HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON AND EDELMAN JJ

NICK DEGUISA & ANOR — APPELLANTS

AND

ANN LYNN & ORS — RESPONDENTS

Deguisa v Lynn
[2020] HCA 39
Date of Hearing: 2 September 2020
Date of Judgment: 4 November 2020
A4/2020

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Supreme Court of South Australia made on 5 September 2019 and 3 March 2020 and, in their place, order that:*

   (a) the appeal to that Court be allowed;

   (b) paragraphs 1, 3, 4, 7 and 8 of the orders of the District Court of South Australia made on 29 August 2018 in matters DCCIV 1750 of 2016 and DCCIV 597 of 2018 be set aside and, in their place, it be ordered that:

      (i) the balance of the plaintiffs' actions be dismissed; and

      (ii) the plaintiffs pay the defendants' costs in both matters; and

   (c) the respondents pay the appellants' costs in that Court.

3. The respondents pay the appellants' costs in this Court.

On appeal from the Supreme Court of South Australia

Representation

A L Tokley QC and H M Heuzenroeder for the appellants (instructed by Clarke Hemmerling Lawyers)

W J N Wells QC with R Ross-Smith for the respondents (instructed by Lindbloms Lawyers)

CATCHWORDS

Deguisa v Lynn

Real property – Torrens system – Where appellants registered proprietors of land – Where appellants obtained planning approval to subdivide land and build two townhouses – Where present certificate of title for land referred to memorandum of encumbrance which prohibited erection of any buildings other than "a dwellinghouse" and prohibited "multiple dwellings" – Where back-cover sheet of memorandum of encumbrance had typed statement indicating that encumbrance formed part of common building scheme – Where neither memorandum of encumbrance nor present certificate of title identified other lots benefited by restrictive covenants in memorandum of encumbrance – Where s 69 of *Real Property Act 1886* (SA) provided title to land indefeasible subject to encumbrances and interests "notified" on original certificate of title of such land – Whether appellants were notified of restrictive covenants in memorandum of encumbrance in accordance with s 69.

Words and phrases – "cancelled certificate of title", "certificate of title", "common building scheme", "encumbrance", "memorandum of encumbrance", "notice", "notified", "notified on the certificate of title", "prudent conveyancer", "purpose of the Torrens system", "Register Book", "restrictive covenants", "search and inspection", "searches of the Register", "sufficiently notified", "title", "title by registration", "title of the registered proprietor", "Torrens system".

Real Property Act 1886 (SA), ss 51B, 69.

1 KIEFEL CJ, GAGELER, KEANE, GORDON AND EDELMAN JJ. Robert Richard Torrens, a native of Cork in Ireland[1], by his vision, energy and tenacity, secured for his adoptive home, South Australia, the manifold benefits of the system of land title by registration which bears his name. The Torrens reform group was multidisciplinary, drew on international comparative law analysis including of other land systems and presaged the great modern law reform projects[2].

2 As Professor Whalan has explained, the Torrens system is characterised by the guarantee of the State that the title which it produces to a person seeking to take an interest in a parcel of land is an accurate and comprehensive statement of the state of the title to that land, as to both the title of the registered owner and the interests of others in that land[3]. With the benefit of that guarantee, a person dealing with a registered proprietor of land need look no further than the registered title and the interests notified on it in order to ensure that his or her dealing does not miscarry[4].

3 The benefits of the Torrens system in bringing order out of the chaos of the state of colonial land titles in South Australia were so significant that the system came to be adopted by the other Australian colonies prior to Federation, and by the Territories thereafter. But for some time after the adoption of the Torrens system by legislatures in Australia, the courts did not fully embrace the radical reform wrought by the adoption of Torrens' great innovation. That was due, in no small measure, to the influence of the Privy Council's decision in *Gibbs v Messer*[5], the effect of which was to defer the indefeasibility of the title of a registered proprietor

---

1 Croucher, "'Delenda Est Carthago!' – Sir Robert Richard Torrens and His Attack on the Evils of Conveyancing and Dependent Land Titles: A Reflection on the Sesquicentenary of the Introduction of His Great Law Reforming Initiative" (2009) 11 *Flinders Journal of Law Reform* 197 at 202.

2 Raff, "Torrens, Hübbe, Stewardship and the Globalisation of Property Law Systems" (2009) 30 *Adelaide Law Review* 245.

3 Whalan, *The Torrens System in Australia* (1982) at 20.

4 Whalan, *The Torrens System in Australia* (1982) at 13-20; *Breskvar v Wall* (1971) 126 CLR 376 at 385.

5 [1891] AC 248. See *Clements v Ellis* (1934) 51 CLR 217 at 243-245.

so that the title of a person dealing with the registered proprietor might be defeated by the effect of transactions that were not notified on the certificate of title.

4 It was only in the landmark decisions of the Privy Council in *Frazer v Walker*[6] and the High Court in *Breskvar v Wall*[7] that it was fully accepted that the Torrens system established a system of title *by* registration rather than one *of* registration of title. That understanding of the scheme of the Torrens system informed this Court's decision in *Westfield Management Ltd v Perpetual Trustee Co Ltd*[8]. In that case, the Court unanimously affirmed that the dealings recorded on the certificate of title, together with the information appearing on that folio of the Register Book, provide a purchaser taking his or her title to land from the registered proprietor "with the information necessary to comprehend the extent or state of the registered title to the land in question" so that information extraneous to the certificate of title was immaterial to the indefeasibility of the purchaser's title[9]. As will be seen, the path to the resolution of the principal issue in the present case is significantly illuminated by the approach in *Westfield*.

The issue

5 The appellants are the registered proprietors of land situated at 538 Henley Beach Road, Fulham ("Lot 3"), as comprised in certificate of title volume 5804 folio 557 ("the present certificate of title")[10]. The appellants have planning approval to subdivide their lot and build two townhouses[11].

6 The first and second respondents are daughters of Betty Fielder, who was the owner of a large parcel of land which included 52 smaller parcels of land, including Lot 3, sold in the mid-1960s as part of what is claimed to be a common building scheme. The third respondent is the registered proprietor of Lots 5 and 35,

---

6 [1967] 1 AC 569 at 581, 584-585.

7 (1971) 126 CLR 376 at 385-387, 391, 397, 399-400, 406, 413.

8 (2007) 233 CLR 528 at 531-532 [5]. See also at 539 [39].

9 *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528 at 531 [5].

10 *Deguisa v Lynn* [2019] SASCFC 107 at [137].

11 *Deguisa v Lynn* [2019] SASCFC 107 at [107].

one or the other of which is said also to be derived from the common building scheme.

7 The respondents contend that covenants in the common building scheme restrict the nature and extent of construction permitted on Lot 3.

8 The appellants' principal contention is that they are not bound by the restrictive covenants, because they were not "notified" of them in accordance with s 69 of the *Real Property Act 1886* (SA) ("the Act"). This contention was rejected by the courts below. The appellants also argue that none of the respondents have standing to enforce the common building scheme, and further, that the covenants do not on their terms prevent the construction they seek to undertake. Once again, the appellants were unsuccessful in relation to these arguments in the courts below.

