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

RESPONDENTS' 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 the Issues

2. Whether there is one only, or more than one, Building scheme.
3. Whether the term "notified" in s 69, Real Property Act 1886, in its application to restrictive covenants contained in a registered encumbrance, and in particular, the identification of the land intended to be benefitted, is limited to incorporation by reference, or extends to information on the Register in respect of which a prudent conveyancer would be put on inquiry by the registered instrument.
4. Whether, if the former, identification of the land intended to be benefitted was incorporated by reference in the registered instrument, or, if the latter, was ascertainable in 2008 by a reasonably informed search of the Register as a result of what appeared in the registered instrument,
5. Whether, as a matter of construction, the covenants in the Encumbrance are to be construed as prohibiting the erection on a subdivided Lot 3 of two dwelling houses.
6. Whether, even if Lot 3 and Lot 35 belong to different Building Schemes, the Third Respondent has standing to seek declaratory and injunctive relief against the appellants.

Part III: Section 78B of the Judiciary Act 1903

7. No notices under this section are required.

Part IV: A Statement of Material Contested Facts

CT and Endorsed Documents

8. The submission, at AWS [8-9], that in **2008**, the appellants only had access to the "present CT" (5804/557) – as the current title – and that they were not referred to the grandparent title which was only endorsed on the "First edition" – the parent title (3310/186) is mistaken, and addressed starting at paragraph [71] below.

9. The submission, at AWS [11.3] that there is no evidence the "Building Scheme" endorsement on the back sheet was brought to the attention of the Boins, with the implication that the Boins did not purchase "on the footing" that there was a Building Scheme, is addressed at paragraph [39] below.

10. The submission at AWS [13]-[13.2] that "Encumbrancer" (the Boins) is not defined so as to include their assigns overlooks s 3, *Real Property Act 1886* as it applied in 1965 (now s 3 (2)) which provided "the description of any person as encumbrancer … shall be deemed to extend to and include the … assigns of such person". Moreover, it is quite evident from the Proviso to the covenant[1] that it was intended that each successive transferee from the encumbrancer would be bound for as long as each was registered proprietor of the encumbered land.[2]

11. To the statement at AWS [13.4] should be added the following: unlike *Netherby Properties Pty Ltd v Tower Trust Ltd*[3] where the covenants were not "linked" to the enforceability of the rent charge[4], the covenants in this case do.[5]

The Subdivisions – R-G "working documents" and Deposited Plans

12. The statements at AWS [16] asserting the status of the dockets and Deposit Plans as "working documents" is disputed, for the reasons developed at paragraph [76] below.

13. The submission at AWS [17]-[18], suggesting by implication that there is significance in the order in which the Lots came to be sold, is disputed. That may be the case where a restrictive covenant runs with land by reason of annexation,[6] but where a Building Scheme exists, the order of sale is irrelevant: the Building Scheme operates as an

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1 Appellants'' Book of Further Material, 37/8 **(a/BFM.37/8). Note:** the appellants' references to page numbers in the CAB and the a/BFM are not the same as in the uploaded version of that Book: both are given, with the appellants' numbering first, viz 37/8

2 *Burke v Yurilla SA Pty Ltd* (1991) 56 SASR 382 (FC), 392 (Debelle J); CAB.128/9, Peek J, footnote 113

3 *Netherby Properties Pty Ltd v Tower Trust Ltd* (1999) 76 SASR 9 (Perry J), 11 [10], 20 [52]

4 "do hereby encumber the said land with [the yearly rent charge] … AND IN CONSIDERATION of the transfer of the said land to me/us …DO HEREBY COVENANT …"

5 "DO HEREBY ENCUMBER the said land .. with the payment [of the yearly rent charge] *and with* the performance and observance of the covenants …

6 *Chambers v Randall* [1923] 1 Ch 149; *Langdale v Sallas* [1959] VR, 634, 639; *Randell v Uhl* [2019] VSC 668, [57] (Derham AsJ)

exception to the rule that a vendor cannot annex a covenant to land he does not own[7]: the Building Scheme applies regardless of the date of transfer out of the parent title; the scheme "crystallizes" as soon as the first lot is sold.[8]

Building Scheme or Schemes – competing inferences

14. The submission in AWS [19] footnote 40, as to whether the appellants would have had access to the computer base in 2008 (the *Notice* Inquiry,[9] not as to whether a Building Scheme was proved in fact (the *Historical* Inquiry))[10] is disputed. Peek J refers to Morgan's evidence as being undisputed[11] – and while Morgan says the Alphabetical Lists[12] have been available "since the day dot", but only accessible electronically "in the last several years",[13] he adds: "you've always been able to go to these books and examine them at the LTO". The Registry was computerised in 1990.[14] The appellants gave no evidence at trial.[15] In 2008 the Register was accessible online.

15. The parent titles of all 52 Lots shows that each bears the endorsement "CANCELLED". In the case of Lot 3, the converted title issued on 6/9/2000.[16] The ability to computerise titles dates from the commencement of Act No 9 of 1990.[17]

16. At AWS [32] footnote 66 the appellants records Kourakis CJ's view that a cancelled certificate is not part of the Register Book.[18] The learned Chief Justice's suggestion that they may be kept in "other records" of the Registrar-General (**R-G**) is, with respect contradictory, or at least, incomplete[19].

17. The submission in AWS [20]-[23] moves (without acknowledgement) from the Notice Inquiry back to the Historical Inquiry (of fact). It refers to the Gaetjens Plan, and to the

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7 *Re Mack and Conveyancing Act* [1975] 2 NSWLR 623

8 *Brunner v Greenslade* [1971] Ch 993, 1003-1004; CAB.129/30, Peek J, [181]

9 Addressed at footnote 41 below

10 Addressed starting at paragraph 33 below

11 at CAB.155/6, Peek J, [264] at fn 186

12 a/BFM.449/51-451/53 (the 3 pages are out of order: the 3rd page is the 1st page of the exhibit)

13 CAB.157/8, Peek J

14 Act No 9 of 1990

15 *Jones v Dunkel* (1959) 101 CLR 298

16 see a/BFM.435/7

17 Commenced 21 May 1990

18 CAB.80/1 [38]

19 Section 51B (part of Division 2 of Part 5 introduced in 1990) provides that where the R-G "is required by this or any other Act or any other law to register title to land or record any other information relating to land", the R-G can do so electronically, in which event the register Book is to be taken to include "the records maintained by the Registrar General pursuant to this section relating to the land", and s 53 requires the R-G to retain the information (which includes a certificate of title), once recorded, in the form in which it was originally registered or in some other form. So when s 51C (in the same Division) authorises the cancellation of a CT and the issue of a new one, the combination of s 51B and s 53 requires the retention of the cancelled certificate as part of the "Register Book", as defined in s 51B.

two schedules of encumbrances. AWS [21] refers to the majority conclusion as to the there being **ONE** building scheme.[20]

18. Kourakis CJ's judgment *confuses* the historical factual inquiry (at the laying out of the Building Scheme) with the Notice inquiry.

