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STRAPLINE: Restrictive covenants

HEADING: **Re Milbex: A practical approach to the variation of restrictive covenants in Victoria**

PRECEDE: A recent decision has shown the value in s84 applications of providing the Court with specific evidence of development plans and their likely impact on the neighbourhood. **By Jonathan Tisher and Paula Cumbo**

In Victoria, a restrictive covenant may be modified or discharged either by making an application to the Supreme Court under s84 of the Property Law Act 1958 (Vic) (PLA) or, where the covenant postdates the enactment of the town planning legislation on 25 June 1991, by planning permit under the Planning and Environment Act 1987 (Vic) in the Victorian Civil and Administrative Tribunal (VCAT).¹

The Transfer of Land Act 1958 (Vic) also provides that the Registrar **of Titles** shall, in certain circumstances, have the power to record the release, variation or modification of a restrictive covenant in the event of the agreement of all interested parties.

The context of this article is on applications under the PLA.

Section 84(1) of the PLA provides that in order to enliven the Supreme Court's discretion to discharge or modify a restrictive covenant, the applicant must establish one of the following grounds:

- 1 There has been a material change in the character of the property or neighbourhood or other circumstances such that the restriction ought to be deemed obsolete: s84(1)(a); or
- 2 The continued existence of the restriction would impede the reasonable user of the land without securing practical benefits to other persons: s84(1)(a); or
- 3 The proposed modification will not substantially injure the persons entitled to the benefit of the restriction: s84(1)(c).

Additionally, s84(1)(b) gives the Court the power to discharge or modify a

restrictive covenant where all beneficiaries of the covenant agree (either expressly, or by implication by their acts or omissions) to the discharge or modification. In many circumstances, achieving the consent of all interested parties can be a cumbersome task.

Indeed, under the PLA, the courts have generally taken a conservative approach to applications for the modification or extinguishment of restrictive covenants.² Despite the existence of more progressive Victorian authority, particularly *Stanhill Pty Ltd v Jackson (Stanhill)*,³ the reality is that most standard applications for modification or discharge have been difficult to win.

However, in the recent Supreme Court decision of *Re Milbex Pty Ltd (Re Milbex)*⁴ (an application under s84(1)(c) of the PLA), Byrne J followed the robust approach of Morris J in *Stanhill*, eschewing the traditionally restrictive approach of Victorian and English authority on the matter, readopted by Ashley J in *Bevilacqua v Merakovsky (Bevilacqua)*.⁵

In this context, the *Re Milbex* decision can be seen as signifying a renewed judicial enthusiasm for Morris J's broader, policy-based reading of s84, empowering the courts to vary restrictive covenants "so as to effect the better use and development of land in the public interest" [51].

Background

In May 2004, the plaintiffs, property developers *Milbex Pty Ltd* and *Zina Deuel*, purchased a property in Tennyson Street, Elwood with the intention of demolishing the existing house and erecting a multi-story block of seven units, with basement carpark, on the property.

Before construction began on the project, the plaintiffs discovered that the land was burdened by a restrictive covenant which prevented the owners from erecting a building on the property other than a detached private dwelling house, despite the plaintiffs having been granted a planning permit for the development by the City of Port Phillip.

The plaintiffs had inadvertently attached a title plan (which did not identify the covenant affecting the property), rather than a full copy of the title, to their planning permit application. On discovery of the error, the City of Port Phillip applied to VCAT to have the permit cancelled. The plaintiffs successfully made application to stay the VCAT proceedings while they applied to the Supreme Court seeking an order pursuant to s84(1)(c) of the PLA that the restrictive covenant over the subject land be modified to allow the proposed development.

The Court received 24 written objections from both beneficiaries of the covenant and other nearby residents expressing their concerns in relation to the application to vary the covenant. Their concerns largely related to the effect that the development would have on local amenity. However, none of the objectors

agreed to be joined to the Supreme Court proceedings.

The decision

In *Re Milbex*, the plaintiffs sought an order pursuant to s84(1)(c), which permits the Court to modify a restrictive covenant where it is satisfied that the proposed modification will not substantially injure the persons entitled to the benefit of the restriction [5].