9 The appellants' principal contention should be accepted. The text of s 69 of the Act, the statutory context in which it is to be construed, and the authoritative judicial exposition of the purpose of the Act, combine to support the conclusion that a person dealing with a registered proprietor of land is not to be regarded as having been notified of an encumbrance or qualification upon the title of the registered proprietor that cannot be ascertained from a search of the certificate of title or from a registered instrument referred to in a memorial entered in the Register Book by the Registrar-General.

10 On the footing that the appellants' principal contention must be accepted, their appeal must be allowed. That being so, it is unnecessary to consider the other contentions advanced by them.

Common building schemes and the Torrens system

11 A common building scheme is constituted under the general law. It is sufficient for the purposes of this case to say that where a plaintiff and defendant each derive title to a lot from a common vendor of land laid out for sale in separate lots as part of a general scheme of development, the lots are sold subject to a covenant containing restrictions imposed upon all the lots for the benefit of all the lots, and the plaintiff and defendant (or their predecessors in title) have purchased their lots on the footing that the restrictions were for the benefit of the other lots in

the general scheme, the plaintiff will in equity be entitled to enforce the covenant against the defendant[12].

12 Under the Act, restrictive covenants in common building schemes cannot be registered. Indeed, it has been observed that "there is no evidence that the notification or registration of restrictive covenants was within Torrens' field of vision"[13]. In New South Wales[14], Victoria[15], Western Australia[16], Tasmania[17] and the Northern Territory[18], legislation has made specific provision for the creation and notification of restrictive covenants; but South Australia, Queensland and the Australian Capital Territory have not made any such provision.

13 The present case is not concerned with whether a covenantor is bound by his or her promise to the covenantee, but with whether the title to land in ownership of a successor in title to the covenantor is affected by the interest of the owner of another parcel of land in the enforcement of the covenant, the benefit of which attaches to that other person's land. While the provisions of the Act speak of encumbrances, liens, estates or interests as possible qualifications of, or burdens upon, the title of a registered proprietor of land, there is no express reference in the Act to restrictive covenants, or to the interest of the covenantee as a species of interest that may burden or qualify the title of the registered proprietor. The cases do not suggest, and the appellants did not argue, that restrictive covenants enforceable under the general law as part of a common building scheme are in

---

12 *Elliston v Reacher* [1908] 2 Ch 374 at 384; *Brunner v Greenslade* [1971] Ch 993 at 1003-1004. See generally Bradbrook and MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants*, 3rd ed (2011) at 348-350.

13 Christensen and Duncan, "Is it time for a national review of the Torrens' system? – The eccentric position of private restrictive covenants" (2005) 12 *Australian Property Law Journal* 104 at 104.

14 *Conveyancing Act 1919* (NSW), ss 89A, 89B, 89C.

15 *Transfer of Land Act 1958* (Vic), s 88.

16 *Transfer of Land Act 1893* (WA), ss 129A, 129B.

17 *Land Titles Act 1980* (Tas), ss 102-104.

18 *Law of Property Act 2000* (NT), s 169.

some way so alien to the scheme of the Act that the equitable rights and obligations so created cannot be accommodated to the provisions of the Act. But if the benefit and burden of mutual restrictive covenants are to affect the registered title of a purchaser of a parcel of land subsequent to the original covenantors, steps must be taken to ensure the notification on the certificate of title of each parcel of land burdened by a restrictive covenant and the other lots intended to be benefited by that covenant as part of the common building scheme.

14 In South Australia, advantage has been taken of s 128 of the Act, which provides for the execution in the appropriate form of an encumbrance where "land is intended to be charged with, or made security for, the payment of ... [a] sum of money, in favour of any person". The courts have upheld the practice of annexing the restrictive covenant of a common building scheme to an encumbrance which secures the payment of a sum of money. This practice facilitates the registration of an instrument which gives notice on the certificate of title of the burden of the restrictive covenant and of the other lots in the scheme which benefit from it[19]. It must be understood that the rent charge in an encumbrance creates an interest in land, but a restrictive covenant of itself does not.

15 It was common ground between the parties that a covenant can operate against an owner of land who is not himself or herself a covenantor only if the owner is relevantly fixed with notice of the other parcel or parcels to which the benefit of the covenant is attached. In this regard, the provision of the Act of central concern in the present case is s 69. It provides, subject to immaterial exceptions:

> "The title 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".

16 Not surprisingly, the appellants' argument emphasised the text of s 69, making the compelling point that the section speaks of encumbrances and interests "notified on" the original certificate of title rather than of some looser or less immediate connection between what is to be found on the certificate of title and the encumbrance or interest, such as "relating to" or "reasonably ascertainable from" the certificate of title. The appellants contend that s 69 could hardly have been clearer that encumbrances or interests that can be discovered only by a search for material extraneous to the Register Book are beyond its contemplation. As a

---

19 *Blacks Ltd v Rix* [1962] SASR 161 at 163-164; *Burke v Yurilla SA Pty Ltd* (1991) 56 SASR 382 at 389-390; *Netherby Properties Pty Ltd v Tower Trust Ltd* (1999) 76 SASR 9 at 21-22 [71]-[72].

matter of the ordinary and natural meaning of the text of s 69 of the Act, there is force in the appellants' contention.

17 The other provisions of the Act which provide the context in which s 69 operates do not suggest any reason to disagree with this view of the operation of s 69. On the contrary, reference to the statutory context in which s 69 appears shows that the scheme of the Act is that the certificate of title should be kept by the Registrar-General so as to enable a person searching the Register Book to find a statement of the state of the registered proprietor's title that is both accurate and comprehensive. It is convenient to refer to these provisions now, before turning to a summary of the facts of the case and an examination of the judgments in the courts below.

Statutory context

18 Section 10 of the Act states that the objects of the Act are "to simplify the title to land and to facilitate dealing therewith, and to secure indefeasibility of title to all registered proprietors, except in certain cases specified in this Act". Section 11 of the Act goes on to state that the Act "shall always be construed in such manner as shall best give effect to the objects" of the Act.

19 Section 49 provides that "[e]ach original certificate shall constitute a separate folium of the Register Book, and the Registrar-General shall record thereon distinctly and separately all memorials affecting the land included in each certificate".

20 Section 51 provides that "[e]very memorial entered in the Register Book shall be sealed with the seal of the Registrar-General, and shall state 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". In this regard, the term "instrument" is defined by s 3(1) as "every document capable of registration under the provisions of any of the Real Property Acts, or in respect of which any entry is by any of the Real Property Acts directed, required, or permitted to be made in the Register Book".

