SUPREME COURT OF VICTORIA
COMMERCIAL & EQUITY DIVISION

Not Restricted

No.4531 of 2000

BRIAN JOHN FITT and
WALTER CHARLES THOMAS DOWELL — Plaintiffs

v

LUXURY DEVELOPMENTS PTY LTD
(ACN 006 713 935) — Defendant

JUDGE:	Gillard J
WHERE HELD:	Melbourne
DATE OF HEARING:	17, 18, 19 & 20 April 2000
DATE OF JUDGMENT:	20 June 2000
CASE MAY BE CITED AS:	Fitt & Anor v Luxury Developments Pty Ltd
MEDIUM NEUTRAL CITATION:	[2000] VSC 258

RESTRICTIVE COVENANT – principles to apply – enforcing burden and benefit by and against subsequent owners – Building Scheme – land identified.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr G. Uren QC with Mr M. Townsend	Maddock, Lonie & Chisholm
For the Defendant	Mr P.N. Wikrama with Mr L.M. Watts	Strauss & Associates

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HIS HONOUR:

1 This is the return of a summons in a proceeding instituted by an originating motion seeking declarations and a permanent injunction to restrain a breach of a restrictive covenant, and in the alternative, damages.

Parties

2 The first plaintiff Brian John Fitt ("Mr Fitt") is an international mail consultant and together with his wife Maureen Fitt, is a joint proprietor of a residential property located at 16 Hartlands Road East Ivanhoe ("Fitts' land").

3 Hartlands Road runs east-west and joins at the western end at a roundabout, Lower Heidelberg Road.

4 The Fitts' land is described in Certificate of Title Volume 5324 Folio 671 and is subject according to the Certificate of Title, to a restrictive covenant which inter alia precludes them from erecting more than one dwelling house on their property.

5 The second plaintiff Walter Charles Thomas Dowell ("Mr Dowell") is the joint proprietor with his wife Lieselotte Dowell of the residential property located at 18 Hartlands Road East Ivanhoe ("Dowells' land").

6 Dowells' land is adjacent to the Fitts' land and west of it.

7 Their land is described in Certificate of Title Volume 5718 Folio 524 and their title is endorsed with a restrictive covenant in the same terms as the covenant applying to the Fitts' land.

8 Dowells' land is located in Hartlands Road 318 feet to the east of the intersection with Lower Heidelberg Road.

9 The defendant Luxury Developments Pty Ltd ("Luxury Developments") is an investment developer company operated and controlled by Bernard Ulrich Seiffert.

10 Since 1989 Luxury Developments has conducted the business of locating land,

acquiring it and building houses. Mr Seiffert and his company are experienced developers.

11 Mr Seiffert was cross-examined during the course of the hearing on his affidavits and I formed the opinion that he is an intelligent, strong willed worldly man.

12 Luxury Developments purchased a substantial block of land known as 270 Lower Heidelberg Road East Ivanhoe being the land described in Certificate of Title Volume 5344 Folio 793 and was registered as proprietor on the 19th May 1998 ("Luxury Development's land"). The land fronts Lower Heidelberg Road and runs down the side of Hartlands Road that is to the east of Lower Heidelberg Road. It is an irregular block with a frontage of 122.5 feet to Lower Heidelberg Road and a depth of approximately 196 feet at its longest side on Hartlands Road. Erected on the land was a single residence.

13 The Certificate of Title has noted on it as an encumbrance the same restrictive covenant that is noted on the titles of the Fitts' and Dowells' land.

14 Mr and Mrs Dowell reside approximately 120 feet to the east of the Luxury Development's land and between their land and Luxury Development's land is one residential lot.

15 Luxury Developments despite objections has obtained a planning permit to erect three houses on the block, a plan of sub-division dividing the block up into three titles and a building permit. It commenced to demolish the house on their land in January – February 2000 and commenced building works on or about the 14th February.

Proceeding

16 The plaintiffs instituted their proceeding by originating motion on 6th March 2000. They sought a declaration that the Luxury Development's land was burdened by a restrictive covenant noted on the Certificate of Title, a declaration that each of them were entitled to enforce the restrictive covenant against Luxury Developments and

an injunction restraining it from erecting more than one dwelling house on the land.

17 On the 23rd March they issued a summons returnable on the 29th March before a Master.

18 The matter came on before Master Evans and the proceeding was adjourned into the Practice Court to be heard on 17 April 2000 at the request of Luxury Developments which sought an adjournment for some three weeks.

19 At the hearing before Master Evans Mr Seiffert on behalf of Luxury Developments undertook that all building works on the Luxury Development's land would cease at 5.00 pm on 31st March 2000 until the hearing and determination of the proceeding.

20 In the meantime Luxury Developments issued a summons in the same proceeding seeking declaratory relief that the Luxury Development's land was not affected by the restrictive covenant or alternatively a declaration as to the nature and extent of the restriction of the restrictive covenant and an order pursuant to s.84 of the Property Law Act 1958 that insofar as the restriction affected the land that "the same be discharged or alternatively modified so as to permit three dwellings to be erected on the said land."

21 The summons was not heard by me and is still pending.

22 When the matter came on before the Practice Court I was requested to hear the matter because of its urgency. It was agreed that I should do so subject to any urgent applications in the court and it was heard over the following four days interrupted from time to time by other Practice Court matters.

