

FOLEY'S | LIST

INTERPRETATION OF RESTRICTIVE COVENANTS

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INTERPRETATION

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Two recent Victorian cases discuss how the rules of interpretation of restrictive covenants coincide with those for other contracts except where Torrens system legislation restricts the background material that can be considered. **By Philip Barton**

Uncontroversial construction principles

Cavanough J commenced by noting that the words of a covenant were generally to be given their ordinary and everyday meaning and not be interpreted in a technical or legal sense, and must be construed in context and upon a reading of the whole of the instrument.⁴ Accordingly, although the proper construction of the instrument was a question of law, the meaning of a particular word or expression may be a question of fact, particularly where the court had already determined as a matter of construction that it was used in its ordinary and natural meaning (at [53]); although a decision upon an expression in one instrument could only be applied with great caution to that in another instrument (at [54]).

Use of extrinsic material

Cavanough J also considered whether the principles of interpretation of restrictive covenants over Torrens system land differed from those for interpretation of contracts generally. He noted that, while considerable

A restrictive covenant is an agreement that restricts the use or enjoyment of certain land for the benefit of other land. It is typically imposed in a transfer from a subdivider of a lot in a subdivision whereby the purchaser, on both its own behalf and on that of its successors in title, agrees with the vendor, on both its own behalf and on that of its successors in title, to refrain from certain actions on that lot. In the recent Victorian cases of *Prowse v Johnstone (Prowse)*¹ and *Subr & Ors v Michelmore & Ors (Subr)*² the Supreme Court of Victoria discussed the principles of covenant interpretation. *Prowse* also discussed the interpretation of the most ubiquitous type of

covenant – a single dwelling covenant. This article considers these cases.

Prowse v Johnstone

The central prohibition in a 1912 covenant burdening the plaintiff's two lots in a residential estate was not to "erect more than one house" on each lot. The covenant also restricted building materials, and prohibited certain excavations, trade or business use, subdivision, and reduction of frontage. The plaintiff proposed to erect a three-storey building comprising 18 residential apartments with basement car park. She sought a declaration that such a development, generally in accordance with her current architectural plans, would not breach the single dwelling restriction.³





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authority held that they did not differ,⁵ *Westfield Management Limited v Perpetual Trustee Company Limited (Westfield)*⁶ now suggested otherwise. In *Westfield*, when considering an easement contained in a registered instrument under the NSW Torrens legislation, the High Court stated that:

“Rules of evidence assisting the construction of contracts inter partes, of the nature explained by authorities such as *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (53) [Footnote 53: (1982) 149 CLR 337 at 350–352], did not apply to the construction of the Easement”.⁷

The passage referred to in *Codelfa* appears to be that which materially concluded:

“The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning”.⁸

The High Court explained this non-applicability in *Westfield*:

“The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee.

“... evidence is admissible to make sense of that which the Register identifies by the terms or expressions found therein. An example would be the surveying terms and abbreviations which appear on the [deposited] plan ...

“But none of the foregoing supports the admission in this case of evidence to establish the intention or contemplation of the parties to the grant of the Easement”.⁹

Notwithstanding that *Westfield* concerned an easement under NSW law, Cavanough J noted (at [57]) indications in the High Court’s reasoning that it would apply to restrictive covenants in Victoria, including “fundamental considerations” related to the Torrens system.

Prowse on the limits of *Westfield*

However Cavanough J (at [58]) also quoted, without disapproval, recent New South Wales

authority that, notwithstanding *Westfield*, a registered document should be construed as having the meaning that a reasonable reader, with the knowledge of the surrounding circumstances available to him or her, would attribute to it – the reader could still consider surrounding circumstances limited to those that are knowable without evidence from outside the terms of the document¹⁰ such as “the material in the folio identifiers, the registered instrument, the deposited plans and the physical characteristics of the tenements”.¹¹ Cavanough J applied this accordingly to take into account that the instrument before him was executed as part of a residential subdivision, and that, because this was discoverable from reading the covenant and searching the register, covenants throughout the estate were imposed with a view to establishing a residential estate of a particular character (at [56] and [58]). Cavanough J then interpreted the covenant before him. However, as *Subr* also grappled with *Westfield* it is convenient to turn to it before returning to *Prowse*.

Subr v Michelmore

In *Subr*, a 1937 covenant inter alia restricted erection of “any building of a greater height than twelve feet above the present level of the land hereby transferred”. It was common ground that these words referred to the 1937 level, but the plaintiffs also contended that the covenant was void for uncertainty because this level could not be determined without extrinsic evidence prohibited by *Westfield*. Pagone J rejected this argument. Against the background that courts should strive to construe terms to give them effect where that was fairly open, and that any doubt in meaning should be construed against the covenantor,¹² Pagone J held (at [7]) that, notwithstanding the strictures of *Westfield*, a properly construed covenant could itself require reference to extrinsic material. The critical task was to construe what the Register by its words identified, and the reader may thereby be put on notice to look elsewhere to give effect to this.¹³ This covenant unambiguously directed attention to the level of the land and accordingly the Court could determine this (at [17]), just as it could if the level had been expressed by

reference to datum kept by a public body (at [7]). Conversely, topographical evidence could be led to show that a term in a covenant was void for uncertainty.¹⁴ But evidence from witnesses of a historical nature about the land, including childhood recollections and family photos, was prohibited by *Westfield*.¹⁵

