.
> 3. The proposed covenant removal is not supported as it operates to ensure the conservation of places of heritage significance
> 4. The proposed covenant removal fails to satisfy the interests of affected people within the Grace Park Precinct who have similar covenants which contribute to the local neighbourhood character.

120 Council submitted that:

> Importantly though, neither s 60(5) nor clause 52.02 require consideration of the validity or enforceability of a covenant. This is a separate question.

121 However, in *Beman*, the principal finding that the restrictive covenant was unenforceable led to a clear determination of the review proceeding since the Court concluded[15]:

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15 At [38].

> I consider that there would be no purpose in remitting the proceeding to the Tribunal. If the Court declared, as it could, that the Covenant was unenforceable, the Tribunal would be obliged to order the variation of the planning permit to allow for the removal of the Covenant. There are no 'affected parties' for the purpose of cl 52.02 of the Planning Scheme if the Covenant has no legal effect.

122 The applicant submitted I should apply what it regards as binding reasoning of the Court in *Beman* that, because the Covenant is unenforceable, there are consequently no affected people whose interests should be considered under Clause 52.02.

123 It urged me to issue a final order granting a permit to remove the Covenant on this basis.

124 Mr Stanford submitted that even if he was not an identifiable beneficiary of the Covenant, his interests would necessarily be affected by its potential removal as an immediately adjoining land owner and occupier.

125 The Court in *Beman* was faced with residents and resident groups objecting to the grant of a permit to remove the covenant. In the absence of them being able to demonstrate they were beneficiaries, they were not regarded as 'affected people' for the purpose of Clause 52.02.

126 I accept that the Court did not provide detailed reasons for its conclusion. However, to my mind, its application of principles is entirely consistent with its earlier finding that were are no beneficiaries of the covenant and that it the covenant was not enforceable by any person.

127 When dealing with a planning permit application to remove a covenant, it is reasonable to construe the reference to 'affected persons' in the context of the particular instrument. If the instrument does not have any beneficiaries, it would be arbitrary to suggest that other people could be affected by its removal.

128 To put this another way, if a person does not have an interest under the terms of a restrictive covenant and is not entitled to enforce it, how could it be said that they have a sufficient interest in its removal?

129 Council submitted that it was not incumbent on me to regard the finding of the Court in *Beman* – that there are no people affected for the purpose of Clause 52.02 because the covenant is unenforceable - as part of the *ratio decidendi* (binding reasoning) of that decision.

130 Alternatively, Council and objectors suggested that I should approach this finding with caution since the Court did not have a contradictor before it.

131 Instead, Council considered that the two step approach taken in the Tribunal decision of *Hill v Campaspe SC*[16] should be followed in preference to the approach taken by the Court in *Beman*, whereby:

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16 (Red Dot) [2011] VCAT 949.

- the interests of beneficiaries (if any) should be identified to enable consideration of whether the limitation in section 60(5) of the PE Act prevents the grant of a permit; and
- an assessment should be made on the planning merits about the acceptability of the proposal to remove or vary the covenant, including consideration of matters under Clause 65 of the planning scheme (such as neighbourhood character and amenity). This may involve consideration of the interests of non-beneficiaries under the category of 'planning interests', as distinct from 'property interests'.

132 I accept submissions for the applicant that there are important distinctions between the facts of this proceeding and those in *Hill v Campaspe*, most notably, the fact there was no dispute about the validity of or continued benefit of the restrictive covenant applying to identified land in that proceeding. There were also objections from owners of land demonstrated to benefit from the restrictive covenant.

133 I also note the discretion exercised by the Tribunal in that proceeding involved more conventional permissions under the zone and overlay controls, where third party powers to object are broader.

134 In any event, the decision of the Supreme Court in *Beman* is subsequent to the decision of the Tribunal in *Hill v Campaspe* and it is clear that the earlier decision had been brought to the Court's attention as outlined in the decision at first instance.[17]

135 The review proceeding under appeal in *Beman* required consideration of both section 60(5) and Clause 52.02. It reached this finding in the same legislative context as the application for review before me.

136 For these reasons, I regard the substantive conclusions in *Beman* as binding case authority on the facts before me.

137 Consequently, I find that it is an inevitable conclusion that there are no people whose interests are affected for the purpose of Clause 52.02 in this proceeding.

138 This makes it appropriate to adopt the approach taken by the Court tothe disposition of the proceeding, to grant a planning permit to remove the covenant in its entirety.

### Is there residual discretion? If so, how should it be exercised?

139 Council and objectors submitted that even if the Covenant was found to be a personal one, it does not automatically follow that a permit for its removal should be issued. The Tribunal still needs to determine whether this is the correct and preferable decision.

140 Given the extensive submissions of mixed law and fact in this proceeding to date, combined with the objections and detailed statements of grounds and

[17] *Beman Pty Ltd v Boroondara CC* [2016] VCAT 2020.

Council's delegate's report, I consider there is no need for any further hearing on the planning merits of the application.