23 When Mr Uren QC who appeared with Mr Townsend for the plaintiffs opened the proceeding it was on the basis that this was the hearing of the proceeding for final relief.

24 The plaintiffs relied upon a number of affidavits. Mr Seiffert swore a number of affidavits on behalf of Luxury Developments. He was the only deponent who was

cross-examined.

25 On the third day of the hearing after Mr Uren QC had closed the case for the plaintiffs Mr Wikrama of counsel who appeared with Mr Watts for the defendant made an observation concerning the balance of convenience which caused me to raise with him whether or not he understood this was the hearing of the proceeding itself and not an interlocutory application. Mr Wikrama indicated some uncertainty and I requested him to take instructions over night. I informed him that I had understood it was the trial of the proceeding.

26 The following day Mr Wikrama informed the court that his client wished to proceed on the basis that it was the trial of the proceeding.

The land

27 Prior to 12th March 1921 Thomas Michael Burke an estate agent purchased 74 acres of land in an area known as East Ivanhoe. He was registered as proprietor on the 12th day of March 1921 of the land described in Certificate of Title Volume 4480 Folio 831.

28 He sub-divided the area into 201 building blocks. The plan of sub-division comprised 5 pages and was numbered P/S8402.

29 On each sheet of the plan of sub-division appeared the following notation –

> "All Lots on P/S8402 are
> Affected by a Building Scheme"

Attached to these reasons is a photostat copy of sheet number 1 of the plan of sub-division.

30 Luxury Development's land is Lot 1 on that plan.

31 Fitts' land is Lot 47 and Dowells' land is Lot 48. The road running generally north south is Lower Heidelberg Road and the road running east west is Hartlands Road.

32 Mr Burke sold the Luxury Development's land to James Henry Porter. The

Instrument of Transfer was executed on 20th September 1927 and was numbered 1336298.

33 The transfer was registered on 21st September 1927 and a new title was issued that day in respect of Lot 1. It was Volume 5344 Folio 793.

34 A few days later Mr Burke sold the Fitt's land to Leo Aloysius Mahon. The Instrument of Transfer was executed on the 26 September 1927 and was numbered 1337191. The transfer was registered on the 28th September 1927 and a new title was issued that day in respect of Lot 47. It was Volume 5324 Folio 671.

35 Some years later Mr Burke sold the Dowells' land to William David Vaughan. The Instrument of Transfer was executed on 12th February 1931 and was numbered 1476109.

36 The transfer was registered on 20th February 1931 and a new title was issued that day in respect of Lot 48. It was Volume 5710 Folio 524.

37 According to the original Certificate of Title Volume 4480 Folio 831 the last sale of the Burke development occurred some time prior to 27th July 1950 and the Instrument of Transfer was registered on that date.

38 The evidence clearly establishes that at the time when the sales took place of the Fitts', Dowells' and Luxury Development's lots, Mr Burke still owned a substantial number of lots in the sub-division. He still owned approximately 95 lots at the time he sold the Luxury Development's land.

39 The first registered proprietor of Luxury Development's land was Mr Porter. The Certificate of Title issued on 21st September 1927 and on the front of the title under the heading –

> "ENCUMBRANCES REFERRED TO"
>
> appeared the following –
>
> "THE COVENANT contained in Instrument of Transfer No. 1336298 in the Register Book that the above described land may not be used

except for private residential purposes only and that there may not be erected or suffered on the said land any shop laundry factory business establishment school almshouse charitable institution or church nor any hall or building of any kind for use wholly or partly for any religious or educational or business or charitable purpose or for public entertainment of any kind whatsoever nor any hoarding for advertisement or display and that no such premises hall or building may be used for any purposes (except private residential purposes only) hereinbefore indicated or mentioned and that no quarrying operations may be carried on in or upon the said land and that no marl stone earth clay gravel or sand may be dug carried away or removed from the said land and that not more than one dwelling house and that roofed with tiles or slates and not otherwise may be erected or suffered on the said land and that such dwelling house shall (exclusive of all Architect's fees and the costs of erecting any fences) cost for erection not less than the sum of £500 and that no paling or close iron fences may be erected or suffered on the said land." (Emphases added.)

40 In the Instrument of Transfer number 1336298 executed by the parties it was agreed as follows –

"AND in consideration of the premises and to the intent that the covenants hereinafter contained shall respectively be noted on and referred to on the Certificate of Title for the time being of the land hereby transferred as an encumbrance affecting the same and that such covenants shall run with such land and be binding upon the same and the registered proprietor or proprietors for the time being thereof (but not so as to render such registered proprietor or proprietors personally liable in damages for any breach of such covenants after he or they shall have ceased to be such registered proprietor or proprietors the said James Henry Porter DOTH HEREBY for himself his heirs executors administrators and transferees registered proprietor or proprietors for the time being of the said land hereby transferred COVENANT with me the said Thomas Michael Burke my heirs executors administrators and transferees the registered proprietor or proprietors for the time being of so much of the land described in Certificate of Title Volume 4480 Folio 895831 as is represented by the Lots on the said Plan of Subdivision other than the land hereby transferred and every part thereof that the land hereby transferred shall not at any time be used except for private residential purposes only and that no shop laundry factory business establishment school almshouse charitable institution or church nor hall or building of any kind for use wholly or partly for any religious or educational or business or charitable purpose or for public entertainment of any kind whatsoever nor any hoarding for advertisement or display shall at any time be erected or suffered on the land hereby transferred and that no such premises hall or building