Part V: Respondents' Argument in Answer

History and development of the Building Scheme

19. The history of restrictive covenants in the general law was addressed by Peek J in the Full Court.[21]

20. The possibility of enforcing a negative covenant affecting the land against subsequent purchasers of the burdened land emerged in *Tulk v Moxhay.*[22] There are only three possible ways in which the *benefit* of a restrictive covenant may pass on the transfer of land namely, by annexation;[23] by assignment;[24] and under a Scheme of Development[25] or Building Scheme.[26] There is no fourth category.[27]

21. In the case of a Building Scheme, it was well understood that the principle at play was not the law of covenants, but an equity based on a community of interest and importing a reciprocity of obligation. [28] [29]

22. By the early 20th century, the conditions for inferring the requisition intention had "crystallised" into the requirements laid down by the Parker J in *Elliston v Reacher*

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20 CAB.118/119, Peek J, [143] – [147]

21 CAB.122/3 [160]-[161]; annexation (123/4 – 124/5); assignment (124/5 – 126/7): building scheme (126/7 - 133/4)

22 *Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143

23 *Drake v Gray* [1936] Ch 45; *Rogers v Hosegood* [1900] 2 Ch 388; *Bradbrooke and Neave* at 315-337

24 *Miles v Easter* [1933] Ch 611; *Bradbrooke and Neave at 338-343*

25 See Megarry J's explanation for preferring Scheme of Development over Building Scheme: *Brunner v Greenslade* [1971] Ch 993,999; [1973] All ER 833, 836f

26 *Renals v Cowlishaw* (1878) 9 Ch D 125, per Hall V-C at 129; approved on appeal, (1879) 11 Ch D 866; *Spicer v Martin* (1888) 14 App Cas 12, per Lord MacNaghten at 24-5; *Elliston v Reacher* [1908] 2 Ch 374, per Parker J at 384; and on appeal, [1908] 2 Ch 665; *Nottingham Patent Brick & Tile Co v Butler* (1885) 15 QBD 261; *In re Dolphin's Conveyance* [1970] 1 Ch 654; *Burke v Yurilla SA Pty Ltd Burke v Yurilla SA Pty Ltd* (1991) 56 SASR 382

27 *Pirie v Registrar-General* (1962) 109 CLR 619, per Kitto J (Owen J, conc.) at 628-9; *Re Pinewood Estate* [1958] Ch 280; Hayton, "Restrictive Covenants as Property Interests" (1971) 87 LQR 539

28 *Renals v Cowlishaw* (1878) 9 Ch D 125, per Hall V-C at 129 (as unanimously approved by a strong court of appeal (James, Baggally, Thesiger LJJ) and by Lord Macnaghten in *Spicer v Martin* (1888) 14 App Cas 12, at 23

29 Thus, Parker J in *Elliston v Reacher*[29] (in a passage cited by Megarry J in *Brunner v Greenslade*[29]):

> … when, as in cases such as *Spicer v Martin*, there is no sale by auction, but all the various sales are by private treaty and at various intervals of time, the circumstances may, at the date of one or more of the sales, be such as to preclude the possibility of any actual contract. … It is, I think, enough to say, using Lord Macnaghten's words in *Spicer v Martin*, that where the four points I have mentioned[29] are established, the community of interest imports in equity the reciprocity of obligation which is in fact contemplated by each at the time of his own purchase.

[referred to hereafter as *the Elliston 4*]. [30] To these four points, Parker J added several further elements.[31] Cogent evidence of an intention that the covenants shall be for the common benefit of the purchasers is where the several lots have been laid out for sale as building lots, ..., or, as it has been sometimes said, that there has been a "building scheme".[32] In the application of the *Elliston 4*, the trend has been away from "ancient technicality."[33]

23. But the equity, once established, only runs with the land where the successor takes with notice.

Restrictive Covenants and the Torrens System

10 24. The equitable doctrine by which the burden of a restrictive covenant may enure for the benefit of land held by the covenantee and his or her successors in title, and may be enforced against successors in title of the covenantor, had to find an accommodation within the Torrens System.

25. The aim is to reconcile the principles of the Torrens System (dealing on the faith of the Register only)[34] with established principles of equity in relation to restrictive covenants, which, while emphasising the proprietary nature of a restrictive covenant, seek to give effect to "the common intention notwithstanding any technical difficulties involved".[35]

26. Different approaches have been adopted by the States of Australia to ensure the enforcement of restrictive covenant in the Torrens System.[36]

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30 [1908] 2 Ch 665, at 384 – these are set out in the judgment of Peek J at CAB.117/8 [138]. The essence of this binding equity was summarised by Buckley LJ in *Reid v Bickerstaff* [1909] 2 Ch 305, at 323: " There can be no building scheme unless two conditions are satisfied: namely, first, that the defined lands constituting the estate to which the scheme relates shall be identified and, secondly, that the nature and particulars of the scheme shall be sufficiently disclosed for the purchaser … compliance with the first condition identifies the class of person as between reciprocity of obligation is to exist. Compliance with the second discloses the nature of the obligations which are to be mutually enforceable. There must be, as between the several purchasers, community of interest and reciprocity of obligation."

31 [1908] 2 Ch 374, 384-5

32 *Nottingham Patent Brick and Tile Co v Butler* (above) at 269

33 CAB.130/1–131/2 [183]-[184]; *Forestview Nominees Pty Ltd v Perpetual Trustees WA Ltd* (1998) 193 CLR 154, 163-164 (Gaudron, McHugh, Gummow, Kirby, Hayne JJ); *Hayton* (above) at 548; *Baxter v Four Oaks Properties Ltd* (above) at 825; Bradbrook & Neave, 285 [12.14]

34 *Gibbs v Messer* [1891] AC 248 (PC), per Lord Watson at 254, cited with approval by Wilson and Toohey JJ in *Bahr v Nicolay [No. 2]* (1988) 164 CLR 604, at 637; see also, per Mason CJ, Dawson J at 613, per Brennan J at 652; *Fels v Knowles* (1906) 26 NZLR 604 (CA) at 619-620, cited with approval by Lord Buckmaster in *Waimiha Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd* [1926] AC 101, at 106 (itself referred to in *Bahr v Nicolay [No. 2]* (above) at 636; see also *Hemmes Hermitage Pty Ltd v Abdurahman* (1991) 22 NSWLR 343, per Kirby P at 344F; *Breskvar v Wall* (1971) 126 CLR 376, per Barwick CJ at 386-7; *Stein*, "The principles, aims and hopes of title by registration" (1983) 9 Adelaide Law Review 267

35 *Brunner v Greenslade* [1970] 3 All ER 833, per Megarry J at 842, citing *Baxter v Four Oaks Properties Ltd* [1965] Ch 816, per Cross J at 825, 826; see also *Marten v Flight Refueling Ltd* [1962] 1 Ch 115 (Wilberforce J)

36 *Conveyancing Act 1919* (NSW), section 88 (3) (a) (*Pirie v Registrar-General* (1962) 109 CLR 619); *Land Titles Act 1980* (Tas), sections 102-104; *Transfer of Land Act 1958* (Vic), section 88; *Transfer of Land Act*

27. In South Australia the Courts have accepted, since *Blacks Ltd v Rix* in 1962[37], that the registration of an encumbrance to secure an annuity or rent charge, to which is annexed a restrictive covenant, is an appropriate means of recording the restrictive covenant on the Title. The Full Court, in *Burke v Yurilla SA Pty Ltd*[38] declined to overrule *Blacks Ltd v Rix*, and the appellants did not seek to have it, or *Burke v Yurilla SA Pty Ltd*, overruled by the Full Court in this case.

