HIGH COURT OF AUSTRALIA

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File Number:	A4/2020
File Title:	Deguisa & Anor v. Lynn & Ors
Registry:	Adelaide
Document filed:	Form 27A - Appellant's submissions-Appellants' amended sul
Filing party:	Appellants
Date filed:	11 May 2020

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A4 of 2020

BETWEEN:

Nick Deguisa
First Appellant
Tori McKenzie
Second Appellant

and

Ann Lynn
First Respondent
Christine Evans
Second Respondent
Richard John Fielder
Third Respondent

APPELLANTS' AMENDED SUBMISSIONS

Part I: Certification

1. We certify that this submission is in a form suitable for publication on the internet.

Part II: Concise Statement of Issues

2. In order to bind a subsequent purchaser of a Torrens title, to what extent, and in what way, must a building scheme be *"notified"* on the certificate of title (**CT**), for the purposes of s 69 of the *Real Property Act 1886* (SA) (**RPA**)?
3. Will a building scheme be sufficiently *"notified"* on the CT to bind successors in title, where identification of quasi-dominant tenements would require searches of other CTs and documents held by the Registrar-General (**RG**)?
4. Did the Third Respondent have standing to enforce any building scheme that may have bound the Appellants?
5. If a building scheme existed and was binding upon the Appellants as the majority of the Court below concluded, does such a scheme properly construed prevent the Appellants from erecting a new dwelling on the land proposed to be the subject of an approved subdivision?

Part III: Section 78B, *Judiciary Act 1903* (Cth)

6. No notices under this section are required.

Part IV: Citations

7. Court below: *Deguisa & Anor v. Lynn & Ors* [2019] SASCFC 107; District Court: *Lynn &Ors v. Deguisa & Anor* [2017] SADC 78 (common building scheme enforceable); *Lynn & Ors v. Deguisa & Anor* [2017] SADC 84 (building of new dwelling house prohibited).

Part V: Narrative Statement of Facts

CT and Endorsed Documents

8. On 23 January 2008 the Appellants purchased for value from the executors of the estate of the Second Appellant's late grandmother, the land comprised in CT V5804, F557 (**present CT**).[1] The present CT is largely, but not wholly, reproduced at CAB20, [48]. It was the First Edition of the present CT that was available to be searched by the Appellants, to identify the metes and bounds of the property rights being acquired.[2] The First Edition was not in evidence, however, it was implicit in the manner the courts below approached the case,[3] and it was necessarily inferred, that save for subsequent entries concerning a mortgage and a caveat, the First and Second Editions of the present CT were identical.

9. In addition to the fact that the Appellants are the registered proprietors, inspection of the Second Edition of the present CT[4] also relevantly reveals that:

   9.1 The land is described as *"ALLOTMENT 77 FILED PLAN 119295 IN THE AREA NAMED FULHAM HUNDRED OF ADELAIDE"*,[5] with an implicit cross reference to a map on page 3 showing the allotment being off Henley Beach Road, near that road's corner with Carolyn Avenue;

   9.2 The map includes above[6] the marking out of Allotment 77 (and by implication separate from that Allotment) a reference to *"DP7593"*;[7]

   9.3 The parent title (**parent title**) was "CT3310/186"; and

   9.4 The Schedule of Dealings relevantly contains dealing number 2675722 entitled *"ENCUMBRANCE TO KEITH OLIVER AYTON AND BETTY JOAN FIELDER AS JOINT TENANTS"*.[8]

10. The memorialised dealing 2675722 is a Memorandum of Encumbrance, with a back sheet.[9]

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[1] CAB116, [136-137]; Note the reference to *"Folio 577"* in Peek J's reasons is a typographical error – BFM435.2.

[2] CAB21, [52]. The First Edition was issued when the title was, on 6 September 2000 converted to a computerised title: CAB116, fn79; BFM435.2.

[3] See for example, CAB20-21, [48], [52].

[4] BFM435.

[5] Allotment 77 was generally referred to in the courts below as *"Lot 3"* which these submissions adopt; see [17] herein.

[6] CAB140, fn153.

[7] The reference to *"DP[number]"* is to a Deposited Plan of development. The primary Judge at CAB21[52] erred factually in considering that the present CT annexed DP7593. This was Ground of Appeal 3.1.2 in the Court below, at CAB55.18. Peek J identified the correct position as referenced in the preceding footnote.

[8] There was no evidence at trial as to whether the encumbrancers were still alive, and the encumbrancees are now deceased: BFM11, T127.8; BFM13, T131.11.

[9] CAB9, [14]; CAB34-35, [6]; CAB115-116[135]; The complete document is in BFM39. There is no reference on either the back sheet or the Memorandum of Encumbrance to cancelled CT V2442, F85, which has been referred to as the grandparent title (**grandparent title**), CAB68, [1], CAB113, [125]. For Lots 14, 31, 32 and 34, technically it is a great-grandparent title. The back

11. Inspection of the back sheet,[10] upon which the Respondents rely in asserting notice, relevantly reveals:

11.1 That filing fees were paid at 11.10am on 8 November 1965 (which fixes the time when the Memorandum of Encumbrance was first presented for filing), and it contains a memorialisation of 19 November 1965 at 11am, that *"A Memorial of the within Instrument No 2675722 was entered in the Register Book, Vol 3310 Folio 186"*;

11.2 It has a hand written notation: *"Is this encumbrance part of a common building scheme? If not to what land is it appurtenant. Refer ALR9/11. O.D.R. No 2675721"*. The reference to ALR9/11 is to a requisition by an assessor with initials ALR, on behalf of the RG, on 9 November 1965.[11] The reference to O.D.R. is to *"Other Document Retained"*;[12]

11.3 The requisition gave rise to a typed and signed endorsement by a Land Broker that *"This encumbrance forms portion of a common Building Scheme"*.[13] This endorsement was entered after the Encumbrancers had signed the Memorandum of Encumbrance.[14] There was no evidence of whether the existence of an asserted common building scheme was brought to the attention of the encumbrancers.[15]

12. The back sheet to the encumbrance contains the only mention of a building scheme on the current CT and related documents. None of the other CTs (and their memorialised documents) concerning land said to be quasi-dominant tenements, refer to the scheme.[16]

13. The Memorandum of Encumbrance:[17]

13.1 Was executed on 4 November 1965 by Giulio Boin, Builder, and Franca Boin, his wife, as persons *"entitled to be registered as the proprietor of an estate in fee simple"*, but was not executed by the Encumbrancees;

13.2 Does not define *"the Encumbrancer"* to include their assigns;

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sheet is considered by Peek J at CAB114-115, [131-132], 160[275]. A small portion of the grandparent title land (which originally covered some 68 acres – CAB113, [125]) became registered as the parent title, which is 60 feet by 127 feet: BFM462.

[10] CAB29.

[11] CAB114-115[131-132].

[12] CAB17, [36]. The nature of the other document was not the subject of any evidence.

[13] CAB114-115, [131-132]

[14] CAB17, [35]. CAB29 shows the Memorandum of Encumbrance was again presented after the requisition on 17 November 1965.

[15] CAB93, [81].

[16] CAB115, [134]. The term *"quasi-dominant tenements"* is used here because it has been so adopted by Perry J in *Netherby Properties Pty Ltd v. Tower Trust Ltd* (1999) 76 SASR 9, [39], although in a building scheme all Lots are logically both dominant and servient *inter se*. The terminology with respect to restrictive covenants seems to have been based upon the view that they were an extension in equity, of a common law easement; see *A-G(Ex Rel Lumley) & Anor v. T S Gill & Sons Pty Ltd* [1927] VLR 22, 35.3.