> shall at any time be used or suffered to be used for any purposes (except private residential purposes only) hereinbefore indicated or mentioned and that no quarrying operations shall at any time be carried on in or upon or suffered to be carried on in or upon the land hereby transferred and that no marl stone earth clay gravel or sand shall at any time be dug carried away or removed or suffered to be dug carried away or removed from the land hereby transferred and that not more than one dwelling house and that roofed with tiles or slates and not otherwise shall at any time be erected or suffered on the land hereby transferred and that such dwelling house shall (exclusively of all Architect's fees and the costs of erecting any fences) cost for erection not less than the sum of Five hundred pounds and that no paling or close iron fences shall at any time be erected or suffered on the land hereby transferred."
>
> (Emphases added.)

41 The phrase "the said plan of subdivision" referred to the words earlier appearing in the Instrument of Transfer, namely, "ALL THAT piece of land being Lot one on Plan of Subdivision Number 8402."

42 The Fitts' land Instrument of Transfer was registered on 28th September 1927 and the Certificate of Title contained the heading -

> "ENCUMBRANCES REFERRED TO"

43 Typed below that heading was a covenant in exactly the same terms as the covenant in the Luxury Development's land title. The only difference was a change to the number of the Instrument of Transfer which in the Fitts' land was Transfer Number 1337191.

44 Instrument of Transfer 1337191 contained the same relevant wording in respect to the restrictive covenant as in the Luxury Development's land transfer.

45 The Dowells' land Instrument of Transfer was registered on 20th February 1931 and the new Certificate of Title noted the same encumbrance as in the certificates of Title for the other two lots.

46 The Instrument of Transfer Number 1476109 also contained exactly the same wording as the wording in the instruments of transfer in respect to the Luxury

Development's land and the Fitts' land.

47 The evidence establishes that at the time when Mr Burke sold the Luxury Developments land, he also owned other lots in the sub-division including the Fitts' and Dowell's lots.

48 Each title to the three lots revealed the following history of ownership –

A. Luxury Development's land - Certificate of Title Volume 5344 Folio 793

Date of Registration	Owner
21.09.1927	James Henry Porter
28.02.1930	Josephine Marguerita Nolan
04.05.1948	Berton Nolan & Josephine Marguerita Nolan
-	Berton Nolan as surviving owner
30.12.1993	W A Hooper Services Pty Ltd
19.05.1998	Luxury Developments Pty Ltd

49 Mr Seiffert on behalf of Luxury Developments stated that prior to acquiring the lot he was aware of the terms of the restrictive covenant, and sought legal advice from Mr Hooper QC who informed him that the covenant was no longer current. He purchased the property with full knowledge of its terms.

B. Fitts' Land - Certificate of Title Volume 5324 Folio 671

Date of Registration	Owner
28.09.1927	Leo Aloysius Mahon
16.05.1947	Alfred Pond
21.07.1947	Gunnic Sanders Waddell
05.08.1949	Donald James Pritchard and Mary Isabell Pritchard
02.03.1950	Reginald Bruce Douglas and

	Margaret Joan Douglas
18.08.70	Paul Connell Nunan
20.09.1973	Probate granted to Susy Friend and Mary Prince
03.04.1990	Tushar Bhuta
21.02.1995	Brian John Fitt and Maureen Maree Fitt

C. Dowells' land – Certificate of Title Volume 5718 Folio 524

Date of Registration	Owner
20.02.1931	William David Vaughan
04.02.1944	Clarinda Mary Stone
11.06.1949	Letters of administration granted to Ronald Morton Stone
24.12.1954	James Francis Duncan and Margery Hedwig Duncan
19.01.1955	Mary Elizabeth Doyle
04.07.1955	William Wilson Doyle and Mary Elizabeth Doyle
26.11.1963	Walter Charles Thomas Dowell
21.11.1975	Walter Charles Thomas Dowell and Liese Lotte Hildegard Dowell

50 On any sale of any of the three lots of land, a search of the Certificate of Title would have revealed to the new purchaser that there existed a covenant in terms which precluded the erection of more than one residential property on each lot. A search of the Instrument of Transfer referred to in the Title would have revealed the full terms of the covenant.

51 A search of the Plan of Sub-division Number 8402 would have revealed that all the

lots were affected by a building scheme.

52 The most recent Certificate of Title placed in evidence was Volume 6514 Folio 788. It was issued on the 30th July 1941. The Instrument of Transfer is numbered 1825699 and was executed by Thomas Michael Burke as vendor and Francis Percival Arthur Gibbs as purchaser on the 21st July 1941. It concerned Lot 64 in the sub-division. The front of the title under the heading, ENCUMBRANCES REFERRED TO, noted the following –

> "THE COVENANT contained in Instrument of Transfer No. 1825699 in the Register Book relating to (a) – use of the land (b) building (c) hoarding for … advertisement or display (d) quarrying (e) … digging carrying away or removing marl, stone earth clay gravel or sand and (f) fencing … ".

