

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

S ECI 2025 04337

IN THE MATTER of an application pursuant to section 84 of the *Property Law Act 1958* (Vic) concerning the restrictive covenant contained in Instrument of Transfer 1392831 registered in the Register Book at the Office of Titles under the *Transfer of Land Act 1958* (Vic), burdening the land known as 6 Jessamine Avenue, Prahran, Victoria, more particularly described as Lot 6 on Plan of Subdivision 11971 and being the land in Certificate of Title Volume 11848 Folio 755

APPLICATION BY

JASON RAPHAEL BESSER and CARA NATALIE BESSER Plaintiffs

ORDER

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| JUDICIAL REGISTRAR: | Judicial Registrar Burgess |
| DATE MADE: | 12 August 2025 |
| ORIGINATING PROCESS: | Originating Motion |
| HOW OBTAINED: | On return of the Originating Motion filed 30 July 2025 |

ATTENDANCE: M Townsend, counsel for the Plaintiffs

OTHER MATTERS:

- A. This proceeding, pursuant to section 84 of the *Property Law Act 1958* (Vic) concerns an application to modify a restrictive covenant that applies to the subject land known as 6 Jessamine Avenue, Prahran, Victoria (**Covenant**).
- B. The Covenant prohibits, amongst other things:
 - a) excavation unless for the purpose of construction of building on the Land;
 - b) construction using material other than brick, stone or concrete; and
 - c) roofing of other than slate or tiles.
- C. The Plaintiff seeks to modify the covenant to allow the use of Colorbond and Zinalume roofing materials in association with the retained, existing slate and tiles.
- D. In support of the application, the Plaintiffs rely upon, and the Court has read, the following material:
 - a) affidavit of Jason Raphael Besser dated 28 July 2025;



b) affidavit of Andrew Lam dated 28 July 2025; and

c) written submissions of Matthew Townsend filed 5 August 2025.

- E. Having regard to the Plaintiffs' proposal and the evidence before me, the Court is of the opinion that the proposed modification of the Covenant is benign in its nature and scope and that the proposed modification will not cause substantial injury to the persons entitled to its benefit, pursuant to section 84(1)(c) of the Act.
- F. In particular, the Court notes the evidence indicating that non-compliant roofing materials appear to have been used towards the rear of the dwelling for years if not decades.
- G. The Court is therefore of the opinion that the proposed modification of the Covenant will not cause substantial injury to the persons entitled to its benefit and in consideration of the unusual circumstances of this case, is prepared to grant modification sought without notice to beneficiaries.
- H. The Judicial Registrar relies on the orders of the Honourable Associate Justice Irving made on 12 August 2025 pursuant to r 84.04 of the *Supreme Court (General Civil Procedure) Rules 2015 (Rules)*.
- I. This order is signed by the Judicial Registrar pursuant to r 60.02(1) of the Rules.

THE COURT ORDERS THAT:

1. Pursuant to section 84(1)(c) of the *Property Law Act 1958* (Vic), that the restrictive covenant contained in Instrument of Transfer 1392831 registered in the Register Book at the Office of Titles under the *Transfer of Land Act 1958* (Vic), burdening the land known as 6 Jessamine Avenue, Prahran, more particularly described at Lot 6 on Plan of Subdivision 11971 and being the land in Certificate of Title Volume 11848 Folio 755 be modified by adding the words underlined, as follows:

...will not at any time hereafter excavate carry away or remove or permit to be excavated carried away or removed any earth clay stone gravel or sand from the lot hereby transferred except for the purpose of excavating for a swimming pool, the foundations of any building to be erected thereon or use or permit or allow the said lot to be used for the manufacture or winning of bricks tiles or pottery ware And further will not erect more than one dwellinghouse on the said lot or more than one building to be used as residential flats on less than two adjoining lots and that no such dwellinghouse or building shall be constructed of any material other than brick stone or concrete, or other materials with a rendered finish with the roofs of slate, Colorbond, Zinalume or tiles.

2. As soon as practicable after the authentication of this Order, the Plaintiffs lodge an authenticated copy with the Registrar of Titles.
3. No orders as to costs.
4. Liberty to apply.



DATE AUTHENTICATED:

15 AUGUST 2025



JUDICIAL REGISTRAR BURGESS