[17] BFM36-37.

13.3 Has obliterations effected by a typewriter having overwritten the text with repetitions of the letter "X" at the point where the standard description of the land to be encumbered would usually be set out, and further has the space for the number of the Lands Titles Office Plan left blank;[18]

13.4 In its chapeau, provides that in consideration for the transfer, the land is encumbered with a rent charge in fee simple, and with covenants;

13.5 Contains covenants following the chapeau, as follows:

> *"1. The Encumbrancer will pay to the said Keith Oliver Ayton and Betty Joan Fielder the sum of 1/- if demanded on the 30th day of June next and on each succeeding 30th day of June.*
>
> *2. That the Encumbrancer will not at any time erect or permit or suffer to be erected upon the said land or any part thereof any building or buildings other than*
> *(a) a dwelling house for private residential purposes, and*
> *(b) outbuilding or outbuildings suitable for use in conjunction with a dwelling house used for private residential purposes*
>
> *AND FURTHER the Encumbrancer will not at any time erect or permit or suffer to be erected upon the said land or any part thereof any dwellinghouse*
> *(a) with its external walls constructed of any material other than brick or stone or reinforced concrete or any combination thereof, or*
> *(b) the internal area of which shall be less than 1200 square feet, or*
> *(c) the value of which (excluding all outbuildings) shall be less than FOUR THOUSAND POUNDS (£4,000.0.0) and for the purposes of this subparagraph the value shall be deemed to be the actual cost of labour and materials alone in the erection of the same.*
>
> *3. That the Encumbrancer will not at any time erect or permit or suffer to be erected upon the said land or any part thereof any block or blocks of flats home units or other multiple dwellings.*
>
> *4. That the Encumbrancer will not use or permit or suffer the said land or any part thereof or any building thereon to be used for or in connection with any trade, business or commercial purpose.*
>
> *5. That the Encumbrancer will not at any time make or permit or suffer to be made any additions to or alterations in any dwellinghouse or any other building or erection upon the said land which shall or may render such dwellinghouse or building or erection suitable or adaptable for any trade, business or industrial purpose or which shall or may have the effect of converting such dwellinghouse building or erection into a block of flats, home units or multiple dwellings."*

The Subdivisions – RG Working Documents and Deposited Plans

14. If the Appellants' first substantive argument (at [35-48] herein) is not accepted and it is necessary to consider documents and circumstances beyond the current CT and the memorialised encumbrance, then the following further facts are relevant.

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[18] CAB90, [69]. This occurred with respect to Lots numbered 1 to 4, but, with the exception of Lot 47 which used later forms with panels for identification of the land, all of the other relevant Lots defined the land with words such as *"being Allotment [number] of the subdivision of portion of Section 433 laid out as Fulham in Lands Titles Office Plan [number] and being the whole of the land comprised in Certificate of Title Register Book Volume [number] Folio [number]"*. BFM pages, 17 (Lot 1); 26 (Lot 2); 44 (Lot 4); 51 (Lot 6); 59 (Lot 7); 67 (Lot 8); 75 (Lot 9); 83 (Lot 10); 91 (Lot 11); 99 (Lot 12); 107 (Lot 13); 116 (Lot 14); 126 (Lot 15); 135 (Lot 16); 143 (Lot 17); 150 (Lot 18); 160 (Lot 19); 168 (Lot 20); 176 (Lot 22); 183 (Lot 23); 190 (Lot 24); 203 (Lot 26); 211 (Lot 27); 219 (Lot 28); 227 (Lot 29); 237 (Lot 30); 245 (Lot 31); 253 (Lot 32); 261 (Lot 33); 272 (Lot 34); 280 (Lot 36); 288 (Lot 37); 295 (Lot 38); 303 (Lot 39); 312 (Lot 40); 320 (Lot 41); 328 (Lot 42); 339 (Lot 43); 347 (Lot 44); 355 (Lot 45); 364 (Lot 46); 371 (Lot 47); 380 (Lot 48); 388 (Lot 49); 396 (Lot 50); 404 (Lot 51); 412 (Lot 52); 421 (Lot 53); 429 (Lot 54).

15. The land comprised in the grandparent title was originally a dairy in the Western suburbs of metropolitan Adelaide.[19] There was an initial subdivision some time prior to 1960.[20] This case concerns, however, a second subdivision of 54 allotments.[21] It was effected primarily[22] in three stages, two in 1964 and the third in 1965.[23] The land is bounded to the South by Henley Beach Road, an arterial road[24] to the nearby beach, and at the time of the subdivision, to the East of the land was the River Torrens parkland reserve.[25]

16. Docket No 669/64[26] contained a document that identified the Appellants' land by reference to an area marked out as "O". It, along with other similar dockets, contained a variety of documents maintained by the RG for various purposes related to the subdivision. The dockets are neither part of, nor referred to on the current CT. Similarly, they are not referred to on either the Memorandum of Encumbrance or its back sheet. Rather, the dockets and Deposited Plans were working documents that were amended from time to time by developers, but were maintained so that when all was finalised, CTs could be issued in conformity with the subdivisions which had been certified by surveyors, the Town Planning Commissioner, the Commissioner for Highways and the relevant local council.[27]

17. On 7 September 1964 pursuant to DP8199, a strip along Riverside Drive was subdivided into 10 lots, and issued with CTs V3262, F100 to 109 with the grandparent title cancelled to that extent.[28] Each folio contained a map of the DP8199 allotments.[29] Some three months later, on 10 December 1964, pursuant to DP7593 there were 38 new CTs, being V3284, F82 to 119 issued with the grandparent title again being cancelled to that extent.[30] On 13 April 1965, Lots 1 to 4 (which were not the subject of any Deposited Plan) were subdivided, with

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[19] CAB7, [1]; CAB8, [10]; CAB68, [2]; CAB113, [125].

[20] CAB111, [119]. Note the statement in the affidavit that each of the 53 blocks which were sold had an encumbrance placed on them at the time of sale, is incorrect: CAB118, [143]. Further, the titles to Lots 25 and 37 were not in evidence.

[21] CAB172.

[22] Some allotments were transferred to family members of the original registered proprietor on different dates in December 1964: CAB95, [89-90].

[23] CAB92, [78] (first 10 titles issued on 7 September 1964); CAB94, [86] (38 titles in a second tranche on 10 December 1964); CAB96, [95] (4 titles issued without a Deposited Plan on 13 April 1965).

[24] CAB87[59].

[25] CAB28, which identifies the location as *"one mile from the sea ... with reserves adjacent"*; CAB102 better identifies the reserve, as does BFM500. See also CAB98.

[26] CAB113, fn72; CAB90, [68]. BFM462. A *"Docket"* appears from the documents in the exhibit to be like a file. See also Docket 1279/63, BFM466-479, and Docket 1259/64, BFM480-496.

[27] CAB89, [65-66].

[28] CAB92, [78].

[29] CAB92-93, [78]; CAB104.

[30] CAB94, [86].