The Statutory Scheme

28. The central feature of the Torrens System (indefeasibility) is s 69, *Real Property Act* 1886).[39] [40]

e-Registration in 1990 expanded the contents of, and access to, the Register Book

29. *Act No 9 of 1990* introduced e-Registration into the *Real Property Act 1886.* In particular –

29.1. s 51B enabled information relating to land that the Registrar-General was required by law to record, as also the registration of title, to be recorded electronically.

29.2. the term "Register Book" was to be taken to include "the records maintained by the Registrar-General pursuant to this section relating to land".

29.3. Section 53 was amended to require the R-G to "retain all information "recorded by the Registrar-General under this Act" in its original form "or in some other form".[41]

29.4. The term "certificate" or "certificate of title" was defined to mean either the records maintained by the R-G under the section, or the CT issued by the R-G under his seal in respect of the land, or both;

29.5. The term "*original* certificate" or "*original* certificate of title" was defined to mean the records maintained by the R-G pursuant to the section in respect of the land.

29.6. Section 65 provided for public access to the Register Book, and "to all instruments filed and deposited in the Lands Titles Office", and the term "instrument", although remaining as originally defined ("every document capable of registration under the

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1893 (WA), section 129A; *Land Title Act* (NT), *Pt 6 Div 5; Law of Property Act*, (NT) Pt 9 Divs 4 & 5 (see, Bradbrook & Neave, pp 465-487 [17.3 – 17.4], [17.35-17.72]

37 *Blacks Ltd v Rix* [1962] SASR 161

38 *Burke v Yurilla SA Pty Ltd* (1991) 56 SASR 382 (FC), 393-396 (Debelle J)

39 The history of this section is section 33, *Act No 15 of 1857-8,* section 20, *Act No 16 of 1958*, section 41, *Act No 11 of 1860*, section 40, *Act No 22 of 1861.*

40 In 2008 when the appellants were purchasing Lot 3, s 69 still referred to "the original certificate", but, by then, a system of computerised titles (E-Registration) had been operating for over 15 years, and the meaning and scope of the term "original certificate of title" had altered significantly

41 The wording was clarified by s 14 of Act No 29 of 2016 (e-Conveyancing)

Real Property Acts[42], *or in respect of which any entry is by any of [those Acts] directed, required, or permitted to be made* in the Register Book" [italics added]), became an expanded category by reason of the expanded definition of "Register Book" introduced by s 51B.[43]

29.7. Section 51C (in the same Division) authorised the cancellation of a CT and the issue of a new one. The combination of s 51B and s 53 required the retention of the cancelled certificate as part of the "Register Book", as defined in s 51B.

Section 69, RPA

30. A restrictive covenant may be contained in the encumbrance a memorial of which is entered on the CT, but the relevant "interest" may be said to include those elements that enable the covenants to run with the land in equity, so as to bind subsequent purchasers. The question is in what circumstances is that interest taken to be "notified" on the CT.

Accommodating Restrictive Covenants within the Statutory Scheme

31. **Transferring the burden:** Provided the covenant is negative in substance,[44] and, in its terms, "touches and concerns" the benefitted land,[45] exhibiting an intention that the *burden* run with the encumbered land,[46] for the benefit of the covenanted land, the burden will pass to the successors in title of the covenantor.[47] These requirements are not in issue in the present case.

32. **Transferring the benefit:** There can be no Building Scheme unless the *Elliston 4* are satisfied, and the nature and particulars of the scheme are sufficiently disclosed for the purchaser.

32.1. The *Elliston 4* involves an *historical* enquiry: was the Scheme of Development (or Building Scheme) *in fact* established; ie, lots laid out with the intention of placing each lot owner under a restriction 'touching and concerning' the land,

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42 Defined in s 3 as No 15 of 1857-58, No 16 of 1868, No11 of 1860, No 22 of 1861, No 128 of 1878, No 223 of 1881 (Rights of Way) and the 1886 Act (the present Act, as amended from time to time)

43 According to Kourakis CJ a deposited plan not a registered instrument(CAB.80/81 [38]), or part of the Register Book (CAB.88/9 [64])but, as shall be seen, these amendments confirmed that Plans of subdivision, including plans of re-subdivision, deposited or lodged in the LTO were instruments, and part of the Register Book.

44 *Tulk v Moxhay* (1848) 41 ER 1143 (implied negative stipulation); *Burke v Yurilla SA Pty Ltd* (1991) 56 SASR 382 (covenant not to build a house of less than a specified value)

45 *Bradbrook and Neave* at 384-389; *Clem Smith Nominees Pty Ltd v Farrelly* (1978) 20 SASR 227

46 *Bradbrook and Neave* at 381-2; see also, the terms of the encumbrance itself, and the submissions in that respect at paragraph 10 above

47 *Fitt v Luxury Developments Pty Ltd* [2001] VSC 258 (Gillard J), [150]-[158], [272]-[277], *Randell v Uhl* [2019] VSC 668 (Derham AsJ), [51]-[51]

and intended also for the benefit of each lot owner (reciprocity)?[48] This usually requires a common vendor, but not necessarily so.[49]

32.2. Notice involves a more *contemporary* enquiry: Were the nature and the particulars of the Scheme "sufficiently disclosed" for the current purchaser?

The Historical Inquiry: Applying the *Elliston 4* in the Torrens System

33. The conclusion of the Trial Judge that a Building Scheme was established in 1964 when the subdivision was laid out in accordance with the Gaetjens plan,[50] was not seriously questioned in the Full Court, and is not a ground of appeal in this Court.

34. A submission was put, however, and pursued in this Court, that the Scheme relevant to Lot 4 was limited to the re-subdivision constituting Lots 1-4, and that the third respondent (Richard John Fielder), as owner of Lot 35,[51] had no standing to enforce the covenant in the encumbrance burdening Lot 3. The reasons of Kourakis CJ (dissenting) are called in aid.

35. In the general law, the Court could have regard to extraneous material in order to establish the existence of the scheme.[52] While, therefore, "equity readily gives effect to the common intention notwithstanding any technical difficulties involved"[53] the question of intention "at the time where the partition of the land took place, [had] to be gathered, as every other question of fact, from any circumstances which can throw light upon what the intention was".[54] (Often years later, when contemporaneous evidence was sparse). The same recognition of the realities of proof is reflected in the judgment of Wilberforce J in *Marten v Flight Refuelling Ltd*.[55] The courts were prepared to draw inferences.

