IN THE SUPREME COURT OF VICTORIA
COMMON LAW DIVISION
PROPERTY LIST

Not Restricted

S ECI 2025 03157

BETWEEN:

SHYAMA BERNADETTE JAYASINGHE & ANOR (according to the attached Schedule) — Plaintiffs

v

GRANT WILLIAM PERRY & ANOR (according to the attached Schedule) — Defendants

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JUDGE:	Daly AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	30 September and 6, 7 and 29 October 2025
DATE OF JUDGMENT:	4 December 2025
CASE MAY BE CITED AS:	Jayasinghe v Perry
MEDIUM NEUTRAL CITATION:	[2025] VSC 751 (revised 5 December 2025)

REAL PROPERTY — Restrictive covenants — Application to modify restrictive covenant under s 84(1)(b) and (c) of the *Property Law Act 1958* (Vic) — Covenant not to build dwelling above a certain height — Covenant breached — Whether acquiescence constitutes agreement under s 84(1)(b) of the *Property Law Act 1958* (Vic) — Whether inaction by beneficiaries constitutes agreement to modification of the covenant — Whether modification would not cause substantial injury — *Re Clearwater Properties Ltd* [2013]] UKUT 210 (LC) applied — No discretionary matters warranting refusal of application — Application granted pursuant to s 84(1)(b) of the *Property Law Act 2010* (Vic).

STATUTORY INTERPRETATION — Meaning of 'agreement' under s 84(1)(b) of the *Property Law Act 1958* (Vic) — Natural and ordinary meaning — Interpretation to give effect to harmonious goals — *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 applied.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr M Townsend of counsel	Duffy & Simon
For the Defendants	Ms T Acreman of counsel	Novum Law Group

HER HONOUR:

Introduction

1 The parties to this proceeding are in a very difficult situation. The plaintiffs, Mrs Shyama and Mr Chandana (Carl) Jayasinghe are a retired couple who purchased a vacant lot in Lysterfield in the foothills of the Dandenong Ranges in 2022 ('Jayasinghe property') in order to build a new home. The vendors of the Jayasinghe property, another retired couple, Mr Grant and Mrs Janine Perry, live on the land immediately adjacent to the Jayasinghe property ('Perry land'). In order to protect the rather stunning views from their home on the Perry land, the Perrys included in the contract of sale and registered on the title to the Jayasinghe property covenants which sought to restrict the Jayasinghes from, among other things, building a single-storey dwelling greater than a particular height ('restrictive covenant').[1]

2 What followed is discussed in further detail in the following section of these reasons. However, in short, the house that the Jayasinghes have built on the Jayasinghe property ('new dwelling'), which is close to complete, breaches the height restriction imposed by the Perrys in the restrictive covenant ('height restriction') by approximately three metres. The roof of the new dwelling substantially obscures the views from the Perrys' living/dining area and outdoor entertainment area.

3 The Jayasinghes have brought this proceeding to vary the restrictive covenant under s 84 of the *Property Law Act 1958* (Vic) ('Act') in such a way as to ensure that the new dwelling is no longer in breach of the height restriction. Given the purpose of the restrictive covenant, and the impact of the breach upon the Perry land, one would generally expect that the Jayasinghes would face considerable, if not insurmountable, difficulties in obtaining the relief that they seek in this application.

4 However, the position has been complicated by the conduct of the Perrys. Despite the height restriction being a matter of considerable importance to them, and despite having concerns about a potential breach of the height restriction from the early stages of the construction of the new dwelling, they did not take any substantive action

[1] Similar covenants were also placed upon a further lot located on the other side of the Jayasinghe property and sold by the Perrys to another purchaser.

regarding the breach of the height restriction until some seven months after the fact that the new dwelling would breach the height restriction must have become obvious to them. Construction of the new dwelling commenced in late April 2024, and no formal action was taken by the Perrys until they delivered a letter to the Jayasinghes from their former solicitors dated 24 February 2025 ('24 February letter').

5 The Jayasinghes say that the Perrys will not suffer a substantial injury by the modification of the height restriction, given that only part of the Perry land has the benefit of the height restriction, and given the Perrys' own plans for the further development of the Perry land. The Jayasinghes say further that the conduct of the Perrys in standing by while the construction of the new dwelling proceeded to near completion signifies their agreement to the modification of the height restriction within the meaning of s 84(1)(b) of the Act. In response, the Perrys say that the injury to them and the Perry land by reason of the Jayasinghes' breach of the height restriction is self-evident. They say further that they raised their concerns with the Jayasinghes and their contractors about the potential breach of the height restriction on several occasions between May 2024 and July 2024, and that they were entitled to assume that those concerns would be addressed by the Jayasinghes.

6 There is no good outcome in this litigation. The Perrys and the Jayasinghes will be next door neighbours, and the previously cordial relationship between them has no doubt soured as a consequence of what has occurred. If the Jayasinghes' application to vary the height restriction is refused, the Jayasinghes will have to expend considerable time and funds upon rectifying their near complete dwelling in order to comply with the height restriction. They may have some recourse against their builder and/or town planning consultants, depending upon their contractual arrangements with those parties, and the solvency and/or insurance coverage of those parties, but a full recovery of any rectification costs cannot be guaranteed.

7 On the other hand, if the Jayasinghes' application is granted, the Perrys face waking up every day to a view of a neighbouring dwelling that significantly impacts the amenity of their home, in circumstances where they took considerable pains and trouble to ensure that a dwelling of that kind was not constructed adjacent to their home some three and a half years ago. The real question in this proceeding is,

however, whether the Perrys have done enough to enforce their rights under the restrictive covenant, or whether, by standing by while construction of the new dwelling proceeded, they have in effect surrendered their right to do so.

8 However, the resolution of the Jayasinghes' application does not involve a comparison of the prejudice to each party and identifying what appears to be the result which is productive of the least injustice, or which party should bear the most blame for the current situation. Further, the applicable test is not where the balance of convenience lies. Rather, the question is whether the Jayasinghes can persuade me that the requirements of either or both of s 84(1)(b) and s 84(1)(c) of the Act have been satisfied, and if so, whether there are other discretionary matters which tell in favour or against the grant of the application.

9 Upon viewing the new dwelling from the house on the Perry land, I am not satisfied that the modification of the height restriction would not cause the Perrys substantial injury. In fact, I am positively persuaded that the modification of the covenant *will* cause the Perrys substantial injury. However, I am satisfied, for reasons explained in more detail later in these reasons, that the Perrys' conduct in standing by for a period of many months after the height of the new dwelling was clearly ascertainable amounted to, in effect, a representation to the Jayasinghes that they did not intend to enforce the height restriction. The Perrys' omissions, have caused me to conclude that they agreed to the modification of the height restriction within the meaning of s 84(1)(b) of the Act. The Jayasinghes' own conduct in (unwittingly) breaching the height restriction is not conduct which would deny them relief on discretionary grounds.

10 Accordingly, subject to resolving what I expect will be a relatively minor issue regarding the standing of any mortgagee of the Perry land for the purposes of s 84(1)(b) of the Act, the Jayasinghes' application to modify the restrictive covenant to vary the height restriction will be granted.

11 My detailed reasons follow.

Factual background

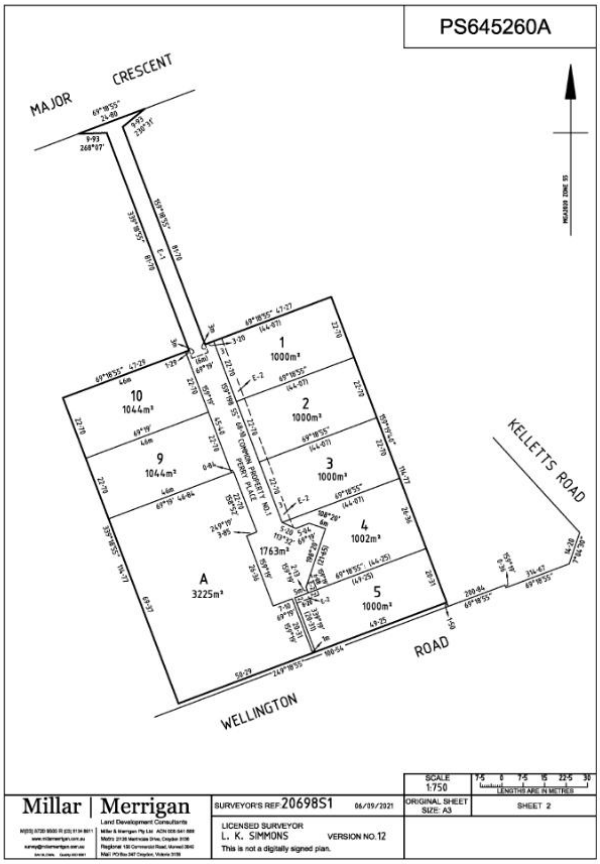
12 In July 1987, the Perrys purchased a large block of land in Lysterfield ('parent land').[2] The parent land was situated on a slope, rising upwards from Major Cresent towards Wellington Road, a major arterial road. Wellington Road forms the rear boundary of the parent land to the south, with the parent land being separated from Wellington Road by a vegetated buffer zone approximately 1.5 metres wide.

13 About halfway up the slope, the Perrys constructed their home, which is a comfortable but unostentatious single-storey ranch style dwelling. Prior to the construction of the new dwelling, the Perrys enjoyed sweeping views to the north and north-west from their living/dining area, main bedroom, and outdoor living area.

14 In her affidavit affirmed on 11 August 2025, Mrs Perry deposed that from the Perry land, the Perrys could see across to the You Yangs and Mt Macedon to the west and north-west, towards Wheelers Hill and Knox City to the north, and across Croydon to the Dandenongs and the Yarra Valley to the north-east. Below is a photograph taken from the Perrys' living room in October 2023, which shows the views to the north prior to the construction of the new dwelling.

[2] The parent land was 6,200sqm in size, or approximately one and a half acres.

15 In or about 2011, the Perrys commenced the process of subdividing the parent land, in two stages. The plan of subdivision for the first stage ('plan of subdivision') involved the subdivision of the parent land into three lots, being the Perry land, the Jayasinghe property, and another block on the other side of the Jayasinghe property. The plan of subdivision was approved by Knox City Council ('Council') on 8 February 2012, and registered on 25 October 2013. The plan of subdivision was further amended on 11 April 2022, 19 May 2022, and 16 August 2024.[3]



16 The above plan shows the Perry land as Lot A, the Jayasinghe property as Lot 9, and the other lot sold by the Perrys as Lot 10 of the plan of subdivision. The Perry's home is situated on the lower third of the Perry land, immediately adjacent to the Jayasinghe property. The second stage of the subdivision, which has been approved by the Council,[4] but has not yet been registered, involves the subdivision of the Perry land into three separate lots with an area of roughly 1000 square metres each.

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3 Lots 1 to 5 on the plan of subdivision did not form part of the parent land.

4 An amended planning permit was issued on 9 December 2020.

17 The version of the plan of subdivision included in the contract of sale for the Jayasinghe property includes the following prominent statement:

> CREATION OF RESTRICTION 'B'
>
> The registered proprietors of the burdened land covenant with the registered proprietors of the benefited land as set out in the restriction with the intent that the burden of the restriction runs with and binds the burdened land and the benefit of the restriction is annexed to and runs with the benefited land.
>
> Burdened land: LOTS 9 & 10 ON THIS PLAN.
>
> Benefited land: LOTS 9, 10 &A ON THIS PLAN.
>
> DESCRIPTION OF RESTRICTION:
>
> NO BUILDING GREATER THAN SINGLE STOREY IN HEIGHT MAY BE CONSTRUCTED ON THE BURDENED LAND.

18 On 28 April 2022, the Jayasinghes purchased the Jayasinghe property for $1,127,500, and settlement of the sale took place on or about 28 June 2022.

19 The contract of sale specified that the Jayasinghe property was to be subject to the restrictive covenant and set out the terms of the restrictive covenant in full, including the height restriction. The plan of subdivision only recorded the single-storey restriction, not the height restriction. The restrictive covenant was also documented in a Memorandum of Common Provisions ('MCP') registered on the title upon the transfer of the Jayasinghe property. The restrictive covenant in the MCP precludes the Jayasinghes from constructing a dwelling which:

(a) is greater than single storey in height;

(b) has a roof pitch in excess of 25 degrees; and

(c) exceeds the maximum ridge height of 139.3 based on The Australian Height Datum 1971 (AHD 71).[5]

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[5] Australian Height Datum 1971 (AHD71) is the official vertical datum (height reference system) used for measuring elevations and depths across Australia. Reference Point: AHD71 defines mean sea level as zero elevation. It was established by analyzing tide gauge observations from 30 coastal locations around mainland Australia over several years, with the measurements adjusted to represent mean sea level for the period 1966-1968. Purpose: It provides a consistent reference framework so that heights measured anywhere in Australia can be compared meaningfully. Without a standard datum, elevation measurements from different surveys wouldn't relate properly to each other. Source: Claude AI, Anthropic.

20 The practical impact of the height restriction is that unless there were significant excavations on the Jayasinghe property prior to construction of the new dwelling, the Jayasinghes would be limited to erecting a dwelling with modest ceiling levels, and/or a flat or close to flat roof. This issue may have prompted the inclusion in the contract of sale of a special condition to the effect that the contract of sale was subject to the Jayasinghes receiving a satisfactory report from their builder as to the site works required at the Jayasinghe property. There is no evidence that any such report was sought or obtained by the Jayasinghes prior to the settlement of the contract of sale.

21 It took some time for the Jayasinghes to make the necessary arrangements to construct the new dwelling. Originally, the Jayasinghes dealt with Metricon Homes, but they were unhappy with the standard of service. On or about 15 August 2023 they signed a building contract with Live Well Homes Pty Ltd ('builder'). The building contract was in a conventional form, and specified a contract price of $730,000, with progress payments to be made to the builder upon the achievement of the usual milestones (for example, base stage, frame stage, lock up stage, fit out, joinery and so on).

22 Mr Jayasinghe gave evidence that he gave a copy of the contract of sale (which referred to the height restriction) to the builder.[6] However, the plans annexed to the building contract[7] showed that, if the new dwelling was constructed in accordance with the plans in the building contract (and it seems to be common ground that it was) then the new dwelling would breach the height restriction.

23 During this period, the Jayasinghes occasionally spoke to the Perrys outside the Perrys' home when they visited the Jayasinghe property. While the parties differ in their recollections of who was there and what was said during some of these conversations, it seems that there was at least one meeting where there was a discussion about the Perrys' own plans for the Perry land.

24 The Perrys gave evidence under cross-examination at trial that in or about 2023 they had considered building a new home at the rear of the Perry land, adjacent to the Wellington Road buffer zone, on the highest point of the Perry land.

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6 T20 L2-4.

7 These plans appear to have been prepared by another company, not the builder.

25 In evidence was a bundle of A3 plans showing various iterations of plans for the construction of a large, two-storey, four bedroom home with a lift, and, no doubt, with even more sweeping views than those the Perrys previously enjoyed from their current home ('project'). If the Perrys went ahead with the project, it would then be open to them to complete the process of subdividing the Perry land into three lots in accordance with their planning permit, with one lot containing a new home, one lot containing their existing home, and a vacant lot in the middle.

26 However, the Perrys gave evidence that they abandoned the project in September 2023, because the estimated costs of construction escalated as the plans were developed and refined, to a level unacceptable to the Perrys.[8] Mrs Perry said she had only one conversation with Mr Jayasinghe about the project. The Jayasinghes gave evidence that there were two conversations during which the project was discussed, and gave evidence the Perrys told them that they were abandoning the project because of the trouble that the Jayasinghes had experienced in obtaining planning permission for the new dwelling. For a range of reasons, I prefer the Perrys' version of events, but not much turns upon this factual dispute for present purposes.

27 In any event, it seems the Jayasinghes did not have any particular difficulties obtaining a planning permit for the new dwelling. A building permit was issued on or about 14 November 2023. On 8 December 2023, Smart Town Planning Pty Ltd made an application to the Council for a planning permit. Accompanying the planning permit application were, among other things, a register search statement identifying two covenants registered on the Jayasinghe property (but not the actual instruments containing the terms of the restrictive covenants), the plan of subdivision, and a town planning report. The planning permit application did not refer to the restrictive covenant or the height restriction, and replied 'no' to a standard form question as to whether there were any encumbrances on the title of the Jayasinghe property.

