



Précis Paper

When a building scheme impacts the land purchaser – the significance of *Randell v Uhl* [2019] VSC 668

Abstract – In *Randell v Uhl* the Supreme Court of Victoria made clear the sort of notice necessary for a building scheme to be effective against a purchaser of land. The Register search has to, either directly or indirectly, disclose the existence of a building scheme in order for a purchaser of a piece of land to be bound by it.

Discussion Includes

- NSW and Vic law (1:07)
- Why significant decision (2:45)
- Who needs to be familiar with these rules? (3:43)
- Details of the case (5:07)
- What is a building scheme in Vic? (10:24)
- Issues in the case (15:21)
- Evidence in the case (17:23)
- Five elements of a building scheme (22:49)
- Findings (28:20)
- Nature of case in Supreme Court and in VCAT (33:23)

Précis Paper

When a building scheme impacts the land purchaser – the significance of *Randell v Uhl* [2019] VSC 668

1. In this edition of BenchTV, Gregory Sirtes SC (Barrister) and Matthew Townsend (Barrister) discuss the significance of the Supreme Court of Victoria decision in *Randell v Uhl* [2019] VSC 668.

NSW and Vic law

2. Since 2000, in Vic to get a planning permit you have to be able to reassure the planning system you're not going to breach a restrictive covenant. It forces the person to go to court to vary the covenant before the application for planning permission is made.
3. In NSW you can get development approval even if it means it's inconsistent with the restrictive covenant. Then if you decide to build or act on your development permit without first having dealt with or varied the restrictive covenant you're exposed to having the covenant enforced against you by a beneficiary of it. That's sorted out in Vic beforehand which means a lot of people go through the Supreme Court to get their ducks lined up in a row before then seeking planning permission.

Why significant decision

4. In the decision Associate Justice Derham made it crystal clear the sort of notice necessary for a building scheme to be effective against a purchaser of land. The Register search has to directly or indirectly disclose the existence of a building scheme in order for a purchaser of land to be bound by it.
5. Until this decision it was not clear what was necessary for a building scheme to apply or not apply.

Who needs to be familiar with these rules?

6. Property lawyers need to understand the extent of beneficiaries who can enforce restrictive covenants because quite often restrictive covenants will say everyone who is the owner of a lot within a plan or subdivision has the benefit of the covenant but it's not until you find out who's got a direct contractual relationship to work out who's got the benefit of the covenant.
7. But if there's a building scheme it may be there's an interlocking network of covenants between different blocks in the subdivision where there doesn't need this privity to be established so you can have a wide network of covenants and every lot within the plan or subdivision has the benefit and the burden of the restrictive covenant. If you try to amend

your restrictive covenant you're not only going to be opposed by someone down the road but quite possibly by the whole neighbourhood.

Details of the case

8. Randell bought two lots next to each other in Templestowe in north Melbourne and wanted to build a house on each of them. But he found there was an encroachment of a building on one of the lots already so he couldn't build on that particular lot.
9. He tried to vary the covenant.
10. There were over 20 defendants in the case. The entirety of the neighbourhood came out to prevent the covenant being varied.
11. Since the 1940s it had remained a heavily treed block and effectively become a nature reserve in the street.
12. There was an array of objections – including increased traffic, increased noise, change of neighbourhood character.

What is a building scheme in Vic?

13. A building scheme is an attempt by a subdivider of land prior to the introduction of planning schemes to have the effect of a planning scheme. So it might try to limit the nature of a subdivision, effectively to create a community by a set of rules, such as we would now see in planning schemes.

Issues in the case

14. There was an issue as to whether there was a building scheme at all and an issue as to whether the client had notice of that building scheme.
15. The Court found that there was a building scheme but he wasn't bound by it.
16. The issue was whether a subset of the defendants were entitled to have their concerns taken into account or whether it was a larger group of people. Because the Court found that Mr Randell didn't have proper notice of the building scheme there was only a subset of beneficiaries that had standing to participate in the proceedings.

Evidence in the case

17. Typically, in a restrictive covenant case both sides will call expert evidence. Where evidence is of a technical nature there is a good argument for 'hot tubbing' – caucusing of expert evidence. Planning evidence tends to be more subjective with less benefit in hot-tubbing.
18. The planning evidence went to the question of substantial injury. The existence or otherwise of the building scheme was a question of law.

Five elements of a building scheme

19. His Honour crystallised the five elements of a building scheme: 1. Plaintiff and vendor must derive title from a common vendor. 2. The estate must be laid out prior to sale with the intent to impose the restriction on all lots. 3. The restriction was for the benefit of all lots. 4. The lots were purchased on the footing the restrictions would apply to all lots. 5. The covenant network affected the defined area.
20. There was a historical analysis of the evolution of the land over the last 70 years to ascertain these elements.
21. In Vic there's a section 32 statement – as part of the sale process there's a statement to accompany the contract of sale that discloses certain documents, including a search of the Register.

Findings

22. His Honour found there was a building scheme.
23. His Honour followed the finding in *Vrakas*. It 'would render conveyancing a hazardous and cumbersome operation, and ... would defeat the object of the Act and destroy ... the efficacy of the system ... '.
24. His Honour clarified what the standard of investigation was. You're entitled to take at face value the Register search statement. You're obliged to look at the documents that are referred to on the Register search. But you are not obliged to go any further. It was the clarity of the test that was significant in this case.
25. His Honour ultimately found the title did not disclose the building scheme.
26. With the modification to the covenant Mr Randell could now go to his local council and put in an application for development permission. He did that and it was refused. He's now seeking planning permission at VCAT.

Nature of case in Supreme Court and in VCAT

27. Is there any overlap between the arguments in the two courts?
28. The planning issues are a matter for another day. In the Supreme Court, his Honour was apprised in broad terms of what they were doing, the architectural plans, but the more detailed or granular issues were to be examined later on in the planning tribunal.

BIOGRAPHY

Gregory Sirtes SC

Barrister, 12 Wentworth Selborne Chambers, Sydney

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, building and construction, insurance and corporation matters.

Matthew Townsend

Barrister, Owen Dixon Chambers East, Melbourne

Matthew Townsend has been a barrister for more than 20 years and practises exclusively in planning and environment and property law. In 2000 Matthew was awarded the Public Interest Law Clearing House Pro Bono Award by the Governor of Victoria for his work in environmental litigation. He was Dux of International Environmental Law at Leiden University in Holland in 1992 and the inaugural winner of the JF Kearney QC prize in environmental law in 1991.

BIBLIOGRAPHY

Focus Case

Randel v Uhl [2019] VSC 668

Benchmark Link

https://benchmarkinc.com.au/benchmark/insurance/benchmark_08-10-2019_insurance.pdf

Judgment Link

<http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2019/668.html>

Cases

Vrakas v Mills [2006] VSC 463

Legislation

Sale of Land Act 1962 (Vic)

Transfer of Land Act 1958 (Vic)