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Précis Paper

Restrictive covenants

An examination of restrictive covenants and planning permits in Victoria and NSW.

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Précis Paper

Restrictive covenants in Victoria and NSW

1. **In this edition of BenchTV, Matthew Townsend, Barrister, Owen Dixon Chambers East, Melbourne and Greg Sirtes SC, 12 Wentworth Selborne Chambers, ~~Judge Advocate,~~ Sydney examine differences in the use of restrictive covenants and planning permits in Victoria and NSW.**

Schism between law in NSW and Victoria

2. **It appears there is a schism between the state of law in NSW and Victoria.**

In Victoria covenant before permit

3. **Townsend's work is half in the planning jurisdiction dealt with in the Civil and Administrative Tribunal and the other half through the Supreme Court of Victoria with the modification and removal of restrictive covenants.**
4. **He predominately acts for developers – 70-80 per cent of the time, sometimes acting for local authorities, sometimes for objectors.**
5. **How far into the development process will the dispute in relation to a restrictive covenant find its way before the court?**
6. **In Victoria you have to deal with the covenant before you deal with the planning permit because you cannot get a planning permit if it is inconsistent with the covenant. That's in the Planning and Environment Act so people go to the Supreme Court typically, to deal with the covenant and then they'll go and get their planning permit.**
7. **There's a risk when the developer purchases the property as to whether they can maximise the highest and best use from that property depending on whether they can extinguish the covenant.**
8. **People will get advice before they buy. Sometimes they'll buy it under contract subject to being able to modify the covenant. But quite often if people have held the land for a long time, maybe it's part of a deceased estate, often they'll want to modify the covenant to improve its value before releasing it back onto the market.**

Originating process

9. **The originating process that's filed in order to start those sort of proceedings requires an originating motion, an affidavit from the solicitor in support of that, and typically some evidence from a town planner in support of the application which will go to the court and the court will then order notice to the local beneficiaries. Then there will be a day when everyone comes back, both the applicant and the beneficiaries who have an**

interest in the application. That's where the court determines whether to grant the application or, if contested, set it down for a contested hearing.

10. **In NSW these kind of applications take place in the Equity Division of the Supreme Court because invariably parties will be seeking depositions? in relation to whether or not a restrictive covenant is valid and may well seek injunctive relief to prevent a development taking place. In Victoria, it's not in the Equity Division.**
11. **It's in the common law list of the Supreme Court.**
12. **I think there's a property list that's in the common list in the Supreme Court.**
13. **If there's an objection to a restrictive covenant, typically, the judge will have a view, if the evidence is particularly clear one way or another. Then the judge will decide that the application has failed on its merits, because the applicant, the person seeking to vary the covenant, will have the onus of proving the case. So if the applicant hasn't discharged its burden, the judge will say, I'm not going to even bother having a look at the land. But typically, even in a lightly contested application, the judge will drive out there, have an unaccompanied view and that will inform his or her decision as to whether to allow the modification.**

How long does the process take?

14. **The process for a hotly contested application for a restrictive covenant to be varied or extinguished, ordinarily, if lodged it at the beginning of the year, might be listed towards the second half of the year for a contest, and if you're lucky, you'll get a decision from the judge within three months. A few recently have taken more than 12 months to be determined by the judge. Quite often that's a wild card in the process developers don't anticipate.**
15. **It's very unlikely there will be an appeal from a previous decision. We have been waiting for years to find one going for appeal to the Court of Appeal. The closest was Prowse and Johnstone. There was some suggestion it would go on appeal – I think it got to the first round of the Court of Appeal then the applicant Prowse that was trying to vary the covenant against the whole neighbourhood in Camberwell abandoned the application. So we haven't had an application in what was then the Full Court of the Supreme Court since the 1970s.**
16. **On any day in the Supreme Court, you'll see up to five applications for modification of a restrictive covenant. They're quite often dealt with at the beginning of the list. The barristers who appear in this jurisdiction tend to do a lot of these cases, and tend to have all the paperwork ready, the court's already been through the paperwork and so they're quite often dealt with administratively at the beginning of the morning's list and then the judge goes on to deal with more contentious issues.**