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[8] There were three iterations of plans in evidence, dated 29 December 2022, 14 April 2023, and 15 June 2023. The latter set of plans were very detailed, which suggests that planning for the project was well advanced, but the date of these plans was also consistent with the Perrys' evidence that the project was abandoned in late 2023.

28 The town planning drawings annexed to the planning permit application included a plan which showed that the height of the new dwelling would exceed the height restriction.[9]

29 After seeking further information regarding unrelated aspects of the proposed development on the Jayasinghe property, the Council resolved to publicly advertise the application by mailing a letter to affected properties, and by erecting a sign on the Jayasinghe property for 14 days.

30 The Perrys were adamant that they did not receive a letter from the Council regarding the planning permit application. However, they agreed that they saw the yellow sign on the Jayasinghe property. They took no steps to inspect the planning permit application. They did not consider they needed to do so, because they had no reason to believe that the Jayasinghes would not comply with the terms of the restrictive covenant, including the height restriction.

31 No objections to the planning permit application were made, and the planning permit was issued by the Council on 18 March 2024. Again, a careful analysis of the drawings annexed to the planning permit would reveal that the new dwelling would, when constructed, breach the height restriction. Further, the report prepared by the Council officer in support of the grant of the planning permit dated 13 March 2024 referred to the single-storey restriction specified in the plan of subdivision, but not the restrictive covenant in the MCP. This report also referred to the height of the new dwelling as being 6.34 metres.

32 Construction of the new dwelling commenced in late April 2024, with excavation and plumbing works. At a fairly early stage, by May 2024, the Perrys were concerned that the site cut on the Jayasinghe property was too shallow to enable the new dwelling to comply with the height restriction.

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[9] However, given the size of the text showing the relevant measurements, and the way in which the height data was presented on the plan, a person inspecting the plans would require excellent eyesight and/or magnification and would need to understand what is meant by 'FFL' (finished floor level) and AHD in order to understand how high the new dwelling would be.

33 In her affidavit affirmed on 11 August 2025, Mrs Perry deposed that between May 2024 and July 2024 she and her husband raised their concerns about the height of the new dwelling on a number of occasions, as follows:

(a) in the week commencing 13 May 2024 the Perrys spoke with the site cut manager about the height restriction and their concerns. The site cut manager said that he was aware of the height restriction, and that the site cut was correct;

(b) the following week, Mrs Perry telephoned the site cut manager and repeated her concerns that the site cut was not deep enough. The site cut manager repeated his assurance that the site cut was correct, and that the plumbers would also check the heights; and

(c) sometime before 4 June 2024, the Perrys spoke to the Jayasinghes outside their home, and told the Jayasinghes about their discussions with the site cut manager. Mr Jayasinghe said that he knew of these discussions, and that the Perrys had questioned the depth of the site cut and the issue of the height restriction.

34 None of this evidence was challenged at trial.

35 On or about 4 June 2024, Mr Perry telephoned a friend, Mr Ron Grenfell, a retired surveyor who had been involved in preparing the Perrys' application for the plan of subdivision. Mr Grenfell told Mr Perry that he could test whether the new dwelling complied with the height restriction by comparing the top of the new dwelling with the height of the coffee table in the Perrys' living room. Mr Grenfell told Mr Perry to lay a large ruler across the coffee table pointing north to south, and then bend down to measure the approximate height of the new dwelling against the edge of the ruler through the Perrys' living room window ('coffee table test').

36 Sometime after Mr Perry received Mr Grenfell's advice, the construction of the wall frames of the new dwelling were completed. Deploying the coffee table test, Mr Perry was able to ascertain that the height of the walls of the new dwelling were about the

same as the height restriction. That is, unless the new dwelling was constructed with a flat roof, or a close to flat roof,[10] the height restriction would be breached.

37 Sometime in July 2024, probably between 10 and 18 July 2024, which was after the wall frames of the new dwelling had been erected, but before any roofing works had been carried out, the Perrys invited the Jayasinghes to their home for a discussion about the new dwelling ('July meeting'). While the evidence of the parties regarding the purpose of the July meeting and what was said at the July meeting differed somewhat, the parties' 'takeaways' from the July meeting diverged sharply. As it turned out, neither takeaway was correct. The Perrys believed that they had clearly explained their concerns about the possible breach of the height restriction to the Jayasinghes, believed that the Jayasinghes had understood and acknowledged their concerns, and believed that the Jayasinghes would take action to address their concerns.

38 On the other hand, in his affidavit affirmed on 4 June 2025, Mr Jayasinghe acknowledged that at the July meeting the Perrys had referred to the height restriction, and demonstrated the coffee table test, but deposed that he and his wife believed that the Perrys' concerns had been 'resolved'. However, under cross-examination at trial, Mr Jayasinghe gave evidence that he did not know of the height restriction at the time of the July meeting, because he thought he was simply confined to building a single storey house on the Jayasinghe property. Mr Jayasinghe gave evidence that he did not understand what Mr Perry intended to convey by the conduct of the coffee table test, and that he did not himself stoop down to look along the ruler to compare the height of the walls of the new dwelling with the height of the ruler.[11]

39 Mr Jayasinghe did not tell the Perrys that he would take any action as a consequence of what he was told at the July meeting. It seems that he was not asked provide any assurances or to confirm that he would take any action. Both Mr Perry and Mr Jayasinghe gave evidence that Mr Jayasinghe did not say anything in response to what Mr Perry told him during the July meeting. However, Mr Jayasinghe gave evidence that after the July meeting he spoke with a representative of the builder, who

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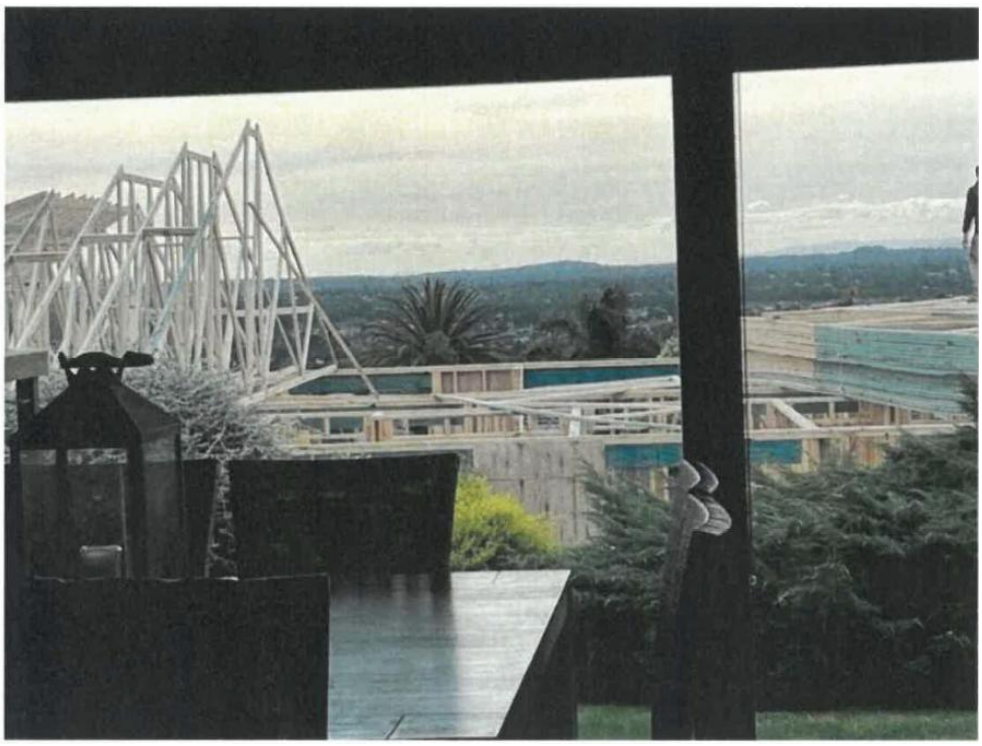
10 A report prepared by an engineer, Mr Brendon Clark (see paragraph 63 of these reasons), provided examples of how the design of the new dwelling could be modified to comply with the height restriction by constructing a roof with a pitch of two percent.

11 T31 L7-T32 L10.

told him that the dwelling was being constructed in accordance with the planning permit. Mr Jayasinghe was satisfied by this assurance, and construction of the new dwelling continued.

40 On 20 July 2024, Mr Perry left for Darwin, where the Perrys owned an apartment and regularly spent the winter months. Mrs Perry followed nine days later, on 29 July 2024. However, a photograph exhibited to Ms Perry's affidavit of 11 August 2025, which was taken on 25 July 2024, shortly before her departure for Darwin (see below) shows that the roof erected on the new dwelling would substantially impair the views from the Perrys' living/dining room.



41 In her affidavit of 15 August 2025, Mrs Perry gave the following evidence:

> Between 20 and 29 July 2024, I spoke to two people from Live Well Homes about my concerns about the roof height. I know it was between these dates because it was when Grant was away in Darwin and I was at home.
>
> I spoke to a Live Well Homes employee who held a clipboard. We spoke while we were standing in my driveway. I asked him if he was aware of the height restriction. He started to go through his papers and kept saying "yes, yes" as he flicked through the pages on the clipboard.
>
> I invited one of the site managers or inspectors from Live Well Homes into our home to look at the height of the[new dwelling] from our lounge room. I told him there was a covenant on the [Jayasinghes'] land which was a height restriction. I said that the roof of the [new dwelling] looked too tall to me. We

> both stood in my lounge room, and he agreed it was a very tall roof. He used the words, "A big head on a small body." I asked him to report it back to his manager and to contact me. I never heard back from him.
>
> I also raised the problem of the height with the workers putting the roof trusses up. One of those workers said, "Oh you're just worried you're going to lose your view."

42 None of this evidence was challenged at trial.

43 In response, in his affidavit of 25 August 2025, Mr Jayasinghe referred to the communications deposed to by Mrs Perry, as deposed as follows:

> I refer to paragraphs 60 to 90 of [Mrs Perry's] Affidavit and say that at no time during the period May 2024 to July 2024 did the [Perrys] explicitly advise us that they were concerned that the roof of our home breached the [height restriction]. I agree that in or around July 2024 the [Perrys] raised their concerns regarding the height of the building. However, following the conversation referred to in paragraph 23 of My June Affidavit, I understood that the [Perrys'] concerns were resolved.
>
> I confirm that from July 2024, the [Perrys] did not raise any further concerns regarding the height of our home until we received [the 24 February letter] advising us of their view that our home breached the [height restriction].
>
> We would not have continued with the construction of our home had we suspected or known that the [Perrys] remained concerned that the building breached the [height restriction].

44 While Mr Jayasinghe's evidence to the effect that he and his wife believed that the Perrys' concerns had been 'resolved' is difficult to accept, his evidence to the effect that the Perrys raised no further concerns with him or his wife after July 2024 is correct.

45 Mr Perry gave evidence that Mrs Perry did not send him the photograph reproduced at paragraph 40 above. He did not, however, give evidence that Mrs Perry did not tell him about the roof trusses erected on the new dwelling. It seems highly unlikely that Mrs Perry would not have told her husband about the roof trusses or shown him the photograph, or that she did not tell him about her communications with the representatives of the builder before she departed for Darwin.

46 The Perrys remained in Darwin until 29 September 2024. By the time they returned, the roofing works at the new dwelling were complete, in that the roof trusses had been clad in metal sheeting, such that the full impact of the new dwelling upon the views from the Perrys' home must have been abundantly clear to the Perrys by this time, as is illustrated by the photograph below. And, while Mr Perry did not give evidence as

to whether or not he conducted the coffee table test again after his return from Darwin, if he had, it would also have been abundantly clear that the new dwelling breached the height restriction.

47 No convincing explanation was ever provided by the Perrys as to why they took no action to contact the Jayasinghes to protest the breach of the height restriction after the erection of the roof trusses and prior to the delivery of the 24 February letter. In her affidavit of 11 August 2025, Mrs Perry explained that in September and October of 2024 they were busy with selling their Darwin apartment, which was a process which required considerable attention. They also spent some weeks between mid-December 2024 and early February 2025 holidaying and attending family events in regional Victoria. I assume that I am being asked to infer from this evidence that the Perrys were too busy to take any further action.

48 By late February 2025, the new dwelling was almost complete. In Mr Jayasinghe's affidavit affirmed on 4 June 2025, Mr Jayasinghe deposed that by May 2025, the new dwelling was at lock-up stage. In his further affidavit affirmed on 12 September 2025, Mr Jayasinghe deposed that the installation of the kitchen and bathroom cabinetry commenced in late December 2024, and was completed in late February 2025.

49 Mr Jayasinghe deposed as follows:

> The construction of our home is structurally complete and has connections to water, electricity and sewerage.

> All that is left is the internal fit out, including installation of appliances, heating, ventilation and air conditioning, door hardware and fit-off, shower screens and mirrors, carpet and the timber deck.
>
> The last payment made to the builder was on 2 January 2025 with respect to the 'Joinery' stage. Below is a table of the payments made to the builder to date.

Stage	**Date of Payment**	**Amount**
Deposit	7 May 2024	$36,500.00
Under Ground Plumbing	9 May 2024	$36,500.00
Base Stage	13 June 2024	$73,000.00
Frame Stage	2 August 2024	$109,500.00
Lockup Stage 01	24 October 2024	$36,500.00
Rough In	25 October 2024	$182,500.00
Fit Out	2 January 2025	$73,000.00
Joinery	2 January 2025	$73,000.00
	Total	**$620,500.00**

50 Mr Jayasinghe's evidence about the progress of the construction of the new dwelling and its current status was confirmed by the view undertaken on 30 September 2025 ('view').

51 In early February 2025, the Perrys engaged a surveyor, and after receipt of the surveyor's report, contacted their solicitors. During a meeting on 24 February 2025, the Perrys handed the Jayasinghes the 24 February letter, which annexed the surveyor's report, which stated that the new dwelling breached the height restriction by approximately three metres, and that the pitch of the roof was 45 percent, not 25 percent less as required by the restrictive covenant.[12]

52 The 24 February letter stated as follows (omitting formal parts):

> Our instructions are as follows:
>
> 1. You purchased [the Jayasinghe property] from our clients with settlement taking place on 28 June 2022.
>
> 2. The title to [the Jayasinghe property] purchased by you contained a restrictive covenant regarding roof pitch and roof height restriction on any dwelling subsequently erected by you.

[12] It is now common ground that the pitch of the roof of the new dwelling does not breach the restrictive covenant.

> 3. Currently you are erecting a dwelling on [the Jayasinghe property] which unfortunately breachers [sic] the terms of the restrictive covenant.
>
> Enclosed herewith is copy correspondence from our clients surveyors Millar Merrigan. The correspondence clearly addresses the breach of covenant.
>
> We suggest that at this stage you immediately cease construction of the dwelling. At the same time, it would probably be wise for you to consult a lawyers [sic] to consider your position.
>
> Our clients are most anxious to bring the current situation to a mutually agreeable solution. To this end we suggest you have your legal representative contact our office.

53 Upon receipt of the 24 February letter, the Jayasinghes instructed the builder to stop work immediately, which it did, save for some minor works required for safety reasons, which were agreed to by the Perrys.[13] Counsel for the Jayasinghes said that, accordingly, an inference can be drawn that, had the Perrys formally notified the Jayasinghes of their concerns at any time prior to February 2025, works on the new dwelling would have ceased. I agree that such an inference can readily be drawn.

54 However, there was no evidence of any communication between the Perrys and the Jayasinghes, even on a casual basis, between the July meeting and the delivery of the 24 February letter, a period of over seven months, save for a message from Mrs Jayasinghe to Mrs Perry in about October 2024 telling Mrs Perry that they were about to visit Sri Lanka because Mr Jayasinghe's mother had passed away. There was also a text message exchange between Mrs Perry and Mrs Jayasinghe on 31 December 2024, as follows:

[13] In their affidavits, the Perrys asserted that the new dwelling was not at lock-up stage in May 2025 as claimed by the Jayasinghes, and that further works have been done at the Jayasinghe property without their consent, but it is not necessary to resolve these disputes for the purpose of the current application.

55 Counsel for the Jayasinghes relied upon this text message exchange as signifying the Perrys' consent to the breach of the height restriction. I believe that submission places more weight on this communication than it is able to bear. However, what the text message exchange does establish is that the Perrys knew (if they had not already reached that conclusion from their own observations) that the new dwelling was close to completion, and that the Jayasinghes would be moving into the new dwelling in around mid-March 2025. That knowledge may well have spurred the Perrys into taking action to engage solicitors and a surveyor prior to that time,[14] which they did, probably some time in early February 2025. The question in this proceeding was whether this was too late.

