HIGH COURT OF AUSTRALIA

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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' REPLY[1]

Part I: Certification

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

Part II: Concise Reply to the Argument of the Respondents

2. The Respondents appear to make, *in effect*, five principal contentions, namely that:
   2.1 *Bursill's* case should be interpreted as requiring searches of documents beyond the CT and documents memorialised thereon;
   2.2 Amendments inserting s 51B of the RPA broadened the definition of *"original certificate"* and *"Register Book"* to include all records held by the RG relating to the land, thereby widening the scope of what was notified to the Appellants pursuant to s 69 of the RPA – an argument not raised in the Courts below;
   2.3 Discharging an obligation of reasonable searching required going back to the grandparent CT, and then to the Deposit Plans (**DPs**) and Dockets, which would have (it is said) identified 52 allotments as part of one building scheme;
   2.4 The covenants should be construed to limit a proprietor to one dwelling house per un-subdivided allotment;
   2.5 The Third Respondent has standing even if Lot 35 was in a different building scheme.
3. These contentions should each be rejected for the reasons below and in the Appellants Amended submissions.

[1] In this document, paragraphs in the Respondents' Submissions as designated "RS[xx]" and in the Appellants' Amended Submissions as "AAS[xx]". Definitions in AAS are adopted in this Reply.

Reply as to: Interpretation of Bursill's case; RS[45-61]

4. The judgment of Windeyer J in *Bursill's* case does not bear the interpretation the Respondents seek to place upon it – otherwise his identification of what the *"critical issue"* was, and the reference to *"notified on the folium of the register-book constituted by ... the certificate of title."* {see AAS[43]} would make no sense. Similarly, the Respondents fail to address the fact that Barwick CJ considered that if the argument he had rejected had held sway, the transfer would not have formed part of the Register Book, was *"unregistered"* and no further issue would arise, i.e. no further searches would have been required {see AAS[41]}. The views of Barwick CJ, approved in the unanimous decision in *Westfield*, and his stated agreement with the judgment of Windeyer J, similarly mean that the judgment of Windeyer J cannot mean what the Respondents contend it means.

5. In the case of *Registrar-General(NSW) v. Cihan*,[2] the Court of Appeal was significantly influenced in its conclusion that cancelled CTs could be referred to, by the fact that other provisions in the NSW legislation (not present in the RPA) implied that documents that were not memorialised could be incorporated onto the folium by reference. In the absence of such a consideration, authority dictates that a cancelled CT does not form part of the Register Book.[3] AASfn103 is referred to and repeated.

Reply as to: s 51B of the RPA; RS[29], fn76, [76-77]

6. The Respondents seek to contend that the Register Book included cancelled CTs and the term *"original certificate"* (as appearing in the paramountcy provision, s 69 of the RPA,[4] as at 2008 when the Appellants searched the Register Book), was, from 1990, given an extended meaning by s 51B of the RPA. The asserted extension includes *"the records maintained by"* the RG *"pursuant to this section relating to the land."* Such an interpretation would make searching titles much more difficult in a manner that is inconsistent with ss 10 and 11 of the RPA.

7. The suggested extended definitions, however, also have to be read in light of the words, *"in particular"* appearing before the sub-paragraphs, which govern by limitation when they may be applied. This is not triggered until the RG is a *"required"* (as a condition precedent)

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[2] [2012] NSWCA 297, relevantly at [68].

[3] *Hassett v Colonial Bank of Australia* (1881) 7 VLR 380, 387.4 (Stawell CJ describing the prior cancelled registered certificate in terms that *"Such a certificate no longer exists."*); 389.7 (Higinbotham J - *"... for the legal effect of the issue of the second certificate would be to erase the first from the register."*)

[4] Note that Sch 2 of the *Real Property (Electronic Conveyancing) Amendment Act 2016* (SA) (No 29 of 2016) deleted the word *"original"* and AAS[31] should have identified the paramountcy provision as at 2008 as stating *"[t]itle of every registered proprietor of land shall, subject to such encumbrances, liens, estates, or interests as may be notified on the original certificate of such land, be absolute and indefeasible ..."*.

to register or record information. That this is a condition precedent is supported by the fact that the chapeau to s 51B of the RPA makes clear that the purpose of the section is to *exclude* the possibility that references in the RPA or related legislation to the registering of titles and the recording of information might be construed as being limited to hard copies of such information.[5]

8. There was no legislative *requirement* under the RPA or otherwise, to record cancelled CTs or Dockets by *"electronic, electromagnetic, optical or photographic"* processes, and thus s 51B of the RPA had no further part to play. No doubt s 53 of the RPA placed an obligation on the RG to retain hard copies of cancelled CTs, but similarly the words *"or in some other form"* cannot be elevated into a *requirement*. The RG was entitled to scan these documents and allow them to be searched electronically, but this also was not *"required"* such as to attract any further operation of s 51B of the RPA. Likewise, there was no *requirement* to exercise a power under s 51C(2)(b) of the RPA, to update manual CTs to computer titles.
9. Finally, as previously mentioned, any equity that bound Mr and Mrs Boin was extinguished when the McKenzies purchased Lot 3, before s 51B of the RPA came into existence {AAS[47], [72]}. The Respondents fail to address this issue at all.