21 Section 57 provides relevantly that "[e]very instrument shall, when registered, be deemed part of the Register Book".

22 It is evident that ss 49, 51 and 57 contemplate that the Registrar-General is duty-bound to ensure that the certificate of title is a comprehensive statement of all memorials "affecting" the land included in the certificate. That comprehensive statement leaves no room for the possibility that information extraneous to the

certificate of title may affect the title of the registered proprietor. That understanding is confirmed by s 77, which requires the Registrar-General to "record on every certificate issued by him, and in such manner as to preserve their respective priorities, memorials of all subsisting ... encumbrances ... to which the land may be subject".

23 Section 65 provides relevantly that "[a]ny person shall have access to the Register Book, and to all instruments filed and deposited in the Lands Titles Office for the purpose of inspection during the hours ... appointed for search".

24 Section 128 provides relevantly that whenever any land is intended to be charged with the payment of a rent charge in favour of any person, "the registered proprietor shall execute an encumbrance in the appropriate form".

25 Section 129(1) provides relevantly that every such encumbrance "shall contain an accurate statement of the estate or interest intended to be ... encumbered, and shall also contain or have endorsed thereon a memorandum of all leases, mortgages, and encumbrances (if any) affecting such land".

26 Section 129(2) relevantly provides that where an encumbrancer is required to "do or refrain from doing any ... act ... by reference to some other document", the Registrar-General may require a copy of the document concerned to be attached to the encumbrance or deposited in the General Registry Office or in any other public registry in the State where, in the opinion of the Registrar-General, the requirement is not adequately set forth in the instrument lodged for registration.

27 In 1990, s 51B was added to the Act. That section provides that where the Registrar-General is required by the Act or any other Act to register title to land, or to record any other information relating to land, the Registrar-General may do so by an electronic or other process. In such a case, the provisions of the Act are to be construed so as to apply to the registration of title, and the term "Register Book" will be taken to include the records so maintained by the Registrar-General. In particular, s 51B(e) provides that a requirement of the Act that a record relating to land be made by entry or endorsement of a memorial or memorandum in the Register Book or by any other entry or endorsement or by notation in the Register Book or on the certificate or other instrument of title for the land will be satisfied if the Registrar-General makes the record by an electronic process.

Lot 3

28 Lot 3 is one of 54 allotments which once were part of a larger parcel of land contained in the now cancelled certificate of title volume 2442 folio 85 ("the

grandparent certificate of title")[20]. The registered proprietor of that large parcel of land was Oliver Ayton, the third respondent's maternal grandfather. That parcel of land was bequeathed by Oliver Ayton to Keith Ayton and Betty Fielder in 1961[21]. In the mid-1960s, that land was the subject of a substantial subdivision which, among other things, produced Lot 3.

29 The first sale of Lot 3 occurred in 1965 to Giulio and Franca Boin. At that time, Lot 3 was contained in certificate of title volume 3310 folio 186 ("the parent certificate of title")[22]. A memorandum of encumbrance ("the Memorandum of Encumbrance"), numbered dealing 2675722, dated 4 November 1965, was lodged for registration and recorded on the parent certificate of title. Lot 3, so encumbered, was transferred from Keith Ayton and Betty Fielder to Giulio and Franca Boin.

30 The terms of the Memorandum of Encumbrance relevantly provided[23]:

> "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 dwellinghouse for private residential purposes, and
>
> (b) outbuilding or outbuildings suitable for use in conjunction with a dwellinghouse used for private residential purposes
>
> ...
>
> 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."

---

20 *Deguisa v Lynn* [2019] SASCFC 107 at [72].

21 *Deguisa v Lynn* [2019] SASCFC 107 at [126].

22 *Deguisa v Lynn* [2019] SASCFC 107 at [131], [133].

23 *Deguisa v Lynn* [2019] SASCFC 107 at [135].

31 In relation to the Memorandum of Encumbrance, the present certificate of title to Lot 3 states[24]:

"**Schedule of Dealings**

Dealing Number	**Description**
2675722	ENCUMBRANCE TO KEITH OLIVER AYTON AND BETTY JOAN FIELDER AS JOINT TENANTS"

32 On the back-cover sheet of the Memorandum of Encumbrance there appears a handwritten requisition by the Lands Titles Office. It is in these terms[25]:

"Is this encumbrance part of a common building scheme? If not to what land is it appurtenant."

33 The handwritten requisition gave rise to the Memorandum of Encumbrance being relodged and filed, with a typed statement by a land broker, A & HF Gaetjens Pty Ltd, which stated[26]:

"This encumbrance forms portion of a common Building Scheme."

34 The land broker's reference to the existence of a common building scheme was not replicated or expanded upon on any of the memorialised documents or certificates of title for land said to be affected by the common building scheme[27].

35 In 1967, Giulio and Franca Boin transferred Lot 3 to William and Muriel McKenzie as joint tenants. The appellants purchased Lot 3, being then contained in the present certificate of title, from the estate of Muriel McKenzie. The transfer took effect on 23 January 2008. As has been noted, the present certificate of title had endorsed upon it the encumbrance in favour of Keith Ayton

---

24 *Lynn v Deguisa* [2017] SADC 78 at [48].

25 *Deguisa v Lynn* [2019] SASCFC 107 at [131].

26 *Deguisa v Lynn* [2019] SASCFC 107 at [132].

27 *Deguisa v Lynn* [2019] SASCFC 107 at [134].

and Betty Fielder in its schedule of dealings[28]; but there was no mention in the present certificate of title or the Memorandum of Encumbrance of other lots intended to be benefited by cll 2 and 3 of the Memorandum of Encumbrance.

The other land said to be subject to the common building scheme

36 It was established in the course of these proceedings that each of the 54 lots which resulted from the subdivisions of the grandparent certificate of title, with the exception of Lots 5 and 21, was sold with a registered memorandum of encumbrance that included the same restrictive covenants as appear in the Memorandum of Encumbrance[29]. As noted, the present certificate of title to Lot 3 does not contain any description of the certificates of title to the other lots derived from the grandparent certificate of title.

37 All 54 lots are depicted on a document described as the "Gaetjens Plan", a one-page document which, it may be inferred, was created by the land broker A & HF Gaetjens, who acted for the vendors in marketing the subdivided lots to the public[30]. The Gaetjens Plan was located by the third respondent during a search of Betty Fielder's personal items after her death[31]. It was not available upon a search of the Lands Titles Office[32].

38 The subdivision of the land covered by the grandparent certificate of title was effected in stages:

(1) Ten certificates of title were issued on 7 September 1964, for allotments subject to Deposited Plan 8199[33].

---

28 *Deguisa v Lynn* [2019] SASCFC 107 at [136]-[137].

29 *Deguisa v Lynn* [2019] SASCFC 107 at [130].

30 *Deguisa v Lynn* [2019] SASCFC 107 at [121].

31 *Deguisa v Lynn* [2019] SASCFC 107 at [122]-[123].

32 *Deguisa v Lynn* [2019] SASCFC 107 at [123].

33 *Deguisa v Lynn* [2019] SASCFC 107 at [78], [127].