36. Under the *Real Property Act 1886*, this historical inquiry is not confined to the Register.[56]

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48 *Re Dennerstein* [1963] VR 688 (Hudson J), 692.5; *Netherby Properties Pty Ltd Tower Trust Ltd* (1999) 76 SASR 9 (Perry J), 10 [7] – 14 [30, 21 [72]; *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258 (Gillard J), [138]-[149]; *Vrakas v Mills* [2006] VSC 463 (Hargrave J), [28]-[39]; *Re Hunt* [2017] VSC 779 (Landsdowne AsJ), [30]-[36]; *Xu v Natarelli* [2018] VSC 759 (Ierodiaconou AsJ), [67]; *Randell v Uhl* [2019] VSC 668 (Derham AsJ), [58]-[77]

49 Bradbrook & Neave at [13.91]; *Re Dolphin's Conveyance* [1970] Ch 654; *Re Mack* [1975] 2 NSWLR 623

50 CAB. 172/3; a/BFM.500/502

51 And also of Lot 5, which, being the remnant title of the common vendors' dairy farm was not the subject of a registered encumbrance

52 *Kelly v Barrett* [1924] 2 Ch 379; *Smith & Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500, at 508, 518; *Marten v Flight Refuelling Ltd* [1962] Ch 115, at 131; *Re Dolphin's Conveyance* [1970] Ch 654, at 659; *Texaco Antilles Ltd v Kernochan* [1973] AC 609, at 624

53 *Brunner v Greenslade* (above) at 842 d-e, citing *Baxter v Four Oaks Properties Ltd* (1969) Ch 816, per Cross J at 825, 826

54 *Nottingham Patent Brick and Tile Co v Butler* (1885) 15 QBD 261, per Wills J at 269

55 [1962] 1 Ch 115, at 133-4

56 *Re Dennerstein* [1963] VR 688 (Hudson J), 692.5 - 694.5; *Netherby Properties Pty Ltd Tower Trust Ltd* (1999) 76 SASR 9 (Perry J), 10 [7] – 14 [30, 21 [72]; *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258

37. The Gaetjens plan (appended to the Reasons of Peek J) is admissible evidence of the *existence* of a common building scheme of 52 or 54 lots.[57]

38. The appellants rely on Kourakis CJ's 'contrary factual finding' of a separate building scheme for Lots 1-4. It is submitted that the paragraphs of his reasons in which the learned Chief Justice addresses this issue[58] *confuse* the factual inquiry (at the laying out of the Building Scheme) with the notice inquiry. His Honour puts himself in the position of the *Original Purchasers* (the Boins) and then conducts a notional search of the CT (the parent title issued to the common vendors in respect of Lot 3 only) and on which is noted the grandparent title, but in respect of which His Honour held there was no reason for the Boins to suspect the Deposit Plans 8199 and 7593 referred to in the grandparent title would be relevant to Lot 3, and further enquiries would suggest the only quasi-dominant tenements would be Lots 1-4. The summary[59] follows a section in which the Chief Justice refers variously to "the original purchaser" and the "subsequent purchasers".[60]

39. It is submitted that the Chief Justice fails to distinguish between the *factual* inquiry into the existence of a Building Scheme, and the *notice* inquiry, merging the two by stepping into the shoes of the Boins, and *confining* the evidence from which it might be inferred that they purchased "on the footing" (*Elliston, element 4*) that the covenants were to enure to the benefit of the other lots, to what they might have inferred from the parent title.

40. Peek J's reasoning as to the proof of the *Elliston 4* is, it is submitted, correct.[61]

41. In this respect the Building Scheme endorsement on the back sheet of the Encumbrance evidences what the extrinsic circumstances establish that the Boins must already have known. The *absence* of evidence as to whether they saw the endorsement[62] raises no counter inference.

42. Kourakis CJ limits the *factual* inquiry to what an otherwise *uninformed* original purchaser might discover from an examination of the CT alone and proposes that the *notice* inquiry is to be undertaken by "reasonable purchaser in the position of the appellants." [63] Both propositions, it is submitted, are erroneous.

(Gillard J), [283]-[331]; *Vrakas v Mills* [2006] VSC 463 (Hargrave J), [40]-[51]; *Re Hunt* [2017] VSC 779 (Landsdowne AsJ), [69]-[70]; *Randell v Uhl* [2019] VSC 668 (Derham AsJ), [82 e]-[82f]

57 CAB.11/112- 112/113, Peek J, [117]-[124]

58 CAB.90/1-96/7, [71]-[96]

59 taken from CAB.95/6-96/7, [92]- [97]

60 CAB.93/4-94/5, [79]-[87]

61 CAB. 111/112-112/113 [117]-[124]; 118/9–121/2, [142]-[157]) – in particular, [143]-[147]

62 AWS 11.3, echoing Kourakis CJ at CAB.93/4 [81]

63 CAB.96/7, [98]

The Contemporary Inquiry: "sufficient disclosure" for the current purchaser?

43. The requirements of notice for the covenant to bind a successor in title and the requirements of the *Real Property Act 1886* according to its text, context and purpose are accommodated in the meaning to be attributed to the term "notified" in s 69.

44. Equity finds its relevant formulation for the purpose of South Australian law in *two* passages from the reasons of Debelle J (speaking for the Full Court) in *Burke v Yurilla (SA) Pty Ltd*,[64] identified by Peek J in the Full Court.[65]

Bursill's Case - Grounds of Appeal 2.1 and 2.2

45. *Bursill* does not stand for the "narrow point" contended for by the appellants,[66] that is, "notified" for the purpose of s 69 extends only to the content of a "memorialised instrument" *incorporated into the CT by reference*: [67] that is, the term 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.[68]

46. The Court had regard to notifications on successive CTs.

47. Disagreeing with the court below,[69] the High Court held that the interest could not be upheld as an omitted easement (an express exception to indefeasibility). Instead, the question was whether an interest in land (a horizontal stratum), not itself capable of being made the subject of a registrable transfer, had been, nevertheless, "notified on the folium of the register book constituted by … the certificate of title", within the meaning of s 42 of the 1900 Act,[70] by reason of the content of the Memorandum of Transfer to which the entry on the CT referred.