CT V3310, F184 to 187 being issued (including, as Lot 3, the parent title to the Appellants' land (**Lot 3**)). Again the grandparent title was cancelled to the necessary extent. Lot 3 is now designated Lot 77 on the present CT.[31] The grandparent CT was then completely cancelled upon a vesting of the new roads in the Corporation of the City of West Torrens.[32]

18. In 1967, Lot 3 was transferred by Mr and Mrs Boin, to one Mr William McKenzie, and his wife, Mrs Muriel McKenzie, the Second Appellant's late grandparents.[33] There was no direct evidence as to whether this transfer was for value, but that is the obvious inference.[34] Save for Lot 5, the subdivided lots were then sold off between October 1964 and February 1981.[35] Lots 6, 26, 27 and 29 were transferred prior to the second stage of the subdivision.[36]

10 ***Competing Inferences as to a Building Scheme or Schemes***

19. The majority were of the view that a reasonable conveyancer would have been put on notice by the signed endorsement ([11.3] herein) that there was a high likelihood that there would be a number of identified benefited properties on the Register, each with mutually enforceable covenants.[37] Peek J summarised the position set out above,[38] and referred to the evidence of a solicitor, Mr Morgan, that by searching on a computer[39] for the surname *"Ayton"* in an alphabetical listing of vendors' names it took five or ten minutes to put 90% of the encumbrances together in one list.[40] Mr Morgan's evidence was that he didn't search the surname Fielder, *"which would be lost in numerous other Fielders."*[41]

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[31] CAB140, fn152.

[32] CAB95, [92]; CAB96, [95]; CAB99.

[33] CAB116, [136].

[34] Mr Boin was a builder and in late 1967 he and Mrs Boin also purchased Lot 4: BFM43-46. Given the period of time between when Mr and Mrs Boin purchased Lot 3, and when it was transferred to the Mr and Mrs McKenzie, the inference is that Mr Boin built on the land for commercial gain, which implies a sale for value to Mr and Mrs McKenzie.

[35] BFM225-229; BFM369.

[36] BFM49-54; BFM201-214; BFM225-233.

[37] CAB154, [257].

[38] CAB113-114, [125-130].

[39] Each title could be downloaded for a cost of $27.75, and each encumbrance could be downloaded for $10.80: BFM435.1; BFM9, T123.12.

[40] CAB155, [264]. BFM449-450, generating BFM441-447. There was no evidence about whether access to a computer database in this manner was available when the Appellants purchased the property.

[41] CAB155-156, [264].

20. In Mr Morgan's affidavit at trial, Exhibit DGM1 contained a plan of all 54 allotments, referred to as the *"Gaetjens Plan"*,[42] and two schedules of the encumbrances and titles.[43] These schedules contain some factual errors.[44]

21. The majority concluded that there was one building scheme because of the similarity of the encumbrances, and the laying out of plots on the Gaetjens Plan.[45] There was no particular defined process of sales in stages by reference to lots from the different Deposited Plans resulting from the different sub-divisions.[46]

22. In dissent, Kourakis CJ made contrary factual findings that:

22.1 The failure to identify the benefited land in any of the encumbrances leaves unanswered the question whether there was one, two or three building schemes;[47]

22.2 There were natural inferences to be drawn from the geographical layout of the Lots, and the separate Deposit Plans, that there were up to three separate building schemes;[48]

22.3 The original purchasers of Lot 3, Mr and Mrs Boin:

> *"... had no reason to search the grandparent title, even though it was noted on their Certificate of Title. Even if they had inspected the grandparent title, they had no reason to suspect that the Deposited Plans noted on it had any relevance to them. They had no reason to check the titles issued for the Riverside Drive and DP7593 lots, nor to delve further and inspect the encumbrances and then infer from the similarity of the covenants that all of the lots were the benefited land."*[49];

22.4 Even if Mr and Mrs Boin were required to make further enquiries, the most natural inference *"arising from the complex chain of title"* was that the quasi-dominant tenements were only the Lots fronting Henley Beach Road;[50]

22.5 Lot 35, now owned by the Third Respondent, was not in a building scheme with Mr and Mrs Boin, and if they were not bound, then neither were the successors in title.[51]

23. Kourakis CJ reached these conclusions after a detailed factual analysis of the documentary

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[42] CAB28; BFM500. This was not a document held by the RG, but rather a document located in private papers by the Third Respondent: CAB112[122].

[43] BFM441-447.

[44] Lot 12 has the wrong execution date (BFM101); Lot 26 has a typographical error leading to the wrong Deposit Plan number (BFM206.3); Lot 35 has the wrong registration date (BFM270); Lots 42 and 43 have the wrong execution date (BFM330, BFM340).

[45] CAB118, [143]. Note that of the 54 Allotments, Lots 5 and 21 were never encumbered: CAB121, [154-155]; For reasons unexplained, Lot 25 appeared no longer to be encumbered (BFM445); and Lot 53 erroneously had two encumbrances, for it and Lot 54 registered on it: BFM418-419.

[46] CAB118, [146].

[47] CAB93, [80].

[48] CAB87, [59]; CAB93, [79].

[49] CAB96, [96].

[50] CAB96, [96-97]; CAB95-96, [92-93].

[51] CAB96, [97].

evidence, including relevant certificates of title, cancelled certificates of title, Deposited Plans, and dockets.[52]

Claims as to Standing

24. The Third Respondent is the registered proprietor of Lots 5 and 35, and the First and Second Respondent, while having no direct interest in any of the properties, join the proceedings as daughters of one of the encumbrancees *"in order to preserve the memory of Betty Fielder and the way she considered the land should develop."*[53] Lot 5 is not burdened by an encumbrance.[54] It was concluded, however, that Lot 35 did provide standing as being part of one building scheme.[55] Lot 35 is some distance from Lot 3. To get to it from Lot 3, it would be necessary to travel *via* Henley Beach Road, Susan Street, Ayton Avenue, and Meredith Avenue.[56]

Part VI: Argument

25. The Appellants submit that they were not *"notified"* as required by s 69 of the RPA, of the nature and extent of the interest by which it is claimed their title is burdened. This, their principal contention, is supported by a consideration of the legislative history of the RPA, the manifest scheme of Torrens legislation and High Court and other authority.

History and Objects of the Torrens System Guide the Interpretation of the RPA

26. The necessity for devising the Torrens system arose out of the circumstances of the very foundation of South Australia and the Wakefield scheme.[57] A key requirement of the scheme operating effectively was the sale of new parcels of land at high prices to fund further emigration and government expenditure. In this respect the Provence was in competition with land sales from other Colonies, in circumstances where plots in New South Wales and Victoria were inexpensive.[58] Further, the state of the old system deeds was in complete disarray, with speculation and fraud being rife.[59] The value of the land the new Government was selling required enhancement, which was to be achieved by a State

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[52] CAB86-98[57-98]. The minutiae of this analysis defies summarisation in a Submission such as this document.

[53] CAB8, [12]. It was proved at trial, that the estate of the late Betty Fielder had been wound up: BFM11-12, T127-128.

[54] CAB121, [154].

[55] CAB163, [291]; In dissent, Kourakis CJ finding that standing had not ben established, CAB87, [60].

[56] CAB28.

[57] Professor G Taylor, *Emergence of the Torrens System in Australia*, in *Boundaries of Australian Property Law*, in H Esmaeili, and B Grigg (eds), *Boundaries of Australian Property Law*, 2017, CUP, p23.

[58] Professor D Pike, *Introduction of the Real Property Act in South Australia* (1960) 1 Adel Law Rev 169, 172.5.