(2) Thirty-eight certificates of title were issued on 10 December 1964, for allotments subject to Deposited Plan 7593[34].

(3) Six certificates of title were issued on 13 April 1965 for five allotments on Henley Beach Road and an allotment on Carolyn Avenue. These allotments included Lot 3 on the Gaetjens Plan. These allotments were not subject to a deposited plan but are depicted in the plan in Lands Titles Office Docket 669 of 1964[35].

39 That information is recorded in memorials on the back sheet of the grandparent certificate of title[36]. The relevant deposited plans and docket were not mentioned on the folio of the Register Book containing the present certificate of title for Lot 3; rather they are records of the Lands Titles Office and working documents in conformity with which the certificates of title for the new subdivided lots were issued[37].

The primary judge

40 On 16 December 2015, the appellants applied for development approval to build two attached residences on Lot 3. On 12 April 2016, that application was granted[38]. The respondents, contending that the building of two dwelling houses on Lot 3 would infringe the restrictive covenants in the Memorandum of Encumbrance, lodged a caveat over Lot 3 to protect their interest in enforcing the covenants. The respondents commenced proceedings in the District Court of South Australia to extend the caveat until their substantive application to prevent the construction of the townhouses on Lot 3 was determined[39].

---

34 *Deguisa v Lynn* [2019] SASCFC 107 at [86], [127].

35 *Deguisa v Lynn* [2019] SASCFC 107 at [89], [90], [95], [127].

36 *Deguisa v Lynn* [2019] SASCFC 107 at [127].

37 *Deguisa v Lynn* [2019] SASCFC 107 at [66].

38 *Deguisa v Lynn* [2019] SASCFC 107 at [107].

39 *Lynn v Deguisa* [2017] SADC 78.

41 The primary judge (Judge Tilmouth) held that the restrictive covenants were binding on the appellants as part of a common building scheme with respect to 52 allotments (which did not include Lots 5 and 21), established in 1964 when the subdivision was laid out in accordance with the Gaetjens Plan[40].

42 The primary judge reasoned that the appellants had sufficient notice of the covenants and ought to have made further searches to ascertain the nature and extent of the common building scheme. The primary judge said that the appellants[41]:

> "were in a position to 'identify the land which is entitled to the benefit of the covenant either from the encumbrance or from other related documents which can be discovered on a search of the Land Titles Office'".

43 The primary judge held further that the respondents had standing to bring the proceedings in their capacity as caveators, and that they had the statutory right to bring and enforce caveats in relation to their equitable interest in the land[42]. In addition, his Honour held that the third respondent had standing on the basis of his ownership of an allotment in the common building scheme which was subject to identical restrictive covenants to the appellants' land[43].

44 In a subsequent judgment in separate proceedings[44], the primary judge held that the terms of the Memorandum of Encumbrance prohibited the erection of more than one dwelling house. On that footing, the appellants were prohibited from doing so despite having obtained planning approval for that purpose[45].

---

40 *Lynn v Deguisa* [2017] SADC 78 at [42]-[43].

41 *Lynn v Deguisa* [2017] SADC 78 at [64], citing *Burke v Yurilla SA Pty Ltd* (1991) 56 SASR 382 at 391.

42 *Lynn v Deguisa* [2017] SADC 78 at [68]-[69].

43 *Lynn v Deguisa* [2017] SADC 78 at [69].

44 *Lynn v Deguisa [No 2]* [2018] SADC 84.

45 *Lynn v Deguisa [No 2]* [2018] SADC 84 at [28], [30].

The Full Court of the Supreme Court of South Australia

45 The appellants appealed to the Full Court of the Supreme Court of South Australia from both of the primary judge's judgments. The majority of that Court (Peek J, with whom Hughes J agreed) upheld the conclusions of the primary judge. Peek J held that the 52 lots sold out of the subdivision that were encumbered with identical restrictive covenants, which did not include Lots 5 and 21, were therefore part of a common building scheme[46]. His Honour held further that the appellants were sufficiently notified of the restrictive covenants. In this regard, Peek J proceeded upon the "governing principle", stated by Windeyer J in *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd*[47]:

> "What is 'notified' to a prospective purchaser by the vendor's certificate of title is 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 appears on that certificate of title."

46 Peek J went on to say[48]:

> "And if one inquires, 'What searches of the Register ought reasonably be made by a prospective purchaser?' the applicable principle becomes:
>
> > A prospective purchaser is required to make such searches of the Register as ought reasonably be made by a prudent conveyancer having regard to both what appears on the vendor's certificate of title and what comes to his or her knowledge during the course of such reasonable searches."

47 Importantly, Peek J understood that the searches contemplated by Windeyer J included searches that were not directed by entries in the Register Book to particular registered instruments. Peek J considered that the appellants, having inspected the Memorandum of Encumbrance referred to on the certificate

---

46 *Deguisa v Lynn* [2019] SASCFC 107 at [141], [145], [154]-[155].

47 (1971) 124 CLR 73 at 93, cited in *Deguisa v Lynn* [2019] SASCFC 107 at [194], [252].

48 *Deguisa v Lynn* [2019] SASCFC 107 at [253].

of title, would have been put on notice of the possible existence of a "common building scheme", and thus of the likelihood of a number of identifiable lots with mutually enforceable covenants[49].

48 The appellants ought then to have undertaken the further searches of the Register that would have been undertaken by a prudent conveyancer; these searches would have confirmed that all the lots in the building scheme were sold by the same common vendors, had the same encumbrances and restrictive covenants attached to them, and originated from the same subdivision which had produced Lot 3, and that therefore Lot 3 was part of a common building scheme[50]. Further, as to the searches that would have been conducted by a prudent conveyancer, Peek J accepted expert evidence adduced by the respondents to the effect that a search for the "distinctive surname 'Ayton'" in the 1965 or 1966 alphabetical listings of the vendors attainable from the Lands Titles Office would have yielded all of "the encumbrance names"[51]. It is noteworthy that the expert evidence in relation to these searches was that "Ayton" rather than "Fielder" would be chosen for the purpose of the searches because "Ayton" was an unusual name, whereas "Fielder" would be "lost in numerous other Fielders"[52].

49 In dissent, Kourakis CJ, having referred to the reasons of Barwick CJ and Windeyer J in *Bursill*[53], held that the appellants were not bound by the restrictive covenants because s 69 of the Act does not contemplate either a search for other certificates of title that were not referred to in a memorial on the present certificate of title, or other general searches to ascertain the other lots that might have been benefited by the covenants in the Memorandum of Encumbrance[54]. Because neither the memorial of the Memorandum of Encumbrance nor the Memorandum of Encumbrance identified the lots said to be entitled to the benefit of the covenants said to burden Lot 3, Kourakis CJ concluded that the interests of such covenantees

---

49 *Deguisa v Lynn* [2019] SASCFC 107 at [256]-[257].

50 *Deguisa v Lynn* [2019] SASCFC 107 at [275].

