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How Restrictive is a Restrictive Covenant? Some new ways to remove or modify age old covenants

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1. This paper reviews some recent decisions handed down in the Supreme Court concerning the removal or modification of restrictive covenants.

2. In two of the cases, the Plaintiffs sought to rely upon apparent defects in the wording of the covenants to argue that the covenants were not restrictive covenants or alternatively that they could be interpreted in a more expansive way.

3. The third case highlights a successful approach to presenting a case in the Supreme Court that is similar to that used in a planning case at VCAT, albeit acknowledging that planning tests are not strictly relevant to or determinative of the considerations to be made under section 84 of the *Property Law Act* 1958 (**Act**).

4. In each case, the Court applied relatively settled tests to the arguments raised and in general took a relatively conservative approach.

5. While this paper will examine various cases in the Supreme Court that have considered applications to modify or remove covenants pursuant to the Act, it should not be forgotten that a party can apply to modify or remove a restrictive covenant under section 60 of the *Planning and*

Environment Act 1987, whether as part of a planning application or by seeking a declaration.

6. The tests applied by the Planning and Environment Act are considered to be more difficult to satisfy than those set out under the Act.[1]

Property Law Act

7. The test applied by the Court to modify or remove a restrictive covenant is set out in section 84(1) of the *Property Law Act* 1958 (**Act**) which provides that the Court may modify or discharge a restrictive covenant on application by a person with an interest in land, where the Court is satisfied:

   (a) "that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Court deems material the restriction ought to be deemed obsolete or that the continued existence thereof would impede the reasonable user of the land without securing practical benefits to other persons or (as the case may be) would unless modified so impede such user; or

   (b) 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

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[1] See for example, *Watts v Yarra Ranges SC* [2016] VCAT 605 which refers to a number of supreme court applications having been made to vary a restrictive covenant prior to a town planning application for development being made.

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…

8. In most cases, the Court will be asked to consider the grounds arising in subparagaphs (a) and (c), above.

9. There are four grounds that can be distilled from sections 84(1)(a) and (c) of the Act, namely that the restrictive covenant:

(a) Is obsolete because of changes in the character of the property or neighbourhood or other circumstances of the case which the Court deems material;

(b) Would impede the reasonable user of the land without securing practical benefits to other persons;

(c) Would impede the reasonable user of the land unless modified; or

(d) Will not substantially injure the persons entitled to the benefit of the restriction.

10. There is a reasonable amount of cross over between ground (b) and (c), above. It is also the case that many of the considerations relevant to the above grounds are similar.

11. With the above tests in mind, the Court has considered a number of arguments to vary or remove restrictive covenants over the last year.

Blue Concept

12. In the case of *Blue Concept Pty Ltd v Christine Farnan & Ors*[2] (**Blue Concept**), the Court considered an application by a developer with a proposal for a 70 apartment development to be located on land at 35, 37 and 39 Murrumbeena Rd, Murrumbeena to modify or remove a 1912 covenant that limited development on each lot in the subdivision to "… not more than one dwelling house shop or other building with out buildings …" (**covenant**).

13. The covenant was expressed to bind the original transferee and "… her heirs executors administrators and transferees only while she or they actually be or remain the registered proprietor or proprietors of the said land hereby transferred…"

14. The covenant was subsequently modified in 1959 and 1961 to the effect that the covenant was modified to permit a maximum of two dwelling houses or outbuildings, but no other type of construction, and that the covenant only affected lots 35 and 37 Murrumbeena Rd.

15. The Plaintiff sought declarations that, amongst other things:

    (a) the covenant's obligations were only binding upon the initial transferee of the land and not on the Plaintiff as a subsequent transferee of the land;

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[2] [2015] VSC 125.

(b) in the alternative, that if the covenant's obligations are binding upon it, the subsequent amendments to the covenant were in addition to rather that in lieu of those created by the original covenant.

(c) Finally, an alternative declaration that lot 39 (which was not affected by the subsequent amendments) could be the site for the apartment building, being an "other building".

16. Any of the above arguments would permit the multi unit development to proceed on the land (subject to planning approval) as the multi-unit building was "one other building", at least in the latter case, in some form.

17. As to the first contention:

(a) The Plaintiff argued that the covenant only applied to the original transferee and her heirs, executors and transferees and that the obligation had lapsed when the Plaintiff became the registered proprietor of the land.

(b) The Court rejected that interpretation and found that the covenant also was stated to "run with the said land" and "be binding on the registered proprietor or proprietors for the time being".