53 The wording of the covenant in the Instrument of Transfer was in the same terms as the wording in the Instruments of Transfer concerning the Fitts', Dowells' and Luxury Development's land.

Restrictive Covenant

54 A restrictive covenant is an agreement creating an obligation which is negative or restrictive forbidding the commission of some act. In its most common form it is a contract between neighbouring land owners by which the covenantee determined to maintain the value of his property or to preserve the enjoyment of his property acquires a right to restrain the other party, namely the covenantor, from using his land in a certain way.

55 The original parties to the covenant can enforce it against the other.

56 Being a contract between two parties it does usually continue to bind those two parties personally and this is the position even when one of the parties ceases to own the land. However, the only remedy available in those circumstances where there is a breach would be nominal damages.

57 Of course the parties may agree otherwise with respect to liability for damages as

Mr Burke and the first purchaser of each lot did in the Instruments of Transfer in the Burke subdivision.

58 Problems can arise when one of the parties to the covenant sells the land and ceases to have any control over it. By reason of the law of privity of contract the new owner not being a party to the covenant could not enforce it, except in the case of an assignment of the right to him.

59 However, the Common Law did recognise that the benefit of a restrictive covenant which was made with the covenantee having an interest in the land to which the covenant related, passed to his successor in title and could be enforced by the latter – see for example Sharp v Waterhouse (1857) 7E and D 816; 119 E.R. 1449.

60 At Common Law subject to proof of certain matters the benefit did run with the land and the covenantor was liable to the successors of the covenantee by reason of the terms of the covenant. In other words he was personally liable on the covenant.

61 Although the benefit could run with the land for the purpose of enforcing the covenant against the covenantor owner, at Common Law the burden did not run and hence a new owner was not liable on the covenant. See Austerberry v The Corporation of Oldham (1885) 29 Ch. D 750.

62 "As between persons interested in land other than as landlord and tenant, the benefit of a covenant may run with the land at law but not the burden: see the Austerberry case" per Lord Templeman in Rhone v Stephens (1994) 2 AC 310 at 317.

63 Because the Common Law did not enforce the burden of a covenant against a new owner, equity stepped in.

64 Equity recognised that the burden of restrictive covenant may run with the land in certain circumstances.

65 In 1848 in the historic case of Tulk v Moxhay equity intervened and provided remedies which were not available at common law in respect to the enforcement of a

restrictive covenant against a subsequent transferee of land from the original covenantor.

66 In Tulk v Moxhay (1848) 2 Ph. 774; 41E.R. 1143 equity enforced a restrictive covenant against a purchaser of the land who was not the covenantor but who purchased with full notice of its terms.

67 The facts were that in the year 1808 the plaintiff then an owner of a vacant piece of ground in Leicester Square in London as well as several houses forming the Square sold a piece of the ground by description of "Leicester Square Garden or pleasure ground . . . to one Elms in fee simple". In the deed of conveyance Mr Elms covenanted with the plaintiff "his heirs and administrators" –

> "that Elms, his heirs and assign should, and would from time to time, and at all times thereafter at his and their own costs and charges, keep and maintain the said piece of ground and square garden, and the iron railing around the same in its then form, and in sufficient and proper repair as a square garden and pleasure ground, in an open state, uncovered with any buildings, in neat and ornamental order."

68 The land was subsequently conveyed to a number of purchasers and ultimately to the defendant whose purchase deed contained a similar covenant with his vendor.

69 The defendant admitted that he had purchased the block of land with notice of the covenant in the deed of conveyance of 1808.

70 The defendant manifested an intention to alter the character of the Square garden and to build upon it and the plaintiff who still owned several houses in the Square applied for an injunction. The Master of the Rolls granted an injunction and motion was made to the Lord Chancellor to discharge the order.

71 The Lord Chancellor noted that the contract was enforceable between the owner of the land the Plaintiff and the original purchaser and stated -

> "It is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this court having any power to interfere. If that was so, it would be impossible for an owner of land to sell part of

it without incurring the risk of rendering what he retains as worthless. It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is not whether the covenant runs with the land but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.

The question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

(Emphases added.)

72 It is noted that the ratio decidendi was that if a purchaser acquires property with notice of the restrictive covenant that concerns it then the covenantee can enforce the covenant against that purchaser. The decisions which followed Tulk v Moxhay proceeded on the basis that purchase with notice of the covenant was all that had to be proved. The last decision to proceed on that basis was Luker v Dennis[1]. It was a defence to establish that the purchaser acquired the legal estate for value without notice of the covenant.

73 However the law has developed rapidly since 1877 and what was a simple legal principle has become somewhat complicated. Later cases show that the Tulk v Moxhay doctrine does not just rest on notice.

74 The basis for the doctrine was discussed by the High Court in Forestview v Perpetual Trustees WA[2] at pp.164-167.

75 At p.166-67 the court said –

"A more satisfactory explanation as to the passing of the burden of

[1] (1887) 7 Ch.D. 227.

[2] (1998) 193 CLR 154.

