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Caveats, covenants and couch-surfers: recent developments in property law

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The law on property and proprietary rights is constantly evolving. This paper seeks to explore that evolution in light of a number of recent Victorian cases, each representing a unique development in the law and providing, it is hoped, a useful point of reference should practitioners encounter a similar legal or factual conundrum of their own.

Removal of caveats

The recent Victorian Supreme Court decision in *Yuksels Nominees Pty Ltd v Nguyen & Anor*[1] has provided some useful guidance about the removal of caveats under the *Transfer of Land Act 1958* (the 'TLA'). The decision is of note because it illustrates:

- circumstances where an application for removal of a caveat may or may not be considered 'vexatious' for the purpose of section 89A(3)(b) of the TLA; and

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* Like many barristers, Cameron's liability is limited by a scheme approved under Professional Standards Legislation. This paper is intended to be of a general nature only, and does not constitute advice. The law evolves, and the material discussed in this paper may be subject to change. This is a revised version of a paper which was presented to members of the Goulburn Valley Law Association, Shepparton, 26 October 2016.

[1] [2015] VSC 663.

- a court's discretion when contemplating removal of a caveat under section 90(3) of the TLA.

The facts

Yuksels Nominees Pty Ltd ('Yuksels'), the plaintiff in the proceeding, was sole proprietor of a property in Sunshine. The first defendant, Ms Nguyen, lodged a caveat over the property. The caveat referred to part-performance of an oral agreement said to have arisen between Ms Nguyen, Yuksels and other parties.[2]

Concurrently, Ms Nguyen was the plaintiff in a County Court proceeding seeking damages for breach of an employment contract she had with a number of parties including Yuksels. She alleged that it was a term of the contract that Yuksels or one of its related parties would grant her, amongst other things, the right to purchase a penthouse at the Sunshine property at cost price. She alleged various breaches of the contract, and sought relief including damages, debt, and a declaration that certain moneys were to be held in trust.

Yuksels applied to the Supreme Court for removal of the caveat pursuant to section 90(3) of the TLA. On Yuksels' case, it could not borrow to finance the development while the caveat was in place. Ms Nguyen opposed the application on the basis there was another proceeding on foot to substantiate her caveat; any attempt to remove the caveat would prima facie be vexatious and ought be stayed.

In determining whether the caveat ought remain in place, the threshold issue arose, then, as to whether Yuksels' application for removal of the caveat was 'vexatious' in light of the County Court proceeding.

Was the application for removal of the caveat 'vexatious'?

Section 89A permits 'any person interested in the land' which is affected by a caveat to apply to the Registrar of Titles for its removal. Section 89A(3)(b) states:

> *'Upon receiving any such application and certificate and upon being satisfied that the applicant has an interest in the land in respect of which the application is made, the Registrar shall give notice to the caveator that the caveat will lapse as to the land and the estate or interest therein in respect of which the application is made on a day specified in the notice unless in the meantime either —*
>
> *(a) ...*
>
> *(b) notice in writing is given to the Registrar that proceedings in a court to substantiate the claim of the caveator in relation*

[2] The second defendant was the Registrar of Titles.

> *to the land and the estate or interest therein in respect of which the application is made are on foot'.*

The matter was heard before T. Forrest J. In addressing the question of whether there was another proceeding on foot in relation to the property the subject of the caveat, his Honour looked to the substance of the County Court Writ. His Honour held that the County Court proceeding did not constitute 'proceedings in a court to substantiate the claim' for a caveat within the meaning of section 89A(3)(b), finding that Ms Nguyen had not sought a declaration, or any other form of relief, that could be said to be referable to the caveatable interest. There was, as his Honour observed, 'no reference in the entire 27 page document to the caveat or to [s 89A(3)(b)] of the Act'.[3]

His Honour also found that although Ms Nguyen's claim for damages was referable to the contract said to have been breached — such contract relating to the Sunshine property — the claim did not demonstrate the existence of a proceeding on foot to substantiate the caveat. His Honour observed:

> *'In the County Court proceeding, [Ms Nguyen] does not seek to establish any proprietary interest in the [Sunshine] property, but rather seeks to claim damages for breach of an alleged agreement'.*[4]

Consequently, his Honour held that the application in the Supreme Court for removal of the caveat was not prima facie vexatious.

