



## HIGH COURT OF AUSTRALIA

4 November 2020

DEGUISA & ANOR v LYNN & ORS  
[2020] HCA 39

Today the High Court unanimously allowed an appeal from a judgment of the Full Court of the Supreme Court of South Australia. The appeal concerned the requirement of notification in s 69 of the *Real Property Act 1886* (SA) ("the Act") in relation to the burden of restrictive covenants which are part of a common building scheme affecting land. Section 69 of the Act provides, subject to immaterial exceptions, "[t]he 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". Restrictive covenants in common building schemes cannot be registered under the Act.

The appellants are the registered proprietors of land situated at 538 Henley Beach Road, Fulham ("Lot 3"). The appellants obtained planning approval to subdivide Lot 3 and build two townhouses. Lot 3 and 51 other allotments were once part of a large parcel of land which was subdivided and sold in the mid-1960s as part of what was claimed by the respondents to be a common building scheme.

The present certificate of title for Lot 3 referred in its schedule of dealings to a memorandum of encumbrance ("the Memorandum of Encumbrance"). The Memorandum of Encumbrance was lodged for registration and recorded on the now cancelled certificate of title for Lot 3 when in 1965 it was first sold. The terms of the Memorandum of Encumbrance relevantly prohibited the erection of any building or buildings other than "a dwellinghouse", and also prohibited the erection of "multiple dwellings". On the back-cover sheet of the Memorandum of Encumbrance there appeared a handwritten requisition by the Land Titles Office, stating "[i]s the encumbrance part of a common building scheme? If not to what land is it appurtenant". The handwritten requisition gave rise to the Memorandum of Encumbrance being relodged, with a typed statement by a land broker that "[t]his encumbrance forms portion of a common Building Scheme". Neither the Memorandum of Encumbrance itself nor the present certificate of title identified the other lots intended to be benefited by the restrictive covenants in the Memorandum of Encumbrance.

The respondents, contending that building two townhouses on Lot 3 would infringe the restrictive covenants in the Memorandum of Encumbrance, commenced proceedings in the District Court of South Australia to prevent the construction. The primary judge held that the appellants were sufficiently notified of the restrictive covenants and were therefore bound by them. The primary judge held further that the respondents had standing to bring the proceedings, and the terms of the Memorandum of Encumbrance prohibited the appellants' proposed construction of the townhouses. Those conclusions were upheld by a majority of the Full Court of the Supreme Court.

By grant of special leave, the appellants appealed to the High Court. The High Court held that the appellants were not notified of the restrictive covenants in accordance with s 69 of the Act. A person is not notified of an encumbrance or qualification upon the title of the registered proprietor of land that cannot be ascertained from a search of the certificate of title or from a registered instrument referred to in a memorial on the certificate of title. The appellants 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. Given this conclusion, the Court found it unnecessary to consider whether the respondents had standing to enforce the common building scheme or whether the covenant on its terms prevented the appellants' proposed construction.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*