51 *Deguisa v Lynn* [2019] SASCFC 107 at [264].

52 *Deguisa v Lynn* [2019] SASCFC 107 at [264].

53 *Deguisa v Lynn* [2019] SASCFC 107 at [30]-[32].

54 *Deguisa v Lynn* [2019] SASCFC 107 at [36], [53].

in the appellants' land were not notified on the present certificate of title, and so the appellants were not bound by the restrictive covenants[55].

50 Kourakis CJ said[56]:

> "[T]he question in this case is whether the memorial of the registered encumbrance containing the restrictive covenant, or the registered encumbrance itself, gives notice of the properties which hold the benefit of the covenant which burdens Lot 3. There is no statutory basis on which to frame the question more widely to include memorials and registered instruments in the entirety of the Register Book. It is one thing to be able to identify the benefited land by an internal reference, in the registered encumbrance itself, to the Certificates of Title of the benefited land, or by a reference to land which can be ascertained with certainty from public documents, like a deposited plan in the Lands Titles Office. It is quite another thing to bind the registered proprietor on the basis of inferences he or she might draw from other Certificates of Title and the registered instruments noted on them, however probable those inferences might appear to be."

51 Kourakis CJ went on to observe that, even if the appellants had been required to undertake further searches, those searches would not have put the appellants sufficiently on notice, because different inferences as to the extent of the building scheme were available[57], the most natural inference being that the land benefited by the covenants by the owner of Lot 3 comprised only Lots 1-5, which were all part of the final re-subdivision of the grandparent certificate of title facing Henley Beach Road[58].

52 The resolution of the difference of views separating Kourakis CJ and Peek J depends in large part on the significance to be accorded to the reasons of the

---

55 *Deguisa v Lynn* [2019] SASCFC 107 at [3], [39], [61].

56 *Deguisa v Lynn* [2019] SASCFC 107 at [39].

57 *Deguisa v Lynn* [2019] SASCFC 107 at [56], [70].

58 *Deguisa v Lynn* [2019] SASCFC 107 at [96]-[98].

members of the majority of this Court in *Bursill* in relation to the scheme of the Act[59]. It is convenient, therefore, to turn now to a consideration of that decision.

Bursill

53 In *Bursill*, the certificate of title referred to a "Right of way created by ... Transfer No 7922". Though the certificate of title referred only to creating a right of way, an examination of the transfer document itself revealed that there were further rights granted with respect to buildings and airspace. Section 37 of the relevant legislation, the *Real Property Act 1900* (NSW) ("the NSW Act"), provided that "[e]very memorial entered in the register-book shall state the nature of the instrument to which it relates". Section 42 of the NSW Act at that time provided that the registered proprietor of land held the interest in land subject to interests "notified on the folium of the register-book constituted by the grant or certificate of title".

54 The majority of the High Court (Barwick CJ and Windeyer J) held that the grant of rights to buildings and airspace effected by the transfer document itself was sufficiently notified to a prospective purchaser in accordance with s 42 of the NSW Act. It is important to appreciate that the matter at issue was whether the inadequate description of the nature of the instrument on the certificate of title meant that a purchaser had not been sufficiently notified of the effect of the instrument. That question was answered in the negative by both Barwick CJ and Windeyer J because the true effect of transfer no 7922 was apparent from a reading of that instrument, which was itself referred to on the certificate of title. In this regard, Barwick CJ said[60]:

> "It is not without significance that registered dealings being part of the Register Book are bound up with it ... and thus available for search and inspection. The Register Book is available for public search."

55 Barwick CJ went on to say[61]:

> "It seems to me that it was not intended that the certificate of title alone should provide a purchaser dealing with the registered proprietor with

---

59 (1971) 124 CLR 73 esp at 79 and 93.

60 (1971) 124 CLR 73 at 77.

61 (1971) 124 CLR 73 at 77-79.

> all the information necessary to be known to comprehend the extent or state of that proprietor's title to the land. The dealings once registered became themselves part of the Register Book. It was therefore sufficient that their registration should be by statement of their nature recorded on the certificate of title ...
>
> Both in the endorsement in 1862 and in the endorsement on the present certificate of title a description of what the memorandum of transfer achieved appears. In practical terms this inadequate description cannot be of moment because even to ascertain the nature and extent of the right or rights of way which it is said to have created or extended the memorandum of transfer must be searched and examined ...
>
> To my mind, it is inescapable that a person dealing with the registered proprietor in this case would be bound to search the registered dealing of which particulars were endorsed on the relevant certificate of title. Further, s 42 says that the registered proprietor holds the described interest in land subject only, with the stated exception, to 'notified' encumbrances etc and s 43 does not protect a purchaser from the effect of notice of registered interests. In my opinion, no purchaser from the registered proprietor in this case could properly claim to hold the land free of the registered estate or interest created by the memorandum of transfer of 1872 [transfer no 7922]."

56 It is tolerably clear from the context in which these observations were made that when Barwick CJ spoke of "search", he meant obtaining and reading such registered instruments as were notified on the certificate of title. He was certainly not suggesting the need for a search for documents that might have been found outside the Register Book or documents that might be found in the Registry Office but were not incorporated by an entry on the certificate of title.

57 Barwick CJ thus concluded that the inadequate description, or misdescription, of the nature of the instrument of transfer did not prevent a sufficient notification of the interest of the transferee[62]:

> "If, as I think, the memorandum of transfer was duly registered that registration was continued under the Act of 1900 ... The estate or interest in the airspace occupied by the building over the right of way therefore was not an unregistered interest: on the contrary, it was a registered interest. That registered estate or interest was, in my opinion, sufficiently

---

62 (1971) 124 CLR 73 at 78-79.

> particularized on the present certificate of title ... The notification brought to the knowledge of the purchaser the existence in the Register Book of the memorandum of transfer and therefore of the registered interest in the land of the registered proprietor which the registered memorandum of transfer created."

58 Contrary to the view of the majority of the Court below in the present case[63], the reasons of Barwick CJ in *Bursill* do not support the proposition that what is "notified" within the meaning of s 69 of the Act extends beyond what is referred to on the certificate of title, to include what might be found outside the Register or in other documents somewhere in the Lands Titles Office if one knew how to find them. Indeed, it is apparent from the passages cited that Barwick CJ, in speaking of registered dealings being available for "search and inspection", was speaking of the search of registered instruments or of instruments referred to in such instruments which were themselves registered. As he said, if the memorandum of transfer was unregistered, then "no further matter with respect to it" would have arisen[64]. In other words, if the transfer document was not a document incorporated through reference on the certificate of title in the Register Book, the prospective purchaser would not be bound to search for it.

59 Whether Windeyer J took a different view is perhaps debatable. Windeyer J said[65]:

> "The argument that the interest in the buildings is not notified on the certificate of title proceeded on the assumption that Bursill, when purchasing the land, could safely neglect to search transfer No 7922, which was expressly referred to on the certificate of title. It is contended that this reference to the memorandum of transfer did not amount to constructive notice of its full operation, because it was described as creating an 'Extension of the Right of Way' ... [W]hat is 'notified' to a prospective purchaser by his vendor's certificate of title is everything that would have

---

63 *Deguisa v Lynn* [2019] SASCFC 107 at [219].