The application

56 The Jayasinghes issued this proceeding on 4 June 2025, after correspondence between the solicitors for the parties failed to achieve a resolution. By that time, the Jayasinghes had consulted their own surveyor, who confirmed that the new dwelling breached the height restriction, but not the restriction regarding the pitch of the roof.

57 The Jayasinghes have applied under s 84(1)(b) and (c) of the Act to modify the height restriction to equal the height of the new dwelling.

58 Section 84(1) of the Act relevantly provides as follows:

> **Power for Court to modify etc. restrictive covenants affecting land**
>
> (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

[14] Although there was no evidence to that effect.

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—

…

(b) ***that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction whether in respect of estates in fee-simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed have agreed either expressly or by implication by their acts or omissions to the same being discharged or modified; or***

(c) that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction:

Provided that no compensation shall be payable in respect of the discharge or modification of a restriction by reason of any advantage thereby accruing to the owner of the land affected by the restriction unless the person entitled to the benefit of the restriction also suffers loss in consequence of the discharge or modification nor shall any compensation be payable in excess of such loss; but this provision shall not affect any right to compensation where the person claiming the compensation proves that by reason of the imposition of the restriction the amount of consideration paid for the acquisition of the land was reduced.

(emphasis added).

59 No claim has been made by the Perrys for compensation in this proceeding. However, on 17 September 2025, the Perrys issued a new proceeding ('related proceeding'), in which they said as follows:

(a) between about 13 May 2024 and 4 June 2024 the Perrys put the Jayasinghes on notice that the site cut may not be deep enough for the new dwelling to comply with the height restriction;

(b) at the July meeting the Perrys demonstrated to the Jayasinghes that the new dwelling would not comply with the height restriction;

(c) the Jayasinghes knew or ought to have known that the new dwelling breached the height restriction;

(d) the Jayasinghes have failed to remedy the breach of the height restriction; and

(e) as a result of the Jayasinghes' breach, the Perrys have suffered loss and damage, namely, the loss of their views, and a loss of the value of their property in an amount yet to be determined.

60 In the related proceeding, the Perrys seek an injunction pursuant to s 37 of the *Supreme Court Act 1986* (Vic) requiring the Jayasinghes to carry out any necessary demolition of the new dwelling, or, alternatively damages in lieu of or in substitution for an injunction pursuant to s 38 of the *Supreme Court Act 1986* (Vic).

The evidence

61 Given that the factual disputes between the parties were relatively limited, I do not propose to canvass the evidence relied upon by the parties in any great detail. Both the Jayasinghes and the Perrys relied upon affidavits made by them, and, in the case of the Jayasinghes, their solicitor, Ms Myfanwy (Myf) Cummerford. Ms Cummerford's evidence was largely confined to putting into evidence documents obtained from the Council under subpoena. The Jayasinghes also relied upon two reports prepared by a town planner, Mr Hugh McIntyre. Both Mr and Mrs Jayasinghe were cross-examined at trial, as was Mr McIntyre.

62 The Perrys relied upon affidavits made by them, and a report prepared by an engineer, Mr Brendon Clark.

63 Mr Clark prepared a report which concluded that it would be possible to modify the new dwelling in order to comply with the height restriction, with a roof pitch of two percent, which would require removal of the roof sheeting, roof framing and ceiling of the new dwelling. Further, additional wall studs and lintels over doorways may need to be installed to support a different roof structure. Depending upon the actual constructed height of the walls of the new dwelling (as compared with the plans approved by the Council), it may be necessary to remove a portion of the top of the wall frames to comply with the height restriction and achieve a minimum roof pitch of two percent.

64 Mr Clark was not required to attend Court for cross-examination. There is no reason why I should not accept his evidence without reservation. There was no evidence

before me as to the cost of rectifying the new dwelling in accordance with Mr Clark's recommendations.

65 As indicated earlier in these reasons, the factual controversies between the parties were relatively limited. Credit did not therefore loom particularly large in this proceeding. However, to the extent that there was any conflict in the evidence of the Jayasinghes on the one hand and the Perrys on the other hand, I generally prefer the evidence of the Perrys. In particular, I cannot accept Mr Jayasinghe's evidence in his affidavit of 4 June 2025 that after the July meeting, he believed that the Perrys' concerns about the height of the new dwelling had been 'resolved'.

66 Such a conclusion is entirely inconsistent with Mr Perry's evidence regarding the purpose of the July meeting, being to discuss the height of the new dwelling, and his evidence to the effect that he demonstrated the coffee table test in order to show Mr Jayasinghe that the top of the wall frames were equal to the height restriction. Further, if Mr Jayasinghe had genuinely believed that the Perrys' concerns had been resolved at the July meeting, I question why he would have raised the issue again with the builder after the July meeting.

67 However, Mr Jayasinghe's evidence to the effect that he raised the question of whether the new dwelling was too high with the builder, but that his own concerns arising from what was said during the July meeting were resolved by being told by the builder that the new dwelling was being constructed in accordance with the planning permit rings true, and I accept this evidence. While Mr Jayasinghe's conclusion that there were no problems in proceeding with the construction of the new dwelling notwithstanding the Perrys' concerns because it was being constructed in accordance with the planning permit was misguided, it is hardly an outlandish conclusion for him to reach in the circumstances.

68 In their closing submissions, the Perrys submitted that Mr Jayasinghe's evidence in particular was inconsistent and self-serving. Further, they submitted that Mr Jayasinghe's evidence regarding what was said during the July meeting reveals that Mr Jayasinghe understood that:

(a) the coffee table height was about the height of the height restriction,

(b) the [Perrys] were concerned about the height of the' [new] dwelling because it would be higher than the height restriction once the roof went on

(c) and (although he would not admit it during cross examination) given the frame was already up it would have been obvious to Mr Jayasinghe that once the roof went on, the height which the [Perrys] were saying was the height restriction would in fact be breached.

69 The Perrys also submitted that Mr Jayasinghe admitted under cross-examination that he understood that the Perrys were telling him that the new dwelling would exceed the height restriction. However, having reviewed the part of the transcript relied upon by the Perrys to support that proposition, I do not agree that Mr Jayasinghe made an unequivocal admission in those terms.

70 This submission arose out of the following exchange:

> Okay. So they demonstrated, either Grant or Janine demonstrated, to you how to read the height of the dwelling from the height of the coffee table, didn't they? --- They mention[ed] that, yes.
>
> Okay. And their evidence is that Grant bent down and looked upon the - along the ruler?---That's correct, yes.
>
> Did you bend down and look along the ruler?---No, I did not.
>
> Okay. You understood at that time that what they were saying was that the height restriction was about the height of their coffee table, didn't you?--- That's what they mentioned. Yes, correct.
>
> So they told you that the height restriction on your land was about the height of their coffee table, yes?--- That's correct, yes.
>
> Yes. And you looked at your dwelling and you could see that if the roof went on your dwelling, it would exceed the height of that height restriction, didn't you?--- I didn't looked at it, but - and a - and plus, to use a coffee table and the ruler to measure the height I have never heard of, so therefore I didn't take any notice.
>
> You just decided not to take any notice of the concerns they were raising?--- I was more under the impression that for them to confirm their thought, not for me.
>
> They were telling you that the height restriction was about the top of the frame on your dwelling. You understood that that was what they were saying?--- They mentioned that. Yes, correct.
>
> And you knew then that if a roof went on your dwelling, you would exceed the height restriction, didn't you? ---I didn't even think of that.

> Although you were having a discussion about their concerns, you decided simply not to think about whether or not your dwelling exceeded the height restriction. Is that your evidence?--- So ah actually, it's not correct, the way it is coming through. Because - because of the way it was trying to measure, and plus because my builder, who confirmed their building against the council ah approved document, there was no need for me to check on the coffee table (indistinct).
>
> There was no need for you to check on the coffee table?---No, there was absolutely no need for me to check on that.
>
> *Right. So although the Perrys were telling you you were exceeding the AHD restriction, you took your builder's word that the builder was complying with the building contract as ending the matter. Is that right?--- That's correct.*
>
> You hadn't told your builder about the height restriction, though, had you?---I didn't know about the height restriction. I only ask[ed] for single-storey house.[15]
>
> (emphasis added).

71 All that can be conclusively gleaned from the above evidence is that Mr Jayasinghe should have realised that the Perrys were concerned about the height of the new dwelling, but he himself did not undertake the coffee table test, which seemed to him to be a strange way to measure the height of the new dwelling. I understand Mr Jayasinghe's response to the question in the italicised portion of the extract of the transcript reproduced above to be responsive to the second part of the question, that is, that he took the word of the builder as 'ending the matter', rather than being responsive to the introductory part of the question. The introductory part of the question referred to the 'AHD restriction', which was a term which I doubt was used by anyone during the July meeting, and I accept Mr Jayasinghe's evidence that at the time of the July meeting, he did not understand the term 'AHD'.

72 Further, it is difficult to accept Mrs Jayasinghe's evidence that the Perrys told her that they had abandoned the project because of the difficulties the Jayasinghes had experienced in obtaining a planning permit.

73 It is not necessary for me to determine the number of conversations the parties held about the project, or who was present during these conversations. However, I accept Mrs Perry's evidence to the effect that she and her husband decided not to pursue the project in around September 2023. Once that evidence is accepted, then the evidence

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15 T31 L1-L31 to T32 L1-L18.

that the Perrys had said they had abandoned the project because of the difficulties the Jayasinghes had obtaining planning permits could not be correct, because the Jayasinghes did not even apply for a planning permit until December 2023. In any event, the Perrys were quite familiar with the planning process, having undertaken the subdivision of the parent land, and Mr Perry gave evidence that there was not much left to be done to implement the second stage of the subdivision.

74 However, the factual dispute between the parties as to what was said about the project and when is not critical to the resolution of the current application. That said, the Perrys' evidence to the effect that they abandoned the project in about September 2023 (which is consistent with the dates of the plans in evidence) does not support the Jayasinghes' contention that the Perrys did not take any formal action to enforce the height restriction because they planned to construct a new home at the highest point of the Perry land, and as such did not care about the height restriction. However, for the purposes of the application under s 84(1)(b), what the Perrys actually did or did not do is more important than their reasons for their action or inaction.

75 Finally, I do not accept Mrs Jayasinghe's evidence that Mrs Perry told her during the meeting when the Jayasinghes were handed the 24 February letter that the Perrys were not concerned about the loss of their views. I simply cannot imagine that this is something Mrs Perry would say. However, Mrs Jayasinghe may well have been mistaken, and Mrs Perry may have said something to the effect that the Perrys were not *just* concerned about the loss of their views, but were also concerned about the Jayasinghes being delivered a 'non-compliant' home by their builder.

76 However, the discrepancies between the evidence given by the Jayasinghes and the Perrys ultimately do not matter that much when determining the outcome of the current application. The matters where there was a conflict of evidence were largely peripheral to the main issues in the current application, save perhaps the evidence regarding what was said during the July meeting. The question of whether the modification of the height restriction is likely to cause the Perrys substantial injury involves an objective assessment as well as having regard to the Perrys' own subjective views. In any event, even if the Perrys had intended to build another home

further up the slope of the Perry land, that would not alter the impact of the new dwelling on the part of the Perry land upon which their current home is situated.

77 Further, the impact of any concerns I may have about the reliability of the Jayasinghes' evidence is tempered by the fact that the primary focus of the test in s 84(1)(b) of the Act is on the conduct of the beneficiaries of the restrictive covenant, not the conduct of the registered proprietors of the land burdened by the restrictive covenant.

78 However, to the extent that it is relevant, I generally accept the Jayasinghes' evidence that they did not understand the height restriction, which was expressed in technical terms unfamiliar to most lay people, and that the Jayasinghes relied upon their builder, town planner and other contractors to construct the new dwelling in compliance with all relevant requirements.

79 To explain further, I accept Mr Jayasinghe's evidence to the effect that, at the July 2024 meeting, he still did not understand the height restriction or the purpose and effect of the coffee table test. I also accept Mrs Jayasinghe's evidence that she was shocked and devastated upon receipt of the 24 February letter. The Jayasinghes do not strike me as dishonest and/or unscrupulous people who would deliberately set out to antagonise their neighbours, or who would ruthlessly pursue their own interests at the expense of others. The evidence that they stopped work on the new dwelling as soon as they received the 24 February letter is consistent with their evidence to the effect that, prior to that date, they genuinely believed that there was no problem with the design of the new dwelling.

80 The Jayasinghes can certainly be criticised for not properly investigating the true meaning of the height restriction, particularly once they were alerted to, or should have been alert to the Perrys' concerns about the height of the new dwelling, and by the July meeting at the latest. They can also be criticised for unreservedly accepting the advice of the builder regarding what was really a legal issue. However, I am not satisfied that they deliberately and wilfully set out to breach the height restriction, or, that once they were alerted to the Perrys' concerns (and should have been alert to the need to make further investigations), that they were wilfully blind to the Perrys' concerns.

81 None of the contractors engaged by the Jayasinghes involved in obtaining approvals for the new dwelling, or involved in the construction of the new dwelling were called to give evidence. However, I was not invited to draw any specific adverse inference from their failure to give evidence.

82 The Jayasinghes also relied upon a report prepared by a town planner, Mr McIntyre. Mr McIntyre prepared two reports, and was cross-examined at trial.

83 However, while no criticism is directed at Mr McIntyre personally, his evidence was of limited assistance on the question of whether the Perrys will or will not suffer substantial injury if the height restriction is modified.

84 Prior to preparing his first report, Mr McIntyre did not go upon the Perry land, although he did visit the immediate neighbourhood. Because he did not go upon the Perry land, Mr McIntyre formed the erroneous opinion that the views to the north from the Perrys' home were blocked by vegetation screening between the Perrys' home and the Jayasinghe property. Otherwise, Mr McIntyre opined that the new dwelling would not cause any substantial injury because the new dwelling was constructed in keeping with other dwellings in the immediate vicinity.

85 Further, during the course of cross-examination, Mr McIntyre agreed that when assessing whether the modification of the height restriction would cause substantial injury, he made no comparison between the benefits employed by the Perry land with a dwelling which complied with the height restriction, and the benefits enjoyed with the new dwelling as constructed, as required by the authorities.

86 Accordingly, it is not necessary for me to canvass in any detail the reports prepared by Mr McIntyre or the evidence he gave during the course of the hearing. However, the following conclusions can be drawn from Mr McIntyre's evidence:

(a) contrary to the evidence of Mrs Perry, the new dwelling has not caused significant overshadowing of the Perrys' home;

(b) most of the work that the height restriction has to do relates to the part of the Perry land on which the Perry's home is sited; and

(c) the Jayasinghes are unlikely to face significant difficulties in obtaining Council approval for the modification of the new dwelling to enable it to comply with the height restriction.

87 In relation to the issue referred to in paragraph 86(c) above, in Mr McIntyre's supplementary report, Mr McIntyre opined as to the likelihood of the Jayasinghes being able to obtain an amendment to the planning permit to enable the new dwelling to be modified in accordance with Mr Clark's recommendations. Mr McIntyre opined that the Knox Planning Scheme would require the Council 'to assess whether an amended planning permit would result in an outcome which accords with an established, or desired neighbourhood character'. Mr McIntyre opined further that there was no guarantee that the Council would grant the application, as the Council may conclude that the installation of a roof with a pitch of two percent does not 'accord with the established built form character of the area'.

88 However, when taken to the Council's planning guidelines and policies in the course of cross-examination, Mr McIntyre agreed that it was unlikely that the planning guidelines triggered by any application by the Jayasinghes to amend the planning permit would require the Council to assess the impact the modification of the new dwelling upon neighbourhood character. In any event, Mr McIntyre agreed that if the new dwelling was modified in accordance with Mr Clark's recommendations, it would not be out of keeping with the other dwellings in the immediate vicinity of the Jayasinghe property, and that it was more likely than not that the application to amend the planning permit would be approved by the Council.

89 Finally, on 30 September 2025, I conducted, accompanied by the legal representatives of the parties, a view of the Perry land and the Jayasinghe property.

90 During the view, I visited each of the north-facing rooms in the Perrys' home, and observed the impact of the new dwelling upon the vista from those rooms, which was significant, given the close proximity of the new dwelling to the Perrys' home. I also traversed the whole of the Perry land, from which I could see that the views from the upper portions of the Perry land and the grassed area adjacent to the Perrys' home were largely unaffected by the new dwelling. The photographs I took during the

course of the view were sent to the parties prior to the commencement of the hearing of the application and were included in the court book.

