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PROPERTY LAW PRACTICE UPDATE

Restrictive Covenants and Easements

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Executive Summary

This paper provides an update on the law and practice in relation to the removal and modification of restrictive covenants in Victoria with a focus on applications pursuant to s84(1) of the *Property Law Act* 1958. It explains how applications to remove or modify covenants are heard and determined; explains the usefulness of the "*Guide to Practitioners - Applications for the Modification or Discharge of Restrictive Covenants*"; encourages practitioners to be judicious about the relief they seek; explains that the Supreme Court is often assisted by the production of draft plans for development to assess any impacts on beneficiaries; and explains that objecting defendants usually recover most of their costs from plaintiffs—even if they lose the proceedings on the merits. The paper then briefly touches on the process of removing or varying restrictive covenants under the *Planning and Environment Act* 1987.

The paper concludes with a short note on the decision of *Anderson v City of Stonnington* [2016] VSC 374, a decision of the Supreme Court that describes with some clarity when land becomes a public right of way at law, and the inter-relationship private rights of way or easements, and public rights of way under the *Road Management Act* 2004.

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Recent developments in the practice of removing or modifying restrictive covenants

The number of applications for the removal or modification of restrictive covenants continues to grow with the Supreme Court of Victoria hearing what seems to be a dozen or so cases each week for procedural or final orders.

What are restrictive covenants?

Restrictive covenants are essentially contracts that run with the land. The capacity to enforce a restrictive covenant is generally determined by the terms of the contract itself, and is usually provided to owners of proximate land. By definition, they are negative in nature, so it is difficult to see how a covenant that requires someone to plant or maintain landscaping might form the basis of a valid restrictive covenant. For such an outcome, the statutory mechanism of an agreement pursuant to s173 of the *Planning and Environment Act* 1987 might be more appropriate.

Restrictive covenants were originally used as a crude form of planning control often to ensure a homogeneity of land use and development in early housing estates. Most common were covenants stipulating that a parcel of land only be developed with a single dwelling, but other covenants prevented the use of land for commercial purposes or required buildings to be made of materials such as brick and slate or tiles.

They are mostly found in the eastern suburbs from Prahran through to Croydon; but also from Coburg through to Reservoir and beyond. Even today, they are used in contemporary housing estates such as Beacon Cove in Port Melbourne and in the growth corridors of Melbourne.

In other words, it's an area of practice that won't be disappearing any time soon.

Section 84(1)(c) of the *Property Law Act* 1958 is the ground of choice

Most applications to remove or modify a restrictive covenant now rely solely on s84(1)(c) of the *Property Law Act* 1958—the so-called, "substantial injury" test. This hasn't always been the case, but given the difficulties proving obsolescence (84(1)(a—first limb)) or demonstrating that the land cannot be used for any other useful purpose (84(1)(a—second limb)) it is ordinarily the easiest test to satisfy:

> ***84 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 order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of*

compensation to any person suffering loss in consequence of the order) upon being satisfied—

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

(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…

While few applications to vary a covenant proceed to a contested trial, the overwhelming number of applications succeed, if only because objectors often don't appear, or if they do appear, decline to become Defendants in the proceedings.

Applications for the modification and removal of restrictive covenants are being heard principally by a small group of Associate Justices

Applications for the modification and removal of restrictive covenants are still heard by a small group of Associate Justices, but there are subtle but important differences amongst them, particularly in relation to:

- advertising—extent and nature *Re: Cheong* S CI 2014 05002; *Re: Tan Phat Huynh* S CI 2016 00553;
- the response of the Court to unopposed applications: *Re Jensen* [2012] VSC 638 (unopposed dual occupancy refused); and *Re Morihovitis* [2016] VSC 684 (unopposed application for apartments refused); and
- the extent of modifications approved in contested applications—*Re Jonson* [2016] VSC 721 (6 dwellings approved); *Maclurkin v Searle* [2015] VSC 750 (4 dwellings approved); and *Oostemeyer v Powell* [2016] VSC 491 (dual occupancy refused, per Riordan J).