64 *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (1971) 124 CLR 73 at 76.

65 *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (1971) 124 CLR 73 at 92-93.

> come to his knowledge if he had made such searches as ought reasonably to have been made by him as a result of what there appears ...
>
> It seems to me that ... a prudent conveyancer acting for a purchaser of the land ... would have ascertained what it was that transfer 7922 referred to on the vendor's certificate of title in law effected."

60 It can be seen that in this passage, when Windeyer J spoke of what a "prudent conveyancer" would do in the light of the reference to transfer no 7922 on the certificate of title, his Honour was speaking of taking up and reading that instrument of transfer.

61 The respondents submitted that the reasons of Windeyer J support the view that a prospective purchaser ought to be taken as having been notified of "everything that would have come to his knowledge if he had made such searches as ought reasonably to have been made by him as a result of what there [on the certificate of title] appears". This reasoning was said by the respondents to proceed on the basis of assessing what the entry on the certificate of title reasonably put the prospective purchaser on notice of, not only what the entry incorporated by reference. The respondents accepted that, on the facts of *Bursill*, the relevant search did not need to go further than the instrument directly referred to on the certificate of title, but maintained that that is not to say that the proposition for which *Bursill* stands is that a required search can never go beyond such an instrument.

62 Given that the issue on which the decision of the case turned was whether the misdescription of the instrument was material, or whether the effect of the misdescription was dispelled by a reading of the instrument, there is something to be said for the view that Windeyer J should not be regarded as saying any more than that a "prudent conveyancer" would actually take up and read the instrument that is recorded in the Register Book, and would thus not be misled by the misdescription. It must be acknowledged, however, that the Court of Appeal of New South Wales in *Registrar-General v Cihan*[66] did not interpret the reasons of Windeyer J (or those of Barwick CJ) in that way. Rather, the Court of Appeal accepted the interpretation contended for by the respondents in the present case.

63 In *Cihan*, the Court of Appeal was relevantly concerned with whether an easement, which subsisted before the land in question was brought under the Torrens system, was recorded in the relevant folio of the Register pursuant to the modern analogue in New South Wales of s 69 of the Act. That analogue speaks of

---

66 (2012) 16 BPR 30,845.

encumbrances or interests "recorded in" the relevant folio of the Register rather than "notified on" the certificate of title, but nothing turns on that. The current folio of the Register recorded an encumbrance which provided "Easement affecting the land shown so burdened in Vol 6451 Fol 53". Volume 6451 folio 53 contained the endorsement "Last Certificate Vol 1022 Fol 161". The certificate of title comprised in volume 1022 folio 161 contained a description of the dominant tenement of an easement. Barrett JA (with whom Allsop P and Tobias A-JA agreed) held that the easement was sufficiently notified. Barrett JA, after referring to the judgments of Barwick CJ and Windeyer J in *Bursill*, said[67]:

> "The concept here is that 'notification' ... is sufficiently made if particulars explicitly stated are such as to engender in the mind of a reasonable reader generally familiar with property and land titles a need for further inquiry by resort to readily available records."

64 Barrett JA, applying that understanding to the facts of the case before him, held that the "Last Certificate" referred to indicated a "source of additional information" about the content of the endorsement, and that a search of that certificate of title would have brought to light the dominant tenement[68].

65 With all respect, the Court of Appeal's expansive view of what is "recorded in a folio of the Register" is not supported by a close reading of the reasons of Barwick CJ in *Bursill*. In addition, it may be said that the reasons of Windeyer J in *Bursill* do not provide unequivocal support for the expansive view that a purchaser is bound to make an open-ended "inquiry by resort to readily available records". However that may be, there is little to be gained by further consideration of what Windeyer J meant to convey in *Bursill*. Even if it be accepted that Windeyer J did have in contemplation prudent searches, possibly extending to such as might have been required of a purchaser to avoid being fixed with constructive notice of a defect in title in relation to pre-Torrens title land, such an expansive view is inconsistent with the scheme of the Act as expounded in *Westfield*.

---

67 *Registrar-General v Cihan* (2012) 16 BPR 30,845 at 30,855 [64].

68 *Registrar-General v Cihan* (2012) 16 BPR 30,845 at 30,852-30,854 [45]-[57], 30,855 [64], [66].

Westfield

66 In *Westfield*, this Court held that it is contrary to the purpose of the Torrens system to seek to establish the intention or contemplation of the parties to an instrument registered under the NSW Act by reference to material extrinsic to the instrument. In a unanimous judgment, Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ said[69]:

> "Together with the information appearing on the relevant folio, the registration of dealings manifests the scheme of the Torrens system to provide third parties with the information necessary to comprehend the extent or state of the registered title to the land in question. This important element in the Torrens system is discussed by Barwick CJ in *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd*[70]. It will be necessary later in these reasons to refer further to the significance of this for the present appeal."

67 The Court in *Westfield*[71] referred with approval to the decision of Connolly J in *Hutchinson v Lemon*[72]. In that case, a memorial of a registered survey plan which showed the existence of an easement appeared on a certificate of title, but there was no memorial of a document creating the easement. The defendants argued that the memorial of the registered plan on the certificate of title was only a notification that a survey of such an easement had been lodged, rather than a notification of an easement over the land[73]. Connolly J rejected that argument, saying[74]:

---

69 *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528 at 531-532 [5].

70 (1971) 124 CLR 73 at 77-78. See also the remarks of Connolly J in *Hutchinson v Lemon* [1983] 1 Qd R 369 at 372-373.

71 (2007) 233 CLR 528 at 531 [5] fn 31.

72 [1983] 1 Qd R 369.

73 *Hutchinson v Lemon* [1983] 1 Qd R 369 at 372-373.

74 *Hutchinson v Lemon* [1983] 1 Qd R 369 at 373.

> "[*Bursill*] is authority for the proposition that to identify the interests which are notified ... by entry or memorial on the certificate of title involves a search of the instrument of which the memorial is so entered."

68 In approving of the decision in *Hutchinson v Lemon* and the remarks of Connolly J in the cited passage in particular, the Court in *Westfield* accepted that only instruments notified by entry or memorial on the certificate of title are sufficiently notified on the certificate of title to defeat the otherwise unqualified title of the registered proprietor.

69 Importantly, in *Westfield* the Court expressly approved of the reasons of Barwick CJ in *Bursill*, but did not mention the reasons of Windeyer J in that case[75]. When their Honours later returned to discuss the significance of this element of the Torrens system, their Honours said[76]:

> "Recent decisions, including *Halloran v Minister Administering National Parks and Wildlife Act 1974*[77], *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[78], and *Black v Garnock*[79], have stressed the importance in litigation respecting title to land under the Torrens system of the principle of indefeasibility expounded in particular by this Court in *Breskvar v Wall*[80].
>
> The importance this has for the construction of the terms in which easements are granted has been remarked by Gillard J in *Riley v Penttila*[81]

---

75 *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528 at 531 [5].