91 During the view, I also visited the Jayasinghe property and toured the new dwelling. The tour of the new dwelling confirmed Mr Jayasinghe's evidence that the construction of the new dwelling is nearly complete.

Have the Jayasinghes established that modification of the height restriction would not cause the Perrys substantial injury?

Relevant legal principles

92 In any application under s 84(1)(c) of the Act, the applicant must establish a negative proposition, being the absence of substantial injury. In *Randall v Uhl*,[16] Derham AsJ summarised the applicable principles, as follows (omitting footnotes):

> (a) a substantial injury must be a detriment to the benefitted land that is real and not fanciful. The requirement that the injury must be substantial is intended 'to preclude vexatious opposition cases where there is no genuineness or sincerity or bona fide opposition on any reasonable grounds'. That does not mean, however, that s 84(1)(c) of the [Act] is restricted to dealing with vexatious or frivolous objections. Although the restriction of s 84(1)(c) of the [Act] to 'substantial' injury would enable the weeding out of vexatious objections to the modification or removal of a covenant, the dichotomy in the section is not between vexatious and non-vexatious claims but is between cases involving some genuinely felt but insubstantial injury, on the one hand, and cases where the injury may truly be described as substantial, on the other;
>
> (b) the substantial injury relates to practical benefits, being any real benefits to the person entitled to the benefit of the covenant. It is not sufficient for a plaintiff to merely prove that there will be no appreciable decrease in the value of the property that has the benefit of the covenant;
>
> (c) substantial injury may arise from the order for modification of the covenant being 'used to support further applications resulting in further encroachment and in the long run the object sought when the covenant was imposed [being] completely defeated'. This consideration is referred to as the 'precedent value'; and
>
> (d) whether there will be substantial injury is to be assessed by comparing:
>
> (i) the benefits initially intended to be conferred and actually conferred by the covenant; and

16 [2019] VSC 668.

(ii) the benefits, if any, which would remain after the covenant has been discharged or modified;

(e) if the evidence establishes that the difference between the two will not be substantial, the plaintiff has established a case for the exercise of the Court's discretion under s 84(1)(c) of the [Act];

(f) it is relevant to consider evidence of statutory planning provisions to the extent they show what realistically will be the result of the removal or modification of the covenant because 'it would be artificial and wrong to pay no heed at all to the reality of the situation';

(g) in considering whether the plaintiff has satisfied the Court that there will not be substantial injury:

(i) town planning principles and considerations are not relevant;

(ii) the absence of objectors to the discharge or modification of a covenant will not necessarily satisfy the onus of proof; and

(iii) each case must be decided on its own facts, and each covenant should be construed on its own terms and having regard to the particular context in which it was created;

(h) if the plaintiff satisfies the Court that there will be no substantial injury to the relevant persons, the Court has a residual discretion to refuse the application. The Court in exercising its discretion, may consider town planning principles and the precedent value.[17]

93 Further, in *Jiang v Monaygon Pty Ltd,*[18] Derham AsJ stated that the test of whether a modification would cause substantial injury has to be seen through the prism of the purpose of the restriction.[19]

94 The most significant principle in the context of the current application is the requirement to compare the benefits initially intended to be conferred by the height restriction with the benefits which would remain after the height restriction is modified.

The parties' submissions

95 The Jayasinghes submitted that the modification of the height restriction would not cause the Perry land substantial injury for the following reasons:

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17 Ibid [85].
18 [2017] VSC 591.
19 Ibid [30].

(a) the Perrys will retain views from their living room through the sliding door to the outdoor entertaining area, from the entertainment area itself, from the grassed area to the west of the Perrys' home, and from the upper portions of the Perry land;

(b) the evidence shows that the views from large areas of the Perry land are not impacted by the new dwelling;

(c) Mrs Perry's evidence that the construction of the new dwelling has reduced the sunlight reaching her home does not bear scrutiny given the evidence of Mr McIntyre;

(d) given that the purpose of the height restriction as to protect the views from the Perrys' home, not the value of the Perry land, then any potential depreciation in the value of the Perry land is not relevant to the question of substantial injury; and

(e) in any event, there is no admissible evidence of any diminution of value.

96 In response, the Perrys submitted as follows:

> Determined objectively, the primary benefit intended to be conferred by the height restriction is the preservation of views across the valley for the purposes of protection of the amenity they provide from the whole of the [Perry] land. Those views are not simply enjoyed from a living room or a deck, but from the whole of the land. They provide for the [Perrys'] enjoyment of their land, they give a sense of openness, they provide a grand vista which is aesthetically pleasing and beneficial to health and wellbeing and they positively contribute to the value of the land.

97 The Perrys submitted that the injury caused by the breach of the height restriction is 'not reduced to an acceptable level by some partial views which remain from the deck… or from the highest point of their land'. Accordingly, the new dwelling 'substantially defeats the purpose of the covenant. The proposed modification defeats that purpose entirely'.

98 The Perrys submitted further, as follows:

> For the purposes of the substantial injury test, it is irrelevant whether or not the [Perrys] intend to proceed with the second stage of their subdivision. It is irrelevant whether they intend to build a house on the upper part of their lot.

> It is irrelevant whether or not the [Perrys] intend to demolish their existing dwelling.
>
> The height restriction covenant runs with the land. The benefit of the height restriction adds value to the [Perry] land both in a monetary sense, and in the sense of enjoyment of amenity. Regardless of whether the [Perrys] own the land, live in the existing dwelling, demolish the dwelling or subdivide the lot, the property right they enjoy as beneficiaries of the covenant is valuable, and they will suffer substantial injury if it is disturbed in the way intended by the modification.

Discussion

99 The evidence establishes, in my view without any real doubt, that the purpose and effect of the height restriction was to preserve the views from the Perrys' home situated on the lower portion of the Perry land, including the views from the main living/dining area and the outdoor entertaining area of their home. I accept that the height restriction has limited work to do when it comes to the upper two thirds of the Perry land, as the new dwelling, even at its current height, is obscured by the Perrys' home when viewed from that part of the Perry land.

100 The visual impact of the new dwelling upon the views from the north side of the Perrys' home is significant and could reasonably be described as intrusive and oppressive. I accept that the construction of the new dwelling has adversely affected the amenity of the Perry land, and, as a consequence, the Perrys' quality of life.

101 The onus lays upon the Jayasinghes to establish that the proposed modification of the restrictive covenant would not cause substantial injury to the Perrys. Having regard to the Perrys' evidence about the importance to them of the views from their home they enjoyed prior to the construction of the new dwelling, the photographs in evidence taken prior to the construction of the new dwelling, and my own observations during the course of the view, I am positively satisfied that the modification of the height restriction *will* cause the Perrys substantial injury.

102 If the height restriction is modified, then the Perrys will lose the opportunity to enforce the height restriction by obtaining injunctive relief to compel the Jayasinghes to modify the new dwelling in order to comply with the height restriction. While I accept that only part of the Perry land has the benefit of the height restriction, it is a critical part of the Perry land. Common sense suggests that a view is far more likely to be

enjoyed from a living area or an outdoor entertainment area than from standing on an unsheltered grassed area.

103 Assessing whether a discharge or modification of a restrictive covenant requires a comparison of the benefits intended to be conferred and actually conferred by the restrictions in the restrictive covenant and the benefits which would remain after the covenant has been discharged or modified. Here, the comparison is stark. If the height restriction is maintained, then it would be open to the Perrys to take action in response to the Jayasinghes' clear and substantial breach of the height restriction, as they now have. The Jayasinghes, or any successors in title, would be required to either demolish the new dwelling, or substantially modify the new dwelling in order to comply with the height restriction. As a consequence, the Perrys would regain (although perhaps not to the same extent as to what they had had they not sold the Jayasinghe property) the sweeping views from their home. If the height restriction is modified, the new dwelling will remain in its current form for the foreseeable future.

104 Further, the fact that the project could and may well be reactivated by the Perrys does not support the proposition that the Perrys would not suffer substantial injury by reason of the modification of the height restriction. I have no reason to doubt Mrs Perrys' evidence that constructing the new home in accordance with the plans in evidence would cost about one and a half million dollars, and, in any event, the breach of the height restriction will have materially diminished the value of that part of the Perry land on which the Perrys' home is sited.[20]

105 Finally, while I accept that the height restriction has most work to do on the part of the Perry land upon which the Perrys' home is sited, the breach of the height restriction has the potential to compromise the development potential of the Perry land as a whole. I do not place too much weight upon this matter, because the evidence did not fully address this issue, but it seems to me that the development potential of the Perry land is a relevant consideration in assessing whether the

[20] There was no admissible evidence about the impact of the construction of the new dwelling on the value of the Perry land (or on any part of the Perry land), but common sense suggests that there must be some impact.

modification of the height restriction would or would not cause the Perrys substantial injury.

106 To explain further, the planning permit issued by the Council contemplates the subdivision of the Perry land into three large lots. While I cannot be completely certain given the lack of evidence regarding the gradient of the Perry land, the slope of the Perry land up towards Wellington Road suggests that the two now undeveloped lots could be developed with new dwellings, each of which, along with the Perrys' current home, would enjoy expansive views to the north. However, there is nothing precluding the Perrys, or any subsequent purchaser of the lot upon which the Perrys' current home is sited, from renovating the Perrys' home to add a second storey to recapture the views the Perrys' home previously enjoyed. However, such a renovation or redevelopment would have a flow-on effect, compromising the ability of any dwelling on the middle lot to enjoy the same views, unless it was built to a height that would in turn compromise the views from the lot adjacent to Wellington Road.

107 Accordingly, while the height restriction in the restrictive covenant has most work to do in the lower portion of the Perry land, I am not satisfied that the modification of the height restriction will not cause substantial injury to the whole of the Perry land. The Jayasinghes' application under s 84(1)(c) of the Act must therefore fail.

Have the Perrys expressly or impliedly agreed to the modification of the height restriction?

Introduction

108 Ordinarily, the conclusion that I am not satisfied that the removal of the height restriction would not cause the Perrys substantial injury would be fatal to the Jayasinghes' application. However, the Jayasinghes say that they did not understand the height restriction, given the technical terms in which it was expressed in the restrictive covenant, and simply thought they were confined to building a single-storey home, for which they had obtained a planning permit. However, given that the Jayasinghes executed a contract of sale which expressly acknowledged the height

restriction, their ignorance would not provide them with grounds for resisting any action by the Perrys to enforce the height restriction.[21]

109 Further, it is clear from the evidence that the Perrys have never provided express, affirmative consent to the breach of the height restriction, and, by implication, the modification to the height restriction in the restrictive covenant.[22] I do not accept Mrs Jayasinghe's evidence to the effect that Mrs Perry told her that they were not worried about losing their views. I also do not accept the Jayasinghes' submission to the effect that the Perrys were not terribly concerned about enforcing the height restriction because of their plans to build a new home upon the upper portion of the Perry land. I accept the Perrys' evidence to the effect that while they did have plans to construct a new home on the southern boundary of the Perry land, the project has been abandoned, at least for the time being. In any event, as explained in the preceding section of these reasons, the implementation of the project would probably reduce the impact of the new dwelling upon the Perrys personally, but not the impact of the new dwelling upon the Perry land.

110 However, the question of whether the Perrys provided their express, affirmative consent to the modification of the height restriction is not the end of the inquiry.

Relevant legal principles

111 There has been remarkably limited judicial consideration of what amounts to 'agreement' for the purposes of s 84(1)(b). The limited discussion in this jurisdiction has generally focussed upon the question of whether the absence of any objections to an application for modification could amount to agreement or consent on the part of a beneficiary or beneficiaries.[23] The corresponding provisions in other Australian jurisdictions (save for Tasmania) are not identical, such that little assistance can be gained from the jurisprudence in other states and territories. It was suggested by

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21 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 180-1.

22 I agree with the submission of counsel for the Jayasinghes to the effect that the agreement referred to in s 84(1)(b) of the Act is referable to the outcome of the modification, not any agreement to the amendment of the instrument itself.

23 See, for example, *Re Pivotel Pty Ltd* (2001) V ConvR 54-635; *Hillman v Dissayanake* (2008) V ConvR 54-745, [58]; and *Re Djurovic* [2010] VSC 348, [10] and see also *Re University of Westminster* (1999) 78 P&CR 82, 90.

counsel for the Perrys that the test in Victoria is more stringent than the test in New South Wales and other Australian jurisdictions.[24]

112 However, the salient terms of s 84(1)(b) do mirror the language in s 84(1)(b) of the *Law of Property Act 1925* (UK). In the decision of the President of the Upper Tribunal (Lands Chamber) in *Re Clearwater Properties Ltd*,[25] Lindblom P considered what amounts to a party having 'agreed to' a modification or removal of a restriction within the meaning of the provision. I adopt the following summary of the key observations in this decision in the Jayasinghes' written closing submissions as an accurate summary of his Honour's reasoning (omitting extracts from the actual decision and citations):

> In *Re Clearwater Properties Ltd* [2013] UKUT [210 (LC)], the President of the Upper Tribunal (Lands Chamber) Lindblom P said of the UK provision:
>
> a) there must be clear evidence of consent to the specific outcome for which the applicant contends for a covenant to be discharged or modified under section 84(1)(b):
>
> b) the inclusion of "implication" and "omissions" in section 84(1)(b) indicate that the paragraph does not require a legally binding contract:
>
> c) the power under section 84(1)(b) to discharge or modify a restrictive covenant is widely drawn, and the concept of 'agreement' is a broad one:
>
> d) critically, for present purposes, agreement may be established through acquiescence alone:
>
> e) while all relevant facts must be considered, *it is the consent of the beneficiaries to the covenant* that must be shown:
>
> f) when construing the beneficiaries' conduct, the test is objective:
>
> [and]
>
> g) the decision maker must be satisfied that agreement has been reached on the particular facts of the case:
>
> (emphasis in original).

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24 See the statement to that effect in Adrian Bradbrook and Susan McCallum *Bradbrook and Neave's Easements and Restrictive Covenants* (LexisNexis Butterworths, 3rd ed, 2011) [19.126] n 238.

25 [2013] UKUT 210 (LC).

113 Lindblom P opined further that agreement 'is not confined to a formal written agreement embodied in a contract or a deed', and that '[a]greement may be found in evidence of a restriction being disregarded or left unenforced'.[26]

114 Of course, as observed by the counsel for the Perrys, the decision in *Re Clearwater Properties Ltd*[27] is not binding upon me. However, it is a relatively recent and thoughtful consideration of a materially identical provision by a senior judicial officer of a specialist land and environment tribunal in the United Kingdom, and therefore should be afforded considerable weight, unless I consider it to be plainly wrong. While the facts in this case were materially different than in the current case, the analysis has broader application. I do not consider that the reasoning of Lindblom P is plainly wrong. In fact, I agree with his Honour's reasoning.

115 When construing the terms of a statute, one must first consider the natural and ordinary meaning of the words used.[28] Ordinarily, the phrase 'agreed to' suggests some element of mutuality, or a meeting of minds between parties. However, the reference in s 84(1)(b) to the requirement that the parties with the benefit of the restriction in the covenant 'have agreed to' the modification or removal of the restriction suggests that 'agreed to' within the meaning of s 84(1)(b) is synonymous with 'consented to' rather than 'contracted with'.

116 In *Spellson v George*,[29] Handley JA referred to the concept of 'consent', albeit in a different context, as follows:

> Consent may take various forms. These include active encouragement or inducement, participation with or without direct financial benefit, and express consent. Consent may also be inferred from silence and lack of activity with knowledge. The trustee must know of the consent prior to the breach.[30]

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26 Ibid [45].

27 Ibid.

28 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78], where the plurality stated as follows: 'Ordinarily …the legal meaning…will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning'.

29 (1992) 26 NSWLR 666.

30 Ibid 669-70.

117 Lindblom P's observations in *Re Clearwater Properties Ltd*[31] to the effect that the power to discharge or modify a restrictive covenant under s 84(1)(b) is a broad one, and that mere acquiescence may be sufficient to constitute agreement for the purpose of s 84(1)(b) of the Act could be viewed as inconsistent with the proposition that parties in the position of the Perrys should not lightly to be taken have surrendered valuable property rights only recently registered on title.[32] However, I agree that the s 84(1)(b) is expressed in very broad terms, insofar as the provision refers to agreement 'by implication', and refers to omissions as well as acts.

