

DEGUISA & ANOR v LYNN & ORS (A4/2020)

Court appealed from: Full Court of the Supreme Court of South Australia
[2019] SASCFC 107

Date of judgment: 5 September 2019

Special leave granted: 20 March 2020

An area of land of approximately 68 acres in Fulham, South Australia, was owned by Mr Oliver Ayton (the third respondent's maternal grandfather). After his death, the land was transferred to Mr Keith Ayton and Mrs Betty Fielder (the third respondent's mother). In the mid-1960s, the land was subdivided into approximately 54 allotments, with each allotment (with the exception of two allotments) being subject to restrictive covenants. The covenants prohibited the owners of the allotments from building blocks of flats, home units or other multiple dwellings on the affected land.

The appellants are the registered proprietors of land situated at 538 Henley Beach Road Fulham (Lot 3) in South Australia. The first two respondents are the executors of the estate of the late Mrs Betty Fielder. The third respondent is the owner of two properties, namely Lots 5 and 35.

In December 2015 the appellants applied to the relevant council for development approval of Lot 3. Approval was granted for the sub-division of the property into two equal parts. In November 2017 the appellants applied for development approval to build two attached residences on the property, one on each sub-divided lot. The Council granted planning consent later that month. The respondents contended that the building of the two dwelling houses on the sub-divided land infringed the covenant and in July 2016 they lodged a caveat over the property to protect their interests in enforcing the covenant.

The respondents commenced an action in the District Court of South Australia seeking to extend the caveat over the property. Judge Tilmouth held that the appellants had deemed and actual knowledge of the encumbrance and that the respondents as caveators were statutorily entitled to enforce the caveat. Judge Tilmouth ordered that the building of the houses on the land was in breach of the encumbrance and that the appellants were prohibited from taking steps to build on the land.

The appellants then appealed to the Full Court of the Supreme Court of South Australia. The majority of the Full Court dismissed the appeal. Peek J (with Hughes J agreeing) held that if a potential purchaser is on notice from the Certificate of Title that there may be a restriction on title, they must make reasonable searches of the Register to determine the nature and extent of those restrictions. Peek J held that the appellants were bound by the covenant. Kourakis CJ would have allowed the appeal, holding that the documents evidencing the covenant and the registered instrument did not identify the land covered by it. As a result, Kourakis CJ held that the appellants were not bound by the covenant.

The grounds of appeal in this Court are that the majority of the Full Court of the Supreme Court of South Australia:

- a. erred in finding that restrictive covenants ran with the land and bound all subsequent owners, including the appellants;
- b. erred in holding that the third respondent had standing to enforce the restrictive covenants by virtue of his ownership of "Lot 35"; and
- c. erred in holding that the restrictive covenants properly construed only permitted one dwelling house to be constructed on the proposed subdivided land.