141 In the event that I may be found to be in error in my principal findings above, I have also considered how any potential residual discretion should be exercised.

142 Referencing the purpose of Clause 52.02, I agree with the applicant that there is no requirement for an application to remove a restrictive covenant to be accompanied or preceded by a particular use or development proposal.

143 In this instance, the lack of such a proposal is effectively neutral. Removing the covenant would mean that any future proposal to use or develop the land would be subject to any applicable planning scheme controls in the ordinary way.

144 There are no relevant decision guidelines specified in Clause 52.02. Instead, considerations would stem from section 60 of the PE Act, relevant policy, zone and overlay provisions together with the decision guidelines in Clause 65.01 of the planning scheme.

145 Considerations of potential relevance are very broad brush, such as the need to consider the orderly planning of the area and the effect on the amenity of the area.

146 I have considered Council's delegate's report which details the relevant setting in recommending a refusal to grant a permit. Relevantly it expressed the view that[18]:

> While not expressly written as a restriction to a single dwelling on the site, it appears that the covenant has achieved, in a large capacity, the same effect.
>
> Given the detached single dwelling character of the precinct, it is considered that the covenant with regard to dwelling restriction is not obsolete.
>
> Review of the surrounding neighbourhood indicates a broadly cohesive and consistent character in keeping with the covenant intent…
>
> There are no beneficiaries to the covenant however a number of dwellings within the precinct have similar covenants contributing to the cohesive pattern of development.
>
> The existing covenant does not expressly limit one dwelling on the site but limits built form and typology…
>
> Given the consistent and cohesive nature of the surrounding neighbourhood character it is considered that the removal of the covenant is inconsistent with the orderly planning of the area and the broader strategic outcomes set out in the Boroondara Planning Scheme.

[18] The following quotes were originally formatted in tabular form in response to what the delegate regarded as relevant considerations.

147 Ms Walker similarly submitted that:

> The particular requirements of the Covenant in this case, and the network of similar covenants on other titles, have broad impact and have been influential, and clearly remain influential in establishing and maintaining the character and amenity of the neighbourhood.

148 Other objectors made comparable submissions, including Grace Park Residents' Association which explained:

> The original purpose of the restrictive covenant to preserve the Grace Park area as a high quality residential neighbourhood/garden estate with the character of separate houses and one dwelling per allotment remains as relevant today as when originally covenanted.
>
> The removal of covenants that have served the community for over 100 years will detract from the conservation of important places of heritage impact…The broader detrimental impact on the future amenity of this heritage area should be considered against any argument for the need to remove the covenant…
>
> …the detriment would be a loss of amenity and the potential for increased development that would adversely affect the cohesive heritage character of the precinct.

149 The applicant responded:

> The Covenant cannot operate to support and protect the neighbourhood character, cultural heritage or sense of place because it is unenforceable and the restrictions in the Covenant are of no legal affect...
>
> Removal of the Covenant for the Subject Land will have no affect on any other covenant within the Grace Park Precinct which, in any event, could only contribute to the local neighbourhood character if they confer the benefit on identified land, about which there is no evidence, and no such covenant is in issue in this proceeding.
>
> It is accepted that the Covenant probably played a role in the initial establishment of the neighbourhood whilst one of the covenantees were alive but the restrictions in the Covenant have been of no legal affect since the date of death of the last surviving covenantee.

150 I accept that there is a strong community interest in new development and land use respecting prevailing neighbourhood amenity, character and heritage values.

151 However, if the Covenant is unenforceable, it is no longer legally effective to control the future use or development of the land. Even though it currently appears on title to the land after the death of the transferors, its ongoing influence is only illusory.

152 For example, in *Re Ferraro*, the Court held that the relevant land was no longer affected by any restrictions since the restrictive covenant was no longer enforceable.[19]

153 Since the covenant has no ongoing operation as an effective restriction, the grant of a planning permit to remove it would not alter the status quo in terms of the owner's entitlements to use or develop the subject land.

154 Beyond this, if residual discretion exists, it is relevant to have regard to the fact the use and development of the subject land would not be 'at large' if the covenant was removed. All use and development would still need to accord with relevant planning scheme provisions and building regulations as they apply from time to time.

155 The property contains a dwelling of contributory heritage significance within the Grace Park Estate. The principal control is the need for a planning permit for buildings and works under the Heritage Overlay which applies to the land.[20] In most instances, a planning permit application under this overlay would trigger the need for public notification to people who may be affected.

156 I accept that there is currently a relatively high level of consistency within the built form character, external materials and siting of dwellings of this immediate locality. This would be a relevant consideration for any future development of the land under the Heritage Overlay controls.

157 The use and development of the land would also need to be consistent with the Neighbourhood Residential Zone (Schedule 3) controls. To this extent, even though the Covenant purported to prevent the use of the land for shops and this would be removed, only an extremely limited category of shop would be permissible under this zone and would require planning permission.

