HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

ON APPEAL FROM THE SUPREME COURT
OF SOUTH AUSTRALIA

BETWEEN:

Nick Deguisa
First Appellant
Tori McKenzie
Second Appellant
and
Ann Lynn
First Respondent
Christine Evans
Second Respondent
Richard John Fielder
Third Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of Propositions

2. **The Historical Fact (RWS [33] – 37)[1]:** The historical actions in 1965 identify the common intention which equity will always give effect to over form;[2] that is, the 'community of interest' giving rise to 'reciprocal obligations'.[3] The "Elliston" inquiry[4] is a factual inquiry, and the Torrens system does not dispense with, or alter the nature of this inquiry.[5] The approach of Kourakis CJ [6] should be rejected.

3. **Disclosure[7] (RWS [31-32;[43-44]):** Sec 69 requires the interest to be "notified"[8] on the "original certificate".

3.1. In **1967** this was the CT bound into the Register Book (s 48) and the Fourth Schedule" (s 73) required the nature of the estate in respect of which it was issued to

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1 Respondents' Written Submission (**RWS**), paragraph 33 **[33].**
2 *Brunner v Greenslade* [1971] Ch 993, at 1005H-1006B (Megarry J)
3 **RWS [21]-[23].** This usually requires a common vendor, but not necessarily so (*Vrakas* (adjoining owners); Bradbrook & Neave (**B&N**) at [13.91]; *Dolphin*; *Re Mack* [1975] 2 NSWLR 623
4 **RWS [33]** - It is not necessary that every last lot be subject to the restriction: B&N at [13.99]; *Re Mack* (above); *Re Dennerstein* at 693-4; CAB.18-19, Tilmouth DCJ at [40] – [41]),
5 **RWS [36]:** *Re Dennerstein [1963] VR 689; Fitt v Luxury Developments Pty Ltd [2000] VSC 258; Netherby Properties Pty Ltd v Towers Trust Ltd (1999) 76 SASR 9;; Vrakas v Mills [2006] VSC 463; Randell v Uhl [2019] VSC 668*
6 CAB.91-97 [71]-[96]; See, **RWS [38]-[42]**
7 *Reid v Bickerstaff* [1909] 2 Ch 305, at 323 Buckley LJ ("sufficient disclosure')
8 not "entered" or "memorialised"; cp, *Gibb v Registrar of titles (Vic)* (1940) 63 CLR 503, per Dixon J at 517

be "*set forth*", but the interests to which it was "subject", to be "*notified*".[9] The memorial of a registered instrument on the CT had only to "state the nature of the *instrument*", not the interest registered (s 51).[10]

3.2. In **2008**, this was the certificate *filed* [11] in the Register Book (s 48), **or** the records maintained by the R-G pursuant to s 51B (s 51B (c)).[12]

3. ***Bursill* (RWS [45]-[56])** decided that an unregistrable interest (the overhanging fee simple) referred to in a registered instrument may be "notified" on the CT by a notified search. *Bursill* supports the contention that a prudent conveyancer's search of *the registered instrument* is also not confined to the four corners of the instrument (and any documents incorporated into the instrument by reference).

4. *Cihan*[13] supports that contention too. There, the current CT (on which appeared the entry of an unspecified interest) led, successively, once by deemed incorporation, [14] once by search, to two predecessor (cancelled) CTs (**RWS [57]-[61]).**

5. ***Status of "cancelled" CT*:** 'cancel' in relation to a CT has the meaning and effect of "annul", not "expunge" or "extract/remove".[15] The cases relied on by the appellants[16] do not bear out their contention. There were cancelled CTs in *Bursill*, *Burke* and *Cihan.*

6. ***Incorporation of search:*** It seems that it is necessary for the 'notification' to identify: (a) the existence of a Building Scheme; (b) the nature of the restrictive covenant; and (c) the identity of the lands affected by the scheme, both as to benefit and burden.[17]

7. While documents incorporated into an instrument *by reference* need not be confined to registered document – that is, documents in the Register [18] - there is no *textual* justification for the proposed limitation (incorporation by reference); and no justification in text or authority for an adoption of the *concept*.