Application for removal of the caveat

Pursuant to section 90 of the TLA, a caveat lapses where 30 days' notice has been given to the caveator of a registrable transfer or dealing having been lodged. Section 90(3) provides:

> *'Any person who is adversely affected by any such caveat may bring proceedings in a court against the caveator for the removal of the caveat and the court may make such order as the court thinks fit'.*

Turning to the merits of the application for removal of the caveat under section 90(3), and being guided by the principles in *Piroshenko v Grojsman*,[5] his Honour found, first, that there was no prima facie case justifying the maintenance of the caveat. Although Ms Nguyen had advanced an argument in the County Court about a constructive trust, the trust was referable to the holding of money rather than the property the subject of the caveat.

Secondly, in identifying where the balance of convenience lay, his Honour looked to whether damages might be an adequate remedy were the caveat to be

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[3] *Yuksels Nominees Pty Ltd v Nguyen & Anor* [2015] VSC 663, [7].

[4] Ibid [8].

[5] [2010] 27 VR 489.

removed and held it 'impossible … for [Ms Nguyen] to maintain that damages are an inadequate remedy when the only remedy claimed in the County Court action are damages'.[6] For that same reason, his Honour could not identify any prejudice to Ms Nguyen should the caveat be removed.

Finally, his Honour considered the prejudice to Yuksels in maintaining the caveat. In particular, his Honour considered Yuksels' argument that the caveat would hamper the development's finance. His Honour held that '[i]n a large property development such as this, it is plausible that having finance in place early would be highly desirable, particularly where sales off the plan are proposed'.[7]

For those reasons, His Honour proceeded to order the removal of the caveat.

Conclusion

When encountering an application for removal of a caveat, the decision in *Yuksels Nominees Pty Ltd v Nguyen & Anor* demonstrates the importance of identifying the caveator's underlying claim. As that case demonstrates, the form of relief a caveator seeks can be relevant to the question of whether an application to remove the caveat might be vexatious, and also to determining whether there might be any prejudice to the caveator should the caveat be removed.

Residential tenancies and the 'sharing economy'

The Victorian Supreme Court has ruled on an appeal from a decision of the Victorian Civil and Administrative Tribunal ('VCAT') regarding the proper characterisation of an 'Airbnb' arrangement at property the subject of a residential tenancy. In the case of *Swan v Uecker*,[8] Croft J held that the Airbnb arrangement in question gave rise to a lease and as such breached the tenants' duty under the tenancy agreement not to sub-let the property.

Although ruling in favour of the landlord, the Court noted the public interest in the case and made clear that the outcome of the appeal did not in any way bear upon the merits or legality of Airbnb arrangements generally. The Court's decision nevertheless is important because it illustrates the intersection between the 'sharing economy' and residential tenancy law, and it is a decision that may have consequences for arrangements with similar facts.

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6 *Yuksels Nominees Pty Ltd v Nguyen & Anor* [2015] VSC 663, [12].

7 Ibid [14].

8 [2016] VSC 313.

The facts

The landlord was owner of a two bedroom apartment which she let to two tenants in August 2015. A few months after commencing the lease commenced, the landlord discovered the tenants had been advertising the apartment for short-stay type accommodation on the popular accommodation website, Airbnb.

The apartment was subject to two separate listings on Airbnb, namely:

- making the entire apartment available to guests at a rate of $200 per night; and

- making only one bedroom available to guests at a rate of $102 per night.

The tenancy agreement expressly forbade sub-letting. Upon becoming aware that the tenants had made the apartment available on Airbnb without her consent, the landlord deemed the tenants in breach of the tenancy agreement and issued a notice to vacate under section 253 of the *Residential Tenancies Act 1997* (Vic) (the 'RTA'). That provision states:

> *'Assignment or sub-letting without consent*
>
> *(1) A landlord may give a tenant a notice to vacate rented premises if the tenant has assigned or sub-let or purported to assign or sub-let the whole or any part of the premises without the landlord's consent.*
>
> *(2) The notice must specify a termination date that is not less than 14 days after the date on which the notice is given'.*

When the tenants failed to vacate, the landlord applied to VCAT for an order for possession.