48. Barwick CJ noted that registered dealings being part of the register book were available for public search and inspection; and that "it was not intended that the Certificate of Title alone should provide a purchaser … with all the information necessary to be known to comprehend the extent or state of that proprietor's title to the land." [71]

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64 (1991) 56 SASR 382, at 389-390, 391

65 CAB.150/1, [240]-[241]

66 Appellants' Written Submission (**AWS**) [35]

67 AWS [35]; CAB.78/9, Kourakis CJ, [30]

68 AWS [45]. This was the view that found favour with Kourakis CJ in the Full Court:CAB.78/9, [30], but rejected by the majority:CAB.134/5-137/8, [196]-[205]

69 McLelland CJ in Eq, (1970) 91WN (NSW) 521

70 It should again be noted that the relevant statutory provisions were those applied at the time of purchase of the servient tenement (1957-1969), not when the interest was transferred (1872)

71 at 77.4-77.5

49. Windeyer J (with whose reasons Barwick CJ twice agreed) [72] focussed instead on what the entry on the CT reasonably put the prospective purchaser on notice of. [73] That focus was not, therefore, on the status of the Memorandum of Transfer as a registered instrument (and part of the register book), but rather upon what "as a result of what there appears" (ie, on the CT), 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."

50. There is not here a breath of "incorporation by reference" – such as is contended for by the appellants. [74]

51. The decision was driven by an assessment of what enquiry the prudent conveyancer acting for a purchaser was put on by the entry, and not by any proposition that the entry on the CT merely incorporated by reference the terms of the registered instrument. [75]

52. Windeyer J was explicit that his reference to what a "prudent conveyancer acting for a purchaser …would have ascertained", echoed the words of s 164, *Conveyancing Act 1919* (NSW)[76] as properly expressing the meaning and scope of the term "notified" when used in s 42 of the *Real Property Act 1900-1965* (NSW) - which is derived from s 69, *RPA*.

53. This is the conclusion to which the majority in the Full Court came.[77]

54. Relevant information is therefore confined, in the Torrens System, to information available on the Register which would have come to the knowledge of a "prudent conveyancer"[78] or "a reasonable reader generally familiar with property and land titles"[79]

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72 at 76.3, 79.9

73 at 91

74 And as was the conclusion also of Kourakis CJ, dissenting in the Full Court {CAB. 79, [30]}

75 The commentators support the decision in its application to a subsisting interest: Woodman, (1977) 51 ALJ 98-100: Sackville, (1973) 47 ALJ 533-4.

76 The equivalent section in SA is s 117 of the *Law of Property Act 1936*, which is in similar terms: s 117 (1) (b) – as in s 164 of the *Conveyancing Act 1919* (NSW) – extends the scope of notice to what would have come to the knowledge of a purchaser's "solicitor or other agent" if such inquiries and inspections had been made "as ought reasonably to have been made by the solicitor or other agent". Kourakis CJ, at CAB.74/5-75/6, [20] rejected the respondents' (mistakenly referred to as appellants') reliance on s 117 as "misplaced", referring to s 6, *Law of Property Act 1936*, which provides that "Except as in in this Act expressly provided, this Act, so far as inconsistent with the *Real Property Act 1886* shall not apply to land which is under the provisions of that Act." holding that s 117 must be confined to notice of "instruments". But this, with every respect, begs the question, which is whether reasonably required searches of the register are inconsistent with the *Real Property Act.* Moreover, the restriction His Honour placed on the application of s 117 merely confirms that "instruments" in the RPA was defined, *as at 2008*, 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", reflecting the consequences of e-Registration introduced by Act No 9 of 1990 – see, s 51B

77 CAB. CAB.135/6-137/8, [198]-[205]}

78 *Bursill*, per Windeyer J at 93

79 *R-G (NSW) v Cihan* [2012] NSWCA 297, per Barrett JA at [64]

"if such inquiries and inspections [of the Register] had been made as ought reasonably to have been made" by them.

55. Importantly, the "prudent conveyancer" will not reasonably be required to conduct inquiries and inspections of the Register to ascertain the land intended to be benefitted by a Building Scheme if he or she is not put on inquiry as to the existence of such a scheme.[80]

56. The reference to *Bursill* in *Westfield Management Ltd v Perpetual Trustee Co Ltd* [81] (on which the appellants rely) [82] was only to confirm an undisputed fundamental element of the Torrens System, to which Barwick CJ also had made reference in *Bursill* – the centrality of the Register Book. [83] What is involved is a reasonable inquiry that a prudent conveyancer would undertake "as a result of what … appears [in the CT]."[84] The remarks of Connelly J in *Hutchinson v Lemon* [85] (to which this Court also referred in *Westfield),* [86] far from affirming a 'limitation' on the reach of a notification,[87] acknowledges that the authoritative exposition of the term *notified* "involves a search" (cf incorporation by reference). In that case, the search required, and led to, the instrument where the full interests were identified. *Non constat* that a required search can never go beyond the instrument referred to in the entry: the search in *Bursill* didn't need to go further.

57. That the *ratio* of *Bursill* is a proper search of the Register, not incorporation by reference, is supported by the decision of the Court of Appeal in *Registrar- General (NSW) v Cihan*[88] where CTs of the servient tenement of an easement granted in 1882 had been successively cancelled and new CTs issued.

58. The CT contained an endorsement: "Last Certificate Vol 1022 Fol 161", and that earlier CT contained a description of the dominant tenement.

59. Barrett JA (Allsop P, Tobias AJA agreeing) applied *Bursill* and held that an easement had been sufficiently "notified" (or "recorded" as the legislation then called it), notwithstanding that the express note on that CT (folio identifier) referred only to the later CT. There was no "incorporation by reference" of either the original (pre-Torrens) grant

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80 *Re Dennerstein* [1963] VR 688 (Hudson J); *Netherby Properties Pty Ltd v Tower Trust Ltd* (1999) 76 SASR 9 (Perry J)

81 *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528, at [5]

82 AWS [37], footnote 76

83 at 77-78; *Gibbs v Messer* [1891] AC 248, at 254; *Black v Garnock* (2007) 230 CLR 438, at 461 [12]-[13], 463 [75]; *Queensland Premier Mines Pty Ltd v French* (2007) 235 CLR 81, at 90 [15]; *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd & Registrar-General* (2013) 247 CLR 149, at 159 [20]

84 *Bursill*, at 93.2; *Registrar-General (NSW) v Cihan* [2012] NSWCA 297 (CA), per Barrett JA at [69]

85 [1983] Qd R 369, at 372-3

86 *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528, at [5], footnote 31

87 As the appellants contend; AWS [45]

88 [2012] NSWCA 297

or of its even yet imperfect notification on the earlier CT. His Honour referred to *Bursill*, and specifically to the judgements of Barwick CJ[89] and Windeyer J,[90] and concluded:

> 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 [the prudent conveyancer] a need for further enquiry by resort to readily available records.[91]

60. His Honour regarded the reference in the later CT to the "Last Certificate Vol 1022 Fol 161" as a "source of additional information about the content of the endorsement."[92] In addition to "four identifiers" in the note entered on the folio identifier and the later CT.