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9 s 73 (since amended), Substituted by 51/1979, s 11 (3.5.1979); deleted by 29/2016, Sch 2 (4.7.2018). The obligation of the R-G to "record" "memorials" was *not* co-extensive with the interests to be "notified" on the original CT (s 77).

10 and see *Bursill Enterprises Pty v Berger Bros Trading Pty Ltd* (1971) 124 CLR 73, 77-8 (Barwick CJ)

11 Amended by No 12 of 1975, s 7

12 The definition of "instrument" (s 3), received an expanded scope by reason of its reference to the Register Book (as now defined in s 51B); s 73 was simplified and the fourth schedule replaced by s 54 (form "approved by" the R-G)

13 *R-G (NSW) v Cihan* [2012] NSWCA 297

14 s 40 (1B) - with respect to the first predecessor CT

15 *R v Lithwaite (Inhabitants)* (1849) 13 LT (OS) 116, at 116 (Erle J) – as with postage stamps or negotiable instruments.

16 *Hassett v Colonial Bank* (1881) 7 VLR 380; *Richards v Cadman* (1891) 17 VLR 203

17 *Re Dennerstein [1963] VR 689* at 696-7*; Fitt v Luxury Developments Pty Ltd [2000] VSC 258; Netherby Properties Pty Ltd v Towers Trust Ltd (1999) 76 SASR 9;; Vrakas v Mills [2006] VSC 463* at [45]*; Randell v Uhl [2019] VSC 668* at [61], [82 (e)]; *Burke v Yurilla SA Pty Ltd* (1991) 56 SASR 382, 389-390, 390-391

18 See, *Gibb v Registrar of titles (Vic)* **(**1940) 63 CLR 503; note now, s 129 RPA

8. **The real question is**: in what way may a prospective purchaser *fairly be notified on the CT* of this unregistrable equitable interest? Incorporation by reference is not the sole method of fair notification.

9. There is no justifiable distinction between the identification of an element of an unregistrable equitable interest by its incorporation into a registered instrument (the encumbrance) by *reference*, or its identification by (for example) notice that fairly leads the informed reader to it in the Register.

10. ***This Case* (RWS [71]-[75]:** The reasonably informed reader[19] will identify from the CT and the registered encumbrance) the Grandparent CT as recording all the transferees ("assignees") of allotments out of the common (and joint) ownership of Keith Ayton and Betty Fielder [20]– *regardless* of their location in the DPs or Dockets.[21]

11. **RWS [62]-[70]:** The above analysis is consistent with and supported by the authorities.[22] It is also consistent with the approach in *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 223 CLR 528. [23]

12. **Construction (RWS [79]-[81]):** Properly construed, the covenants prohibit the appellants' proposed construction of *two* dwelling houses on a subdivided Lot 3. Insofar as decided cases articulate textual options, *Tonks v Tonks*[24] is distinguishable. The reliance by the appellants on a repugnant restraint on alienation is misplaced. Clause 3 of the covenant confirms that Clause 2 is intended to prohibit multiple households on the one allotment.[25]

13. **Standing (RWS [82]-[86]):** The Third Respondent [Lots 35, & 5] has standing to seek and obtain a declaration and injunction - if not by reason of membership of the *same* Building Scheme, then by membership of an "adjacent" Building Scheme subject to identical restrictive covenants: breach of those covenants by the owner of Lot 3 (appellants) is as much an interference with Lots 35 (and 5) as any nuisance.

Jonathan Wells QC **Richard Ross-Smith**

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19 *Not* the first encumbrancer (*contra*: CAB.94-97, Kourakis CJ at [81]-[97]): **RWS [38]-[42],** but a solicitor or licensed land broker

20 In 1967, there were aids to search, in 2008 computerised search facilities: Respondents' Book of Further Materials, 120

21 **RWS [76]-[77]:** It is unnecessary to consider whether (as Kourakis CJ held) a DP (or filed Docket) is neither a registered instrument nor a part of the Register. CAB.81-90, Kourakis CK at [38] [64]

22 See footnote 17 above

23 albeit that case deals with the construction of a registered instrument

24 (2003) 11 VR 124, 125

25 *Prouse v Johnstone* [2012] VSC 4