The Tribunal heard the landlord's application for possession in March this year.[9] The Tribunal found that the Airbnb arrangement in question did not give guests exclusive possession of the apartment; it conferred a licence to occupy rather than a lease. The Tribunal went on to dismiss the landlord's application for possession on the basis the tenants had not sub-let the apartment for the purposes of the RTA.

On appeal

The landlord applied for leave to appeal to the Supreme Court. The Court granted leave on the basis there was a sufficiently arguable case being put by the landlord, and that the questions raised on appeal were of public importance. The Court then proceeded to consider the substantive appeal.

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9 *Swan v Uecker (Residential Tenancies)* [2016] VCAT 483.

In approaching the issues on appeal, Croft J clarified that it was only the Airbnb arrangement for the occupation of the entire apartment, rather than the single bedroom, that was the subject of the appeal.

Lease or licence?

In addressing the question of characterisation of the particular Airbnb arrangement, Croft J held that '[i]t is well accepted that, as a matter of law, the test to be applied to distinguish between a lease and a licence is whether or not what is granted is exclusive possession'.[10] His Honour quoted a passage from the decision of Mahoney JA in *Lewis v Bell*,[11] which included:

> *'In deciding … whether what has been granted is the right to exclusive possession, the court, in the process of construction, has in practice looked, inter alia, to two things: the nature of the rights which, in terms, have been granted; and the intention of the parties'.*[12]

Referring to this principle, Croft J held that the relevant 'intention of the parties' is to be ascertained 'objectively on the basis of the terms of the particular agreement … and having regard to surrounding circumstances to the extent that is permissible according to the ordinary rules of construction'.[13]

The tenants submitted that the relevant 'surrounding circumstances' of the case were such that there was no exclusive right to possession and therefore no sub-lease. In doing so, the tenants drew an analogy between the Airbnb arrangement and occupancy by guests at a hotel.

Substance over form

The Court rejected the tenants' arguments, holding that the hotel analogy did not assist the tenants' case. His Honour stated:

> *'[T]he characterisation of an agreement … depends upon the proper construction of that agreement — looking to substance and not form — and having regard to relevant surrounding circumstances. This is not a process that can be transcended by drawing broad analogies with, for example, a hotel or various species of serviced apartments'.*[14]

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[10] *Swan v Uecker* [2016] VSC 313, [31]; see *Radaich v Smith* (1959) 101 CLR 209.

[11] (1985) 1 NSWLR 731.

[12] Ibid 735.

[13] *Swan v Uecker* [2016] VSC 313, [31].

[14] Ibid [40].

His Honour also stressed the importance in not characterising the arrangement by reference to the remedies available to an occupant; it would be to 'invert the process of characterisation' to identify the remedies available to an occupant and then work backwards to ascertain what the arrangement might best be characterised as under law.[15] In the present case, it was irrelevant to the question of the legal characterisation of the arrangement that the tenants could require the Airbnb guests to depart once their agreed period of occupation had ended. His Honour also held that 'the practicality or otherwise of exercising such rights is not a matter that goes to the characterisation of the arrangement'.[16]

Moreover, it did not matter that the duration of occupancy under the Airbnb arrangement was only a few days at a time (the minimum stay was three nights, and the maximum five). His Honour cited authority for the proposition that a lease could arise even where the occupancy was for a matter of 'days or even hours'.[17] What mattered was the quality of the occupancy.