There is now a docket system in place, so the Associate Justice you are initially assigned to, will usually manage the case from start to finish.

Applications to modify covenants are more often heard by a Supreme Court Judge if they involve an application for declaration: *Prowse v Johnstone & Or* [2012] VSC 4; and *Mark William Suhr & Ors v Andrew Gordon Michelmore & Ors* [2013] VSC 284, but this is not always so: *Oostemeyer v Powell* [2016] VSC 491; *Freilich v Wharton* 2013] VSC 533.

Decisions in contested cases have been known to take anywhere from a few weeks to over 12 months to be handed down.

The Court has produced a guide to practitioners

One of the most significant developments in this area in recent times has been the publication of "*A Guide to Practitioners - Applications for the Modification or Discharge of Restrictive Covenants*" on the Supreme Court website. This document, drafted by the Associate Justices themselves, provides a step-by-step explanation of the s84 application process, along with annotated precedents and draft forms of orders.

Once the necessary title searches have been carried out, for most applications, the process should be little more than an admittedly painstaking process of filling in the blanks. If you've not prepared a s84 application before, you will be greatly assisted by engaging a town planner that has worked in this area, preferably through to a contested hearing. Time and again, we see town planners approach these applications as an ordinary planning application assessing the proposed amendment against the controls and policies in the local Planning Scheme, missing the point that this is mostly irrelevant to the s84 criteria the Court has to consider: *Morrison v Neil & Ors* [2015) VSC 269.

Brick no longer means double brick in building materials covenants

Two recent cases have brought to an end of the longstanding principle in *Jacobs v Greig* [1956] VLR 597 that a covenant requiring a building to be made of brick should be interpreted to be mean double-brick, as distinct from brick veneer:

- *Gardencity Altona v Grech and Ors* [2015] VSC 538; and
- *Clare & Ors v Bedelis* [2016] VSC 381

As recently as 2015, experienced planning lawyers were conceding that brick-only covenants required double-brick construction, largely precluding the cost-effective creation of apartments where such a covenant applied.

The Court has moved away from removing as distinct from modifying covenants

Traditionally, the complete removal of single dwelling covenants has been possible, particularly in circumstances in which there was no little or opposition to the application.

However, the Court is now reluctant to approve the complete removal of covenants, partly in response to concerns that if no residual constraints remain on title, a stated intention to build a dual occupancy might ultimately turn into a plan to construct apartments after land has changed hands on the open market.

This is not to say complete removal of a covenant is never appropriate, for instance, if a once-quiet residential neighbourhood becomes a designated activity centre; or where a covenant still requires a defunct firm of architects to approve a house design, but the prudent approach is to ask for as little from the Court as your client really needs.

The Court is now wary of provisos in Covenants

Historically, the Supreme Court has been prepared to approve variations to covenants in the form of a proviso, that is a variation that might read: "… but it shall not be a breach of the covenant to build generally in accordance with Plans 1 to 10 prepared by ABC Architects date 1 January 2017."

However, recently such conditions have fallen out of favour with the Court because it is acknowledged to be undesirable for plans—often needing to be A3 to be legible—to be attached to the register of titles for decades to come.

For this reason, an indicative set of plans should still be provided, but in a contested case, an application is more likely to succeed (either by way of contest or negotiation) if a building envelope can be satisfactorily described in the variation. This is particularly true for ambitious amendments or covenants intended to protect view-lines.

Design 2u for and on behalf of Y & P Harel Pty Ltd v Glen Eira SC [2010] VCAT 1865 remains authority for the proposition that you cannot lawfully be granted a planning permit conditional upon the subsequent removal of a restrictive covenant. A degree of educated guess work is therefore required in seeking approval from the Supreme Court for a development design that will be approved by the Council or the Victorian Civil and Administrative Tribunal on review.

The presumption still exists that Plaintiffs will pay the standard costs of Defendants

Ever since the late-1960s decision of *Re Withers* [1970] VR 319, plaintiffs have been expected to pay the costs of defendants, irrespective of the outcome of the proceedings on the merits. The logic is that the plaintiff is asking for an indulgence in being excused from its contractual obligations.