10 61. It may be added that His Honour did not consider this conclusion to offend the principle that "the register is everything".[93]

General Searches – Ground 2.2

62. The proposition for which the respondents contend does not support a "General Search" – such as was rejected by Hudson J in *Re Dennerstein*.[94] In that case, His Honour found

> "No reference to the existence or the extent of such a scheme [which His Honour had found to exist in fact] is contained in the covenant and, for all that appears in it, the covenant may have been intended to have no greater effect than what the law would give it."[95]

63. As in *Netherby Properties Pty Ltd v Tower Trust Ltd,,*[96] *Vrakas v Mills,*[97] *Re Hunt,*[98] *Xu*

20 *v Natarelli,*[99] *Randell v Uhl,*[100] but unlike *Fitt v Luxury Developments Pty Ltd,*[101] nothing existed on the memorandum of encumbrance that would have put a 'prudent conveyancer' on his or her inquiry as to either the existence of a Building Scheme or the identity of the lands benefitted. The prudent conveyancer is not asked to guess, but provided there is something in the instrument that would put a prudent conveyancer on his or her inquiry, the prospective purchaser will be fixed with knowledge of "such searches [of the register

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89 at 77.5
90 at 93.3
91 at [64]; in the Full Court, Kourakis CJ referred to this paragraph of *Registrar-General v Chan.* and sought to distinguish the decision as "resolv[ing] a difficult problem which arose because of a failure of the Registrar-General to include a registered easement when issuing a new title. It serves as no authority in this case". With all due respect, this does not properly describe the decision, or its effect.
92 at [66]
93 at [69]. This decision is commented on with approval by Professor Peter Butt in (2013) 87 ALJ 230-231: and see further, Edgeworth, *Butt's Land Law,* 2017, 7th ed, at 858-9 [12.710]
94 *Re Dennerstein* [1963] VR 688, 696
95 at 696.5
96 (1999) 76 SASR 9, 24 [79]
97 [2006] VSC 463, [40]-[51], esp [45]
98 [2007] VSC 779, [69]-[70]]
99 [2018] VSC 759, [63]-[67], esp [58]
100 [2019] VSC 668, [82 e]-[82l]
101 [2000] VSC 258, [278]-[327]

book] as ought reasonable to have been made by him" *as a result of what appears*[102] on the instrument referred to in the CT.

64. This, it is submitted, is the intendment of the conclusion reached Debelle J in *Burke v Yurilla SA Pty Ltd*[103], upon a consideration of Bray CJ's references in *Clem Smith Nominees Pty Ltd v Farrelly*[104] to *Bursill* and *Re Dennerstein* in the same passage:[105]

> 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: see per Bray CJ in *Clem Smith Nominees Pty Ltd v Farrelly* and *Re Dennerstein*

65. The decision of Hudson J in *Re Dennerstein*[106] is not, therefore, in conflict with the conclusions of the majority of the Full Court, and can be seen, by reference to its facts, to be addressing a quite different proposition, namely, whether the prospective purchaser is required to search further where the registered instrument does not itself identify the land intended to be benefitted by the covenant), *and does not otherwise put the prospective purchaser (or their agent) on enquiry as to the land intended to be benefitted under the scheme*.

66. The dictum of Bray CJ in *Clem Smith Nominees Pty Ltd v Farrelly*[107] (which was not a Building Scheme case) accepts the above view of *Dennerstein*, and supports the majority's application of *Bursill* [108] to the case of a restrictive covenant annexed to a registered encumbrance.[109]

67. The decision in *Burke v Yurilla SA Pty Ltd*[110] accepted the correctness of the foregoing treatment of *Dennerstein* and *Clem Smith*, in the course of considering a case where a memorial entered on *each* certificate of title of some 9 or 10 subdivided allotments only referred expressly to a registered encumbrance on the common vendor's title by *number only* (not to the certificate of title), and to the vendor/encumbrancer by *name only*.[111]

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102 The words of Windeyer J in *Bursill*
103 *Burke v Yurilla SA Pty Ltd* (1991) 56 SASR 382 (FC), 390-1, also 389
104 *Clem Smith Nominees Pty Ltd v Farrelly* (1974) 20 SASR 227 (FC), 389-390
105 At 391; and see the analysis of Peek J in the Full Court: CAB.148/9-152/3, [236]-[250]
106 [1963] VR 688 (Hudson J)
107 *Clem Smith Nominees Pty Ltd v Farrelly* (1974) 20 SASR 227 (FC), at 389-390
108 *Bursill Enterprises Pty Ltd v Berger Bros Trading Pty Ltd* (1971) 124 CLR 73
109 And see the analysis of Peek J in the Full Court: CAB.141/2-148/9, [215]-[235]
110 *Burke v Yurilla SA Pty Ltd* (1991) 56 SASR 382 (FC)
111 Although the registered encumbrance identified all the allotments intended to be benefitted by the restrictive covenants annexed to it, the memorial entered on the title of the purchasers from the Council did not expressly identify the parent certificate of title on which the encumbrance was entered

68. Subdivided allotments were transferred to a single purchaser (a local government council) which, on the following day, entered into an encumbrance granted in favour of the common vendor (Bellevue Heights Ltd), to which were annexed restrictive covenants in favour of the common vendor, and burdening the subdivided allotments. The encumbrance (No 1881724) was registered on the title of the common vendor (parent title), and when the local council subsequently sold the allotments (in two groups, each group to a different purchaser), a memorial was entered on each of the Certificates of Title issued for the respective allotments created by the subdivision: "Encumbrance No 1881724 to Bellevue Heights Limited."

69. In *Burke*, therefore, the prospective purchaser was put on inquiry as to the terms of the encumbrance, and the Register had to ascertain the whereabouts of the memorandum of encumbrance, and in the case at bar, the prospective purchaser was put on enquiry as to the land intended to be benefitted, and the Register had to be searched to identify that land.

70. In *Netherby Properties Pty Ltd v Tower Trust Ltd,*[112] like *Dennerstein*, a registered encumbrance, to which the restrictive covenants were annexed, gave no hint of their being part of a Common Building Scheme, and thus failed to put the prospective purchaser, or their agent, on enquiry as to the land intended to be benefitted by the covenants. Indeed, the encumbrance did not even purport to secure the performance of the annexed covenants.

Reasonable searches

71. It is first to be noted that the form of the encumbrance borrows heavily from the form of encumbrance recommended in the contemporary 1963 edition of Jessup's *Lands Titles Office Forms and Practice*[113] - and in later editions – and which the prudent conveyancer in 2008 would be familiar with.