76 *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528 at 539 [38]-[39].

77 (2006) 229 CLR 545 at 559-560 [35].

78 (2007) 230 CLR 89 at 167-172 [190]-[198].

79 (2007) 230 CLR 438 at 443 [10].

80 (1971) 126 CLR 376. See also *Figgins Holdings Pty Ltd v SEAA Enterprises Pty Ltd* (1999) 196 CLR 245 at 264 [26]-[27].

81 [1974] VR 547 at 573.

> and by Everett J in *Pearce v City of Hobart*[82] ... The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee[83]."

70 In *Westfield*, this Court indicated a distinct preference for the firm clarity of the approach of Barwick CJ in *Bursill* over the more equivocal statements of Windeyer J. The approach of Barwick CJ is a better fit with the understanding of the Torrens system as a system of title by registration, affirmed in *Breskvar v Wall*. Within that system, the State's guarantee of the state of the title of the registered proprietor shown by the certificate of title encompasses any qualification to that title by virtue of the interest in the land of a person other than a registered proprietor.

71 The approach of Peek J in the present case is inconsistent with the reasons of this Court in *Westfield*. Those reasons support the proposition that unless reference to an interest is endorsed on the certificate of title or incorporated by reference in a registered instrument notified on the certificate of title, the interest has not been notified on the certificate of title.

72 The simplification of land title and the assurance of transparency of land ownership that are the objects of the Act are not able to be accommodated in relation to a common building scheme unless all the lots benefited by a restrictive covenant can be identified by a potential purchaser from information on the certificate of title. Such identification ensures that a potential purchaser is able to make fully informed decisions in relation to the concerned land. It is not to be supposed that the only legitimate concern of a potential purchaser of land in seeking to ascertain the nature and extent of qualifications upon the potential vendor's title to land is to enable the potential purchaser to make a binary choice as to whether to proceed with the purchase or to decline to do so. Knowledge of the nature and extent of qualifications upon the potential vendor's title would also enable a potential purchaser to bargain for a reduction in price to reflect the burden of any qualification upon the potential vendor's ability to convey a clear title to the land. In a case such as the present, a potential purchaser who knows what other

---

82 [1981] Tas R 334 at 349-350.

83 cf *Proprietors Strata Plan No 9968 v Proprietors Strata Plan No 11173* [1979] 2 NSWLR 605 at 610-612.

lots are benefited by the restrictive covenant burdening the potential vendor's lot may seek to negotiate for a release of that burden from the other lot owners. That can occur only if the potential purchaser is able to identify each and every such other lot. In functional terms, the notification of which s 69 speaks can be effective only if a person dealing with the registered proprietor of land is informed by memorials on the certificate of title of the identity of each of the other lots in the common building scheme. Anything less falls short of fulfilling the function that notification on the certificate of title serves within the scheme of the Act.

The benefited parcels were not notified on the certificate of title to Lot 3

73 As a matter of the ordinary and natural meaning of the language of s 69 of the Act, and in conformity with the authoritative exposition of the purpose of the Torrens system in *Westfield*, any intending purchaser of Lot 3 was notified by entry on the present certificate of title only of the memorialised Memorandum of Encumbrance, and of the terms of that instrument. There was no notification on the present certificate of title of the other lots that were benefited by the restrictive covenants in the Memorandum of Encumbrance. Those lots were not identified in the Memorandum of Encumbrance.

74 The land broker's reference to "a common building scheme" on the back of the Memorandum of Encumbrance did not identify a registrable dealing with land and was not a memorial of a subsisting encumbrance. More importantly, the land broker's notation did not identify the certificates of title to lots that have the benefit of the restrictive covenants that are said to burden Lot 3, so that those lots could be identified by a search of the Register.

75 The respondents argued that the description of Keith Ayton and Betty Fielder in the Memorandum of Encumbrance should have prompted a prudent conveyancer to search for the assigns of the transferors and encumbrancees, Keith Ayton and Betty Fielder. This is because s 3(2) of the Act[84] provides that an encumbrancee includes the assigns of the person. The respondents argued that a prudent conveyancer would have known that Keith Ayton and Betty Fielder were the transferors of the land contained in the parent certificate of title, which referred to the grandparent certificate of title. The prudent conveyancer would then examine the grandparent certificate of title, which would reveal the issue of 52 parent certificates of title, the transferees of which were assigns of Keith Ayton and Betty Fielder. The respondents also contended that a prudent conveyancer would have searched for Deposited Plan 8199, Deposited Plan 7593

---

84 *Real Property Act 1886* (SA), s 3 (as it stood in 1965).

and Lands Titles Office Docket 669 of 1964 because they were expressly referred to on the grandparent certificate of title.

76 A similar argument was advanced and rejected in *Re Dennerstein*[85]. That case concerned the Victorian analogue of the Act. The issue was whether a common building scheme affecting the applicant's land prevented the erection of certain buildings. It had been argued that a purchaser could have inspected the lodged plan of the subdivision of the estate in which the land was situated, and then searched the transfer of the other lots contained therein, from which the purchaser could ascertain that the transfers were made pursuant to a common building scheme and hence, possibly, which lands were affected. Hudson J, consistently with the view of the purpose of the legislation later endorsed by this Court in *Westfield*, rejected this argument, saying[86]:

> "[A] purchaser of land under the Transfer of Land Act is not bound to prosecute inquiries and searches and make deductions such as would be involved if [those] contentions were accepted. Even when all the materials and evidence in relation to the circumstances under which an estate has been subdivided and sold are available it 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 Transfer of Land Act, would defeat the object of the Act and destroy in large measure the efficacy of the system sought to be established thereby."

77 His Honour went on to say that a notification of an encumbrance that arises under a building scheme[87]:

> "will not be effective to bind transferees of the land unless not only the existence of the scheme and the nature of the restrictions imposed thereunder, but the lands affected by the scheme (both as to the benefit and

---

85 [1963] VR 688.

86 *Re Dennerstein* [1963] VR 688 at 696.

87 *Re Dennerstein* [1963] VR 688 at 696.

> the burden of the restriction) are indicated in the notification, either directly or by reference to some instrument or other document to which a person searching the register has access".

78 To similar effect, in *Clem Smith Nominees Pty Ltd v Farrelly*[88], Bray CJ said that on the facts of that case, there was:

> "absolutely nothing in the encumbrance from which any land entitled to the benefit of a covenant can be identified or defined, there is absolutely nothing to suggest that the covenants were imposed for the benefit of any land at all".

79 Consistently with the decision of Hudson J in *Re Dennerstein*, and with the approach of this Court in *Westfield*, the appellants in the present case were not required to undertake further inquiries and searches to ascertain the extent of the common building scheme referred to in the land broker's notation in the Memorandum of Encumbrance.