118 I also agree that s 84(1)(b) imports the principles associated with the doctrine of acquiescence. That mere acquiescence is sufficient to amount to agreement is consistent with the broad language of s 84(1)(b), and such a construction is also consistent with the remedies and defences available in actions concerning prospective or actual breaches of restrictive covenants, and the terms of s 85 of the Act.

119 Section 85 of the Act provides as follows:

> **Defendant may apply for order**
>
> Where any proceedings by action or otherwise are taken to enforce a restrictive covenant any person against whom the proceedings are taken may in such proceedings apply to the Court for an order to be made under [s 84 of the Act].

120 Section 85 of the Act contemplates that a defendant to a proceeding to enforce a restrictive covenant may accept, as a matter of fact, that they have breached a restrictive covenant, but may seek to be excused from the consequences of the breach and to regularise the position by seeking to discharge or modify the restrictive covenant concerned. By way of illustration, if the Perrys had taken legal action prior to the issue of this proceeding, in the form that they ultimately did by issuing the related proceeding, the Jayasinghes almost certainly would have defended the proceeding, or at least any claim for a mandatory injunction, on the grounds of acquiescence. Acquiescence is a well-established defence to a breach of contract, or a

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31 [2013] UKUT 210 (LC).

32 See *Averono v Mbuzi* [2005] QCA 295, [19].

claim for a breach of a proprietary interest, as well as founding an argument as to why a claim for injunctive relief should not be granted despite a finding of a breach.[33]

121 The Jayasinghes would no doubt have also made an application for relief under s 84(1) of the Act, as permitted by s 85 of the Act. Setting aside for the moment their claim under s 84(1)(c) of the Act, if their defence to the Perry's claim for injunctive relief on the basis of acquiescence was successful, the application of a more stringent test for determining what amounted to agreement within the meaning of s 84(1)(b) of the Act than to what conduct is required to establish acquiescence could potentially lead to an anomalous result. That is, had the Court found that the Perrys were not entitled to a mandatory injunction by reason of their acquiescence to the breach of the height restriction, but were not taken to have agreed to the modification of the restrictive covenant for the purposes of s 84(1)(b), the Jayasinghes would not be required to modify the new dwelling to comply with the height restriction, but if they did not do so, they would be left with, in effect, a defective title. Such an anomaly would offend the general principle that statutory provisions 'must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals'.[34]

122 The principle of statutory construction that, all other things being equal, statutory provisions should be construed in such a way as to promote a harmonious scheme of regulation and enforcement is generally enlivened where a court is required to consider the construction of a particular provision of a statute by having regarding to other provisions of that statute. However, there seems to be no reason in principle why that presumption should not apply so as to promote a harmonious operation of a statutory provision with established general law principles.

123 Further, in *Interpretation and Use of Legal Sources*,[35] the authors state that '[i]f two constructions of a provision are open, the Court will prefer that which avoids consequences that are, among other things, 'anomalous'.[36] That said, the authors went

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33 Here, the concept of acquiescence overlaps with the principles of *laches*, or delay, which may also deny a party injunctive relief.

34 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-2 [70].

35 Perry Hertzfeld, Thomas Prince and Stephen Tully, *Interpretation and Use of Legal Sources: The Laws of Australia* (Thomson Reuters, 2013).

36 Ibid [25.1.880].

on to say that 'unreasonable consequences can be avoided only by giving to a provision a meaning that it can reasonably bear'.[37]

124 In my view, a construction of s 84(1)(b) which imports the principles of acquiescence promotes a harmonious scheme of enforcement and regulation of restrictive covenants, and avoids the anomalous outcomes which may arise should the test for agreement under s 84(1)(b) be more stringent than the test for what conduct amounts to acquiescence to a breach of a restrictive covenant in any action for enforcement of a restrictive covenant.

125 To explain further, s 85 makes it clear that a defendant to an action taken to enforce a breach of a restrictive covenant may bring an application to discharge or modify a restrictive covenant under s 84(1) of the Act. However, s 85 does not create a statutory cause of action for the enforcement of a restrictive covenant or provide a remedy for any breach. Any action taken to enforce a restrictive covenant must rely upon a cause of action at common law (such as breach of contract), and, to the extent that injunctive relief is sought, the traditional equitable principles underpinning a claim for injunctive relief apply, including any defences available to a party said to have breached the restrictive covenant concerned. An available defence is acquiescence, which may be a bar to any relief, or alternatively, may confine the remedy available for breach to damages alone.

126 Parliament can be taken to have understood the legal framework within which the beneficiary of a restrictive covenant may enforce their property rights and obtain relief for any breach, as well as the presumption that 'where more than one interpretation of a statute is open… the interpretation consonant with the common law is to be preferred'.[38] By enacting s 85 of the Act, Parliament can also be taken to have recognised that one remedy available to a defendant to an enforcement action could be to apply to remove or modify the restrictive covenant concerned. In those circumstances, a broad construction of s 84(1)(b) of the Act, consistent with the legal and equitable principles governing the enforcement of a breach of a restrictive

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37 Ibid [25.1.880].

38 Ibid [25.1.1980]. The reference to 'common law' extends to principles of equity.

covenant, would promote a harmonious operation of the legal framework governing the enforcement and modification of restrictive covenants.

127 Once again, my conclusion in that regard is reinforced by the broad manner in which s 84(1)(b) is expressed. The references to 'conduct', 'omissions' and 'by implication' suggest that what amounts to 'agreed to' for the purposes of s 84(1)(b) of the Act falls far short of affirmative and express consent.

128 I turn now to identify some of the examples in the authorities regarding when a beneficiary of a restrictive covenant could be held to have acquiesced in a breach of the covenant concerned.

129 The starting point is the following statement in *Lindsay Petroleum Co v Hurd*:[39]

> Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material.[40]

130 This analysis was adopted in the context of a breach of a restrictive covenant by Farwell J in *Chatsworth Estates Co v Fewell*,[41] as follows:

> Now, as stated in many authorities, the principle upon which this equitable doctrine rests is that the plaintiffs are not entitled to relief if it would be inequitable to the defendant to grant it. In some of the cases it is said that the plaintiffs by their acts and omissions have impliedly waived performance of the covenants. In other cases it is said that the plaintiffs, having acquiesced in past breaches, cannot now enforce the covenants. It is in all cases a question of degree. It is in many ways analogous to the doctrine of estoppel, and I think it is a fair test to treat it in that way and ask, "Have the plaintiffs by their acts and omissions represented to the defendant that the covenants are no longer enforceable and that he is therefore entitled to use his house as a guest house?"[42]

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39 (1874) LR 5 PC 221.
40 Ibid 239-240.
41 [1931] 1 Ch 224.
42 Ibid 231.

131 However, in order to constitute acquiescence, the authorities make it clear that the party said to have acquiesced in a breach of their rights must have done so knowingly. In *Byrnes v Kendle*,[43] French CJ stated as follows:

> Acquiescence as a defence to a claim for equitable relief is used in at least two different senses:
>
> - A person who is *aware* that an act is about to be *done* to *his* or *her prejudice takes no step to object to it*.
>
> - A person being *aware of a violation of his or her rights which has occurred fails to take timely proceedings to obtain equitable relief*. This is acquiescence after the event which founds the defence of laches.[44]
>
> (emphasis added).

132 Further, Gummow and Hayne JJ held that acquiescence required 'calculated inaction', as follows:

> There remains the defence of acquiescence by Mrs Byrnes in the breach of trust. This, as explained by Deane J in *Orr v Ford*, is best understood as requiring *calculated (that is, deliberate and informed) inaction* by her or standing by, which encouraged Mr Kendle reasonably to believe that his omissions were accepted or not opposed by her.[45]
>
> (emphasis added).

133 In *Gafford v Graham*,[46] the defendant converted a bungalow to a two storey house and extended a barn in breach of a covenant. The plaintiff waited for three years before instigating action. Having failed for three years to make any complaint, the plaintiff was held to have acquiesced in the breaches and was now debarred from relief.

134 Nourse LJ held it would be unconscionable for the plaintiff to seek enforcement of their rights because:

> The plaintiff knew what his rights were. He never made any complaint or objection to the defendant at the time. His objection to the application for planning permission in respect of the bungalow and his complaints to his solicitors can avail him nothing. He made no complaint to the plaintiff until his solicitors wrote their letter of March 7, 1989, about three years after the acts complained of. He only complained of them then because of the much more serious threat presented by the proposed construction of the riding school.

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43 (2011) 243 CLR 253.
44 Ibid 267 [27].
45 Ibid 279-80 [79].
46 (1999) 77 P&CR 73.

> Before that he had effectively treated the conversion of the bungalow and the extension to the barn as incidents which were closed.
>
> For these reasons, I would hold that the plaintiff acquiesced in the conversion of the bungalow and the extension to the barn, his acquiescence being a bar to all relief in respect of those matters.[47]

135 In *Jaggard v Sawyer*,[48] the UK Court of Appeal upheld a decision to deny injunctive relief to a beneficiary of a covenant for breach of a restrictive covenant preventing the construction of an additional driveway from a cul-de-sac to a lot at the rear of the defendant's property. The plaintiff beneficiary protested the construction of the driveway, and threatened legal proceedings, but did not issue a proceeding until after construction of the new home and driveway was well advanced. She also did not seek an interlocutory injunction to halt the construction. Commenting upon the findings of the trial judge, Bingham MR stated as follows:

> But oppression must be judged as at the date the court is asked to grant an injunction, and (as Brightman J. recognised in the *Wrotham Park* case) the court cannot ignore the reality with which it is then confronted.[49]

136 Millett LJ held as follows:

> In the present case, the defendants acted openly and in good faith and in the not unreasonable belief that they were entitled to make use of Ashleigh Avenue for access to the house that they were building. At the same time, they had been warned by the plaintiff and her solicitors that Ashleigh Avenue was a private road, that they were not entitled to use it for access to the new house and that it would be a breach of covenant for them to use the garden of No 5 to gain access to No 5A. They went ahead, not with their eyes open, but at their own risk. On the other hand, the plaintiff did not seek interlocutory relief at a time when she would almost certainly have obtained it. She should not be criticised for that, but it follows that she also took a risk, viz that by the time her case came for trial the court would be presented with a fait accompli. The case was a difficult one, but in an exemplary judgment the judge took into account all the relevant considerations, both those which told in favour of granting an injunction and those which told against, in the exercise of his discretion he decided to refuse it. In my judgment his conclusion cannot be faulted.[50]

137 There are a number of similarities between the facts in *Jaggard v Sawyer*[51] and the current case. However, it should be kept in mind that it was not contended that the

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47 Ibid 81.
48 [1995] 1 WLR 269.
49 Ibid 283.
50 Ibid 289.
51 Ibid.

beneficiary in that case had no entitlement to relief. Rather, the beneficiary's delay in issuing a proceeding to enforce the breach, and her failure to make an application for interlocutory injunctive relief meant that she was entitled to damages only.

138 In their written outline of opening submissions, the Perrys referred at some length to the authorities concerning when a court will grant a prohibitory or mandatory injunction to enforce a breach of threatened breach of a restrictive covenant. I do not understand there to be any dispute about the relevant principles, which are well settled. In *Manderson v Wright (No 2),*[52] John Dixon J observed that 'the breach or invasion of a proprietary right, or a sufficient risk thereof, founded a prima facie entitlement to an injunction or specific performance. The benefit of a restrictive covenant is such a right'.[53]

139 His Honour then went on to note that in *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd*,[54] the Court of Appeal held that:

> [I]t was necessary to make out a special case for the court to exercise its jurisdiction to award damages under Lord Cairns' Act which were not a standard remedy, whereby wrongful acts could routinely be sanctioned by the effective 'purchase' of the landowners' rights. Although the Court of Appeal emphasis that an injunction remained the prima facie remedy for trespass, it approved 'a good working rule articulated by AL Smith LJ in *Shelfer v City of London Electric Light Co* that provided guidance as to when, exceptionally, damages would be appropriate.
>
> A special case can be made out that the plaintiff should be compensated by an award of damages in lieu of an injunction either when the plaintiff had disentitled himself to an injunction (by conduct such as delay) or where the four conditions of the good working rule were satisfied. The four conditions, which are cumulative, are -
>
> (a) the injury to the plaintiffs legal rights is small;
>
> (b) the injury is capable of being estimated in money;
>
> (c) the injury can be adequately compensated by a small money payment; and
>
> (d) it would be oppressive to the defendant to grant an injunction.
>
> Whether these conditions are found will be fact sensitive in each case. Further, there may also be cases in which, though these four requirements are established, the defendant has, by conduct evidencing disregard for the

52 [2018] VSC 162.
53 Ibid [195].
54 (2007) 20 VR 311.

> plaintiffs rights, disentitled himself from asking that damages be assessed in substitution for an injunction.[55]

140 However, it is important not to conflate the principles concerning when a mandatory injunction should be granted for a breach of a restrictive covenant with the test under s 84(1)(b) of the Act.

141 Counsel for the Perrys submitted that to the extent that the test under s 84(1)(b) of the Act encompasses conduct which amounts to or is analogous with acquiescence, it must only apply where acquiescence would be a *defence* to a claim for the enforcement of a proprietary right, not simply to dilatory or equivocal conduct which may be a matter relevant to the remedy available for a proven breach, but does not rise to the level of acquiescence sufficient to deny any remedy at all. This submission illustrates the somewhat slippery nature of the doctrine of acquiescence, and the considerable overlap between conduct which amounts to acquiescence and mere *laches* or delay. However, it is not necessary for present purposes to form a conclusive view on the distinction between different species of acquiescence, although it is an issue which may well arise in the related proceeding. The question here is whether the Jayasinghes have established that the Perrys have agreed to the modification of the height restriction within the meaning of s 84(1)(b) of the Act.

142 In my view, any conduct which would amount to a finding that a party had agreed to the modification or removal of a restrictive covenant must at the very least be conduct of a kind that would also justify the denial of injunctive relief. However, as can be seen from the statements in the authorities in the preceding paragraphs of these reasons regarding the circumstances in which the holder of a proprietary right may be denied injunctive relief, other matters not directly relevant to the test under s 84(1)(b) may be taken into account in determining whether injunctive relief should be granted, such that the tests are not identical.

143 Further, counsel's submissions to the effect that there could and should be held to be different levels of acquiescence for the purpose of evaluating whether the conduct of the beneficiaries of a restrictive covenant means that they have 'agreed to' the modification have some merit. In that regard I understand counsel to be referring to

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55 *Manderson v Wright (No 2)* [2018] VSC 162, [196]-[198].

the discussion regarding the 'chameleon-like quality' of the use of the word acquiescence as a 'broad conjunctive or disjunctive companion to "laches"' referred to by Deane J in *Orr v Ford*, and the subsequent reference by his Honour to an 'inferior species' of acquiescence'.[56] However, the distinction between the different species of acquiescence has not been clearly articulated in the context of the facts of this case. Accordingly, it is not necessary for me to make a finding as to whether the Perrys' conduct could provide the Jayasinghes with a complete defence to any enforcement action (as opposed to conduct which would simply affect the remedy available to the Perrys in any such action) for the purpose of reaching any conclusion as to whether they would be entitled to relief under s 84(1)(b) of the Act.

144 However, I accept that a mere delay in the enforcement of rights is not sufficient to found acquiescence and there must be 'conduct by a person, with knowledge of the act of another person, which encourages that other person to believe that his acts are accepted (if past) or not opposed (if contemporaneous)'.[57]

145 Further, given that s 84(1)(b) of the Act refers to the 'omissions' of the beneficiaries of a restrictive covenant, a question arises as to whether a positive duty was imposed upon the Perrys to speak out, or at least to speak out more than they did. In *Barport Pty Ltd v Baum*,[58] the Court of Appeal, albeit in the context of an estoppel defence, made the following observations about the 'duty to speak':

> However, silence may give rise to an estoppel if, having regard to the nature of the relationship, the nature of the assumption, or the circumstances as a whole there is a duty to speak. In *Thompson v Palmer*, Dixon J observed that an estoppel may be established where a person remains silent, knowing the other person labours under a mistake in circumstances where there is a duty to correct the misunderstanding or identify the true position.
>
> A duty to speak has been found in a number of cases where a person having title or right to property perceives another person as innocently, and in ignorance, conducting itself with reference to the property in a manner that is inconsistent with the existing title or right. In *Waltons Stores*, Brennan J, speaking of the circumstances in which a defendant induces a plaintiff to adopt an assumption or expectation, said:
>
> > For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation

56 (1989) 167 CLR 316, 337-338.
57 Ibid 338.
58 [2019] VSCA 167.