Referring to the particular mechanics of the Airbnb website, Croft J held that it was immaterial to the characterisation of the arrangement that the Airbnb agreement was entered via an online booking system, and that the Airbnb advertisement did not identify the particular premises. His Honour also held that it was immaterial that the terms and conditions on the Airbnb website referred to an Airbnb host granting a 'licence' to a guest — the Court's enquiry was to prioritise substance over form, so the particular label given to the arrangement was not determinative. His Honour noted the absence of legal expressions or 'legalese' in the Airbnb terms and conditions, but held that:

> *'[I]n characterising the effect of an agreement cast in commonplace terms, attention must be focused on substance, rather than the presence of absence of technical language which might commonly be found in more formal documents'.*[18]

His Honour noted that the tenants had not led evidence at VCAT to support an argument that possession was otherwise than exclusive; there was no evidence about the ability of the tenants to access the apartment while Airbnb guests were staying. This went against VCAT's finding, in the first instance, that there was a licence and not a lease in circumstances where the former does not afford exclusive possession.

Finally, his Honour found that the retention by the tenants of the apartment as their home or place of residence did not suggest that Airbnb guests could not have exclusive possession of the apartment. His Honour observed that 'a person may grant a lease in respect of their principal place of residence — for example,

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[15] Ibid [41].

[16] Ibid [43].

[17] Ibid [42]; see *Genco v Salter* [2013] VSCA 365, [29] (Nettle JA).

[18] *Swan v Uecker* [2016] VSC 313, [66].

when going away on an overseas holiday — in the same way that they can grant a licence in respect of that property'.[19]

In allowing the appeal, setting aside VCAT's orders and granting possession to the landlord, the Court stressed the limits of its decision. His Honour stated:

> *'[T]his is not a case on the merits of AirBnB arrangements. Neither is it a case on whether or not AirBnB arrangements might be said to be "illegal" — either in some particular or some general, non-legal, sense. Rather it is a case … which raises for determination … the legal character of this particular AirBnB arrangement and any consequences this characterisation may have in the context of the terms of the lease of the apartment concerned'.*[20]

Conclusion

The decision in *Swan v Uecker* sets a precedent for a situation where offering an entire property for occupancy on Airbnb may give rise to a sub-lease and may breach the terms of a residential tenancy agreement. The Court stressed on a number of occasions the importance of identifying the legal characterisation of an arrangement by reference to its substance rather than its form. This was to be the case notwithstanding that the terms of the Airbnb arrangement referred to the occupancy as a 'licence'.

As stated above, the appeal to the Supreme Court did not call into question the characterisation of an arrangement where only *part* of a property is made available. It follows that each living arrangement created under the 'sharing economy' of Airbnb or similar services should be scrutinised in light of its substance rather than its form, and on its own merits.

Good repair of rented premises

In another residential tenancies decision, the Supreme Court recently addressed a question of law regarding the extent of a landlord's obligation to ensure rented premises are maintained in good repair.

The facts

The case of *Shields v Deliopoulos*[21] was an appeal from a decision of VCAT. In the first instance, the tenant issued a proceeding against the landlord seeking, amongst other things, compensation for breach of the tenancy agreement due to the landlord's alleged failure to keep the rental property in good repair.

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[19] Ibid [73].

[20] Ibid [80] (emphasis added).

[21] [2016] VSC 500.

The relevant provision of the RTA, section 68, provides:

> *'Landlord's duty to maintain premises*
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> *(1) A landlord must ensure that the rented premises are maintained in good repair.*
>
> *(2) A landlord is not in breach of the duty to maintain the rented premises in good repair if—*
>
> *(a) damage to the rented premises is caused by the tenant's failure to ensure that care was taken to avoid damaging the premises; and*
>
> *(b) the landlord has given the tenant a notice under section 78 requiring the tenant to repair the damage.*
>
> *(3) If a landlord owns or controls rented premises and the common areas relating to those rented premises, the landlord must take reasonable steps to ensure that the common areas are maintained in good repair'.*

The tenant raised a number of complaints about various aspects of the property's quality, some of which the tenant alleged were apparent at the start of the tenancy and some of which arose thereafter. These included allegations about holes in walls and floors, flooding and water damage, rodents, and hazards associated with electrical wiring.

The landlord did not defend these allegations at VCAT. Instead, the landlord sought to rely on a bundle of documents the effect of which was said to be that the landlord had spent in excess of $10,000 on repairs and had agreed with the tenant that no further repairs would be carried out for the life of the tenancy, except repairs 'of an urgent matter that concerns essential services to the property and to the safety of the tenant/property'.