72. Next, the prudent conveyancer in 2008 would have noticed not only the endorsement on the Encumbrance back sheet, but also the significance attached to the description of the transferors, and would have been referred by the Encumbrance to a search for the "assigns" of Keith Ayton and Betty Fielder. The prudent conveyancer in 2008 (and, incidentally, the Boins in 1965) would have known that the "Keith Ayton and Betty Fielder" referred to in the Encumbrance were the transferors to the purchasers (Boins) of

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112 *Netherby Properties Pty Ltd v Tower Trust Ltd* (1999) 76 SASR 9 (Perry J)

113 CAB.10/11, Tilmouth DCJ, [20]

the Parent title (3310/186) which identifies the grandparent or header title (2422/83).[114] The prudent conveyancer would go there (as would the Boins) in order to find " the assigns" of Keith Ayton and Betty Fielder. DP 8199, DP 7593, and DKT 669/64 were all noted on the grandparent title as well as the issue of 52 parent titles – *all of which would have been issued to Keith Ayton and Betty Fielder, and the transferees from* ***all*** *those CTs would have been Keith Ayton and Betty Fielder's "assigns".*[115]

73. So the prudent conveyancer in 2008 (as also the Boins in 1965) would have been directed [*put on inquiry by the terms of the encumbrance*] to **all** titles for which there were – or would be - *transferees* (assigns) from Keith Ayton and Betty Fielder

74. It would also have been noted that the express reference to Keith Ayton and Betty Fielder "their heirs executors and assigns" ('*their*' be it noted, not 'their respective assigns' thereby signifying that the reference is to them as the joint transferors to their "assigns")[116] while not in the words of Charge, were in the 'preamble' – viz, "desiring to render the land available for the purpose of securing to and for the benefit of [Keith Ayton and Betty Fielder] their heirs administrators and assigns … the performance and observance of the covenants …", and clearly evidences an intention to benefit Keith Ayton and Betty Fielder's joint assigns.

75. Further, Keith Ayton and Betty Fielder *are* described as "encumbrancees" (there is a later reference to the powers and remedies of "an encumbrancee - but in terms that can be seen as referring to them both jointly); and s 3, *Real Property Act 1886* as it applied in 1965 (s 3 (2) in 2008) provided that "the description of any person as encumbrancee … shall be deemed to extend to and include the … assigns of such person". *Accordingly, the Boins covenanted for the benefit of the* ***joint transferees*** *of Keith Ayton and Betty Fielder.*

The Deposit Plans and Dockets are part of the Register

76. Moreover, it is submitted that certified plans of division deposited, and approved plans of re-subdivision lodged, in the LTO in 1964 and 1965 became part of the Register Book (their deposit effected a vesting of property[117]), would have been accessible as such in

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114 Compare, *R-G (NSW) v Cihan* [2012] NSWCA 297

115 "*Heirs, executors, administrators and assigns*": a composite phrase intended to refer to all the successors in title of any particular person. The phrase is usually used in instruments where the intention of the promisor is to bind the promisor's successors in title (Butterworth's Concise Australian Legal Dictionary, Third Edition, 2004); "*Assign or Assignee*": one to whom property rights or powers are transferred by another (Black's Law Dictionary, Eighth Edition, 2004)

116 CAB.153/4, Peek J, [255]. It may be accepted that the reference to "heirs and executors" must be read distributively, but that does not detract from the reading of "assigns" as referring also to *joint* assigns.

117 Section 11 of the *Town Planning Act 1929*

2008 (when the Applicants bought Lot 3), and would certainly be so now.[118] In this respect, it is to be recalled that the definition of "instrument", as at 2008, included "every document … in respect of which any entry is by any of the Real Property Acts [including the current Act] directed, required, or *permitted*, to be made in the Register Book" [italics added]; and the Register Book had the digitalised definition, inserted by s 51B (in 1990).[119]

77. Further, and in any event, the *express* reference to DP 8199, DP 7593 (subdivisions) and Dkt 669/64 (re-subdivision) on the grandparent title required and authorised the prudent conveyancer to search them.

Standing – Ground of Appeal 2.3

78. This has been addressed above, starting at paragraph 33 above (Historical Inquiry). There is no basis for concluding that there was more than one Building Scheme, and accordingly, the third respondent, as owner of Lot 35 has standing to seek and obtain the declaration and injunctions granted.[120] The alternative argument, based on the third respondent's ownership of Lot 5 and Lot 35 is the subject of the Notice of Alternative Contention (see below)

Construing the Encumbrance – Ground of Appeal 2.4

79. The covenants are to be construed in context and as a whole, giving words their ordinary meaning. To this extent, the principles do not differ from the usual principles for the construction of a contract.[121] However, extrinsic evidence of surrounding facts and circumstances is, in general, confined to those ascertained from the Register,[122] but the limitation is not complete – as for example, technical or abbreviated terms or symbols

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118 see, *Sertari Pty Ltd v Nimba Developments Pty Ltd* [2007] NSWCA 324, [16] – where the Deposit Plans were considered in the construction of an instrument.

119 Until replaced by Act No 23 of 1982, s 101 of the *Real Property Act* required a "plan of subdivision", certified by a licensed surveyor, to be deposited with the Registrar General, Section 11 of the *Town Planning Act 1929* provided that every plan of subdivision or re-subdivision, complying with all approval requirements, should be deposited (subdivision) or lodged (re-subdivision) in the Lands Titles Registration Office. Act No 23 of 1982 introduced into the *Real Property Act*, Part 19AB, including ss 223LA. 223LB and 223LE, which has, since Act No 11 of 1994, defined an "allotment" for the purpose of subdivision as "a separately defined piece of land delineated on a plan of division (s 223LA (1) (e)), and "plan of division" as including a plan of division "approved pursuant to the *Planning and Development Act 1966* or a previous enactment and deposited, or accepted for filing, in the Lands Titles Registration Office …". Dealings with land less than an allotment in area are void, and no instrument purporting to give effect to such a dealing can be registered: s 223LB (1), (4)

120 CAB.45/6-49/50

121 *Prowse v Johnstone* [2012] VSC 4 (Cavanough J), [51]-[56]

122 *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528, 539 [37]-5540 [44]. This was an easement case, but it is considered applicable to restrictive covenants – see the cases referred to in *Prowse v Johnstone* (above), [57]

that have to be explained,[123] physical characteristics of the tenement,[124] extrinsic material referred to expressly,[125] and other covenants in a Building Scheme.[126]

80. The manifest intention of the covenants (especially paragraphs 2 and 3) was to restrict the "building or buildings" on the land to *one* dwelling house with appurtenant outbuildings. In particular –

80.1. The juxtaposition, in paragraph 2 of the prohibition, of "any building or buildings"[127] with the exception, "a dwelling house for private residential purposes" makes clear that the indefinite article "a" means "one".

80.2. This sense of paragraph 2 is reinforced by the provisions of paragraph 3 which prohibits, expressly, the erection of "any block or blocks of flats home units *or other multiple dwellings*". This was a clear prohibition on multiple households in the one building,[128] and it is impossible to suggest that where there is an express prohibition on multiple households, the covenants would then permit multiple dwellings, each with its own household.

80.3. This is reinforced by the consideration that there are 52 covenants in these same terms, all in the one subdivision.

80.4. In any event, there is no reason to read down a prohibition against "multiple dwellings" by reference to a perceived genus, or to definitions in contemporaneous statutes.

81. The appellants' reliance on the avoidance of a *partial* restraint on alienation as a technique of interpretation (which was not raised at trial or in the Full Court) begs the question: the covenants are designed to enhance value, and it would require expert evidence to identify such an alleged diminution in value as to render the covenants void.[129] No such evidence was called, and the respondent would be deprived of the opportunity to defend the claim by adducing expert evidence, if this submission were now entertained. No decision interpreting like covenants has adverted to such an argument.