> will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs.
>
> Brennan J held that, once the defendant in *Waltons Stores* knew that the plaintiff was improving the land in the belief it held a lease, the failure to warn or to countermand that assumption was tantamount to a promise that the defendant would complete the lease.[59]

146 Applying the above to the current case, the Perrys may have had a 'duty to speak' if they knew that the Jayasinghes were continuing to construct the new dwelling upon the false assumption that they were entitled to do so.

147 Finally, while the focus of s 84(1)(b) of the Act is largely on the conduct of the beneficiaries of a restrictive covenant, in this case the Perrys, the conduct of the Jayasinghes is not irrelevant to the inquiry. In order to find that the Perrys acquiesced in the breach of the height restriction by reason of their 'calculated inaction' in the face of the breach, one must also find that their inaction led the Jayasinghes 'reasonably to believe that [the Jayasinghes' breaches] were accepted or not opposed by [the Perrys]'.[60] However, it is the reasonable belief of the Jayasinghes in reliance upon the Perrys' inaction which is the relevant conduct, not the conduct of the Jayasinghes in breaching the height restriction, unwittingly or otherwise. That is, the question of whether the Jayasinghes have acted in good faith is relevant to the exercise of the Court's residual discretion, not the enquiry under s 84(1)(b) of the Act.

The parties' submissions

148 The Jayasinghes submitted that by reason of their failure to take steps to enforce the height restriction, the Perrys have agreed to the restrictive covenant being modified in order to amend the height restriction to 142.3m AHD, being the height of the new dwelling. The Jayasinghes submitted that it is not necessary for them to establish that the Perrys agreed to the amendment of the written instrument containing the

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59 Ibid [114]-[116].

60 *Byrne v Kendle* (2011) 243 CLR 253, 279-80 [79]. See paragraph 132 of these reasons.

restrictive covenant, but rather, that they agreed, by implication or otherwise, to the outcome permitted by the proposed modification.

149 The Jayasinghes' opening submissions referred to the following conduct of the Perrys as amounting to acquiescence:

(a) their failure to take an active interest in the planning permit application, in circumstances where making an objection to the application would have prevented construction of the new dwelling even commencing;

(b) the Perrys learned of the likely breach of the height restriction following Mr Perry's conversation with Mr Grenfell in early June 2024 but took no action to verify their concerns until engaging a surveyor in February 2025;

(c) the Perrys spoke with the Jayasinghes in general terms about compliance with the height restriction, but failed to clearly articulate those concerns until they delivered the 24 February letter; and

(d) the Perrys spent two months in Darwin while the roof on the new dwelling was being constructed, and took no action to enforce the height restriction, even after first being confronted with the scale of the roof in late July 2024.

150 The submissions asked, rhetorically, '[i]f section 84(1)(b) does not apply in this case, one might reasonably ask, when would it apply?'.

151 The Jayasinghes submitted that the Perrys can be taken to have constructive knowledge of the pending breach of the height restriction as early as January 2024, when the planning permit application was advertised. Given the terms of s 61(4) of the *Planning and Environment Act 1987* (Vic), if the Perrys had objected to the planning permit application at that stage, then the issue would have been nipped in the bud well before construction of the new dwelling commenced.[61]

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61 By reason of s 61(4) of the *Planning and Environment Act 1987* (Vic), which provides that the Council must refuse to grant a planning permit that would authorise a development that would breach a restrictive covenant.

152 The Jayasinghes submitted that the Perrys failed to clearly articulate their concerns to the Jayasinghes over the course of the 13 month period between January 2024 and February 2025, and took no action whatsoever after July 2024.

153 Counsel for the Jayasinghes submitted as follows:

> … when Mrs Perry left for Darwin, the height and the pitch of the roof could clearly be identified. Now, had they done any of these things, the application could almost certainly have been avoided. And as I say, at the time they left for Darwin, both [Mr and Mrs Perry] understood that there would be or there was already a significant breach of the [height] restriction. And, again, the [Jayasinghes] were continuing to spend money on the construction of their new home in reliance - and this is importance [sic] - in reliance on the [Perrys'] evident inaction.
>
> Upon their return to Melbourne a couple of months later with the full extent of the roof form having been constructed, the [Perrys] still showed no interest in enforcing their property rights, and instead travelled to Echuca in Gippsland, again indifferent to the [Jayasinghes'] ongoing program of construction. In my submission, here can be no clearer set of circumstances that comprise acquiescence. If the [Jayasinghes] had not commenced this application themselves soon after receiving the [24 February letter], the [Perrys] might never have sought to enforce their property rights at all.[62]

154 Counsel submitted that:

> So we say that a delay of six to 12 months [in] enforcing [their] property rights, while visited with the knowledge that the burdened parties were acting to their detriment, it's not just a regrettable oversight, it's an egregious dereliction of legal responsibility. And given the absence of any discretionary matters that might warrant the court declining to exercise its powers, the application before the court, we say, is one of the clearest contested cases for modification the court is ever likely to encounter.[63]

155 The Jayasinghes submitted that the Perrys had constructive notice of the pending breach of the height restriction in January 2024, when the planning permit application was advertised. Further, in May 2024 they became concerned that the site cut was not deep enough, and in July 2024 they knew there would be, or there already was a breach of the height restriction. However, they failed to take any action to enforce their property rights, such as:

(a) requesting documents from the Council regarding the planning permit application, noting that the surveyor's report annexed to the 24 February letter

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62 T181 L3-L24.
63 T183 L2-L11.

did not contain any information which could not have been obtained from the planning permit application;

(b) clearly articulating those concerns to the Jayasinghes, or committing those concerns to writing; or

(c) seeking legal advice and bringing an action to enforce the height restriction.

156 The Jayasinghes submitted that given that the focus of s 84(1)(b) of the Act is the conduct of the Perrys:

> It follows that by their acts or omissions, the [Perrys] have agreed by implication, to the Covenant being modified to accommodate the dwelling at [the Jayasinghes' property] as it exists today.
>
> It must never be the case that the beneficiary to a restrictive covenant can turn a blind eye to an ongoing process of construction - in this case costing close to half a million dollars - before they act decisively to enforce their rights. A comparable application to cancel a planning permit would be statute barred under the *Planning and Environment Act 1987* and there is a case where even a delay of 14 weeks has been sufficient for the Tribunal to refuse to grant relief.
>
> A delay of six to twelve months in enforcing ones' property rights while visited with the knowledge that the burdened parties were acting to their detriment is not just a regrettable oversight, it is an egregious dereliction of legal responsibility.

157 The Jayasinghes referred to the evidence about what the Perrys did and did not do between July 2024 and the delivery of the 24 February letter, and the Perrys' knowledge that the Jayasinghes were continuing to spend money on the construction of the new dwelling (some $365,000 after the July meeting), and submitted as follows:

> This dilatory approach to the enforcement of the [height restriction] is curious if not baffling, but the only objective interpretation of the [Perrys'] conduct is that they:
>
> a) were no going to commence proceedings to obtain equitable relief to enforce the [height restriction]; and
>
> b) that they had waived any rights to enforce the [height restriction] and released the [Jayasinghes] from liability.

158 The Jayasinghes submitted that the Perrys have taken no action to challenge the validity of the planning permit for the new dwelling,[64] and have only recently

[64] The Jayasinghes say that any application to cancel the planning permit would fail, as it would be too late, given that the new dwelling is almost complete.

commenced an action to enforce the height restriction by the issue of the related proceeding in September 2025.

159 Counsel submitted that the Jayasinghes were submitted to extensive cross-examination at trial in an attempt to portray them has having acted in bad faith, without success. Rather, their evidence 'simply underscored that [they] failed to understand the effect of the [height] restriction until it was explained to them in the [24 February letter]', submitting that:

> As far as the [Jayasinghes] were concerned, they were bound by a single storey height restriction, with which they complied, and they had a valid Planning Permit and plans endorsed pursuant to it. They were entitled to believe that, provided they built in accordance with this permission, they were honouring their lawful obligations:

160 The Jayasinghes submitted that the evidence revealed that Mrs Perry herself did not fully understand the terms of the restrictive covenant. They submitted that:

> The complexity of these contractual arrangements and the sensitivity of the [Perrys'] views from [the Perrys' home] to construction on [the Jayasinghe property], created a greater responsibility on the [Perrys] to take an active interest in the Planning Permit Application and for the [Perrys] to act quickly the moment they could see a potential breach of the [height restriction].

161 The Jayasinghes submitted that the Perrys' submission to the effect that s 84(1)(b) requires agreement from all parties benefiting from the restriction, including the Perrys' mortgagee, should be rejected. The Jayasinghes referred to the decision of the New South Wales Court of Appeal in *Stephenson v Dwyer*.[65] They observed that Hodgson JA said, by way of obiter, that mortgagees may need to agree to modify or extinguish an easement for the purpose of the equivalent provision of the *Conveyancing Act 1919* (NSW), but that proposition was emphatically rejected by Mason P in the same judgment.

162 In response, the Perrys submitted that the Jayasinghes' asserted failure to understand the height restriction amount to wilful ignorance on their part. They appear to have considered that compliance with the planning permit was sufficient, even after the Perrys had raised their concerns about the height of the new dwelling. Contrary to

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65 (2008) 13 BPR 25,107.

the evidence in their affidavits, the Jayasinghes could not have believed that the Perrys' concerns had been resolved after the July 2024 meeting.

163 The Perrys submitted as follows:

> From July 2024, the [Perrys] understood that they had conveyed their concerns about the height of the dwelling to the [Jayasinghes], the [Jayasinghes] understood their dwelling would exceed the height restriction, and the ball was in the [Jayasinghes] court to do something about that exceedance.
>
> The [Jayasinghes] could not have assumed from July 2024 that the [Perrys'] conduct conveyed agreement to modification of the height restriction covenant. The [Jayasinghes] had unilaterally decided not to act on the [Perrys'] concerns but did not convey the fact to the [Perrys]. Viewed in that context, it is unsurprising that the [Perrys] did not take further action until February 2025.
>
> The [Jayasinghes'] assertion that the [Perrys] did not intend to enforce the covenant, or that they failed to send a solicitor letter earlier than February 2025 is not to point.
>
> From July 2024, the [Jayasinghes] were on notice that their dwelling would exceed the height restriction that the [Perrys] were unhappy about that fact and were concerned for the [Jayasinghes] that their builder would hand over a dwelling which did not comply with the height restriction. This was proof positive to the [Jayasinghes] that the [Perrys] were not agreeing to modify the height restriction covenant.
>
> In July 2024 the [Jayasinghes] knew, and objectively they ought to have known, that the [Perrys] did not agree to the dwelling exceeding the height restriction. In not responding to the [Perrys'] concern, nor taking steps to check for themselves whether the height restriction was complied with, the [Jayasinghes] adopted the risk associated with that decision. That is, that the [Perrys] could, at any time, seek to enforce their rights under the height restriction covenant.

164 The Perrys submitted that the evidence of Mr Clark as to what works are required to bring the new dwelling into compliance with the height restriction establishes that the Jayasinghes will not suffer undue hardship if they are required to comply with the height restriction, as Mr Clark's evidence contradicts Mr Jayasinghe's evidence that it would be necessary to demolish the new dwelling.

165 The Perrys submitted that the Jayasinghes' contention that they did not understand the height restriction does not bear objective analysis. They submitted as follows:

> (a) the plain words of the height restriction would indicate to a lay person, without technical knowledge, that there is a restriction on the height of a building which is allowed to be constructed on the [Jayasinghes' property], even if that lay person did not know the precise height of a building which would comply.

(b) it is patently obvious that a single storey dwelling can be a variety of heights and some single storey dwellings will comply with the height restriction, and some will not. It is not necessary to understand AHD, or to know how high the maximum allowable height is to understand this.

(c) it is not reasonable for the [Jayasinghes] to have assumed that the height restriction covenant simply required a single storey dwelling to be constructed on the land

(d) the single storey covenant on the [Jayasinghes' property] supports this view - there is no need for a height restriction and a single storey covenant if all that the height restriction means is that a single storey dwelling must be built

(e) further, if dwelling height on the [Jayasinghes' property] was governed by other regulations (as Mr Jayasinghe stated), there would be no need for a height restriction to be placed on the [Jayasinghe property]. The Regulations would do the work.

166 The Perrys submitted that by the July meeting, the Jayasinghes knew that the Perrys had raised concerns about the height of the new dwelling with their contractors, and that by the end of the July meeting, Mr Jaysinghe understood that the Perrys were telling him that the new dwelling exceeded the height restriction. The Perrys submitted as follows:

> The [Jayasinghes'] attitude to the height restriction demonstrated a reckless disregard for the [Perrys'] rights under the height restriction from before the [Jayasinghes] signed the Contract of Sale, then continuing during the process of negotiating with Metricon and Live Well Homes, then during design of the dwelling, in applying for planning permission through their agent, Smart Town Planning, and finally by the [Jayasinghes] declining to alert the [Perrys] to their decision to ignore the [Perrys'] concerns and continue to build because they had obtained a planning permit to do so.

167 The Perrys submitted that Mr Jayasinghe's evidence regarding what transpired during the July 2024 was unsatisfactory and self-serving, referring particular to 'his attempt to minimise the height issue in describing the July 2024 conversation'. They submitted as follows:

> In admitting that he relied on the builder's opinion that there was no problem with the dwelling because of compliance with the Council approval, Mr Jayasinghe has acknowledged he understood that the [Perrys] believed there was a problem, and the [Perrys] did not believe their concerns were resolved. Nothing was said which would have resolved the [Perrys'] concerns.
>
> Mr Jayasinghe also understood that the [Perrys] were not giving up their rights under the covenant, nor agreeing to modify it or not enforce it. Rather, Mr Jayasinghe believed the [Jayasinghes] were in a position to ignore the

> [Perrys'] concerns because they were complying with the planning permit they had obtained through Smart Town Planning.
>
> From the time of the [July meeting], the [Jayasinghes] were on notice that their dwelling would exceed the height restriction and that the [Perrys] were not agreeing that they could exceed the height restriction and were not agreeing to modify the height restriction.
>
> The [Perrys] put the [Jayasinghes] on notice that they should do something about the impending breach. The [Jayasinghes] chose not to respond to the [Perrys'] concerns, they chose not to check the height of their dwelling against the height restriction, and they chose not to stop the build. In doing so, they adopted the risk associated with their decision.

168 The Perrys submitted, in relation to the Jayasinghes' criticisms of their own conduct, in summary, as follows:

(a) after the July meeting, it was reasonable for them to believe that they had made it clear to the Jayasinghes that the new dwelling was likely to breach the height restriction, and that the Jayasinghes needed to address this issue;

(b) at no stage had the Perrys indicated that they would be content with a building that breached the height restriction;

(c) objectively speaking, it is highly unlikely that parties in the position of the Perrys would agree to alter the terms of the contract of sale so soon after the imposition of the height restriction;

(d) it was not necessary for the Perrys to object to the planning permit application, because if the Jayasinghes' town planner had referred to the height restriction in the planning permit application, the planning permit would never have been granted;

(e) the (late) evidence of the Jayasinghes regarding the Perrys' now abandoned plans to build a new home on the Perry land did not support the contention that the Perrys had 'run hot and cold on their intentions with respect to the height restriction', and Mrs Jayasinghe's evidence that Mrs Perry said she was not concerned about the views should not be accepted; and

(f) the Perrys submitted as follows:

> They imposed the height restriction to protect views from their land. Once construction of the [new dwelling] commenced with the site cut, they started raising their concerns that the dwelling would breach the height restriction. Once the frame went up, in July 2024 they invited the [Jayasinghes] into their home to explain their concerns. Knowing the [Jayasinghes] understood their concerns, the [Perrys] felt the ball was in the [Jayasinghes'] court to do something about the height of their dwelling or the [Jayasinghes] risked being handed a non-compliant dwelling by their builder. When it became clear the [Jayasinghes] were not going to address the issue, the [Perrys] engaged their conveyancing lawyer to write to the [Jayasinghes the 24 February 2025 letter]. It took more than a month for the [Jayasinghes] to provide any substantive response to the 24 February letter.

169 The Perrys referred at some length to the potential liability of the Jayasinghes' town planner and builder for damages associated with the breach of the height restriction, and submitted that, in any event, not all of the costs associated with the construction of the new dwelling will be thrown away if the application to modify the height restriction is rejected.