> restrictive covenants may be that favoured by Ames. In his view, the burden is imposed upon successors to the covenantor 'upon the same principle that the grantee of a guilty trustee .. is bound to convey the res to the cestuique trust'. There would be 'the like injustice, if the purchaser with notice, or the volunteer, were allowed to profit at the expense of the cestuique trust or (the covenantee) by ignoring the trust .. or the restrictive agreement'. Accordingly, equity imposes upon a successor to the covenantor 'a constructive duty' which is 'co-extensive' with the express duty of the covenantor to the covenantee. The position of successors to the covenantor with respect to the burden of the covenant thus rests not upon any legal principle of privity of estate but upon 'the equitable principle of privity of conscience'."

76 I have no doubt that in the present matter the plaintiffs and their supporters cannot understand how the hearing occupied over four days with extensive references to authorities and was contested, when it is clear that Mr Seiffert on behalf of Luxury Developments purchased the land with full knowledge of the existence of the covenant which in plain language restricted the owner of that land from building on it more than one residential premise and the benefit of the covenant was expressed to be for the owners of identified land.

77 But the fact is that the law has moved somewhat since Tulk v Moxhay was decided and is not as simple as being bound by having notice of the covenant.

78 The law, both common law and equity in respect to restrictive covenants has evolved since 1848. In addition statutory law has intruded. Further the subject lands in the present matter are subject to the Torrens system and the provisions of the Transfer of Land Act 1958 must be considered especially in the area of notice of the restrictive covenant. Since 1875 the principles of equity and common law have come together and are enforceable in all courts. It is unnecessary now to distinguish between the rules of common law and the rules of equity because, equity follows the law and has developed its own rules with respect to the burden of a covenant and has followed the common law in respect to the benefit. Hence it is appropriate to consider the principles developed by equity in relation to the passing of the benefit as well as its own unique principles for the passing of the burden. The principles of equity in respect to the passing of the benefit are more comprehensive than the common law.

> "Since 1875 it has usually been unnecessary to distinguish the rules of law from the rules of equity as regards the benefit of a covenant. But when once it was settled that the burden could run in equity, the rules as to the running of the benefit required further development also. This development is probably an elucidation of the rules of common law rather than a separate contribution of equity. But since 1875 this is usually an academic question; and the same rules now apply whether the assignee of the land benefited is suing the original covenantor or a successor in title who is liable under the principle of Tulk v Moxhay." – Megarry and Wade, The Law of Real Property, 2nd ed. at pp.733-34.

79 See observations in 6th edition at page 1024.

80 Where both landowners are not the original covenantor and covenantee respectively, in order for a plaintiff to succeed in a proceeding to enforce a restrictive covenant by the grant of an injunction, he has to prove that he is entitled to enforce the benefit of the covenant in his favour and to enforce the burden of the covenant against the defendant.

81 It is convenient to determine the elements of proof, first in respect to enforcing the benefit and secondly in respect to the burden.

82 The principles of law developed in the 19th and early part of the 20th century through the cases, were dealing with general law land. That is land not registered pursuant to a statutory system of conveyancing.

83 In considering the principles which apply to the present case, it is necessary to take into account two matters of importance.

84 The first is that both the benefited and burdened land were at all material times held under Torrens title and hence the defence open to the successor in title of the burdened land of purchasing the legal estate without notice is not usually relevant. Other considerations apply to the question of notice.

85 Secondly the restrictive covenant, the subject of this proceeding was made on 20th September 1927 and hence pre-dated the commencement of the Property Law Act 1928 which was the 18th December 1929. Certain provisions which were enacted in

that Act aimed at facilitating proof are not available to the plaintiffs in this proceeding. See ss.78, 79 and 80(3) of the Act.

86 In this case neither plaintiff is the original covenantee and the defendant is not the original covenantor. Each is a successor in title to the original parties.

The passing of the benefit

87 There are three ways and only three ways in which a plaintiff not being the original covenantee can have the right to the benefit of a restrictive covenant.

88 They are –

(a) that he becomes the owner of land to which the benefit of the covenant has been annexed, either expressly or by implication;

(b) that the benefit of the covenant has been assigned to him in respect of land which he owns;

(c) that both he and the defendant own land which was subject to a form of scheme which imposed reciprocal rights and obligations.

It must be emphasised that the plaintiff only has to establish one of the three ways in order to acquire the benefit of the restrictive covenant.

89 See Re Arcade Hotel Pty Ltd[3]; Pirie v Registrar-General[4].

90 There is no question of any benefit of the covenant entered into in respect to the Luxury Developments land being assigned to any of the plaintiffs and accordingly that method can be ignored in the present case.

91 However the plaintiffs do rely upon each of the other two methods.

92 To enforce the benefit the plaintiff has to prove –

(i) That the benefit of the covenant is annexed to some land.

[3] (1962) VR 274 at 276 and 287

[4] (1962) 109 CLR 619 at pp. 628-9

93 Whether or not the benefit of the covenant is annexed to some land is a question depending upon the common intention of the original parties to the covenant. It is necessary to construe the words of the covenant in their natural and ordinary meaning to determine the intention of the parties and whether they intended that the covenant was to be annexed to some land and run with it. In carrying out this exercise the court may take into account the surrounding circumstances objectively known to the parties at the time.