With the advent of standard rather than party/party costs, we are now seeing defendants recover between 75% and 100% of their costs.

That said, there is no good reason why Calderbank offers shouldn't work in this jurisdiction—see *Mark William Suhr & Ors v Andrew Gordon Michelmore & Ors* [2013] VSC 284. In my view, they are not

being used enough. They should certainly be used to disturb the presumption that defendants can refuse to seriously consider settling with little or no risk of an adverse award of costs.

Applications for permission to remove or vary covenants via planning permit rarely succeed in controversial cases

Given the costs of seeking to remove or modify a restrictive covenant via the Supreme Court, applicants are still attracted to the idea of seeking a planning permit to modify a covenant. However, given that all beneficiaries need to receive direct notice of such an application and that an objection made in good faith claiming the mere *perception* of detriment is sufficient to bring this process to an end (for pre-1991 covenants); for all but the most humble of applications, this process simply results in further delay and wasted expense: but see *King v Stonnington CC & Anor* [2013] VCAT 939.

Planning Scheme amendments to remove or modify covenants falling out of favour

Interestingly, the City of Stonnington recently introduced a policy making it clear it does not support amending the Planning Scheme to vary or remove a restrictive covenant.

It is understood that the Council found it unduly difficult and time-consuming and is now directing applicants to commence proceedings via s84 of the *Property Law Act* 1958.

Other means of removing or modifying covenants

As always, the option remains to remove a covenant by consent; through the administrative action of the Registrar of Titles (assuming a serious flaw in the drafting of a covenant); or tantalisingly, through application of planning permit *without advertising,* if the breach has been in existence for two years or more: see s47(2) of the *Planning and Environment Act* 1987 and *Hill v Campaspe SC* [2004] VCAT 1399

For further information

For further information, including a collection of working precedents for summonses, affidavits and submissions, refer: https://restrictive-covenants-victoria.com/

Developments in easements and roads

In the recent case of *Anderson & Anor v City of Stonnington & Anor* [2016] VSC 374 McMillan J explained everything you wanted to know about public rights of way and their relationship with easements, but were too afraid to ask.

The case concerned an application by residents of 21 William Street, South Yarra who were troubled by the noise and inconvenience of being exposed to foot traffic along a laneway to its south and west, presumably in the early hours of Saturday and Sunday mornings:

The plaintiffs sought to clarify the legal status of the laneway as a precursor to informing and supporting their action in nuisance.

The Plaintiffs claimed the laneway, owned by the statutory corporation VicTrack:

(a) is not a 'road' within the meaning of the *Local Government Act* 1989;

(b) is not a 'road' within the meaning of the *Road Management Act* 2004;

(c) is not a 'road' within the meaning of the common law; and

(d) is not a 'public highway' within the meaning of the common law.

The Plaintiffs argued that cl 14 of Schedule 5 to the *Road Management Act* 2004 precludes the dedication and use of land as a public highway in circumstances where the land is already subject to a private right of way. In response, the defendants submitted that the true effect of the provision is the opposite of what was pressed by the plaintiffs; that is, the existence of a public right of way over land automatically prohibits the exercise of a private right of way or easement over that land, regardless of which was first in time.

MacMillan J concluded that the defendants' construction of the provision must be preferred and that clause 14 to Schedule 5 of the *Road Management Act* 2004 subordinates a 'private right of way or easement' to a 'public right of way over the same land', such that the former is eclipsed by the latter regardless of which was first in time.

As a result, the Court found that since 1 July 2004, all public rights of way have existed to the exclusion of private rights of way to the extent that the two overlap.

The decision is perhaps most significant and useful for setting out the architecture of what constitutes a public highway at common law; when and under what circumstances such highways are created; and how those highways inter-relate with the statutory concepts of roads under the *Local Government Act* 1989 and the *Road Management Act* 2004.

For those practitioners considering what amounts to the dedication of land for a road at common law and the period of use which must be proved to show acceptance by the public, the Court's decision in *Anderson* is an artful and comprehensive statement of the contemporary position.

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