The Tribunal dismissed the tenant's claims, finding that the landlord had not breached his duty under section 68 of the RTA.

<u>On appeal</u>

On appeal to the Supreme Court on a question of law, the tenant alleged that the Tribunal had erred in its interpretation of section 68 primarily because the Tribunal:

- appeared to have confined the enquiry under that provision to the state of repair at the time the tenant took possession rather than throughout the life of the tenancy; and

- did not consider each of the allegations about the state of repair that the tenant had raised and had instead made a 'global finding'.

Daly AsJ of the Supreme Court heard both the application for leave to appeal from VCAT and the appeal itself. Her Honour granted leave and ultimately allowed the appeal. In doing so, her Honour made a number of useful observations about the nature and extent of a landlord's duty under section 68.

First, her Honour found that 'the duty imposed upon a landlord [under section 68] is strict and absolute'.[22] For the Court, the strict nature of the obligation is consistent with the use of the word 'ensure' in the provision which — though perhaps not surprisingly — her Honour considered by reference to the authorities to be synonymous with the expression 'make sure'.[23]

Secondly, turning to the expression 'good repair', her Honour considered that this means 'tenantable repair' or 'reasonably fit and suitable for occupation'.[24] The application of that expression to a tenancy is to be considered by reference to the 'age and character' of the premises, and includes an obligation to ensure the premises are in good repair at the start of the tenancy.

Thirdly, Daly AsJ held that 'the obligation of a landlord cannot be diluted by charging low rent'.[25] In the VCAT proceeding, the landlord had submitted before the Tribunal's the fact that the amount of rent remained unchanged throughout the tenancy.

Fourthly, her Honour held that the obligation under section 68 does not cease simply because to conduct certain repairs at the property might result in an 'upgrade' to the quality of the property. As her Honour held, 'in many instances it will be inevitable that effecting repairs will "upgrade" the standard of the premises'.[26]

Can parties agree on a protocol for repairs?

In response to submissions advanced by the parties regarding the landlord's case that the parties had agreed, during the course of the tenancy, that no further repairs would be carried out unless urgent, the Court held that parties cannot contract out of the operation of the RTA. Daly AsJ considered this to be consistent with the terms of the legislation, namely:

- section 1, which states that one of the purposes of the RTA is to define the rights and duties of landlords and tenants; and

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[22] Ibid [30].

[23] Ibid [31].

[24] Ibid [38], citing *Proudfoot v Hart* (1890) 25 QBD 42, 51.

[25] *Shields v Deliopoulos* [2016] VSC 500, [38].

[26] Ibid [40].

- section 27(1), which expressly invalidates a term of any tenancy agreement which seeks to exclude, restrict or modify the application of the RTA to the agreement.

VCAT's procedure

Although not strictly necessary given the Court's decision on the above issues raised on appeal, her Honour ruled on the issue of the Tribunal's apparent 'global finding' in relation to the various repair complaints advanced by the tenant in the VCAT proceeding. In doing so, her Honour considered the practicalities of residential tenancy proceedings in VCAT, finding that there was some merit in the landlord's view that the Tribunal Member had given the tenant the opportunity to address each repair-related complaint, and that it would be 'unduly prescriptive' to require VCAT to consider and address each complaint in the proceeding.[27]

Daly AsJ noted the purpose of the residential tenancies legislation as embodied in section 1(d) of the RTA, providing for 'the inexpensive and quick resolution of disputes under this Act', as well as section 98(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). That provision states, amongst other things, that VCAT 'must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed' as the relevant legislative framework permits.[28] For the Court, a 'global finding' in the circumstances was consistent with those principles.

Conclusion

The decision in *Shields v Deliopoulos* helps to clarify the extent of a landlord's duty to maintain a rental property in good repair, and also serves as a reminder about the supremacy of the RTA in governing the rights and duties of parties to a tenancy.

Restrictive covenants

Restrictive covenants are complex creatures, being at times susceptible to various interpretations. This is especially true where the covenant is expressed in language which on the face of things appears plain but which, if given a particular shade of meaning, can result in a breach by the covenantee.