158 Likewise, if more than one dwelling was now proposed on each lot, permission would be required under the zone controls for buildings and works. These would need to be consistent with and respectful of the character of the area (in this instance, by virtue of policy for the Neighbourhood Residential Zone and Heritage Overlay areas, the existing character).

159 When one considers the other elements of the Covenant, a number are truly in the nature of personal covenants that would not in my view affect the orderly planning or amenity of the area. Examples include the minimum price of buildings to be constructed and the approval of plans to the satisfaction of particular transferors.

160 For these reasons, I would have been prepared to support the removal of the restrictive covenant on the planning merits.

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19 I was advised by Mr Pitt QC that the relevant instruments have been removed from title to both that land and the land the subject of Re Hunt.

20 (Schedule 152).

161 Some objectors suggested that if the restrictive covenant had no ongoing effect and there was already a current planning permit issued that would comply with the terms of the Covenant, there was no utility in granting a permit to remove it from title to the subject land.

162 I respectfully disagree. At the very least, it would prevent further time and expense for the owner in seeking to remove or vary it (or reagitate issues about its enforceability) if a future development or land use application was made, having regard to the 'stop gap' provided throughout the legislative regime in respect of registered restrictive covenants.[21]

163 I note that in *Beman* there was also an extant planning permit that had been issued in respect of the land. This did not negate the decision to remove the covenant from the land in its entirety.

164 In this proceeding, I find that removal of the Covenant would be consistent with the objectives of planning in Victoria to allow the fair, orderly and economic use and development of land.[22]

165 There is also utility and public interest in updating the land titles register to recognise that this restriction is no longer binding.

## RELEVANCE OF SETTLEMENT OF RELATED PROCEEDINGS

166 Parties in related review proceedings[23] recently sought a consent order from the Tribunal granting a planning permit for a particular proposal (to refurbish and extend the dwelling on the subject land).

167 Some objectors submitted it would not be consistent with this recent settlement outcome to now permit the full removal of the Covenant from the land. They suggested this would detract from the integrity of the alternative dispute resolution process.

168 In principle, it may be reasonable for the Tribunal to be cautious when considering the effects of its subsequent decisions on earlier settlement outcomes in respect of the same land.

169 However, there are a number of factors that lead me to the conclusion that granting a permit to remove the covenant would not affect the integrity of the particular outcome reached in the related proceedings.

170 First, the earlier proceeding was settled by parties with clear knowledge that there was a contemporaneous proceeding seeking review of Council's failure to remove the restrictive covenant.[24]

171 The parties would have been well aware that one potential outcome of the related proceeding (if the applicant was successful) would be the grant of a permit to remove the restrictive covenant in its entirety, as applied for. Parties would also have known of the impending hearing to consider the

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21 Including sections 60(5) and section 61(4) of the PE Act.
22 Subsections 4(1)(a) and (f) of the PE Act.
23 P11935/2021, P11996/2021, P12004/2021, P12008/2021 and P12012/2021.
24 Most had attended the joint Practice Day Hearing.

legal validity of the covenant and the status of objectors (since the Tribunal directed notice to be given to them).[25]

172 The parties did not arrive at joint terms of settlement in both proceedings which could potentially have curtailed such an outcome. For example, the applicant did not agree to withdraw the current proceeding.

173 Second, in my view, the permissions granted are not in conflict with one another. The permit was granted for a specific form of buildings and works having regard to the provisions of the Heritage Overlay. The plans for approval under the permit complied with the terms of the Covenant (as to materials and roofing), such that the grant of a permit would not contravene section 61(4) of the PE Act.

174 Third, notwithstanding removal of the Covenant, a planning permit would still be required to authorise the buildings and works in question under the Heritage Overlay.

175 There are benefits to objectors from agreed permit conditions imposed through the compulsory conference process to lower building height and the like. These works presumably remain acceptable to the objectors and Council who consented to the grant of a permit.

176 While there may be potential for the permit to be amended by Council in future if an application was made by the permit holder (as alluded to by objectors), this would be subject to the conventional principles of secondary consent or public notice under the PE Act if applicable, irrespective of the removal of the Covenant.

177 For these reasons, I consider that the grant of a permit to remove the Covenant would not detract from the permission granted or affect the integrity of the alternative dispute resolution process in these proceedings.

## CONCLUSION

178 This decision directly follows binding case authority in the Supreme Court on the interpretation of either identical or comparable restrictive covenants.

179 Adopting the same reasoning, I confirm that the Covenant applying to the subject land has no living beneficiaries or benefitting land and is unenforceable. It no longer provides any ongoing restrictions on the use or development of the subject land.

[25] My order dated 9 June 2022 in the current proceeding required service of this application and a copy of the order on all parties to the related proceedings by 15 June 2022. The compulsory conference followed, with final resolution on 29 June 2022.

180 It is now appropriate to grant a permit authorising the removal of the Covenant under Clause 52.02 of the planning scheme.

Dalia Cook
**Member**