Restrictive Covenants - continued.

A successful application was made to modify a single dwelling restrictive Covenant in the Supreme Court. (Wong v McConville & Ors [2014] VSC 148) The Plaintiff wanted to subdivide land in Pascoe Vale Road, Strathmore into two lots. There was an existing dwelling at the front of the lot. The new two storey dwelling would be built at the rear of the lot. The central issue identified by the Court, and reiterated throughout the decision, was whether the Plaintiff had established that the proposed discharge or modification would not substantially injure the persons entitled to the benefit of the restriction (see s 84(1)(c) of the Property law Act). That, said the Court, required a comparison between the benefits initially intended to be conferred and actually conferred by the Covenant, and the benefits, if any, which would remain after the Covenant had been discharged or modified in the manner proposed. It was the opinion of the Court that there was no difference of substance between what the Plaintiff proposed if the modification of the Covenant was allowed when compared with what could presently be built on the land if redeveloped for a single dwelling with no modification being made. [Pars 8 and 9]

Town planning evidence was called by the Plaintiff and Defendants. A large number of changes to the neighbourhood since the time the Covenant was created in 1951 were identified by the Plaintiff's witness. The Defendant Zhang gave evidence of the injury he perceived would be sustained to his property should the Covenant be modified. The Court set out the guiding principles that govern an application to discharge or modify a restrictive Covenant, elucidated in Vrakas v Registrar of Titles [2008] VSC 281. [Par 33]

It was common ground between the expert witnesses, and plain from a reading of the Covenant, that it did not restrict either the size or height of the single dwelling, nor did it preserve in terms any 'garden character', otherwise than indirectly by virtue of a 9 metre setback restriction and the single-dwelling restriction.

An examination of what could be built on the land without any modification to a Covenant is something the Court can take into account. In this case, the Judge undertook an inspection and noted "… the fact that the more recently constructed houses were, as seems to be the trend all around Melbourne's suburbs, huge and bulky, taking up substantially all the available land of the Lot in question". He further noted [Par 55] that the intention of the Covenant is evidenced by what it does not say as much as by what it does say. "Importantly, there is no limitation on building coverage, site permeability or plot ratio, and no specified building envelope."

It was of some significance to the ultimate decision of the Court that:

> "Thus, without any modification to the Covenant, the Land can be developed with a single dwelling of substantial dimensions …. Planning laws did not restrict the size and bulk of a single dwelling on the Land in the way in which the current dwelling has been constructed … a large two storey dwelling could be erected on the Land which has the same characteristics as the additional dwelling proposed to be erected at the rear of the Land, with a second storey having shadowing and overlooking characteristics worse than the proposed development". [Par 57]

In a follow up case (Wong v McConville & Ors (No.2) [2014] VSC 282) the Court considered an application for costs with respect to the earlier hearing. The Court noted that the usual rule - that the successful party be paid its costs by an unsuccessful party - did not apply in the case of a restrictive Covenant application. That is, it would be rare for a successful Plaintiff to be deprived of

costs. However, Covenant modification or removal applications are of a nature where the usual rule does not apply. In many cases, the successful Plaintiff will be ordered to pay the costs of the Defendant.

In this case the Plaintiff made offers to change the development (increased set backs and the like) in an attempt to appease the objectors during the lead up to the hearing of the case. These offers were made on the basis that should they not be accepted, and if the Defendant gained a less favourable outcome than that offered, an application would be made that the Defendants pay the Plaintiff's costs from the date the offer was made.   This process is known as a "Calderbank" offer.

Ultimately, the offers were not accepted, and the outcome for the Defendants was less favourable than that offered by the amended plans. That is, the Covenant was modified as sought. Notwithstanding, the Court found that the Defendants should not be required to pay the Plaintiff's costs, but that the Plaintiff should instead pay the Defendants' costs. The Defendants had not unreasonably rejected the offer; that is to say, the Plaintiff had not satisfied the Court that it was unreasonable of the Defendants to reject the offers. Considerations to which the Court turned its mind included:

- At what stage of the proceeding was the offer made;
- how much time was allowed for the offeree to consider the offer;
- What was the extent of the compromise offered;
- What were the offeree's (Plaintiff's) prospects of success a at the date of the offer;
- was the offer expressed in clear terms; whether the offered included a statement that if it was rejected, there may be an application for indemnity costs.