Questions about costs

17. If I'm an objector and a developer wishes to develop a large high rise, ostensibly breaching a restrictive covenant and I see that as a significant impediment to my amenity, will I invariably end up paying the costs if I lose that case?
18. The way in which the law has developed in Victoria is that the court says that you, in asking the court to vary a covenant, are effectively seeking an indulgence from the court. Provided the parties have not acted in bad faith, irrespective of the outcome on the merits, the developer is most likely to indemnify the objectors.
19. The objectors will have to fund the litigation, but all things being equal, at the end of the day when there's a reckoning in relation to costs, the objectors will get their standard costs reimbursed by the developer or the applicant for modification.

Expert evidence

20. The types of costs an objector will face, often involve expert evidence – what kind of expert evidence is typically adduced in these proceedings?
21. Almost invariably on campaigning evidence, which is a curiosity since town planning policy is not a relevant consideration because this is all about property rights and people's contractual rights in relation to contract that will run with the land so what has that to do with town planning policy?
22. Nonetheless, town planners are the professionals deemed most able to explain to the court what the amenity impacts will be on beneficiaries from modification of the covenant.
23. The judge will be interested to hear an analysis of what the covenant will allow and then assess the impact of what the development will be on the beneficiaries. On that basis the judge will typically make a decision.
24. Because the onus is on the applicant developer to prove his or her case, it's not unusual for a beneficiary objector to simply turn up to court and say, 'I don't want the building next to me, it's going to create a precedent, there are no developments like this in the neighbourhood and if you allow this one, it will be the thin end of the wedge', and that argument is often successful.
25. This jurisdiction has a history of being very conservatively interpreted.
26. In NSW, particularly in personal injury law, you usually have experts who line up behind a particular party – either plaintiffs' experts or defendants' experts.
27. With town planners, it's such a specialised area, there's a handful of town planners who give evidence in this area and they typically provide evidence in support of applications for developers. They have been known to act for objectors but they are typically seen as developers' advocates.

Two more differences between NSW and Victoria

28. In NSW, concurrent witness evidence is promoted by the court and mediation is effectively built into the litigation process.
29. To deal with concurrent witness evidence, In the event you have dueling town planners, in Victoria it's not court practice to require them to confer before the hearing and generate a joint report. It's an idea that's popular in other jurisdictions, particularly in relation to building cases, or engineering cases where there's a dispute on the facts but here when you've really got a dispute as to opinion it doesn't tend to happen, certainly in this jurisdiction. Maybe it should. You might suggest it as a tactical measure to force the other side to engage in dialogue with you but it's not often seen.
30. In terms of this kind of dispute, you seem to have a binary outcome. You don't have much chance of compromise – you vary the covenant or you don't. But that doesn't mean mediations are uncommon in this field of practlce. Mediations are now a standard part of the process in Victoria.
31. Notwithstanding it is a binary outcome, even a modification of a single dwelling into a two lot dwelling which you'd think would either be yes or no, in actual fact a mediation would be able to discern a three-dimensional building envelope that agrees to particular setbacks at the ground floor level, the first floor level, any subsequent levels on top. It might deal with landscaping agreements or compensation. What might appear a binary outcome when you drill down can lead to a variety of outcomes.
32. Those mediations are subject to the planning phase - parties could come to a resolution then take it off to the planning phase and find what they've agreed doesn't find favour with the planning authority. That's why you need to leave yourself a degree of flexibility so you might have an agreement to allow a variation generally in accordance with a set of plans which gives you a bit of room.
33. You should get good planning advice right at the beginning of the process from someone who is very familiar with how the planning tribunal deals with these applications so you can see at the outset where it is you need to end up. And you'll judge your application to vary the covenant accordingly to get yourself through.