170 Counsel for the Perrys submitted during the course of her oral submissions at the hearing of the application that while the doctrine of acquiescence is relevant for the purpose of the test under s 84(1)(b) of the Act, it is not correct to say that s 84(1)(b) is a codification of the doctrine of acquiescence.

171 Counsel submitted that it cannot be that the Perrys' failure to object to the planning permit application is sufficient to ground an implication of agreement to the modification of the height restriction. The Jayasinghes' planning permit does not grant the Jayasinghes the right to override the Perrys' property rights.

172 Counsel submitted that while the focus of s 84(1)(b) of the Act is on the conduct of the Perrys 'that conduct does not occur in a vacuum'.[66] Counsel referred to the decision of Croft J in *Perpetual Ltd v Myer Pty Ltd*,[67] where his Honour, quoting Gummow and Hayne JJ in *Byrnes v Kendle*[68] stated as follows:

> Acquiescence [is]:
>
> > best understood as requiring *calculated that is, deliberate and informed* inaction by [the plaintiff] or standing by which encouraged [the

66 T216 L12-L13.
67 [2018] VSC 2.
68 (2011) 243 CLR 253.

> defendant] reasonably to believe that [the defendant's] submissions were accepted or not opposed by the plaintiff.[69]

(emphasis in original).

173 Counsel submitted as follows:

> It's not the subjective question of whether or not [the Jayasinghes] understood the height restriction and then took the [Perrys'] actions to be indicating agreement, it is whether it was reasonable for them to take the actions of the [Perrys] as accepting or agreeing to modification of the covenant. So there's an aspect of what a reasonable person, in the [Jayainghes'] situation, would understand was occurring.[70]

174 Counsel submitted that it is not sufficient to ground a finding of acquiescence in a 'nebulous general allegation of delay' on the part of the Perrys.[71] Rather, it is necessary for the Court to examine what happened at each stage of the process to determine whether the Perrys' conduct objectively and reasonably amounted to agreement to modify the height restriction.

175 Counsel referred to the decision of Gray J in *Fay v Fay,*[72] and the reference to the conduct of both parties as being relevant to whether relief should be granted. Further, counsel submitted that the hardship to the Jayasinghes may suffer if the application for modification is refused is not relevant to the assessment of whether the Perrys have agreed to the modification of the height restriction within the meaning of s 84(1)(b) of the Act. Hardship would only be relevant to the question of what relief would be available to the Perrys in the related proceeding, although it may be tangentially relevant to the Court's residual discretion under s 84(1).

176 Counsel submitted that acquiescence can be understood in two senses: first, the level of acquiescence sufficient only to deny the grant of injunctive relief (as opposed to an award of damages) and secondly, the level of acquiescence which justifies denying relief entirely. She submitted that in applying s 84(1)(b) of the Act the Court should apply a test for conduct amounting to acquiescence only in the second sense.

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69 *Perpetual Ltd v Myer Pty Ltd* [2018] VSC 2, [127].
70 T218 L18-L26.
71 T221 L23-L24.
72 [2025] VSC 455.

177 Counsel submitted that the failure of the Jayasinghes' town planner to refer to the restrictive covenant in the MCP in the planning permit application is conduct which can be attributed to the Jayasinghes, even if no formal agency relationship is established. Indeed, this omission reflect the Jayasinghes' failure to take seriously the promise they made when they executed the contract of sale, and provides an explanation of why the Perrys conducted themselves in the way that they did. Further, the builder and the other contractors misled the Perrys, whether intentionally or not.

178 In relation to the question of whether the Perrys have agreed to the modification of the height restriction, counsel submitted as follows:

> It is harder for the [Jayasinghes] to prove their case than if it was an older covenant or these weren't the original parties. A reasonable person in the [Jayasinghes'] shoes would not think that by not sending a solicitor letter earlier that the [Perrys] were agreeing to modify a covenant that they themselves had recently imposed for a particular purpose and have accepted in a contract, for which consideration was paid, and that they would agree to that with no compensation.[73]

179 Counsel then reviewed Mr Jayasinghes' evidence regarding the July meeting in some detail, and submitted as follows:

> And in my submission, the refusal to take any steps to understand the height restriction from the point in time at which the contract of sale was being considered and before it was executed, right through until the February 2025 letter was delivered, is a failure on the part of the [Jayasinghes] to take reasonable care to ensure they were compliant with the height restriction on their title. There's a lot of blame being passed to the [Perrys] for not policing the [Jayasinghes'] actions. There's very little responsibility here being taken by the [Jayasinghes] for the consequences of their actions.
>
> It is my submissions that the transcript and the cross-examination of Mr Jayasinghe shows that he knew where the height restriction was and what it meant in terms of his dwelling breaching the height restriction. Contrary to the evidence affirmed in his affidavit material, he did not consider that the [Perrys'] concerns were resolved. Rather, what he did was ask his builder, 'Are you complying with the planning permit and are you complying with the contract?' When the building said yes, he stayed silent and thought to himself, 'I don't have to worry.'[74]

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73 T230 L15-L23.

74 T238 L22–T239 L12.

180 Counsel referred to the decision of *Re Clearwater Properties Ltd*[75] and observed that, given the materially different facts of that case, and some material differences in the equivalent UK provision, the reasoning should be treated with some caution.

181 Counsel responded to the Jayasinghes' apparent lack of understanding regarding the height restrictions by submitting that it was incumbent upon the Jayasinghes to understand what restrictions were imposed upon their land.

182 Counsel concluded her submissions as follows:

> [The Jayasinghes] didn't tell the [Perrys] that [they were satisfied that they didn't have a problem because they had a planning permit]. They therefore continued to be on notice for the whole period up until because, from the [Perrys'] point of view, we have conveyed what our concerns are. Doesn't need a solicitor letter. It is clear that they are not agreeing to modify the covenant when they've got concerns.
>
> It's kind of running the gauntlet of, well, we know they don't agree because we know they've got concerns, but we're just going to force them into taking more action or we know they don't agree to modify and we know they've got concerns, but we're not worried about it so we're just going to ignore it. The obligations is on the [Jayasinghes] to resolve that issue or to communicate to the [Perrys] that they don't consider they need to resolve that issue.[76]

183 In his oral submissions in response to the Perrys' written closing submissions, counsel for the Jayasinghes submitted that the Perrys' submissions sought to deflect the Court's attention away from what is the primary focus of the test under s 84(1)(b) of the Act, being the conduct of the Perrys.

184 The Jayasinghes submitted that the Perrys' conduct fell within both of the definitions of acquiescence referred to by the High Court in *Byrnes v Kendle*,[77] in that they failed to take any steps after becoming aware of the likely breach of the height restriction, and then failed to take timely action to obtain equitable relief after the breach of the height restriction was evident.

185 The Jayasinghes submitted that any submission to the effect that they acted in bad faith should be rejected. They have not been 'coy about their plans, or … underhanded

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75 [2013] UKUT 201 (LC).
76 T257 L1–L14.
77 (2011) 243 CLR 253.

in any way whatsoever'.[78] The height of the new building was apparent from the plans submitted with the planning permit application, of which the Perrys had notice.

186 The Perrys could have obtained a copy of the plans or the planning permit after they became concerned about the depth of the site cut in May 2024, but they failed to do so. Mr Perry's evidence regarding the July meeting demonstrated that, by that time, he already believed that the new dwelling would breach the height restriction. But all the Perrys did was to have an informal conversation with the Jayasinghes, and did not obtain any acknowledgment that the substance of the discussion had been understood by the Jayasinghes and would be acted upon by them.

187 Counsel submitted that, applying the test in *Orr v Ford*:[79]

> [T]he only objective interpretation of the [Perry's] conduct is that they were not going to commence proceedings to obtain equitable relief to enforce the [height] restriction and that they had waived any rights to enforce the [height] restriction and release [sic] the [Jayasinghes] from liability.[80]

188 Counsel submitted that even in December 2024, the Perrys gave no sign of any intention to enforce the height restriction. Referring to the text message exchange reproduced at paragraph 54 of these reasons, while Mrs Perry gave evidence that she was just being neighbourly in this exchange, Mrs Perry did not challenge Mrs Jayasinghe's statement that they would be moving into the new dwelling in 10 weeks' time. That is, Mrs Perry understood that the new dwelling was not going to be demolished, and the roof would not need to be removed or replaced, because the Perrys were not planning to take any action to force them to do so.

189 Counsel submitted that the evidence did not support a conclusion that the Jayasinghes wilfully disregarded the height restriction. Rather, there was simply no meeting of minds between the parties as to what was going wrong. The Jayasinghes did not understand the height restriction, and believed they were proceeding in accordance with Council approved plans.

190 Counsel for the Jayasinghes submitted that it was unfair for the Perrys to criticise the Jayasinghes so harshly for not understanding the height restriction when Mrs Perry's

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78 T189 L2-L4.
79 (1989) 167 CLR 316.
80 T197 L23-L28.

evidence was to the effect that she did not really understand the terms of the restrictive covenant herself. Counsel submitted:

> [T]he sophistication of the controls and the lack of tolerance, given that the Perrys' place was so close to the Jayasinghes' house, means that they should have been more aware of it.[81]

191 Counsel for the Jayasinghes submitted that it was not necessary for the Court to determine why the Perrys acquiesced to the construction of the new dwelling, but there are grounds to suspect that the Perrys have not, to this day, abandoned their hopes to build a new home at the rear of the Perry land.

Discussion

192 As discussed earlier in these reasons, the primary focus of the inquiry under s 84(1)(b) of the Act is the conduct of the Perrys, not the conduct of the Jayasinghes, save to the extent that the conduct of the Jayasinghes is relevant to determining whether the Perrys have acquiesced in the breach of the height restriction, or otherwise agreed to the modification of the height restriction. The relevant conduct of the Jayasinghes for the purposes of s 84(1)(b) of the Act is not their conduct in breaching the height restriction, but rather the reasonableness of any belief induced by the conduct of the Perrys,[82] although the fact of the breach and the reasons for the breach may well be relevant to the exercise of the Court's residual discretion.

193 There is no hard and fast rule about the circumstances in which inaction will amount to acquiescence, what period of time is an acceptable period of delay before a party is said to have surrendered their rights to enforce their proprietary rights, or what amounts to appropriate action to enforce their proprietary rights.

194 In the current case, the Jayasinghes say that the relevant period of delay commenced with the advertisement of the planning permit application in January 2024, and that the Perrys' expressions of concern directed at the Jayasinghes and their contractors between May and July 2024 were insufficient to convey their lack of consent to the breach of the height restriction.

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81 T205 L6-L9.

82 *Byrnes v Kendle* (2011) 243 CLR 253, 280-1 [79].

195 On the other hand, the Perrys say that they made it clear to the Jayasinghes and their contractors on a number of occasions that the new dwelling breached the height restriction, and that the responsibility for addressing those concerns lay with the Jayasinghes, not the Perrys.

196 The Perrys did not identify any event, or any point in time beyond which they would concede that any inaction on their part would amount to acquiescence. But there must be such a point in time. By way of illustration, it could not be seriously contended that a delay of several years would amount to an acceptable delay. However, the Perrys submit, by implication, that the relevant point in time is some time beyond 24 February 2025, when they delivered the 24 February letter to the Jayasinghes.

197 In my view, had the Perrys delivered the 24 February letter after the Jayasinghes obtained an occupancy permit for the new dwelling, and had moved into the new dwelling, it would have been very difficult for the Perrys to contend that they had not acquiesced to the breach of the height restriction. The new building would have been a fait accompli. The issue is whether the point of time at which the clock started ticking was earlier than that.

198 Turning now to the relevant chronology of events, the Jayasinghes' application for a planning permit, which erroneously did not refer to the restrictive covenant registered on the title to the Jayasinghe property, but contained a plan which showed that the new dwelling would breach the height restriction, was advertised in January 2024. The Perrys did not avail themselves of the opportunity to inspect the planning permit application, despite being on notice of the planning permit application.

199 The Perrys say that they did not inspect the planning permit application because they had no reason to doubt that the Jayasinghes would comply with the restrictive covenant, including the height restriction. That much is understandable. One can generally assume, in the absence of evidence to the contrary, that people will comply with their contractual obligations.

200 The Jayasinghes contend that by reason of the information available in the planning permit application, the Perrys had constructive knowledge of the fact that the new dwelling would breach the height restriction.

201 Hindsight now suggests that it would have been prudent for the Perrys to inspect the planning permit application, given that if they had, and had objected to the planning permit application, most of the expense, inconvenience and stress of the current proceeding could have been avoided. However, I do not consider that the failure of the Perrys to object to the planning permit application to amount to acquiescence. I accept the Perrys' evidence to the effect that they had no reason to suspect that the Jayasinghes would not comply with the height restriction.

202 Of course, once construction of the new dwelling commenced, the Perrys actually did have cause for concern that the new dwelling would breach the height restriction, expressed those concerns to the Jayasinghes and their contractors, and received assurances from the latter. One could quibble with the relatively informal manner in which they pressed their concerns, and query why it took more than a month for the Perrys to arrange a meeting with the Jayasinghes after Mr Perry's conversation with Mr Grenfell. Further, while the Perrys believed that they had clearly conveyed their concerns about the breach of the height restriction to the Jayasinghes, given that I accept the evidence of the Jayasinghes to the effect that they did not understand the height restriction until after the delivery of the 24 February letter, they must not have done so clearly enough, and Mr Perry must have misconstrued Mr Jayasinghe's silence at the July meeting as amounting to an acknowledgement of those concerns.

203 However, the Perrys' conduct in the period between May 2024 and late July 2024 could not be construed as amounting to acquiescence to the breach of the height restriction. Given that only the wall frames of the new dwelling were constructed at the time of the July meeting, and given Mr Clark's evidence that it would have been technically feasible to construct the new dwelling with a flat or close to flat roof without breaching the height restriction, the Perrys were not armed with all of the knowledge they needed to assess whether the height restriction would be breached. Of course, it would not have been terribly difficult to obtain further information about the height of the new dwelling, either by asking the Jayasinghes for the plans or by inspecting the plans held by the Council. But, just as I accept the Jayasinghes' evidence that they did not understand precisely what was meant by the height restriction, I also accept the Perrys' evidence that they believed that they had clearly and emphatically conveyed their concerns about the height of the new dwelling to the Jayasinghes, and

had a reasonable expectation that those concerns would be addressed by the Jayasinghes.

204 However, by 25 July 2024, when Mrs Perry took the photograph of the new dwelling with about half of the roof trusses erected (see the photograph at paragraph 40 of these reasons) it must have been abundantly clear to Mrs Perry that their efforts to raise their concerns about the height of the new dwelling with the Jayasinghes, including during the discussion at the July meeting, had been completely ineffective. By this point in time, only two conclusions were open to the Perrys:

(a) that the Jayasinghes did not understand the Perrys' concern that the new dwelling would breach the height restriction; or

(b) that the Jayasinghes knew about the height restriction and knew that the new dwelling would breach the height restriction, but were pressing ahead regardless, in flagrant breach of the height restriction.

205 Either way, it must have been apparent to the Perrys by 25 July 2024 that further action was required by them to prevent the breach of the height restriction. And, to be fair to Mrs Perry, she did take further action. Her evidence to the effect that she raised her concerns about the height of the new dwelling with two representatives of the builder and the workers erecting the roof trusses on the new dwelling was not challenged, either in cross-examination or by the Jayasinghes calling any representatives of the builder or other contractors as witnesses.

206 However, the Perrys' failure to take any further action beyond the few steps taken by Mrs Perry in the paragraph above in the absence of any firm assurances that the Jayasinghes understood the height restriction and/or would take action to remedy the breach is inexplicable. True it is the Perrys were away in Darwin for an extended stay, but modern communications technology means that distance is no real barrier to taking steps such as contacting the Jayasinghes, contacting the Council, contacting Mr Grenfell for advice, or contacting solicitors for advice. The evidence is that the Perrys' adult daughter operates a hair salon from the Perrys' home, and lives across the road, so the Perrys had someone 'on the ground' to observe the continuing construction of the new dwelling. Given the Perrys' past approaches to

representatives of the builder had not borne any fruit, it is difficult to see how the Perrys could reasonably have believed that Mrs Perry's further complaints would have made any difference.

207 Even more baffling was the Perrys' failure to make any further protest, or take any further action once they returned from Darwin in late September 2024. By this time, that the new dwelling breached the height restriction was unmistakeable. No further information was required for them to reach that conclusion. The roof sheeting had been installed, such that what was observed during the course of the view was visible to anyone from sometime in August 2024, and by the Perrys themselves from 29 September 2024. The construction of the new dwelling was advancing at some pace. But the Perrys took no steps to halt the construction of the new dwelling until five months after their return from Darwin.