Interpretation of the covenant in *Prowse*

Returning to the covenant in *Prowse*, the plaintiff chiefly argued that, as “house” had a wide and varied meaning, its meaning depended on the context dictated by “erect”, and this building would present (a proposition ultimately rejected by Cavanough J (at [47])) as one house as commonly understood. This argument failed, chiefly because the ordinary and everyday sense of “house” was a residence designed for occupation by one household or family, which interpretation was here supported by: the context supplied by prohibition of trade and business use, and of subdivision and frontage reduction, and the promise to erect “not more” than “one” house, and; the covenant object to constrain population density (at [61]-[63]). Cavanough J also considered whether his conclusion fitted with previous authority, the chief Australian authorities being as follows:

In *Ex parte High Standard Constructions Ltd*¹⁶ the restriction was to “only one house” and that no building erected upon the land should be used in a certain way. In this case “house” was construed not as synonymous with building but as used in its primary meaning of dwelling house. Whether a building containing several residential flats constituted one dwelling house was said by the Court to depend upon the nature of its construction, and thus¹⁷ no common front door or staircase, no internal communication, and complete structural separation of units constituted separate dwelling houses;¹⁸ but a two-storey dwelling house let as two flats, one lessee having the ground floor and the other the staircase and the upper floor, and both using the same entrance hall, did constitute one dwelling house; and borderline were facts similar to those subsequently occurring in *Prowse*, which absent any controlling context would constitute one dwelling house. However in *Prowse* (at [73]) there was a contrary controlling context of either the building being a block of flats or because, notwithstanding the single entrance and internal communication, it would present as such.

In *Natraine Nominees Pty Ltd v Patton (Natraine)*¹⁹ Smith J determined that a two-unit development did not breach a covenant

prohibiting erection of any building except a brick building to be used exclusively as a residence or dwelling house. Cavanough J (at [74]) distinguished *Natraine* because that covenant did not qualify “dwelling house” with words such as “one”, “single” or “private”, and because in *Natraine* the word “residence” had influenced a wide interpretation of “dwelling house”.

In *Longo Investments Pty Ltd (Longo)*²⁰ Osborn J stated that there was much to be said for the view that a hostel comprised of individual bedrooms and communal facilities, and designed and intended to operate as one “household”, constituted a “dwelling house”. Cavanough J distinguished *Longo* (at [76]) because *Prowse* did not concern one household.

In *Tonks v Tonks*²¹ the prohibition against erecting any building other than “a” (as opposed to “one”) dwelling house was held not to restrict the number of dwelling houses that could be erected. Cavanough J noted (at [85]) that in *Prowse* the word “one” did appear before “house”.

Conclusion

The following covenant drafting principles can accordingly be drawn:

- words will generally be read in their ordinary meaning, eg “house” as meaning a residence designed for occupation by one household or family;
- ensure that the context does not inadvertently alter what you intend to say;
- it may assist to see how a court has interpreted particular words, but this interpretation is not conclusive; and
- if the document is to be registered, then the covenant will be read in light of only those surrounding circumstances knowable from its terms and from a search of the Register. However, you can use terms that give the reader notice to look elsewhere to give effect to what the Register notifies. ●

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1. [2012] VSC 4.
2. [2013] VSC 284.

3. Failing which covenant modification was sought, which also failed: see on covenant modification articles by the author at (2012) 86 *LIJ* December p50 and by Matthew Townsend at (2013) 87 *LIJ* April p58.
4. At [52]. Eg application of the dictionary definition of “message” in *Re Djurovic* [2010] VSC 348.
5. Eg. *Tonks v Tonks* [2003] VSC 195 at [7].
6. (2007) 233 CLR 528. Discussed in *Prowse* at [57].
7. Note 6 above at 539.
8. (1982) 149 CLR 337 at 352.
9. Note 6 above at 539–541.
10. *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64.
11. *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2008] NSW Conv R 56-200, at [16].
12. Note 2 above at [15].
13. At [9]. Similarly, benefiting land may be identified by a description in the covenant of land in general or known terms aided by extrinsic evidence: *Pollard v Registrar of Titles* [2013] VSC 286 at [19].
14. *Ellison v O'Neill* (1968) 88 WN (Pt 1) NSW 213 (“mean lateral level”).
15. Note 2 above at [20].
16. (1929) 29 SR (NSW) 274.
17. *Prowse* [72].
18. Similarly: *Cobbold v Abraham* [1933] VLR 385; *Re Marshall and Scott's Contract* [1938] VLR 98.
19. [2000] VSC 303.
20. [2003] VSC 37.
21. [2003] VSC 195.