<u>Del papa facts of case</u>

34. A group of residents were unhappy about an application to modify a restrictive covenant in a very large area of Melbourne in Balwyn which is covered by the one of the largest single dwelling covenant areas and the developer went to the court saying I either want a two lot variation or a three lot sub-division of the covenant, and went to the court not really nominating one or the other.
35. In running the case the applicant retreated into the two-lot subdivision but wasn't able to prove to the court that the application would not have a substantial injury on the beneficiaries.

36. But it was a failure of evidence, the town planner had not walked onto the land to assess the injury over the back fence. This is a classic example where a town planner might write a report never thinking it's going to end up in a contested hearing, then like a frog in a pot finds the water getting hotter and hotter, doesn't go back to walk around the land to see the impact on the beneficiaries. That seemed to be one of the principal bases on which the applicant failed.

Legislation in Victoria and kinds of arguments

37. The applicant in order to vary a covenant in Victoria needs to bring itself within a number of provisions of the governing legislation in this area.
38. There are a number of provisions in the *Property Law Act 1958* (Vic). I think there are a number of provisions in NSW too under the *Conveyancing Act 1919*. The provision typically relied upon is s 84 1c. Under it you have to demonstrate an absence of substantial injury on the beneficiaries by the application.
39. The critical phrase is substantial injury.
40. That is a preferred provision as opposed to some of the other subsections of s 84.
41. One of the other provisions in s 84 might say you have to demonstrate the covenant is obsolete but over a number of years judges have said, in order to demonstrate something is obsolete, you really have to demonstrate it's got no work to do, which is a very difficult test.
42. The test of substantial injury is more open-textured and it does allow for a greater sense of argument as to what constitutes a substantial injury.
43. Substantial injury can really be divided into tangible and intangible effects. Tangible effects might be things like overshadowing, if you have a beneficiary next door who's facing the prospect of a unit development going up, but the intangible is the more challenging test. Because it really says you've got to deal with the issue of precedent. Judges are most mindful not to create a negative precedent that's going to be followed around the neighbourhood by reason of the application being allowed in this case.
44. You're always mindful of not just the direct impacts but the indirect impacts of what might happen in the particular case.
45. The objector may have a highly subjective view about the development – for example, 'I don't like it, it's ugly'. There's a decision of Justice Cavanough in the Supreme Court *Prowse v Johnstone* in 2012, where the judge said a subjective assessment of the impact is a relevant consideration. One would think that's going to have a degree of objectivity when it's interpreted by the court but nonetheless the court is happy to take into account that you and the other beneficiaries really don't want this in your neighbourhood.
46. In that sense there is an element of subjectivity contemplated or allowed for by the court in assessing what constitutes substantial injury.

47. Melbourne seems to have quite a few of these restrictive covenants which were a product of a particular era or time. Most of the covenants start around 1910, there was a great flourish in 1920s and 30s. They are still being introduced today in some of the more modern subdivisions.

48. They are really a primitive form of planning control, a covenant would say you have to spend more than 300 pounds to do your build, you can only use bricks, you may need to have particular plans approved, you can't use your land for a quarry, it's a primitive way of ensuring a quality residential estate. Over the years planning schemes have been introduced so the work covenants have to do becomes less.

49. How do we deal with obsolescence in the context of, for example, a covenant which was introduced into parties in 1910, in an urban environment which has gone through rapid and considerable postwar change? We're literally more than 100 years down the track from when parties decided to impose these covenants on developments.

50. The courts take the view, and it's really the single dwelling component of the covenant that's the most contentious, even if there is a little medium density there, the single dwelling covenant still has some work to do, and while it does, we're not prepared to go so far as to say it's obsolescent. Which again means an applicant is more likely to apply under the substantial injury test, rather than on the grounds of obsolescence because it really seems to be a difficult test to satisfy.

51. As well as obsolescence and substantial injury, there are other grounds on which you can challenge a covenant.

52. You could challenge one if you could demonstrate that people have effectively rested on their rights, seen development occur and done nothing about it. You might be able to use that ground, but there are very few cases where people have argued that provision of the *Property Law Act 1958* (Vic).