[59] Professor D Pike, *Introduction of the Real Property Act in South Australia* (1960) 1 Adel Law Rev 169; R M Hague, *Hague's History of the Law in South Australia 1837 – 1867*, 2005, University of Adelaide, Barr Smith Press, Ch 12; Professor P A Howell

guarantee of the validity of the title on the Register. This was the genesis of indefeasibility.

27. Addressing such a mischief the preamble to the original *Real Property Act*,[60] stated:

> *"Whereas the inhabitants of the Province of South Australia are subjected to losses, heavy costs, and much perplexity, by reason that the laws relating to the transfer and encumbrance of freehold and other interests in land are complex, cumbrous, and unsuited to the requirements of the said inhabitants, it is therefore expedient to amend the said laws."*

28. Repeating the objects of the RPA, as stated in s 10 thereof,[61] namely, to simplify the title to land, to facilitate dealing therewith, and to secure indefeasibility of title to all registered proprietors, except in certain cases specified in the RPA, Dr Kerr in his classic text on the Torrens system, then stated that these reflected Brickdale's six features of a *"perfect"* conveyancing system: (1) security, (2) simplicity, (3) accuracy, (4) cheapness, (5) expedition, and (6) suitability to circumstances.[62] Section 11 of the RPA, dictates that it should *"always"* be construed in such manner as *"shall best"* give effect to its objects.

29. Accordingly, in order to facilitate dealings with land and secure indefeasibility, it is a basic principle of the Torrens system, that it is a system of title by registration rather than registration of title; consequently together with the *"information appearing on the relevant folio"*, the registration of dealings manifests the scheme to provide third parties (contemplating dealing with the land) with the *"information necessary to comprehend the extent or state of the registered title to the land in question."*[63]

30. These objectives of the Torrens system are achieved in large measure, by abolishing the need for retrospective examination and investigation of chains of title deeds, because the State warrants the title of each successive registered owner. It is the primary object of the system to give a good title transferable by a simple mode of conveyance provided by the RPA, without the need for *"going into the title."*[64]

The Scheme of Statutory Provisions

31. Subject to limited and presently irrelevant enumerated exceptions, s 69 of the RPA provides for indefeasibility by declaring *"[t]itle of every registered proprietor of land shall, subject*

Constitutional and Political Development, 1857 – 1890, in D Jaensch (ed), *Flinders History of South Australia*, 1986, Wakefield Press, pp157-163.

[60] No 15 of 1857-1858.

[61] A minor and irrelevant amendment to these objects introducing the notion of strata titles was inserted by s 5 of the *Real Property Act Amendment (Strata Titles) Act 1967* (SA), but the section was by Schedule 1 of the *Strata Titles Act 1988* (SA), again changed to bring it into conformity with the original 1886 wording.

[62] D Kerr, *Australian Lands Titles (Torrens) System*, 1927, LBC, p6.

[63] *Castle Constructions Pty Ltd v. Sahab Holdings Pty Ltd* (2013) 247 CLR 149, [20]; *Westfield Management Ltd v. Perpetual Trustee Co Ltd* (2007) 233 CLR 528, [5].

[64] D Kerr, *Australian Lands Titles (Torrens) System*, 1927, LBC, pp9-10.

to such encumbrances, liens, estates, or interests as may be notified on the certificate of title of such land, be absolute and indefeasible, ...".

32. Section 47 of the RPA provides that Division 1 of Part 5, applies to and in relation to the *"registration of title to land in the Register Book."* Section 49 in that Division provides that each CT *"shall constitute a separate folium of the Register Book"* and the RG *"shall record thereon distinctly and separately all memorials affecting the land including in each certificate."* The nature of the Register Book is unlike a book made at a stationers, but rather *"it is a book consisting of the grants which are bound up in it."*[65] It *"consists of the individual grants, certificates or folios contained within it at any given time. Added to these are documents that may be deemed to be embodied in the Register upon registration."*[66] By s 77 of the RPA, the CT must have recorded on it, in a manner so as to preserve priorities, memorials of *"all subsisting ... encumbrances, ... to which the land may be subject ...".*

33. Section 54 of the RPA generally requires that for the RG to *"register or record"* any *"instrument"* that purports to *"affect an estate or interest in land under this Act"* the instrument must comply with the RPA, be in an appropriate form, and be lodged in a manner approved by the RG. By the definition of *"instrument"* in s 3 of the RPA, it must be one capable of registration in the Register Book. Section 51 of the RPA, provides that *"[e]very memorial entered in the Register Book shall be sealed*[67] *with the seal of the Registrar-General, and shall have the nature of the instrument to which it relates and such other particulars as the Registrar-General directs, and shall refer by number or symbol to such instrument."*

34. The RPA has never provided for the registration of restrictive covenants and buildings schemes. This is unsurprising, given that at the time it was enacted, the rationale for, scope, and nature, of restrictive covenants and building schemes had yet to be settled.[68] There are difficulties in accommodating building schemes (which may persist indefinitely) within the

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[65] *Richards v Cadman* (1891) 17 VLR 203, 208. This decision was applied with apparent approval by Knox CJ and Starke J in *Commonwealth v. New South Wales* (1923) 25 CLR 1, 25. The *"bound up"* phraseology arises from statutory language no longer used in the RPA, but the underlying concept remains sound. See Professor D J Whalan, *Torrens System in Australia*, 1982, LBC, p79.3.

[66] Professor D J Whalan, *Torrens System in Australia*, 1982, LBC, p18.4. Accordingly, as Kourakis CJ concluded, upon cancellation a CT ceases to be part of the Register Book. CAB80, [38]. There does not appear to be any authority on the status of a cancelled CT. The question of status was left open without any view being expressed by Giles JA in *Mogo Local Aboriginal Land Council v. Eurobodalla Shire Council & Ors* (2002) 54 NSWLR 15, [49].

[67] The requirement was that it be signed by the RG until s 8 of the *Real Property Act Amendment Act 1975* (SA).

[68] W R Cornish *et al*, *Law and Society in England: 1750 – 1950*, 2nd Ed, 2019, Hart Publishing, p154. As Peek J noted CAB127-128, [176], the theory developed from the latter part of the 19th Century, from being based on mutual contracts (cp *Clarke v. Earl of Dunraven* [1897] AC 59), to an equitable interest.

Torrens system, in that they sit uneasily with the conclusiveness of the Register Book, and they also may conflict with public and planning policy.[69]

Bursill's case – No Obligation to Go Beyond the CT – Grounds of Appeal 2.1 and 2.2

35. The Appellants contend that *Bursill Enterprises Pty Ltd v. Berger Bros Trading Co Pty Ltd*,[70] decided a narrow point, namely, whether a memorial describing a memorialised instrument could achieve incorporation of the terms of the instrument by reference onto the CT, giving it the effect of registration.

36. The majority in the Court below considered[71] that the judgment of Windeyer J in *Bursill*,[72] established a *"governing principle"*[73] as to what is *"notified"* to a prospective purchaser by the vendor's certificate of title; namely *"everything that would have come to his or her knowledge if a prudent conveyancer had made such searches as ought reasonably to have been made by him [or her] as a result of what there appears"*[74] on the CT. The majority considered this meant there was a requirement to search for all related documents that can be discovered by a search of documents in the Lands Titles Office.[75]

37. It is submitted that this approach of the majority discloses a clear error. In sympathy with the objects of the RPA as identified above, this Court has unanimously identified that the scheme of the Torrens system is to provide third parties with information necessary to comprehend the nature and extent of a registered title by reference to the *"information appearing on the relevant folio"* and *"the registration of dealings"*.[76] In so doing the Court referred with approval to the judgment, not of Windeyer J, but of Barwick CJ, in *Bursill*.[77]

38. The question being considered in *Bursill* was not the existence of some governing principle

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[69] H Esmaeili, *Restrictive Covenants and the Torrens System*, in H Esmaeili, and B Grigg (eds), *Boundaries of Australian Property Law*, 2017, CUP, p257. CAB26, [70]. Accordingly, in construing the word *"notice"* in s 69 of the RPA, in a manner *"best"* giving effect to his objects, it is appropriate to give it a narrower rather than a broader ambit.