(c) The Court considered that this language, when considered with the language relied upon by the Plaintiff, weighed heavily against the Plaintiff's contention, particularly as the Plaintiff was unable to direct the Court to any authority to suggest that

the covenant would expire after the original transferee and her heirs ceased to be owners of the land.

(d) Further, that there was no wording in the instrument to suggest that the covenant would so expire.

18. As to the second contention:

(a) The Plaintiff contended that the effect of the subsequent amendments to the covenant was that the original covenant remained and was further qualified by the amendments.

(b) The Court found that when expressing what development could occur on lots 35 and 37, the terms of the covenants for the subsequent amendments used the words “with the exception of”. These words were found to have the effect of restricting the use of the land the restriction described in the amendments, namely to two dwellings only and removing the forms of development originally permitted by the 1912 covenant.

(c) If the amendments were intended to be complimentary with the original covenant, they needed to say so.

19. As to the contention that a 70 unit apartment could be considered to be “one other apartment”, the Court found

(a) That it was impossible to say if that could be the case without there being plans that allowed consideration of the scale and design of the proposed development.

(b) "Issues such as the number of pedestrian entry points, the number of driveways and whether it is apparent from the exterior design of the building that it is a multi-apartment development – albeit one contained within a single building – are matters which bear upon the question of whether development can properly be construed as being 'one other building'. In the absence of any plans, it is simply not possible to undertake this task."[3]

Prowse

20. The case of *Maureen Carmel Prowse v Lilian Mary Johnstone & Ors*[4] considers a 1912 covenant restricting the construction or more than one house on each lot and that any house shall be erected of stone or brick or brick and stone with roof of slate or tiles. The Plaintiff's land was at 191-193 Wattletree Road Malvern in part of an estate known as the Coonil Estate. There were 28 defendants.

21. The Plaintiff purchased the land in 1966 and sought declarations that:

(a) The land was not affected by the covenant;

(b) The covenant is not a restriction within the meaning of the *Subdivision Act* 1988; and

(c) The restriction imposed in the covenant cannot be enforced by a person other than the original developer or their executors or administrators.

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[3] *Blue Concept* at para [24].
[4] [2015] VSC 621.

22. There was a prior application by the Plaintiff in *Prowse v Johnstone* [2012] VSC 4 to develop the land with a three-storey building, comprising 18 apartments, together with a basement car park for 36 cars. That case proceeded on the basis that there was a valid restrictive covenant affecting the land. In the previous case, the Court refused the application.

23. On this occasion, tin respect of the first ground:

(a) The Plaintiff's argument derived from a forensic review of numerous transfers effected between the original developer and the original lot owners in the subdivision. The Plaintiff submitted that the transfers showed handwritten amendments that were made at the initiative of a Titles Office officer that were either invalid or beyond power.

(b) The Court rejected that argument on the basis that there was no uniform pattern of conduct that could be established as to how various handwritten amendments came to be made.[5]

(c) Additionally, the Court relied upon the presumption of regularity and that given the time period that has elapsed since the transfers were effected, around 100 years, there was no easily procured evidence to establish the circumstances of the annotations.[6]

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[5] Johnstone at para [136].
[6] Johnstone at para [147].

24. The Court did find, however, that it may be relevant to examine other transfers within a subdivision to determine how an amendment or notation on a covenant came to be made, particularly if other transfers show an identifiable pattern.[7]

25. As to the Plaintiff's second ground, the Plaintiff argued that:

(a) The covenant was not effective to create a restrictive covenant.

(b) The covenant could be interpreted such that it did not apply to transferees taking after the first transferee and therefore the covenant did not run with the land.[8]

(c) A restrictive covenant should describe the persons bound by the covenant, naming the person bound by it rather than relying on the content of the covenant to do so.

26. The Court rejected that argument and observed the following:

(a) The Court should interpret the intention of the parties creating the covenant by taking an objective reading of the all of the words in the instrument.[9]

(b) In this case, the Court found that the intent of the original parties to the covenant was sufficiently clear from the words of the covenant to create a restrictive covenant.[10]

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[7] Johnstone at para [57].
[8] Johnstone at para [149].
[9] Johnstone at para [158].
[10] Johnstone at para [160].

27. Based upon the finding that there was a restrictive covenant in this case, the third ground of appeal was not adjudicated upon.

Maclurkin

28. The case of *Rachel Sheila Kathleen Campbell Maclurkin v Anthony John Searle*[11] considers the impact of a 1949 covenant that restricted development on the land to "no building other than one private dwelling house of brick or brick veneer with roof of tiles".