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123 *Westfield*, 540 [44]

124 *Sertari Pty Ltd v Nimba Developments Pty Ltd* [2007] NSWCA 324, [16]

125 *Suhr v Michelmore* [2013] VSC 284 (Pagone J), 9; *Prowse v Johnstone* (above), [58]

126 *Clare v Bidelis* [2016] VSC 381 (Derham AsJ) ; *196 Hawthorn Road Pty Ltd v Duszniak* [2020] VSC 235 (Landsdowne AsJ), [23]-[37], [79]-[98]

127 In contrast to *Tonks v Tonks* (2003) 11 VR 124, 125 – where it was just "any building", *and* there was no clause 3

128 compare, *Prowse v Johnstone* [2012] VSC 4

129 *John Nitschke Nominees Pty Ltd v Hahndorf Golf Club Inc & Anor* (2004) 88 SASR 334 (FC), 364 [100]-372 [129]

Part VI: Respondent's Argument on the Respondents' Notice of Contention

Standing – Ground I of the Amended Notice of Contention

82. Even if (contrary to the majority in the Full Court held[130]) the Third Respondent (as owner of Lot 35) is not a member of the Building Scheme to which the owners of Lots 1-4 belong, the Third Respondent still had, and has, standing to seek declaratory and injunctive relief.[131]

83. The Third Respondent has standing to seek both declaration and injunction upon two bases: (a) by reason of his ownership of an allotment (**Lot 5**) in the same building scheme, burdened by precisely the same restrictive covenant; (b) by reason of his being able to show a *very special interest* in the subject matter of the action, as owner of Lots 5 *and* 35.

Lot 5

84. The Third Respondent is the current successor in title to the common vendors, Keith Ayton and Betty Fielder, the original covenantees. The common vendor who retains allotments in the development which are not subject to the restrictive covenant is nevertheless treated as impliedly bound by the provisions of the scheme, including the restrictive covenant.[132] The title remained in the hands of one of the common vendors (Betty Fielder) until it was transferred under her will to the Third Respondent in 2015.

Lots 5 and 35

85. The SA courts have power, in the exercise of an inherent jurisdiction, or implied incidental power,[133] and by statute,[134] to grant declaratory relief, with or without consequential orders. The power is "very wide", and is limited only by the court's discretion and the boundaries of judicial power.[135] The Court will therefore look to see whether the declaratory relief sought is directed to the determination of legal controversies, and not to answering abstract or hypothetical questions; whether the

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130 CAB.162/3-163/4[285]-[291]

131 It was not in dispute that the First and Second Respondents lacked standing. Everything depended on whether the Third Respondent had standing

132 *Brunner v Greenslade* [1971] 1 Ch 993, 1003-4

133 *Ainsworth v CJC* (1992) 175 CLR 564, per the plurality at 581-2; *Macks v Viscariella* (2017) 130 SASR 1 (FC), at 134-5 [662]; *Plenty v A-G (SA)* (2013) SASC 35, per Stanley J at [13]

134 s 37, *District Court Act 1991*; s 31, *Supreme Court Act 1935*; *JN Taylor Holdings Ltd v Bond* (1993) 59 SASR 432, per King CJ at 435

135 *JN Taylor Holdings Ltd v Bond* (above), per King CJ at 435, 436; *Ainsworth* (above) at 581-2, referring to *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, per Gibbs J at 437-8

persons seeking relief have a 'real interest' to raise it; and whether there is someone who has a true interest to oppose the declaration sought.[136]

86. The Respondents contend that, by virtue of his ownership of either, or both, Lot 5 and Lot 35, the Third Respondent is enforcing his property rights. But, in any event, it is sufficient[137] that the Third Respondent is affected in the enjoyment (and value) of *his* properties (Lots 5 and 35) by the threatened breach of a restrictive covenant within a Building Scheme (whether as to 54 or 4 allotments), giving him standing to seek declaratory[138] and injunctive relief.[139]

Section 51B – Ground 2 of the Amended Notice of Contention

87. This ground has been addressed at paragraphs [29] and [76] above.

Part VII: Estimate of Required for Presentation of the Respondent's Oral Argument

88. The Respondents estimate their oral submissions will take 2-3 hours.

10 June 2020

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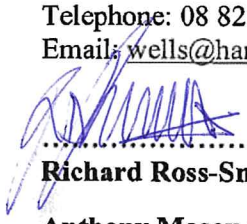

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136 *Ainsworth* (above) at 581-2; *Jododex* (above) per Gibbs J at 437-8 *JN Taylor Holdings Ltd v Bond* (above), per King CJ at 436; *Macks v Viscariella* (above) at 139 [677]; *Aussie Airlines Pty Ltd v Australian Airlines* (1996) 68 FCR 406 (FC) at 414; *Plenty v A-G (SA)* (above) at [14]

137 Meagher, Gummow & Lehane's *Equity Doctrines*, 5th edition, at [21-330]; Spry's *Equitable Remedies*, 6th edition, at 338-346; *ABC v Lenah Meats Pty Ltd* (2001) 208 CLR 199, at [90]

138 *JN Taylor Holdings Ltd (In liq) v Bond* (1993) 59 SASR 432, per King CJ (for the Court), at 435-7 at 435-7; *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339, per French CJ, Kiefel, Bell, Keane JJ at 355 [39]-357 [42]; per Nettle J at 367-8 [83]-[86], 371 [97]-373 [102]; *Clarke v ALP* (1999) 74 SASR 109, per Mullighan J at 134 [70]-135 [71]; *CE Heath Casualty & General Insurance Ltd v Pyramid Building Society (in liq)* [1997] 2 VR 256

139 *Fletcher v Foodlink Ltd* (1995) 60 FCR 262 (Drummond J), 265

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 RESPONDENTS' SUBMISSIONS
LIST OF CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS

Constitutional Provisions

1. Nil

Statutes

2. The Real Property Acts, SA:
   - 2.1. *Act No 15 of 1857-8,* s
   - 2.2. *Act No 16 of 1958*, s
   - 2.3. *Act No 11 of 1860,* s
   - 2.4. *Act No 22 of 1861,* s
   - *2.5. Act No 380 of 1886,* s
   - 2.6. *Act No 22 of 1982,* ss
   - 2.7. *Act No 9 of 1990,* ss
3. *Town Planning Act 1929* (SA), ss
4. *Conveyancing Act 1919* (NSW), section 88 (3) (a)
5. *Property Law Act 1974* (Qld), ss 4 (2), 176-177
6. *Land Title Act 1994* (Qld) (Bradbrook and Neave, 458 [17.2])
7. *Transfer of Land Act 1958* (Vic), section 88
8. *Transfer of Land Act 1893* (WA), section 129A
9. *Land Titles Act 1980* (Tas), sections 102-104

10. *Land Title Act* (NT), *Pt 6 Div 5*

11. *Law of Property Act*, (NT) Pt 9 Divs 4 & 5