94 In Rodgers v Hosegood[5]; Farwell, J. [6] said this -

> "But a covenant may have the two characteristics above-mentioned and yet not run with the land; it is in each case a question of intention to be determined by the court on the construction of the particular document which you regard to the nature of the covenant and the surrounding circumstances. No covenant can run with the land which has not the two characteristics above-mentioned (i.e. concern or touch the land and made with a covenantee who has an interest in the particular land) but every covenant which has those two characteristics does not necessarily run with the land. That it is a question of intention and in each case is to be determined on construction, is apparent from the judgment of Hall V-C in Renals v Cowlishaw."

95 It is necessary to find an intention within the wording of the covenant and the surrounding circumstances, to benefit the particular property in the sense that the owners acquire the benefit as part of their ownership of the land.

96 Various phrases have been used to achieve this object.

97 By way of example I refer to the decision of Langdale Pty. Ltd. v Sollas[7]. In that case at p.639 Adam, J. said this –

> "The covenant by Mrs. Turnbull is expressed to have been made 'with the said Robert James Phillip Simson his heirs executors administrators and transferees registered proprietor or proprietors for the time being of the land remaining untransferred in the said certificate of title.' As appears from such cases as Rodgers v

[5] [1900] 2 Ch.388

[6] at p.395

[7] [1959] VR 634

Hosegood; and Re Ballard's Conveyance[8] these are apt words to annex a benefit of the covenant to the covenantee's land."

98 For completeness I refer to the provisions of s.78 of the Property Law Act which make it unnecessary to establish by express words that the covenant is made with the covenantee and his successors in title and the persons deriving title under him. See Federated Homes Ltd. v Mill Lodge Properties Ltd.[9]. Query whether the decision applies in Australia. See Forestview v Perpetual Trustees WA[10].

99 As I have already stated s.78 does not apply in the present case.

(ii) The covenant must identify the land to which it is annexed.

100 Following the dicta of Adam, J. stated above, his Honour then posed the question – "but to what land?".

101 It is necessary to show that the covenant was intended to benefit the land owned by the plaintiff.

102 In Bohn v Miller Bros. Pty. Ltd.[11] Smith, J. at p.356 said-

> "Under those rules it is clear that, as the plaintiffs are not the original covenantees and there has been no assignment of the benefit of the covenants, they cannot enforce the restrictions against the defendant company unless the benefit of them was annexed to the lots now owned by the plaintiff. The authorities appear to me to show that it is not sufficient that the benefit was annexed to a larger area which includes those lots, if the annexation was to that larger area as a whole."
>
> (Emphasis added.)

103 Smith, J. in that dicta is raising another question which will have to be considered hereafter. But the immediate question is "Does the covenant protect the land owned by the plaintiff?".

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[8] [1937] Ch. 473

[9] [1980] 1 WLR 594

[10] (1998) 193 CLR 154 at 171

[11] [1953] VLR 354

104 Whether or not the covenant in fact was annexed to the lot owned by the plaintiff is a question of construction of the language in the instrument of transfer and in construing the instrument the context and surrounding circumstances can be taken into account. See Ibid at p.357.

105 Often the land to be protected is fully and accurately defined in the terms of the restrictive covenant. However sometimes the covenant is expressed in general terms and refers to an area by a particular name. It is well established that extrinsic evidence is admissible to explain the context in which the words were used.

106 It is not essential that the land to which the covenant is annexed should be expressly identified in the words of the covenant because the maxim id certum est quod certum reddi potest (that is certain which can be made certain) applies. See Smith & Snipes Hall Farm Ltd. v River Douglas Catchment Board[12]. It is sufficient if the words define the land so as to make it open and "easily ascertainable". See Zetland v Driver[13].

(iii) That the covenant is annexed to the whole of the land to be protected as well as each and every part of it

107 This requirement is summarised in the dicta quoted above from the judgment of Smith, J. in Bohn v Miller Bros. Pty. Ltd.

108 Whether or not the covenant is annexed to the whole and each and every part of the land is one of construction.

109 This element of proof is in issue in the present matter. Mr Wikrama of counsel for the defendant has submitted that the covenant is expressed too widely and relies upon the decision of In re Ballard's Conveyance, supra.

110 This element of proof is satisfied if it is established that there is an intention to benefit land which is not greater than can be reasonably benefited by the covenant.

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[12] [1949] 2 KB 500 at 508

[13] [1939] Ch.1 at p.8

111 In Miles v Easter[14], Romer, L.J. said –

> "A purchaser from the original covenantee of land retained by him when he executed the conveyance contained in the covenant will be entitled to the benefit of the covenant if the conveyance shows that the covenant was intended to enure for the benefit of that particular land. It follows that, if what is being acquired by the purchaser was only part of the land shown by the conveyance as being intended to be benefited, it must also be shown that the benefit was intended to enure to each portion of that land."

112 Lowe, J. stated the issue in Re Arcade Hotel Pty Ltd[15] when he said –

> "The question that remains is – does the covenant on its proper construction refer to the dominant land only as a whole or does it refer to the whole and every part of the dominant land? (See per Greene, L.J. in Drake v Gray (1936) Ch 451 at 465."