[70] (1971) 124 CLR 73.

[71] CAB134, [194]; CAB153, [252].

[72] (1971) 124 CLR 73.

[73] Considered to be of the kind referred in *Hargraves v. The Queen* (2011) 245 CLR 257, [40].

[74] CAB123, [194]. This placed a gloss on the words used by Windeyer J, which were in fact: *"everything that would have come to this knowledge if he* [sic] *had made such searches as ought reasonably to have been made by him* [sic] *as a result of what there appears."* (1971) 124 CLR 73, 93.1.

[75] CAB142, [219].

[76] *Westfield Management Ltd v. Perpetual Trustee Co Ltd* (2007) 233 CLR 528, [5]. By s 3 of the *Real Property Act 1900* (NSW), a *"dealing"* includes any instrument registrable under the provisions of that Act, and therefore (as the reference to *Bursill's* case which considered provisions with the same terminology as the RPA in fn 31 of *Westfield* implies) the reference to a registration of *"dealings"* is the directly equivalent to a reference to a memorialised instrument under the RPA.

[77] (1971) 124 CLR 73, 77-78.

but rather whether a memorial on the CT[78] sufficiently *"notified"*[79] a transfer in fee of buildings and airspace. The specific issue joined, and upon which the Court divided, was whether the reference to *"[r]ight of way created by ... Transfer No. 7992"* did not *"notify"* anything other than a right of way (and therefore did not notify the transfer of the fee effected by the incorporated document).

39. This was because notification on the CT was only extended to include a memorial, which in turn by s 37 of the NSW Act was required to *"state the nature of the instrument to which it relates..."*. The memorial, in being limited to a transfer of an easement had not, on the opposing contention,[80] stated the nature of the instrument. Accordingly, it had been argued, the transfer in fee in the instrument described as *"Transfer No. 7992"* was outside the scope of the memorial, and did not become incorporated as part of the folium in the Register Book.

40. Barwick CJ, rejected this argument and (by way of the ratio of the case) construed the words *"nature of the instrument"* as follows:[81]

> *"In my opinion, the nature of the instrument to which s. 37 refers is its description as a transfer, lease, mortgage, encumbrance, etc. What it achieves in particular is not part of its nature for relevant purposes. It is not necessary, in my opinion, to make a memorial effective as the registration of the dealing that the endorsement should particularise to any extent what the instrument does."*

41. Thus what was *"notified"* on the CT was both what appeared on the folium and the content of the memorialised documents, but nothing more extensive. This is made clear by Barwick CJ concluding[82] that were the memorandum of transfer *"unregistered"* no further matter would arise. That is to say, the registered dealing, being the transfer document, was a document on the Register Book incorporated into the CT, and therefore a document a person *"dealing with the registered proprietor in this case would be bound to search"*.[83]

42. A close analysis of the judgment of Windeyer J demonstrates the same approach to that of Barwick CJ,[84] and that no governing principle of constructive notice was laid down. Windeyer J specifically noted that the contest arose because both CTs referred explicitly to

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[78] Which stated *"[r]ight of way created by Indenture Registered No. 261 Book S and Transfer No. 7922 appurtenant to the land above described affecting the piece of land shown as site of right of way in the plan herein."*; see 124 CLR, 88.8.

[79] For the purposes of s 40 of the *Real Property Act 1862* (NSW), in virtually identical terms to s 69 of the RPA.

[80] As accepted by Menzies J in dissent 124 CLR, 84.5, *"It seems to me that the only interests notified were the rights of way and that that description cannot be regarded as covering the transfer of the interest in the land constituted by the transfer of the building"*.

[81] 124 CLR, 77-78.

[82] 124 CLR, 76.5 (*"... if the endorsement ... an easement."*); His Honour had earlier stated the converse proposition, 124 CLR, 78.5 (*"Once the memorial is sufficient ...proprietor's interest."*).

[83] 124 CLR, 79.7.

[84] Indeed, Barwick CJ by twice, 124 CLR, 76.2, 79.9, in his judgment having expressed agreement with Windeyer J's reasons, must himself have been interpreting them in accordance with this submission.

transfer No. 7922 as only creating a right of way, rather than the transfer of a building, and *"Bursill therefore claims that, having purchased land from a prior registered proprietor for value, it has an indefeasible title."*[85]

43. It follows from this understanding of the issue joined in the case, that when Windeyer J referred to making *"such searches as ought reasonably to have been made by him [or her] as a result of what there appears"* and to *"constructive notice of what it [ie transfer 7922] provided"*,[86] his Honour was simply including the content of a memorialised document as incorporated into the CT, and which therefore ought to have been searched. This is made very clear by his Honour's earlier reference to the *"critical question"* being whether the interest in respect of the buildings can be said to have been *"notified on the folium of the register-book constituted by ... the certificate of title."*[87]

44. Windeyer J's reference to constructive notice has to be understood against that background, rather than as the concept was used historically in equity, namely to resolve disputes as to the priority of interests in land by attributing a culpability in relation to the searching a chain of deeds.[88]

45. That what is *"notified"* within the meaning of s 69 of the RPA, is limited to what appears on the folium of the CT, and the content of documents memorialised thereon and thereby forming part of the Register Book – is a proposition also supported by remarks of Connolly J in *Hutchinson v. Lemon*.[89] These remarks were in turn referred to with apparent approval in the unanimous judgment of this Court in *Westfield*.[90]

46. By reason of ss 69 and 77 of the RPA, all that an intending purchaser of Lot 3 had notice of, was the memorialised Memorandum of Encumbrance. Notice of which other Lots were quasi-dominant tenements was not provided. To comply with s 77 of the RPA, *all* encumbrances to which the Lot 3 was subject, had to be memorialised with the RG's

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[85] 124 CLR, 89.3 (emphasising the word *"therefore"*); see also at 124 CLR, 92.8 (*"The argument that ..."*).

[86] 124 CLR, 93.1, 93.6.

[87] 124 CLR, 92.7, explicitly quoting the terminology in s 42 of the NSW Act.

[88] *Bailey v. Barnes* [1894] 1 Ch 25, 31; *Espin v. Pemberton* (1859) 3 De G & J 547, 554; *Ware v. Egmont* (1854) 4 De G M & G 460, 473; *Jones v. Smith* (1841) 1 Hare 43.

[89] [1983] 1 Qd R 369. In this case there was a memorial of a registered survey plan on a CT, and the plan marked out an easement. No document creating an easement had been memorialised. The defendants had contended that what was *"notified"* was merely *"that a survey of such an easement had been lodged."* [1983] 1 Qd R, 373A. Connolly J identified the issue as being one of construing the plan, and concluded that it had the effect of notifying an easement. His Honour stated, *"Bursill Enterprises Pty Ltd v. Berger Bros. Trading Co. Pty. Ltd. (1971) 124 CLR 73 is authority for the proposition that to identify interests which are notified, within the meaning of s. 44, by entry or memorial on the certificate of title involves a search of the instrument of which the memorial is so entered. The short description chosen by the Registrar of Titles in placing the memorial on the on the certificate is not an exclusive statement of the nature of the interest."* [1983] 1 Qd R, 373G.