Traditionally, the courts have taken a narrow view of the **expression** “substantially injure”, placing emphasis on the injury suffered by the persons entitled to the benefit, by “comparing the benefits intended to be conferred by the covenant initially on the persons entitled thereto, and the resultant benefits if any remaining to such person after the covenant has been modified”.⁶

However, in *Stanhill*, Morris J set out his preferred approach to interpreting the section, based on the ordinary grammatical meaning of the words. He stated:

“It does not require a case to be made that the proposed discharge or modification of a restriction will not harm the persons entitled to the benefit of the restriction . . . it is sufficient to show that the proposed discharge or modification will not cause harm to the persons entitled to the benefit of the restriction which could be regarded as being of real significance or importance. This will require a judgment call in the particular circumstances being considered; it does not admit some universal answer based upon the attitude of the beneficiary, the original purpose of the covenant or any other similar factor” [37].

Indeed, in *Re Milbex*, Byrne J did not undertake a detailed analysis of the recent authorities on this matter, save for a brief reference to having “the considerable benefit of a recent analysis of s84 by Morris J in *Stanhill*”. His brief judgment largely focused on the facts of the case. He stated that his task was to “examine the position of the beneficiaries as things now stand in the light of the development permitted upon the subject land and to compare this with their position if the modification were made. If there is no detrimental difference, or the difference is not substantial, s84(1)(c) is satisfied” [13].

The Court was sympathetic to the concern that the development was an “intrusion which might lead to the future detriment of the character of the neighborhood” and recognised that such a concern was capable of amounting to a substantial injury [18]. However, the Court examined the character of the local neighbourhood and found that while the development would lead to a substantial increase in site coverage and population density, the subject land was “entirely surrounded by fairly densely developed properties” [15] and the proposal could not be said to have the effect that the objectors feared [19].

Interestingly, and perhaps signalling the practical focus of this judgment, the Court also made reference to comments by counsel for the plaintiffs pointing out that “it would be possible, consistent with the restrictive covenant, for their clients to build a three-storey single dwelling on the subject land. The development

which would be permitted by the proposed modification would not be more intrusive than such a dwelling for those beneficiaries whose properties abut the subject land” [16].

As to discretionary matters, Byrne J could see no reason to hesitate in granting the modification. Indicative of the strength of counsel’s presentation of the evidence in this case, the judgment unequivocally states that “planning and traffic aspects raise no concern . . . this appears, not only from the reports of the plaintiffs’ witnesses, but also from the fact and terms of the council’s planning permission” [21].

Implications of the decision

In terms of future applications under s84 of the PLA, Re Milbex offers practitioners some important guidance as to the strategic value of certain types of evidence presented to the Court.

The plaintiffs in Re Milbex made a considerable investment in terms of the commission of expert reports on the proposed development, namely an extensive town planner’s analysis and a lengthy report from a traffic engineer. In combination with an unaccompanied site visit to the subject land by Byrne J, and in the context of Morris J’s more policy-based approach, it is arguable that these reports had a significant bearing on the Court’s ability to not only fully understand the evidence presented, but to appreciate the broader town-planning consequences and the impact of the proposed changes on neighbourhood amenity.

However, it is important to note that a central point of difference between Re Milbex and other similar applications is that before the Supreme Court application was made, the plaintiffs had already been granted a planning permit for the proposed development by the City of Port Phillip. This meant that the plaintiffs were able to seek a modification of the covenant which “allowed for the development of a three storey building containing seven dwellings generally in accordance with [the] planning permit . . . ” and not a vague reference to a seven-dwelling building.

Arguably, the practical effect was that the Court was able to “visualise” the proposed development; in the sense that there was some certainty that should the order be made in the form requested by the plaintiffs, the development would not only comply with the town planning requirements of the local authority, but bear a concrete resemblance to the extensive plans and artists’ interpretations presented in court. This was certainly borne out in Stanhill where “the lack of specific plans” appears to have been a significant factor in the Court not approving a development of greater density.⁷

While it is obviously impractical for future applicants to obtain a planning permit before seeking the removal of a restrictive covenant, perhaps one of the lessons from Re Milbex is that there is a definite strategic value in being able to show the

Court, in very specific terms, what it is that the applicants seek to do with the subject land, and through the presentation of empirical evidence to demonstrate how such a proposed development will impact on the local neighbourhood. I

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The numbers in square brackets in the text refer to the paragraph numbers in the judgment.

1. See discussion in P Barton, "Modifying and discharging restrictive covenants in Victoria" (2006) 80(1 & 2) *LJ* 50-53.
2. AJ Bradbrooke and MA Neave, *Easements and Restrictive Covenants in Australia* (2nd edn), **Butterworths** 2000), p508.
3. [2005] VSC 169.
4. [2006] VSC 298.
5. [2005] VSC 235.
6. *Re Cook* [1964] VR 808, at 810-811.
7. Note 3 above, at [69].