Reply as to: Reasonable Searches; RS[14], [62-75]

10. The issue that conflicting potential inferences was fatal to the building scheme being properly notified such as to bind the Appellants {AAS[54]} has not been addressed in RS.
11. It is incorrect to say *per se* that the registry was computerised in 1990 {see RS[14]}. Legislation to allow migration to a computerised system was put in place then, and this occurred over a period of time. For example, the present CT was issued a decade later {AASfn2}. There was no evidence before the trial court that the computer searches Mr Morgan referred to were available in 2008 when the Appellants purchased Lot 3.
12. The submission {RS[63-65]} that *Re Dennerstein* and authorities following it are distinguishable because there was nothing to trigger a broader enquiry is flawed for three reasons. First, it is implicitly premised upon an acceptance of the Respondents' submissions as to how the reasons of Windeyer J in *Bursill* should be interpreted, which interpretation by reason of the matters submitted above should not be accepted. Secondly, the reasoning of Hudson J fixed upon the burden and uncertainty of searching being inconsistent with the scheme of the Torrens system, and these matters apply here notwithstanding the

[5] The intent of the section is to extend the permitted registering or recording to *"electronic, electromagnetic, optical or photographic"* processes. This is made plain by the words *"by that process"*.

endorsement on the back sheet of the encumbrance. Thirdly, it is inconsistent with the statement in *Westfield* that the information necessary to comprehend the nature and extent of the title must appear from the information on the relevant folio and the registration of dealings.[6]

13. Even if the decision in *Sertari Pty Ltd v. Nimba Developments Pty Ltd*,[7] is correct in allowing recourse to DPs in construing the extent of an easement, notwithstanding that they are outside the scope of where *Westfield* identifies third parties are required to search in order to obtain the necessary information about the title, in this case Lot 3 was not part of a DP but was merely on a working docket.

14. If the Appellants are successful on their main arguments, further issues concerning the construction of the covenants, and standing would not need to be reached.

Reply as to: Construction of Covenants; RS[79-80]

15. As to the submission {RS[80.2]} that it is not possible to accept that there be multiple dwellings, each with a household, if there is a prohibition of dwellings containing multiple households, this fails to comprehend the mischief addressed by prohibiting blocks of flats, units and the like. Such buildings involve separate households living in close physical proximity to each other, being confined in the same building. This it may be inferred would have an impact on noise levels and similar facets of amenity. Having one dwelling on each part of the further subdivided land obviously does not attract the same considerations.

16. As to the submission {RS[81]} about expert evidence, clearly one does not require such evidence to draw the conclusion that a subdivided plot of land in a residential area, upon which one cannot build, would make such land virtually unsalable. One can ask rhetorically why would anyone want to purchase it, if it simply had to remain vacant?

Reply as to: Standing; RS[82-86]

17. Lot 5 cannot afford standing, because even if one accepts that in equity the common vendor is impliedly bound by a building scheme {RS[84]}, a prospective purchaser of Lot 3 would be unable to ascertain this from the Register Book, because there would be no document to lodge to notify an encumbrance. Accordingly, such a principle cannot be accommodated within the Torrens system.

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[6] In this respect it is noteworthy that in the mid 1960s, s 3 of the RPA (and now s 3(1) of the RPA) defined *"certificate"* to *"extend to and include all plans and entries thereon:"*. The copies of the DPs were included on the CTs themselves, and were therefore registered. (See BFM62, which includes BFM455, as an example). Most of the Memoranda of Encumbrance, but not Lot 3, included reference to the DPs (see AASfn18). On the other hand, Docket No 669/64 (BFM462), which laid out Lot 3 as the area marked "O", was not included on the parent CT for Lot 3.

[7] [2007] NSWCA 324, [16].

18. As to the question of issuing an injunction or declaration based upon the effect of the enjoyment of property (not otherwise part of a building scheme), this amounts to an unsustainable submission that there should be *quia timet* relief based upon a cause of action in nuisance. Otherwise, there is no equity to support the relief.

Miscellaneous Issues

19. *Historical versus contemporary enquiry; RS[33-44]*: The criticism of Kourakis CJ's judgment, on the asserted basis that his reasoning conflated these issues is unjustified. Let it be assumed that the historical existence of a building scheme was proved. The (so called) contemporary enquiry requires that the basis upon which the historical existence of a building scheme is established, be itself notified appropriately on the Register Book. The contemporary enquiry therefore has inherent in it the historical inquiry. It was always available to the original vendors to provide recitals in the Memorandum of Encumbrance which set out, as it were, chapter and verse, in relation to the building scheme. This did not occur, in a manner fatal to the continued existence of the scheme in relation to Lot 3.

20. *Further omissions*: In addition to the omissions to address issues identified above, the Respondents fail squarely to address the following submissions of the Appellants that:

    21.1 The identification of *all* quasi-dominant tenements on the CT and memorialised documents was necessary to give effective notice of the building scheme, because the ability to obtain an injunction against the holders of each of those tenements gives the registered proprietor an *interest* in *each* of those estates, and thus defines the *"extent or state"* of the property rights *inter se* {AAS[32-33], [46], [61] fn113};

    21.2 A technique of identifying an original common vendor from the cancelled grandparent title was inefficacious because it was settled law that building schemes need not have a common vendor, nor a common original title {AAS[57], [59]};

21. There is a concession {RSfn131} that the First and Second Respondents lacked standing to obtain relief, and the appeal may be allowed against them, based upon the concession.

Dated 2 July 2020:

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