113 His Honour after referring to a number of cases then said –

> "The question raised in those cases is vital to the decision of the matter before us for as Preston and Newsom correctly remark, at p.16: 'If a covenant be annexed only to the whole of a piece of land it is not enforceable at all unless it 'touches and concerns' such whole as a whole, while a covenant annexed to each and every part of a piece of land may be enforced by any person who has a part which is 'touched and concerned'; and they add, 'if the annexation is to the whole, the only person capable of enforcing the covenant is one who substantially has the whole'."

114 There are many cases in which annexation to each and every portion of the protected land is established by express words or necessary implication.

115 The phrase "the said land and every part thereof" shows beyond doubt that the annexation was to each and every portion of the protected land. See Re Ecclesiastical Commissioners' Conveyance[16].

116 The authorities clearly establish that if the covenant has been expressed for the benefit "of the whole or any part of the estate" it could be enforced by the successor

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[14] [1933] Ch.611 at 628

[15] (1962) VR 274 at 277

[16] [1936] Ch.430

in title to any part of the land which the covenant in fact benefited for it would then have been annexed to every piece of property which was in the area of the actual benefit. See Marquess of Zetland v Driver[17].

117 In the case of In re Ballard's Conveyance supra the particular covenant in question restrained the building of more than one dwelling and was for the benefit of "the owners for the time being of the Childwickbury estate". The estate was of some 1700 acres and it was held that the benefit of the covenant could not run with the estate even in favour of somebody acquiring the whole of the estate because the covenant could not on the face of it benefit the whole of the estate. The court held that it had no power to sever the covenant.

118 Clauson, J. in that case at p.480 said –

> "That land is an area of some 1700 acres. It appears to me quite obvious that while a breach of the stipulations might possibly effect a portion of that area in the vicinity of the applicant's land, far the largest part of this area of 1700 acres could not possibly be affected by any breach of any of the stipulations."

119 His Lordship went on to say at p.481 –

> "The result seems to me to be that I am bound to hold that, while the covenant may concern or touch some comparatively small portion of the land to which it has been sought to annex it, it fails to concern or touch far the largest part of the land."

120 Mr Wikrama relies upon the decision and it will be necessary to consider its application in the present matter.

121 Doubt has been expressed as to the correctness of the decision. See Preston & Newsom, Restrictive Covenants Affecting Freehold Land[18].

122 In the case of Re Arcade Hotel Pty Ltd, supra, the restrictive covenant was not enforced because it purported to cover the land as a whole and not to each and every

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17 [1939] Ch.1

18 9th Edn. At para. 2.26

part.

123 The proof of this element is now facilitated by the provisions of s.79A of the Property Law Act 1958 which was enacted in 1964 to overcome the decision in Re Arcade Hotel Pty Ltd. See Transfer of Land (Restrictive Covenants) Act 1964.

(iv) The covenant must touch and concern the land of the covenantee.

124 Again the question is one of construction taking into account all relevant circumstances at the time of execution. A covenant does touch and concern the benefited land if it can be shown that it was intended that the covenant should benefit the actual land owned by the covenantee and was not for his personal benefit.

125 In Rodgers v Hosegood supra Farwell, J. at p.395 expressed the rule in this way –

> "Adopting the definition of Bayley, J. in Congleton Corporation v Pattison, the covenant must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land."

126 Another test is that stated by Warrington, L.J. in Kelly v Barrett[19] -

> "May the land to which the benefit purports to be attached be reasonably regarded as capable of being affected by the performance or breach of the obligation in question, as the case may be?"

127 It follows that the intention will be inferred if in all the circumstances the covenant was of importance to successive owners and enhances the value of their land or their occupation of same.

128 It is well recognised that a covenant whereby the covenantor agrees not to erect more than one dwelling house upon the land is a covenant which is for the benefit of the covenantee. See Langdale Pty. Ltd. v Sollas[20]. Such a covenant does affect the mode of occupation of the land and more importantly affects the value of it. The covenant

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19 [1924] 2 Ch.379 at p.410

20 supra at pp.636 and 638

is concerned with the land and is not merely entered into for collateral purposes. Hence it touches and concerns the land. See also Re Arcade Hotel Pty Ltd, supra, at p.277.

129 As Wilberforce, J. said in Marten v Flight Refuelling Ltd.[21] –

> "If an owner of land, on selling part of it, thinks fit to impose a restriction on user, and the restriction was imposed for the purpose of benefiting the land retained, the court would normally assume that it is capable of doing so."

130 Sometimes it will be necessary to call expert evidence as to the question of the benefit to the retained land. See Marten v Flight Refuelling Ltd., supra, and Wrotham Park Estate Co. v Parkside Homes Ltd.[22].

(v) The covenantee and the present owner must each have a legal estate in the land to be benefited.

131 This is a common law rule. It does not apply in equity. The rule was expressed in Smith & Snipes Hall Farm Ltd. v River Douglas Catchment Board[23] where Denning, L.J. said –

> "It was always held, however, at common law that, in that a successor in title should be entitled to sue, he must bear the same estate as the original owner. That alone was a sufficient interest to entitle him to enforce the contract. The covenant was supposed to be made for the benefit of the owner and his successors in title, and not for the benefit of anyone else."

132 This requirement in most cases does not create any problems.

133 In equity if the covenantee only had an equitable interest the benefit could still run. See Rodgers v Hosegood supra.