The decision in *Clare & Ors v Bedelis*[29] illustrates a situation where a court was required to determine, as a preliminary question to a trial in the proceeding,

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[27] Ibid [63].

[28] See section 98(1)(d) of the Act.

[29] [2016] VSC 381.

whether a building constructed on the defendant covenantee's property breached the covenant under which the plaintiffs were beneficiaries. In his Honour's judgment, Derham AsJ answered that question in the negative for reasons which turned on the interpretation of the language of the covenant in light of the purpose of that covenant and the intention of the parties. Amongst other things, the case is noteworthy for the measure his Honour went to in illustrating the reasons for the Court's decision.

The facts

The covenant was created in March 1956 when the land in question was transferred out of its parent title. The covenant included a term that the acquirer of the land:

> *'[W]ill not erect or cause to be erected on the said land hereby transferred any dwelling house other than one having walls of brick or stone and such house not to be more than one storey in height and all out buildings to be of similar construction …'*

The land in question existed on a sloping street, with the front of the land sloping about 2.5 metres. The plaintiffs, who were owners living in the area and claimed to be beneficiaries under the covenant, alleged that in April 2015 the defendant commenced building a house on the land that did not have walls of brick or stone and was more than one storey in height, in breach of the covenant.[30] The defendant denied these allegations.

The issues before the Court, then, were whether the house had walls of brick or stone and whether the house was more than one storey tall. These issues turned on the proper construction of the restrictive covenant.

The Court's reasoning

In the reasons for his Honour's decision, Derham AsJ conveniently set out the principles governing the construction of restrictive covenants.[31] His Honour stated, inter alia:

- 'the ordinary principles of interpretation of written documents apply. The object of interpretation is to discover the intention of the parties as revealed by the language of the document in question';

- the words used in a restrictive covenant 'should generally be given their ordinary and everyday meaning' and 'must always be construed in their context … and having regard to the purpose or object of the restriction';

- the words 'should be given the meaning that a reasonable reader would attribute to them';

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[30] The previous house on the land was demolished in August 2014.

[31] See *Clare & Ors v Bedelis* [2016] VSC 381, [31].

- the words 'should be construed not in the abstract but by reference to the location and the physical characteristics of the properties which are affected by it, and having regard to the plan of subdivision and … possibly having regard to corresponding covenants affecting other lots in the estate';

- cases with similar expressions should be no more than persuasive in aiding the construction exercise;

- the principles of *Codelfa Construction Pty Ltd v State Rail Authority of NSW*[32] relating to the construction of contracts inter partes do not apply;

- where in doubt, a word should be interpreted *contra proferentem* against the covenantor; and

- the proper construction of an instrument is a question of law, not fact, although the construction of a particular word that a court determines should have its ordinary and natural meaning will usually be a question of fact.

Having considered the parties' submissions on the issues to be determined, his Honour agreed with the plaintiffs' view that it was not relevant to consider evidence about any previous building on the land in construing the covenant. This was so notwithstanding the previous building was substantially the same as the present building. His Honour stressed that 'the determination of the [issues] must be made by reference to the building under construction'.[33]

In response to the defendant's submissions, his Honour agreed that the purpose of the covenant was aesthetic, serving to protect the view of the beneficiaries of the covenant. This was evident from the topography of the land and the fact that covenants attaching to other more elevated lots of land transferred out of the same parent title did not feature a single-storey restriction.

How many storeys?

The Court's finding as to the purpose of the covenant was crucial to the question of whether the defendant's building qualified as a single-storey building. His Honour held that '[t]he meaning of "storey" must be assessed having regard to the purpose of the restriction',[34] such purpose being 'to preserve view for those owners of properties further up the ridge who have the benefit' of the covenant.[35]

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[32] (1982) 149 CLR 337.

[33] Ibid [61(b)].

[34] Ibid [67].

[35] Ibid [68].

