



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY
BETWEEN:

No A4 of 2020
Nick Deguisa
First Appellant
Tori McKenzie
Second Appellant

and

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

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FORM 27F – APPELLANTS’ OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

20 Part II: Argument

A L Tokley QC – Addressing statutory framework; s 51B; Interpretation of Bursill and related authorities; Factual matters; Re Dennerstein – Identifying errors: CAB134[194], 153[252], 160[276]

Preliminary observations (Appellants’ Amended Submissions (AAS)[26-27])

2. The mischief to which the Torrens System is directed arises from the history of land dealing in colonial South Australia, which required efficiency, simplicity and security as primary remedial purposes.

Statutory Scheme (AAS[28-34], [47], [72-73]; Appellants’ Reply (Reply)[6-9])

3. It is a statutory scheme of title by registration of CTs and instruments; one therefore starts with
30 construing the statute.
4. Sects 10 and 11:¹ RPA must “*always*” be construed as “*best*” to effect its purposes (JBA22, 175).
5. Registration of title is provided by Div 1, Pt 5 (JBA34, 178).
6. Each CT is a separate folium of the Register Book (RB), which records *inter alia* the memorials, incorporating instruments memorialised (s 49: JBA34, 178).²
7. The *notification* to which s 69 refers (JBA42, 182) is to be construed according to the s 11 mandate while taking into account its statutory context. Section 69 employs the concept of notified “*on*” the CT; it does not entail a search in any way analogous to searching titles as with “old system” land (cf RS[56]).

¹ All sections referenced are to the *Real Property Act 1886* (SA) unless otherwise indicated.

² As to the nature of the RB, see Whalan: JBA648.5, 650.5; Richards: JBA628.9-629.3.

8. Encumbrances (ss 128 and 129: JBA70)³ are notified “on” the CT (not the RB), by memorial (ss 49, 50: JBA34, 178; s 51: JBA34, 178). By s 49 and 77, “all” memorials of encumbrances to which the land may be subject must be recorded on the CT (JBA46, 187).
9. The memorials bring instruments capable of registration into the RB such that they are within what is notified i.e. by incorporation so they are “on” the CT (ss 57, 67: JBA38, 42, 180, 182; s 3 “instrument”: JBA19, 172; *Bursill*: JBA278.5; CAB78[30]).
10. Section 51B (not argued below) does not alter the position; s 51B deals with records “maintained” not “retained” (cp. s 53) (JBA34-35, 37; AAS[47], [72]; Reply[6-9]).
11. Cancelled CTs are not part of the RB, because in law they cease to exist (*Hassett*: JBA517.4, 519.7). Paper embodiments of cancelled CTs may be required to be so endorsed (s 80H: JBA50; s 78: JBA46, 187; s 103: JBA61, 191).
- Extent of Investigation Required (AAS[35-48])
12. To ascertain the “*extent and state of the registered title*” one begins with the relevant CT, together with instruments that have been memorialised upon the face of the CT (*Westfield*: JBA386-387[5]); *Bursill*: JBA278.5, 279.5-7; s 57: JBA38, 180; CAB78[30]). One is not required to go further.
13. A prospective purchaser is not bound to search for documents outside those “notified” on the RB (*Westfield*: JBA394[39]; *Bursill*: JBA278.4-5). They can ignore cancelled CTs because they do not legally exist ([11] herein; cp Respondents’ Submissions (RS) [72], [77] – a necessary plank in the RS).
14. The judgment of Windeyer J in *Bursill* is consistent with this proposition (*Bursill*: JBA290.8; JBA294.7; JBA295.2; cf Barwick CJ at JBA278.2, 281.9).
15. In the context of a building scheme, the Registered Proprietor (RP) of land subject to it, has an interest in every other allotment the subject of the scheme (*Pirie* JBA361.9-362.2; *Burke*: JBA409.3. And *vice versa* for the other RPs.
16. The registered encumbrance must, therefore, identify *all* other quasi-dominant tenements to disclose the “*nature and extent*” of the title ([8], [15] herein; *Re Dennerstein*: JBA613.3; *Clem Smith*: JBA426.5; 427.3-4) but here it does not, and the buildings scheme fails.
17. Further, here the encumbering of the land to secure payment of the rent-charge does not benefit a quasi-dominant tenement (comp *Clem Smith*: JBA419 (encumbrance) with RespBFM103 (encumbrance)), and the absence of a link is fatal to any building scheme (*Clem Smith*: JBA426.5, 429.2-7).

³ NB by way of correction, JBA195 should be the same as JBA70: s 4, *Real Property Act Amendment Act* (SA) (No 46 of 1963).

Factual Matters AAS[8-24]; Reply[11]

18. The following materials were relevant to ascertaining the nature and extent of the title when it was purchased (RespBFM96-104). Beyond the CT, there was for Lot 3 a Docket (BFM456-464), not a Deposit Plan (neither in any event being required to be searched).
19. The evidence did not establish whether there was one, two or three building schemes (CAB87[59], 93[79-80], 95-96[92-93], 96[96-97] Kourakis CJ (diss)), and onerous searches required the drawing of debatable inferences (*Re Dennerstein*: JBA613.7; CAB86-98[57-98] Kourakis CJ (diss)).
20. The uncertainty introduced is fundamentally inconsistent with ss 10 and 11, which is against Respondent's submissions regarding the interpretation of s 69.

H M Heuzenroeder – Addressing Standing; Covenants; Relief – Identifying errors: CAB163[291], 171[333]

Standing (AAS[65-68]; Reply[17-18])

21. Evidence (addressed above) supported an inference that there were up to three contiguous building schemes, and the Respondents did not prove Lots 3 and 35 were in the same building scheme.
22. Third Respondent thus relies on (1) Lot 5 being implicitly part of a scheme (in absence of an encumbrance), or (2) Lots 35 and 5 being affected by a scheme between Lots 1 to 4 (RS[83]).
23. Re (1): Even if available outside Torrens System, it cannot sit with Torrens System (Reply[17]).
24. Re (2): Only members of a scheme can enforce it *inter se* (*Pirie*: JBA362).
25. No suggestion that Appellants' actions would constitute a nuisance, thus no "real interest to raise it" (Reply[18]; *Forster*: JBA315.10).

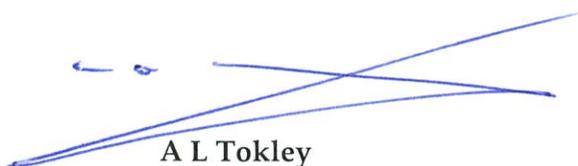
Covenants (AAS[69-71]; Reply[15-16])

26. Appellants rely upon written arguments (AAS[69-70]; Reply[15-16]).
27. The Appellants' construction aligns better with and is supported by a policy against restraint on alienation, and a policy against asset sterilization (*Clem Smith*: JBA433.1); thus Appellants' construction is preferable.

Relief

28. If successful, further orders (CAB187[4]), should include those identified at [2.2-2.3] in the appeal to Court below (CAB54).

Dated 1 September 2020:



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