[90] *Westfield Management Ltd v. Perpetual Trustee Co Ltd* (2007) 233 CLR 528, [5], fn 31.

signature.[91] In the context of a building scheme that required notification of either *all* of the other Memoranda of Encumbrance that constituted the scheme, or at the very least an identification in the memorialised Memorandum of Encumbrance of all of the quasi-dominant tenements. Insofar as *Burke v. Yurilla SA Pty Ltd*,[92] held that it was possible to identify the land which is entitled to the benefit of the covenant from *"other related documents"* it should not be followed. The premise upon which *Burke* was decided is inconsistent with, or at least after *Westfield*[93] has been superseded by, High Court authority.

47. There was no evidence that Mr and Mrs Boin were made aware of,[94] let alone the extent of, a building scheme.[95] When they received a transfer from the encumbrancees, any equity or contractual obligation that may have existed (assuming in fact a covenant in gross had not been created) bound them merely *in personam*. Accordingly, when Lot 3 was transferred in 1967 to Mr and Mrs McKenzie, they as successors in title took an indefeasible title that extinguished any equities.[96] Thus, the Appellants purchased free of any equities.

48. Is submitted that Grounds of Appeal 2.1 and 2.2 are made good by the submissions above.

No Requirement for General Searches – Ground of Appeal 2.2

49. Ground of Appeal 2.2 may also be made out, if (which is contested) searches beyond the CT and instruments incorporated thereon by memorial are required.

50. The Appellants contend that in order to be *"notified"* within the meaning of s 69 of the RPA, the quasi-dominant tenements had to be clearly defined in the Memorandum of Encumbrance, such that it was unnecessary for the Appellants to prosecute inquiries and searches and make deductions as to the extent of the building scheme. The Appellants purchased free of the equities, because any scheme or schemes failed this requirement.

51. Where land is burdened in equity by a building scheme, the *"extent or state"*[97] of the registered title is affected by the existence of each quasi-dominant tenement, as well as the

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[91] Note that the reference by the majority to an *"express memorial"* at CAB160, [275], is erroneous because the endorsement was not signed by the RG as required by s 51 of the RPA, as it stood prior to amendment by s 8 of the *Real Property Act Amendment Act 1975* (SA).

[92] (1991) 56 SASR 382, 391.8.

[93] (2007) 233 CLR 528, [5], [39] (*"The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material ..."*). This accords with the required approach to construing the RPA as set out in s 11 thereof, as best giving effect to its objects.

[94] As Kourakis CJ noted, CAB87, [60].

[95] Unlike the situation in *Netherby Properties Pty Ltd v. Tower Trust Ltd* (1999) 76 SASR 9, [15].

[96] And the majority erred in finding to the contrary at CAB160-161, [276].

[97] *Castle Constructions Pty Ltd v. Sahab Holdings Pty Ltd* (2013) 247 CLR 149, [20] ; *Westfield Management Ltd v. Perpetual Trustee Co Ltd* (2007) 233 CLR 528, [5].

terms of the negative covenants.[98] Subsequent purchasers of land should be able to understand from reading the CT and incorporated documents, all parcels of land that can be used to give standing to a proprietor to enforce a restrictive covenant, and therefore with whom they must negotiate to secure a lawful amendment or a departure therefrom.[99] Conversely, purchasers who wish to enforce restrictions, need to be able to identify the land that should be in compliance with the restrictions, *vis-à-vis* the parcel being purchased.

52. *Re Dennerstein*[100] considered in detail what was required to *"notify"* a person of the extent or state of a building scheme under Torrens legislation. Relying upon Orde J in the Canadian decision of *Re Campbell & Cowdy*,[101] Hudson J held that a covenant notified by an encumbrance must *"sufficiently identify the land in favour of which the restrictions are imposed"*. If the quasi-dominant tenements were not *"clearly defined"* on the CT and documents memorialised thereon which can be easily searched, then it was doubted that this was *"consistent with the intention and meaning"* of the Torrens legislation.

53. Hudson J continued:

> *"A purchaser under such a certificate ought not to be put upon inquiry as to anything beyond what the certificate itself discloses. ... To give to others rights which are not spread upon the face of the register [is] quite opposed to the whole intention of the Act. ...*
> *No reference to the existence or the extent of such a scheme is contained in the covenant ... . In my view, a purchaser of land [under the Torrens Act] is not bound to prosecute inquires and searches and make deductions ... . [I]t is not by any means easy to determine whether the sale of allotments in the estate has been made under or pursuant to a common building scheme. To require a person interested in purchasing one of those allotments to make this determination after obtaining the necessary evidence perhaps years after the original sale if it is available would render conveyancing a hazardous and cumbersome operation, and, in the case of dealings in land under the operation of* [the Torrens Act] *would defeat the object of the Act and destroy in large measure the efficacy of the system sought to be established thereby."*

54. In this case, to ascertain the existence and extent of the asserted building scheme, not only was the prudent conveyancer[102] required to prosecute inquires and searches (like investigating of a complex chain of title[103]) and make debatable deductions; here Supreme Court judges engaged in this process, and came to divergent views. As Kourakis CJ

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[98] G A Jessup, in the 1940 edition of *Forms and Practice of the Lands Titles Office of South Australia*, LBC, p344, stated that *"[a]ll encumbrances affecting the land being dealt with must be mentioned, preferably after the description of the property. The words "subject however to such encumbrances liens and interests etc." appearing in the forms given, indicate the instruments in the encumbrances must be set out."* With a building scheme, the encumbrances of all tenements within the scheme affect all other tenements.

[99] CAB97, [100].

[100] [1963] VR 688, 695-696, which pages contains all of the passages cited.

[101] [1928] 1 DLR 1034, 1037.

[102] *Bursill Pty Ltd v. Berger Trading Co Pty Ltd* (1971) 124 CLR 73, 93.2.

[103] As so characterised by Kourakis CJ in dissent, at CAB96, [97]. The process involves using cancelled CTs to construe the ambit of the operation of Memorandum of Encumbrance (as incorporated onto the CT by memorial), contrary to the views expressed in *Roberts v. Gilgandra Shire Council* (2008) 15 BPR 28, 295, [23], that a CT could not be construed by reference to a cancelled CT.

observed,[104] this result cannot be accepted in a registration system because it introduces *"radical uncertainty into a scheme that has, as its very purpose, certainty"*. To require such a process renders conveyancing hazardous and cumbersome, and destroys the efficacy of the system. It is the antithesis of Brickdale's six features.[105] It flouts the direction in s 11 of the RPA, that it *"always"* be interpreted to *"best"* give effect to its objects.

55. The majority considered[106] that *Re Dennerstein* was relevant only to the statutory provisions in Victoria. This was incorrect, because *Re Dennerstein* had been referred to with approval or apparent approval in various jurisdictions including in South Australia,[107] but more fundamentally its rationale extends beyond specific statutory regimes to the very purposes of the Torrens system which comport with the objects of the RPA as submitted above.