80 The appellants were not required to make searches in relation to cancelled certificates of title. A certificate of title, such as the grandparent certificate of title or the parent certificate of title, once it has been superseded and replaced by the current certificate of title is no longer the certificate of title for a lot; it is no longer part of the Register Book. That is so even though it, or a copy, may be kept in the office of the Lands Titles Office or on its computer systems. The grandparent certificate of title and the parent certificate of title ceased to be part of the Register Book upon their cancellations. There can only be one operative certificate of title at any given time[89]. Nor could the Gaetjens Plan be a source of information in ascertaining the extent of the common building scheme, given it was not part of the Register Book, and not even to be found in the Lands Titles Office or on its computer systems.

81 The respondents referred to the decision of the Supreme Court of South Australia (Debelle J, with whom King CJ and Cox J agreed) in *Burke v Yurilla SA Pty Ltd*[90], where Debelle J said:

---

88 (1978) 20 SASR 227 at 236.

89 See *Real Property Act 1886* (SA), ss 78, 80H and 103. See also s 51C.

90 (1991) 56 SASR 382 at 391.

> "Provided that the person intending to deal with the registered proprietor is able to identify the land which is entitled to the benefit of the covenant either from the encumbrance or from other related documents which can be discovered on a search of the Lands Titles Office, the purchaser would have notice from the Register itself of the restrictive covenant and its terms".

82 But the issue is not whether it is possible that an exhaustive search in the Lands Titles Office or elsewhere might unearth "other related documents", like the grandparent certificate of title in the present case, which no longer form part of the Register Book but which, as it happens, are still kept in the Lands Titles Office notwithstanding the absence of any legislative requirement in that regard.

83 In *Netherby Properties Pty Ltd v Tower Trust Ltd*[91] Perry J held that the restrictive covenants upon which the defendant in that case relied were not enforceable against the plaintiff because the registered memorandum of encumbrance did not identify the lots intended to benefit from the covenants. Referring to the reasons of Debelle J in *Burke v Yurilla*[92], Perry J said[93]:

> "When Debelle J uses the expression 'provided the land entitled to the benefit of the covenant can be identified from the Register', ... what is envisaged is that the quasi dominant tenement can be *readily* identified from the register, without a complex inquiry of the kind referred to by Hudson J.
>
> ... [D]etails must appear in the encumbrance or on the certificate of title upon which the encumbrance is registered, from which the nature and extent of the scheme, and the identity of the land to be benefited, must clearly appear." (emphasis in the original)

84 The reasoning of Perry J fully accords with the understanding of the scheme of the Act stated by this Court in *Westfield*. As Hudson J said in *Re Dennerstein*[94], it would be inconsistent with the objects of the Act to fix a purchaser of registered land with notice of rights and interests that are not referred to by memorial on the certificate of title and ascertainable by a search of the Register Book. If a purchaser

---

91 (1999) 76 SASR 9 at 21-22 [71]-[72].

92 (1991) 56 SASR 382 at 390.

93 *Netherby Properties Pty Ltd v Tower Trust Ltd* (1999) 76 SASR 9 at 24 [77]-[78].

94 [1963] VR 688 at 695-696.

cannot thereby ascertain the lots benefited by the encumbrance, s 69 of the Act operates to free the purchaser, once registered, of any equitable interest that might otherwise have been asserted by an encumbrancee.

85 In addition, it cannot be that, as seems to have been accepted by Peek J in acting upon the expert evidence to which he referred, the operation of s 69 of the Act depends upon whether the surname of the original vendor in a common building scheme is unusual. If generalised searches beyond that of the current certificate of title of a property were required, it would be difficult to draw a line as to when "prudent" searching might cease. This is the sort of complexity and uncertainty that the Act sought to eradicate. More importantly, the scheme of the Act would be reduced to incoherence if the operation of s 69 of the Act were to vary with the surname of the owner of land referred to in a certificate of title that is no longer a folio of the Register Book.

86 The respondents argued further that the scope of what was notified to the appellants under s 69 of the Act was widened by operation of s 51B of the Act. As noted earlier, that provision allows the Registrar-General to record electronically information relating to land and provides that those records are then included in the "Register Book". Section 53 provides that the Registrar-General must retain all recorded information either in its original form "or in some other form". Section 65 provides for public access to the Register Book and "to all instruments filed and deposited in the Lands Titles Office", where an "instrument" is defined in s 3(1) as including "every document ... in respect of which any entry is by any of the Real Property Acts directed, required, or *permitted* to be made in the Register Book" (emphasis added). The respondents argued that the combined effect of these provisions is that the certified plans of subdivision and approved plans of re-subdivision deposited and lodged in 1964 and 1965 respectively were in 2008, and still are, accessible as part of the Register Book, such that they widen the scope of the notification contemplated by s 69 of the Act. These contentions should not be accepted.

87 It is to be noted that s 51B applies only where the Registrar-General is required by legislation to record relevant information electronically. The Registrar-General was not required to record the cancelled grandparent certificate of title or associated plans and dockets electronically, no doubt for the good reason that they were no longer operative in relation to any land within the scope of the Act. Any equitable interest that might have been enforceable against subsequent purchasers of Lot 3 ceased to be enforceable upon the sale of Lot 3 in 1967 by Giulio and Franca Boin, before s 51B was introduced. Nothing in the provisions to which the respondents refer suggests any intention to revive interests that ceased to be enforceable against the land before their enactment. More importantly,

nothing in s 51B suggests an intention on the part of the legislature to alter the operation of s 69 by the enactment of those provisions. In particular, nothing in any of those provisions gives any reason to think that s 69 has an operation in relation to the registration of title by entry upon the folio of the Register Book that is different from the registration of title by electronic means.

Conclusion

88 A person who seeks to deal with the registered proprietor in reliance on the State's guarantee of the title of the registered proprietor disclosed by the certificate of title in the Register Book (or its electronic equivalent) is not to be put on inquiry as to anything beyond that which is so notified. A common building scheme can operate consistently with the scheme of the Act in relation to the enforceability of the benefit of a restrictive covenant only if those rights are notified on the certificate of title of the burdened land, or by express reference in a memorial on the certificate of title to other registered instruments which contain that information. Anything less is inconsistent with the natural and ordinary meaning of the text of s 69 and the purpose of the Act.

89 The present certificate of title to Lot 3 did not contain a memorial that disclosed any registered instrument showing the other lots said to have the benefit of the restrictive covenants. On that basis the appellants' principal contention must be accepted.

Orders

90 The appeal should be allowed and the orders of the Full Court of the Supreme Court should be set aside, and the appeal to that Court allowed.

91 Paragraphs 1, 3, 4, 7 and 8 of the orders of the District Court of South Australia made on 29 August 2018 should be set aside, and in their place it should be ordered that the respondents' actions in the District Court should be dismissed.

92 The respondents should pay the appellants' costs in this Court and in the courts below.