53. Single dwellings are the most common covenants by an order of magnitude. The other type of covenants we often see are covenants in relation to building materials. In a case recently a developer had got a planning permit that required him to build out of brick, but a builder, after the planning permit had been issued, decided it would be cheaper to build out of lightweight construction, a polystyrene product with a render, so it might look identical but the local council would not give a permit for that variation because it was inconsistent with the restrictive covenant.

54. But by this stage the building had already been built. The applicant sought a variation to the covenant to allow the planning permit to be issued. Happily no one objected. The covenant was modified, the permit was modified and the building was regularized.

55. That covenant was introduced in the 1950s, it even required the use of a brick veneer. In the 1920s it might have said brick but brick veneer as a means of construction was introduced and was added to the covenant. This covenant was from the 1940s, 1950s.

56. The purpose was to bring in uniformity in a suburb or area and give an impression of quality. In the advertising brochures we see 'Covenance requiring brick and slate' so it's almost a marketing message. 'This is a quality subdivision, you'll be happy to live here.'
57. There is considerable development in Melbourne. In some places developers themselves are imposing covenants. You'll see, for instance, Mirvac introduced covenants on the Beacon Cove development around Port Melbourne, requiring a building to the satisfaction of Mirvac. Essentially, it meant you can have a particular design, we want to be the arbiter of design up until the subdivision is established. The covenant might only have a life for 25 years, but again this is a way in which the developer can ensure quality control until the land sales. Once the land has been sold and Mirvac or the developer which has done the subdivision is long gone, they don't see a need for the covenant any more, then so long as it has a particular period then that might be the way in which it is designed.
58. Most covenants don't have time limitations attached. We still see single dwelling covenants that don't have time limits on them but not necessarily those where developers retain control over the plans.
59. A major difference we've discussed between NSW and Victorian law is the proliferation in NSW of provisions in what we call local environmental plans that are passed by local councils in NSW. For example, one of the provisions of the Lara local environmental plan passed in 2014, that provides 'For the purpose of enabling development on land in any zone to be carried out in accordance with this Plan or with a consent granted under the Act, any agreement, covenant or other similar instrument that restricts the carrying out of that development does not apply to the extent necessary to serve that purpose.' That kind of provision is not prevalent in Victoria.
60. It actually makes a lot of sense, it's effectively a means by which the government has said planning controls will take precedence over the restrictive covenants in NSW, presumably in areas of strategic importance for growth. What has happened in Victoria is the reverse so, at one point prior to 2000, you could get a planning permit quite inconsistent with a restrictive covenant. A lot of people would go to the Victorian Civil and Administrative Tribunal saying I don't want this development to go ahead. It contravenes a restrictive covenant, and the tribunal would say it's nothing to do with us.
61. In 2000, an amendment to the *Planning and Environment Act 1987* (Vic) effectively said, 'you need to deal with this restrictive covenant before you get a planning permit. We're not going to give you a planning permit if it's inconsistent with the restrictive covenant.'
62. In NSW the government has given primacy to planning controls while in Victoria the Victorian government has said we're going to give primacy to restrictive covenants. Which is quite an extraordinary divergence and one would have to say made in response to domestic political pressure in the eastern suburbs of Melbourne. But I can understand the policy behind the NSW system saying in these particular areas, because

they're so significant from an economic or strategic planning perspective we're going to give primacy to the planning controls.

63. In terms of Victoria, the planning laws are subjugated to what could be some quite ancient inter-parties agreements but they're infrequent outside of Melbourne. You might get some in the older goldmining town like Ballerat and Bendigo but.they are very much the exception.

BIOGRAPHY

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Matthew Townsend has been a barrister for more than 20 years and practises exclusively in planning and environment and property law. He has taught in the Trial Practice and Advocacy program at Monash University and lectures in planning and environmental law at the Leo Cussen Institute.

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Greg Sirtes is a senior member of 12 Wentworth Selborne Chambers. He also sits as~~,~~ a Judge Advocate and Defence Force Magistrate in the Australian Defence Force. His practice is primarily in property, probate, professional negligence, contracts, ~~and~~ building and construction, insurance and corporations matters.

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