56. If generalised searches across CTs located anywhere on the Register Book were required, then it would be almost impossible be assess what degree of searching was reasonable. Upon this assessment being made, such degree as might be considered necessary would almost certainly be onerous. It was mere happenstance in this case, that one of the original vendors had an unusual name, which made it easier to conduct a computer search.[108]

57. Furthermore, it is not necessary that there be a common vendor[109] which removes from the suggested searching technique its efficacy. It would not necessarily be known at the outset in conducting searches whether or not there was a common vendor in the original transactions that may have occurred decades ago. Therefore, there is unacceptable uncertainty with searching an encumbrancee's name, or the encumbrancees' names.

58. Another approach, would be to start with neighbouring properties and conduct searches in all directions at ever greater distances. This method, however, fails to account for the fact that benefitted tenements need not be next to each other, and the law is uncertain as to the

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[104] CAB90, [70].

[105] At [28] herein.

[106] CAB139-140, [212].

[107] *Re Cashmore's Application* [1967] Tas SR 217, 228; *Clem Smith Nominees Pty Ltd v. Farrelly* (1978) 20 SASR 227, 237; *Sawyer v. Starr* [1985] 2 NZLR 540; *Ryan v. Brain* (1991) Q Conv R 54-401; *Burke v. Yurilla SA Pty Ltd* (1991) 56 SASR 382, 389 (the Full Court citing the relevant passage of Bray CJ in *Clem Smith* with approval); *Netherby Properties Pty Ltd v. Tower Trust Ltd* (1999) 76 SASR 9, [72-73]; *Baramon Sales Pty Ltd v. Goodman Fielder Mills Ltd* (2002) V Conv R 54-654, [1]; *Vrakas v. Mills* [2006] VSC 463, [45]; *Hosking v. Haas (No 2)* (2009) 14 BPR 27,407, [32-34]; *Re Hunt* [2017] VSC 779, [42]; *Xu v. Natarelli* [2018] VSC 759, [58]; *Randell & Ors v. Uhl & Ors* [2019] VSC 668, [81]. Further, the decision that *Re Dennerstein* was based upon, namely the decision of *Re Campbell & Cowdy* [1928] 1 DLR 1034, has subsequently be referred to with approval in Canada, *Re Sekretov and City of Toronta* [1973] 2 OR 161; *Wonderland Power Contre Inc v. Post and Beam &c* [2018] ONSC 7589, [66], and Tasmania, *Re Cashmore's Application* [1967] Tas SR 217, 228. See also *Midland Brick Co Pty Ltd v. Welsh* (2006) 32 WAR 287, [208].

[108] In any event, there is no statutory requirement for the RG to keep such lists: see D Kerr, *Australian Lands Titles (Torrens) System*, 1927, LBC, p33, fn 2.

[109] *Re Dolphin's Conveyance* [1970] Ch 654, 663C; *Re Mack and the Conveyancing Act* [1975] 2 NSWLR 623, 634F; *Burke v. Yurilla SA Pty Ltd* (1991) 56 SASR 382, 393.1.

permitted distance between tenements that remains consistent with the existence of a building scheme.[110] Thus, wherever an unencumbered property was located, it would be uncertain whether the geographic limits of the scheme had been reached in a search, or whether there was merely a geographic lacuna in it. Moreover, given that a Memorandum of Encumbrance is usually in standard form,[111] it would be difficult to use the mere similarity of the encumbrances to distinguish one scheme from another.

59. Finally, a conveyancer might go back to the grandparent title, and engage in the process that Kourakis CJ engaged in, in his dissenting judgment. That, however, would be hazardous as it would be making unwarranted assumptions that all the lots in the scheme came from the one original CT, and it would also be assuming a common vendor contrary to what the law allows. Such a method would simply be to adopt a system worse than searching old system title chains, because of the complexities and uncertainties involved.

60. Two criticisms of *Re Dennerstein* by Gillard J *obiter dicta* in *Fitt v. Luxury Developments Pty Ltd*,[112] need to be addressed, and with respect, they do not survive analysis. Gillard J doubted the correctness of *Re Dennerstein* because, first, the objects of the Torrens legislation were satisfied merely by the recording of the relevant restrictions in a memorialised document, and, secondly, it was suggested that the validity of building schemes was to be determined by the courts, and not the RG.

61. However, the first criticism fails because the *"extent or state"* of the registered title is necessarily defined in part by its arming of the registered proprietor with the ability to enjoin other registered proprietors who disregard the covenants.[113] The extent of the land that can be thus affected, is part of the *"extent"* of the property rights of the registered proprietor.

62. With respect to the second criticism, the premise may be accepted, but this does not address Hudson J's rationales for the principles laid down, which were based upon uncertainty and inefficiency of searches and their results, not that the building scheme itself would become indefeasible. The second criticism therefore amounts to a straw man argument.

63. Finally, it is submitted, that by reason of their erroneous interpretation of s 69 of the RPA, the majority relied upon the Gaetjens Plan, a document not held by the RG and not publicly

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[110] *Clem Smith Nominees Pty Ltd v. Farrelly* (1978) 20 SASR 227, 249.6 requires that it be merely *"in the neighbourhood"*.

[111] G A Jessup, *Forms and Practice of the Lands Titles Office of South Australia*, 1940, LBC, p146. See also the 10th Schedule in the 1975 reprint of the RPA in the South Australian consolidated legislation.

[112] [2000] VSC 258, [323], [326-327].

[113] Thereby giving the person so armed an interest in those other estates, *Pirie v. Registrar General* (1962) 109 CLR 619, 627.9.

available, to draw the conclusion that there was but one building scheme with 54 allotments.[114] This is directly inconsistent with the approach required by *Westfield*.[115]

64. It is submitted, accordingly, that Ground of Appeal 2.2 is established on the basis of the submissions above.

Standing – Ground of Appeal 2.3, Ground 1 of the Amended Notice of Contention

65. If (which is contested) the Appellants are bound by a building scheme, the Respondents should nevertheless fail, as they have no interest in the particular building scheme. It cannot be proved such a scheme extended in its scope beyond Lots 1 to 4 (which were subdivided in a later year), and the Respondents, therefore, are merely intermeddling busybodies.[116]

66. The belief of the Respondents based upon hearsay statements of the late Betty Fielder as to the latter's desires with respect to the subdivided property, amounts to nothing more than a mere intellectual or emotional concern, which gains them no advantage other than the satisfaction in righting a perceived wrong,[117] in a private law setting.[118] It plainly does not give rise to any special interest in the subject matter of the action. The action of the First and Second Respondents at trial should have been dismissed on that basis.

67. The Third Respondent lacked standing, because Lot 5 was not bound by reciprocal covenants, and it could not be established, for the reasons addressed by Kourakis CJ,[119] that Lot 35 was part of same building scheme.

68. It is submitted, accordingly, that Ground of Appeal 2.3 is established, and Ground 1 of the Amended Notice of Alternative Contention should be rejected, on the basis of the submissions above.

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[114] CAB118, [145].

[115] (2007) 233 CLR 528, [39]. See also *Fermora Pty Ltd v. Kelvedon Pty Ltd* [2011] WASC 281, [31-40].

[116] *Onus & Anor v. Alcoa Australia Ltd* (1981) 149 CLR 27, 35.6.

[117] *Australian Conservation Foundation v. The Commonwealth* (1980) 146 CLR 493, 530.7; *Onus & Anor v. Alcoa Australia Ltd* (1981) 149 CLR 27, 35.8, 36-37, 52-53, 61.5, 72.3, 73.9.