In assigning a meaning to the word 'storey', having considered the dictionary definition of the word his Honour was reluctant to apply this definition literally; his Honour considered that to do so without regard to the physical characteristics of the land in question and the purpose of the covenant might be to usurp the intent of the covenant. Put another way, his Honour held that '[i]t is not an appropriate method of construing this restriction merely [to] count every possible level in a building and reach a conclusion by addition'.[36]

His Honour was somewhat guided by the observation, made by Hamilton J in *Ferella v Otvosi*,[37] that it is more difficult to identify whether a building is more than two storeys in height where the land slopes, but stressed that 'great care must be taken not to slavishly apply the reasoning on the construction and application of a covenant in one case to another.'[38] In the circumstances, his Honour held that the 'reasonable reader' of the terms of the covenant with knowledge of the surrounding circumstances would consider the building in question a single-storey building.

For his Honour, the fact that the building featured 'a habitable space above a sub-floor which includes a garage' was something 'almost compelled by the slope of the land' and that '[t]he parties to the Covenant must be taken to know of the lie of the land and to take it into account in their understanding of the meaning of the [single-storey] restriction'.[39] In other words, where certain knowledge can reasonably be imputed to the parties this can help govern the objective interpretation of the terms of a covenant.

In concluding his Honour's reasoning in relation to the number of storeys, Derham AsJ stated:

> *'I undertook an unaccompanied view of the Land, the exterior of the house under construction on it, and the lay of the land generally in the neighbourhood. I did so with the express consent of the parties.*
>
> *An image of a subject often conveys a meaning more effectively than a description. The picture below was taken by me on Friday 17 June 2016. The house depicted is, in my view, not more than one storey in height'.*[40]

His Honour then attached the photograph as part of the Court's reasons.

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[36] Ibid [71].

[37] (2005) 64 NSWLR 101.

[38] *Clare & Ors v Bedelis* [2016] VSC 381, [72].

[39] Ibid [76].

[40] Ibid [83]–[84]. A view (or 'demonstration, experiment or inspection') is permitted under the *Evidence Act 2008* (Vic) s 53.

Brick, stone or something else?

Turning to the second issue for determination — whether or not the house was constructed with 'walls of brick or stone' — his Honour again began with a consideration of the dictionary definition of the words 'brick' and 'wall'. His Honour noted that there was no evidence before the Court about the meaning of those words apart from their dictionary definition and the meaning assigned to them in another decision, that of Sholl J in *Jacobs v Greig*.[41] In that case, the Court held that the expression 'walls' meant both internal and external walls.

Curiously, the earlier decision of Sholl J was handed down in March 1956, the same month and year in which the covenant in the present case was granted. Nevertheless, consistent with his Honour's approach to the utility of other case law in construing the meaning of a covenant his Honour warned of the 'real danger in construing the Covenant by reference to evidence given in another case in relation to a covenant which is differently worded'.[42]

Again adopting a purposive approach to the construction of the covenant, Derham AsJ considered that the relevant 'walls' to which the covenant related were the external walls only. In the case of the present covenant, 'the presentation of the dwelling to the outside world is the principal purpose of the restriction' in addition to the desire to avoid using low quality materials.[43]

Finally, with regard to the materials used, his Honour was satisfied that the requirement of 'brick or stone' in the covenant was capable of being satisfied by brick veneer because such a method of fabrication could achieve the purpose of the covenant. His Honour referred to the Court's unaccompanied view of the land and the building as being equivocal as to the solid brick/brick veneer debate. His Honour noted that although it was open to the Court to take judicial notice of solid or cavity brick being the more appropriate material — which in turn would have supported the plaintiffs' contention that brick veneer was inadequate — the parties did not ask the Court to take such notice and the Court considered it 'inappropriate' to do so of its own motion.[44]

Conclusion

The decision in *Clare & Ors v Bedelis* grappled with the complex task of ascertaining the meaning and purpose of a restrictive covenant. The decision also represents an instance where a court has chosen to accompany its published reasons with a photograph. It is a striking example of the effectiveness of a visual aid in enabling both the parties in dispute and subsequent readers of the

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[41] [1956] VLR 597.

[42] *Clare & Ors v Bedelis* [2016] VSC 381, [103].

[43] Ibid [104].

[44] Ibid [111].

reasons to understand how a court has reached its decision. It is, above all, testament to the adage, ‘A picture tells a thousand words’.