29. In this case:

    (a) The Plaintiff sought a modification of the covenant as it affected her home at 70 Boronia Road Boronia to enable her to construct up to four two storey dwellings on her land, each accessed by a common property driveway in the same location as the existing driveway.

    (b) The Plaintiff relied upon the sole ground that the modification will not cause substantial injury to any person having the benefit of the covenant.

    (c) The sole objector lived at 16 Marie St Boronia, some 270m away from the subject land.

30. The Court approved the modification both insofar as the number of dwellings was concerned and also the materials to be used on the following grounds:

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[11] [2015] VSC 750.

(a) The substantial injury test requires a comparison to be made between:[12]

(i) the benefits initially intended to be conferred and actually conferred by the Covenant; and

(ii) the benefits, if any, which would remain after the covenant has been discharged or modified in the manner proposed.

(b) Having regard to the above, the relevant considerations in this case were:[13]

(i) The location of the land on a service road close to the Boronia Shopping Centre and facing Boronia Road, a four lane highway, and physically separate from the residential hinterland to the south (where the objector resided);

(ii) The discharge of the covenant at 66 Boronia Road (two blocks away) established a precedent for a multi unit development in the subdivision (and the modification sought in this case would not have any effect as a precedent);

(iii) The subdivision of numerous neighboring lots as 2 lot subdivisions has already affected the density of

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[12] Maclurkin at para [6].
[13] Maclurkin at para [7].

dwellings in the neighbourhood and created a precedent for further subdivision;

(iv) The immediate neighbors will not be substantially injured by the modifications sought.

31. In addition, the Court outlined the relevant tests insofar as the substantial injury test is concerned, which is a useful summary of the law:[14]

(a) It is a question of fact whether or not a person entitled to the benefit of the covenant will be substantially injured.

(b) The Applicant has to effectively prove a negative (that a beneficiary will not be substantially injured).

(c) The substantial injury test is similar to the practical benefits test (thus there is a similarity of considerations in any application to the Court); and

(d) The beneficiary's injury must occur in relation to the person's enjoyment of their property (a fact which is harder to establish the further away the beneficiary resides).

32. As the Court noted above, there has to be a comparison between the benefits intended to be conferred and actually conferred by the covenant and the benefits, if any, that remain after the covenant has been discharged or modified. If the difference is not substantial, then the test is made out.

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[14] Maclurkin at para [32].

33. In that regard, the following considerations can be relevant to the balancing exercise:[15]

(a) The injury must be something more than unsubstantial. The detriment must be real and not fanciful.

(b) It is not enough for the Plaintiff to show that there will be no appreciable injury or depreciation in the value of a beneficiary's property;

(c) A lack of plans makes it more difficult for a Plaintiff to establish the potential for injury, particularly for adjacent objectors;

(d) The question of injury is not limited to questions of vexatious or frivolous objections;[16]

(e) The precedent value of a decision is a relevant consideration;

(f) Town planning principles are not relevant, save for the exercise of the Court's residual discretion;

(g) The absence of objections does not necessarily satisfy the onus of proof;

(h) The Court has a discretion to refuse an application even if the grounds are proven;

(i) The Court has a discretion to modify a covenant.

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[15] Maclurkin at para [32] (f)-(m).
[16] Maclurkin at para [56].

34. The Judge in this case was greatly persuaded to grant the application after conducting an unaccompanied view of the land and surrounds.[17]

Conclusions

35. The cases reinforce the Court's current approaches to interpreting covenants, namely that:

(a) The Court will seek to ascertain the intention of the original parties to the covenant by considering the plain meaning of the words in the covenant.

(b) Additionally, the Court will consider the underlying purpose of the covenant to assist with its interpretation.[18]

(c) The Court may have regard to extrinsic materials in limited circumstances – eg other transfers in a subdivision;

(d) The absence of plans for a proposal will count against any consideration of a proposal's impacts from the Act's point of view and any declarations sought (a declaration is unlikely to be made in respect of a hypothetical development);

(e) A party should not forget the breadth of discretion available to the Court when interpreting covenants and considering applications in the absence of objection;

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[17] Maclurkin at paras [50]-[52].
[18] See Maclurkin at para [93].

(f) Town planning principals and controls should be considered as part of an application, but they cannot be relied upon as being definitive of the tests established by the Act;

(g) A party should consider the merits of the Court undertaking a view of the area;

(h) The Court's wide discretion needs to be taken into account; and

(i) The facts of each case will be different necessitating often a different approach to resolution.

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