[118] *Shop Distributive and Allied Employees Association v. Minister for Industrial Affairs (SA)* (1995) 183 CLR 552, 558.1.

[119] CAB87, [59-60]. Moreover, the Memoranda of Encumbrance for Lots 1 to 4 are unique in that they all omit references to Deposit Plans, and have parts struck out (see [13.3] herein), although this has occurred manually for Lot 1 with the relevant words struck through with a ruled double line and initials: BFM17. Searches of other Lots would have disclosed, in contradistinction, that they were subject to two uniquely numbered Deposited Plans; the Deposited Plans for each were set out in the relevant Memoranda of Encumbrance; each Deposited Plan had the Lots related to it geographically grouped together. Lots 1 to 4 were unique geographically, in that they fronted an arterial road, namely Henley Beach Road, and had unencumbered properties to each side (Lot 5 and a separate block not allocated a lot number). While the covenants were similar (save for matters such as the difference in the currency the rent charge was denominated in after the changeover to decimal currency), there are inferences available about the advantages in having a different grouping or groupings of registered proprietors who could enforce *inter se* with respect to each scheme. Decades later, whether or not there was more than one scheme, or less than three schemes, is simply speculation.

Construing the Encumbrance – Ground of Appeal 2.4

69. Clauses 3 and 5 of the covenants, were directed to the topics of prohibiting the erection on any part of the said land, of a block or blocks of flats, home units or other multiple dwellings; or preventing commercial use, or of the adaption of buildings to those configurations and uses. Multiple dwellings, in context, means buildings defined by the preceding genus common to the examples.[120] Clauses 3 and 5 exhaust the topics of prohibiting commercial use and limiting density. Clause 2(a) although cast in the negative, directs that such buildings as were to be built, had to be for private residential purposes – effecting a positive stipulation as to residential use. In these circumstances, the indefinite article commencing cl 2(a), was to be construed as meaning *"any"* and not *"one"*.[121] This is further supported by the use of the word *"any"* before the word *"dwellinghouse"* in cl 5, and in the phrase *"AND FURTHER ... any dwellinghouse"*.

70. By reason of the *ut res magis valeat quam pereat* canon, the competing construction should be rejected. Once subdivision occurs, a permanent prohibition on all building on a lot in a residential area[122] would not merely depress the price, but could *"destroy all opportunity of selling"*[123] so as to amount to an unlawful restraint upon alienation of the subdivided part. It would indirectly prevent subdivisions under Part 19AB of the RPA, which such a clause cannot directly do.[124] While similar limitations for short periods are permissible, where they ensure the construction of quality homes;[125] here, by contrast, once subdivided the portion of land is effectively prevented from being alienated contrary to the policy of the law,[126] if construed in accordance with the views of the majority in the Court below.

71. It is submitted, accordingly, that Ground of Appeal 2.4 is established, on the basis of the submissions above.

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[120] It seems likely that it was drafted to remove uncertainty that might arise from cases such as *Kimber v. Admans* [1900] 1 Ch 412, and *Ex parte High Standard Constructions Ltd* (1928) 29 SR(NSW) 274, 278-279.

[121] *Tonks v. Tonks* (2011) 11 VR 124, [17].

[122] As opposed to limiting the number of buildings, as in *Reuthlinger v. MacDonald* (1976) 1 NSWLR 88, 100E-F, although the suggested limitation of *Hall v. Busst* in that case to complete contractual removal of the right to alienate, should not be followed on the basis that it is artificial.

[123] *Allstate Prospecting Pty Ltd v. Posgold Mines Ltd & Ors* [1995] TASSC 41, [27-28]; Equivalently, *In re Rosher* (1884) 26 Ch D 801, 810.9 (*"... a restraint on selling at all."*) Cp *John Nitschke Nominees Pty Ltd v. Hahndorft Golf Club Inc & Anor* (2004) 88 SASR 334, [99] *et seq*; *Nullagine Investments Pty Ltd v. The Western Australian Club Inc* (1993) 177 CLR 635, 649-652, Brennan J in dissent.

[124] CAB165, [297]; *City of Mitcham v. Clothier* (1994) 62 SASR 394, 401-402.

[125] *Vercorp Pty Ltd v. Lin* [2007] 2 Qd R 180, [56-57].

[126] It should be noted that *Caldy Manor Estate Ltd v. Farrell* [1974] 1 WLR 1303 which holds to the contrary, has been considered not to be good law in Australia as it is inconsistent with *Hall v. Busst* (1960) 104 CLR 206. See *Bondi Beach Astra Retirement Village Pty Ltd v. Gora* (2011) 82 NSWLR 665, [297]; *Allstate Prospecting Pty Ltd v. Posgold Mines Ltd & Ors* [1995] TASSC 41, [20].

Section 51B of the RPA – Ground 2 of the Amended Notice of Alternative Contentions

72. This argument by the Respondents was not advanced in the courts below, and no issue there was joined in relation to it. Had it been raised, further evidence could have been led concerning whether the McKenzies' purchase in 1967 was for value,[127] thereby extinguishing the equity at a time prior to s 51B of the RPA coming into operation. In these circumstances it should not be permitted to be ventilated now, for the first time.

73. As it is raised for the first time by way of an alternative contention, and has only been developed slightly in the Special Leave application, the Appellants propose to address it in their Reply, once the full nature of the argument is made apparent.

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Part VII: Precise Form of Orders Sought

74. That:

74.1 The Appeal be allowed;

74.2 The orders of the Court below be set aside and in lieu thereof it is ordered that:

74.1.1. The Appeals to the Court below be allowed;

74.1.2. The Respondents' actions in the District Court of South Australia be dismissed;

74.1.3. The Respondents pay the Appellants costs in this Court and in the courts below.

Part VIII: Time Estimate

20 ~~75. Half a day to a day divided equally between the Appellants and the Respondents.~~

The Appellants estimate their oral submissions will take 3 hours.

Dated ~~8~~ 11 May 2020:

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[127] To avoid the consequences upon indefeasibility of Mr and Mrs McKenzie being treated as mere volunteers; see *Peck v. Peck* [2010] SASC 258, [83], which in any event, the Appellants say is inconsistent with the proper construction of s 69 of the RPA.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A4 of 2020

BETWEEN:

Nick Deguisa
First Appellant
Tori McKenzie
Second Appellant

and

Ann Lynn
First Respondent
Christine Evans
Second Respondent
Richard John Fielder
Third Respondent

ANNEXURE TO APPELLANTS' AMENDED SUBMISSIONS

LIST OF CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS – PARAGRAPH [3] OF PD 1 OF 2019

Constitutional Provisions

1. Nil

Statutes

2. *Real Property Act 1857-1858* (SA), Preamble
3. *Real Property Act 1886* (SA), ss 3 (definition of *"instrument"*), 10, 11, Division 1 of Part 5, 51B, 54, 69, 77
4. *Real Property (Strata Titles) Act 1967* (SA), s 5
5. *Real Property Act 1886* (SA) (1975 consolidated reprint, SA Statutes), Sch 10
6. *Real Property Act Amendment Act 1975* (SA), s 8
7. *Real Property Act 1862* (NSW), ss 37, 40 and 42
8. *Real Property Act 1900* (NSW), s 3 (definition of *"dealing"*)
9. *Strata Titles Act 1988* (SA), Sch 1

Statutory Instruments

10. Nil