208 The explanation provided by the Perrys in their affidavits for their inaction was unsatisfactory, and did not improve at trial. Essentially, the evidence was that until sometime in October 2024, the Perrys were preoccupied with the sale of their apartment in Darwin and in liaising with their conveyancer and tradespeople to prepare that property for sale.

209 However, it beggars belief that the Perrys were unable to make the time to engage a surveyor and contact solicitors during this period. They were at home from 29 September 2024 until they departed for East Gippsland on 19 December 2024, a period of nearly three months, and, as noted earlier in these reasons, the new dwelling is visually imposing. Further, on the assumption that they first engaged their surveyor after returning from regional Victoria in early February 2025,[83] they seem to have had no difficulties in doing so, and only a few weeks elapsed from this time up to the delivery of the 24 February letter. The Perrys are retirees, and as such cannot have had too many demands upon their time after they sold their Darwin apartment in October 2024. The Perrys are familiar with the subdivision and conveyancing process, even if they found those processes time consuming and stressful.

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83 There is no direct evidence as to when the Perrys engaged their surveyor, but the inference I can draw from Mrs Perry's evidence about their travels is that they did not attend to such matters while they were away from home.

210 Further, the solicitors who prepared the 24 February letter were the same solicitors who acted for the Perrys in the sale of the Jayasinghe property, and therefore must have advised upon or at least have been aware of the restrictive covenant. The Perrys also had ready access to land surveyors. The surveyors to whom the Council sent the amended planning permit for the subdivision of the parent land in December 2020 were the same surveyors that prepared the report annexed to the 24 February letter. Mr Grenfell, a retired surveyor, was a friend.

211 Accordingly, it could not be said that the Perrys did not have ready access to appropriately qualified professionals, or that they were complete novices when it came to dealing with property-related matters. They do not appear to lack the necessary financial resources, having sold not only their Darwin apartment but also the Jayasinghe property and the adjacent lot in recent years. They have been able to fund capable legal representation for the defence of this proceeding and the issue of the related proceeding, which indicates that a lack of resources was not the reason for their delay in taking enforcement action.

212 While the relevant delay, being between July 2024 and February 2025, was only a matter of months, not years, they were critical months. Between July 2024 and February 2025, the construction of the new dwelling progressed from the frame stage to being almost complete. The Perrys must have known that the Jayasinghes were spending a significant amount of money upon the construction of the new dwelling, and that any delay in taking further action would only make a bad situation worse. Given their 'neighbourly' relationship with the Jayasinghes, it seems very odd that they would stand by and allow the Jayasinghes to continue to spend money on the new dwelling while reserving to themselves the right to force them to make expensive modifications in order to comply with the height restriction at some unspecified point of time in the future.

213 Further, my findings earlier in these reasons to the effect that the modification of the restrictive covenant to modify the height restriction will cause the Perry land substantial injury is relevant to the assessment of the Perrys' conduct. The height restriction was important to them, for understandable reasons. The breach of the height restriction was not a trivial breach. If they had taken prompt legal action to

enforce the height restriction, and the Jayasinghes had not demolished or modified the new dwelling in order to comply with the height restriction, the Perrys would have almost certainly obtained a mandatory injunction to require them to do so. Given the consequences and the impact of the breach of the height restriction, the Perrys' inaction in the face of the clear breach of the height restriction seems to me to be quite baffling.

214 In their evidence and submissions, the Perrys steadfastly maintained that they had repeatedly raised their concerns with the Jayasinghes and their contractors and that the ball was in their court to address those concerns. I have no difficulty with that proposition, so far as it goes. But to stand by for many months when it must have been obvious that those concerns were not being addressed, amounted to, in the language of Deane J in *Orr v Ford*,[84] 'the contemporaneous and informed ("knowing") acceptance or standing by which is treated by equity as "assent" (i.e. consent) to what would otherwise be an infringement of rights'.[85]

215 Deane J, later in his reasons, observed that:

> [M]ore commonly, acquiescence is used … to refer to conduct by a person, with knowledge of the acts of another person, which encourages that other person reasonably to believe that his acts are accepted (if past) or not opposed (if contemporaneous).[86]

216 And it is at this point the conduct of the Jayasinghes is relevant to the analysis. Was it reasonable for the Jayasinghes to believe, notwithstanding the concerns raised by the Perrys prior to, during and immediately after the July meeting, that the Perrys accepted the beach of the height restriction?

217 In my view, any belief held by the Jayasinghes that the Perrys did not oppose the construction of the new dwelling in its current form prior to about October 2024 was mistaken and unreasonable. I accept that the Jayasinghes did not understand that they were bound by the height restriction, and genuinely believed that by building a single-storey building in compliance with the plans approved in the planning permit, they were doing nothing wrong. It is odd that they did not convey their

84 (1989) 167 CLR 316.
85 Ibid 337.
86 Ibid 338.

understanding to the Perrys, but this regrettable saga has been characterised by an apparent desire on the part of all parties to avoid confrontation. But, especially, after the July meeting, Mr Jayasinghe in particular should have understood that the Perrys had concerns about the height of the new dwelling, and that those concerns had not been resolved. There was, however, no evidence about whether Mrs Perry's communications with the Jayasinghes' contractors after the July meeting were conveyed to the Jayasinghes.

218 However, as time passed, and the Perrys took no further action to enforce the height restriction, and from August 2024 did not even complain about the breach of the height restriction, nothing occurred to disturb the Jayasinghes' genuine, albeit mistaken belief that the new dwelling complied with all relevant requirements. What was originally an unreasonable belief became, as the months passed, a quite reasonable belief, particularly as the Perrys returned to Melbourne in late September 2024, and were aware of the final form of the new dwelling. At least by this time, it was reasonable for the Jayasinghes to believe that the Perrys' concerns had been 'resolved'.

219 Accordingly, all of the necessary elements of acquiescence have been made out. By their inaction after July 2024, and certainly from September 2024, the Perrys' conduct conveyed that they agreed to the breach of the height restriction within the meaning of s 84(1)(b) of the Act.

220 Prior to turning to the relevant discretionary considerations, there was relatively limited argument raised at a relatively late stage of the proceeding, as to whether the consent of the Perrys' mortgagee is required for the purposes of granting an application under s 84(1)(b) of the Act.[87]

221 Having reviewed the discussion of this issue in *Stephenson v Dwyer*,[88] my preliminary view on the question of whether the mortgagee is a person benefiting from the height restriction within the meaning of s 84(1)(b) of the Act is that the detailed analysis of Mason P is to be preferred over the rather tentative opinions of Hodgson JA.

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87 In the title search for the Perry land annexed to the contract of sale for the Jayasinghe property dated 14 May 2025, reference is made to a mortgage in favour of Westpac Banking Corporation registered on 6 July 2016.

88 (2008) 13 BPR 25,107.

However, subject to further discussion with counsel, one option could be, for the avoidance of any doubt, to stay any final orders for a short period of time to notify the Perrys' mortgagee and enable the mortgagee to respond (or not, as the case may be).

Discretionary considerations

222 Given that the requirements of s 84(1)(b) of the Act have been satisfied, the question remains as to whether there are any matters which justify refusing to make an order for the modification of the height restriction.

223 The Jayasinghes say there are not. They referred to the observations by Gillard J in *Re Markin; Re Roberts*[89] to the effect that, while this Court has the jurisdiction to vary a covenant upon the application of the original covenantor, this Court should have a 'strong bias' against doing so.[90] However, they also referred to the decision of Rein J in *Double Bay Bowling Club v Council of the Municipality of Woollahra*,[91] which eschewed any suggestion that there should a strong bias against granting the application, as being incompatible with the language of s 84(1) of the Act.[92]

224 In their opening submissions, the Jayasinghes also submitted that Mr Clark's evidence to the effect that the new dwelling can be modified to comply with the height restriction is irrelevant to the exercise of the Court's discretion, because the evidence of Mr McIntyre is to the effect that there is no guarantee that the Jayasinghes will be granted planning permission by the Council to modify the new dwelling in the recommended form.[93]

225 Counsel for the Jayasinghes submitted that the matters already taken into account when determining whether the jurisdictional threshold for modification or removal has been met are generally not relevant to the exercise of discretion, referring to the reasons of Derham AsJ in *Jiang v Monaygon Pty Ltd.*[94]

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89 [1966] VR 494.
90 Ibid 498.
91 [2020] NSWSC 1861.
92 Ibid [90].
93 However, that submission was only faintly pressed in closing submissions given Mr McIntyre's evidence to the effect that he expected the proposed modification would be approved by the Council.
94 [2017] VSC 591 [77]-[79].

226 Counsel also referred to *Ridley v Taylor*,[95] where Russell LJ stated as follows:

> Finally I come to the question of exercise of discretion, assuming there was jurisdiction. I do not for myself think that the particular situation of the applicant, as having not very long since struck a bargain inconsistent with this particular outcome, is a factor in the exercise of discretion. I do not think that the personality of the applicant or his past behaviour is relevant to the exercise of the discretion. I refer again to the fact that tomorrow an assign may make the same application. I think that the decision (including the exercise of discretion) must be related to the property and its history as such.[96]

227 In response, the Perry submitted that the short period of time which has elapsed since the registration of the restrictive covenant, the fact that the parties are the original parties to the restrictive covenant, and the substantial breach of the height restriction are all matters relevant to the Court's exercise of discretion in the current application. While counsel for the Perrys accepted that there should not be a 'strong bias' against the application for modification, the fact that the Jayasinghes are the original covenantors is relevant, as is the relevantly short period of time that has elapsed since the execution of the contract of sale and the application for modification.

228 The Perrys submitted as follows:

> As early as *Shelfer v City of London Electric Lighting Co* the observation was made that a breaching party is not entitled to ask the court to sanction their wrongful act by purchasing their neighbour's rights through an assessment of damages, leaving the neighbour with the nuisance. In *Wakeham v Wood*, the court of appeal over-turned a decision to award damages at first instance for breach of a covenant protecting a view and a mandatory injunction was granted on the basis that damages would amount to allowing the breaching party to "buy his way out of his wrong". Here, the [Jayasinghes] seek to change the bargain they struck by regularising their substantial breach with no change to the purchase price they paid for their land.

229 And further:

> Equity ought not provide a mechanism for a party to avoid its legal obligations under a common law contract. The [Jayasinghes] freely and voluntarily contracted to purchase land subject to a restriction, and within a matter of months took steps to execute a building contract which would result in a substantial contravention of that restriction.

230 The Perrys referred to the Jayasinghes' criticisms of their conduct, and submitted that:

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95 [1965] 1 WLR 611.

96 Ibid 623.

> Many of these criticisms can equally be levelled at the [Jayasinghes] who appear not to have taken any steps to ensure the dwelling proposed under the building contract would comply with the height restriction they had agreed to, did not look at their plans to work out whether the dwelling would breach, when concerns were raised by the [Perrys] they did not make their own enquiries to find out whether they were in breach, they did not arrange to have their own dwelling surveyed until after the [Perrys] had had it surveyed, did not instruct their builder to stop work on their dwelling until about 4 weeks after receiving the February 2025 letter, and did not provide any substantive response to the February 2025 letter for about 4 weeks.

231 Other matters raised by the Perrys in their closing submissions which may be relevant to the exercise of discretion include the following:

(a) the professionals engaged by the Jayasinghes may well be liable to them for any costs or liabilities incurred by them by reason of the breach of the height restriction; and

(b) the Jayasinghes have overstated the hardship caused to them if they are required to comply with the height restriction, as not all of the costs of the construction of the new building will be thrown away if the application for modification is refused.

232 In my view, the primary factor relevant to whether, having found that the Jayasinghes have satisfied the requirements of s 84(1)(b) of the Act, the Court should exercise its discretion to deny them relief is the Jayasinghes' own conduct, particularly given that they were the original covenantors. In *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd*,[97] the UK Supreme Court held that, in an application for modification of a restrictive covenant to in effect, ratify a breach of covenant, a 'cynical breach', designed to procure an advantage in the application for modification is a relevant matter to be taken into account in the exercise of the Court's discretion,[98] and if a 'cynical breach' is found, that finding should generally move the Court to refuse the application.[99]

233 If I had found that the Jayasinghes had knowingly breached the height restriction, that conduct would have been sufficiently high-handed to amount to a 'cynical breach',

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97 [2021] 2 All ER 871.
98 Ibid 886 [47].
99 Ibid 891 [59].

and the gravity of their conduct would be compounded by both the seriousness of the breach and the fact that the Jayasinghes were the original covenantors.

234 However, as discussed earlier in these reasons, I accept the Jayasinghes' evidence that they did not understand the height restriction because of the technical manner in which it was expressed. Their ignorance, of itself, would not excuse them of any liability for any breach, and may well still not excuse them from there being any financial consequences for the breach. However, that issue is for another day.

235 Further, the Jayasinghes' ignorance of the height restriction, and their misguided response to the Perrys' concerns, does not rise to misconduct of a level which would disentitle the Jayasinghes the relief to which they are otherwise entitled.

236 I accept that the Jayasinghes should have read the contract of sale more carefully, and should have taken positive steps to ensure that they understood the height restriction. Their building designer and the builder should have understood the height restriction, and designed the new dwelling accordingly. Their town planning consultant should have referred to the height restriction in the planning permit application, and the Council officer handling the planning permit application should have inquired as to the terms of the restrictive covenant on the title of the Jayasinghe property.

237 As is evident from the above, there were a number of gatekeepers through which the plans for the new dwelling erroneously passed. Only part of the blame for that can be levelled at the Jayasinghes. And it is correct to say that there was nothing coy or underhanded about the conduct of the Jayasinghes. Further, there is no evidence to support a conclusion that they knew that they were breaching the height restriction and simply did not care. That much is evidenced by the fact that once the Jayasinghes received the 24 February letter, construction of the new dwelling, for all intents and purposes, halted. The breach of the height restriction was a serious breach, but it was not a cynical breach.

238 In that regard, an analogy can be drawn with the conduct of the defendants in *Jaggard v Sawyer*,[100] where the plaintiff beneficiary was refused injunctive relief, in part by reason of her own delays in taking any action, but also because the defendants had

100 [1995] 1 WLR 269.

known of but failed to appreciate the effect of the restrictive covenant, and had acted openly and in good faith, and not in blatant disregard of the plaintiff's rights.

239 For completeness, I do not consider the fact that the Jayasinghes potentially have claims against other parties to mitigate any losses they may suffer as a consequence of the breach to be of any great significance. They may well have such claims, but there is insufficient information before me to determine whether those parties have the capacity to meet any such claims, or whether those parties might have valid defences to those claims.

240 As for the question of the hardship to the Jayasinghes, this is a relatively neutral factor, I accept that the Jayasinghes have somewhat overstated the hardship to them if they were forced to comply with the height restriction and that there are no real barriers to them obtaining planning permission for any modification of the new dwelling.

241 However, while I do not consider that the hardship to the Jayasinghes of being forced to comply with the height restriction is a matter which, all other things being equal, weighs *in favour* of exercising the Court's discretion in their favour, I consider that the fact that the hardship or potential hardship to them may be less than originally anticipated is not a matter which should count against them.

Conclusion

242 Accordingly, the Jayasinghes have established that the requirements of s 84(1)(b) of the Act have been met, and that there are no discretionary considerations which would justify denying the application for modification of the height restriction.

243 I shall hear further from counsel regarding the following matters:

(a) the precise form of order to give effect to these reasons;

(b) whether any mortgagee of the Perry land should be notified of the orders made or proposed to be made;

(c) whether liberty to apply should be granted to the Perrys to apply for compensation in this proceeding, or whether this issue should be left to be dealt with in the related proceeding;

(d) the question of costs; and

(e) directions for the future conduct of the related proceeding.

SCHEDULE OF PARTIES

S ECI 2025 03157

BETWEEN:

SHYAMA BERNADETTE JAYASINGHE	First Plaintiff
CHANDANA PRIYATH JAYASINGHE	Second Plaintiff
- v -	
GRANT WILLIAM PERRY	First Defendant
JANINE MAREE PERRY	Second Defendant

CERTIFICATE

I certify that this and the 71 preceding pages are a true copy of the reasons for judgment of Daly AsJ of the Supreme Court of Victoria delivered on 4 December 2025, revised on 5 December 2025.

DATED this fifth day of December 2025.

SUPREME COURT OF VICTORIA
Associate to an Associate Judge

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Associate