134 There is now a statutory provision which covers this requirement and it is found in s.78(1) of the Property Law Act 1958. The section has the effect of removing the

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21 [1962] Ch.115 at p.136

22 [1974] 1 WLR 798

23 supra at p.516

common law requirement. See Smith & Snipes Hall Farm Ltd. case[24].

135 This provision does not apply in the present matter.

136 If the plaintiff establishes the above elements of proof, then he has established that he has title to the benefit of the covenant.

137 However if the plaintiff is unable to prove that he is entitled to the benefit of a restrictive covenant by annexation he can establish a right to the benefit by showing that both he and the defendant own land subject to some form of scheme which imposes reciprocal rights and obligations on the parties. The most common form of scheme is a building scheme.

Building scheme

138 This is a separate and distinct method to establish the right to the benefit of a covenant.

139 Where land has been subdivided into lots which are sold to purchasers for residential development, restrictions are often imposed on the purchasers of each lot for the benefit of the total subdivision, for example, a covenant prohibiting the erection of more than one house or an inferior quality building.

140 If a building scheme exists then the covenant given on the sale of each lot is enforceable by the owner for the time being of that lot against another lot owner.

141 The covenants which are entered into as all part of a scheme in effect form a law for the particular subdivision. See Reid v Bickerstaff[25].

142 Whether or not a building scheme exists is a question of fact.

143 What has to be established was discussed and stated by Parker J in Elliston v

[24] at p.516

[25] (1909) 2 Ch. 305 at 319

Reacher[26] – affirmed by the Court of Appeal at[27].

144 The plaintiff must prove -

(a) the plaintiff and defendant have derived title from a common vendor;

(b) prior to the sale, that is, the original sale, the vendor must have laid out the estate in lots subject to restrictions which were intended to be imposed on all of them and were consistent only with some general scheme of development;

(c) the common vendor must have intended the restrictions to be for the benefit of all lots sold;

(d) the plaintiffs' and defendants' lots must both have been bought from the common vendor on the footing that the restrictions were for the benefit of the other lots; and

(e) the area to which the scheme extends must be defined.

145 If a building scheme existed and is proven the plaintiff does not have to establish that the covenant was annexed to particular land.

146 Where a scheme was established many, many years ago often there is no extrinsic evidence available to establish it. Hence in those circumstances one is left with the conveyancing documents and the like produced at the time and the court must do its best on that evidence. In the case of Re Dolphin's Conveyance[28] there was no extrinsic evidence and there was practically no evidence in the case of Re Texaco Antilles Ltd. v Kernochan[29].

147 Nevertheless the court can draw the inference from the documentation and will readily do so where it is proven that there was a large subdivision of building blocks and which were sold over a relatively short period.

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[26] (1908) 2 Ch. 374 at 384-85

[27] (1908) 2 Ch. 665

[28] [1970] Ch. 654

[29] [1973] AC 609

148 In the case of Re Dennerstein[30] Hudson, J. discussed the available evidence at p.692 and relied upon such factors as a common vendor, many lots being offered for sale in a subdivision and the common form of restrictive covenant as being factors of some importance in drawing the inference.

149 Mr Wikrama on behalf of Luxury Developments relies upon the decision of Re Dennerstein which turned on the question of the amount of information available to an intending purchaser on searching the register of land. It will be necessary to refer to this case later.

Assumption of the burden

150 A person who acquires land which is burdened by a restrictive covenant has no contractual obligation to a person who has acquired the ownership of the land to be benefited. Further, there is no privity of estate between them. But nevertheless in equity the burden of a negative covenant may run with the land. This is based upon the leading case of Tulk v Moxhay. The plaintiff has to establish a number of facts.

To enforce the burden the plaintiff has to prove -

(i) The covenant must be negative in nature

151 The court is concerned with substance rather than form and accordingly whether the covenant is negative in nature is a question of fact. It is immaterial whether the wording is positive. A negative covenant is one that restrains a person from dealing with his land in a certain way.

> "The question is not whether a covenant is negative in wording, but whether it is negative in substance" –
>
> per Megarry, J. in Shepherd Homes Ltd v Sandham (No. 2) (1971) 1 WLR 1064-1067."

[30] [1963] VR 688

(ii) The covenant must be made for the protection of land retained by the covenantee.

152 This involves proof that there are two lots of land, one that could be described as the dominant land and the other as servient land. Whether this relation actually exists is a question of fact in each case.

153 The important point to note here is that the covenantee does not have the right to enforce a covenant except as against the original covenantor, if he does not have any land for the benefit of which, the covenant was taken.

154 A covenantee or his successor in title must own land to be benefited in order to impose the burden on the owner of the burdened land.

155 This was established by London County Council v Allen[31]. In that case Mr Allen entered into covenants with the London County Council restricting the use of certain land belonging to him. He parted with some of the land. Breaches of the covenants were committed on part of the land which he still owned but also on the part which had been sold by him. The L.C.C. succeeded in contract against Mr Allen but was unable to do so against the purchasers from him because the Council had no land to be protected.

156 Buckley, L.J. stated the law as follows –

> "Upon the authorities as a whole, I am of the opinion that the doctrine of Tulk v Moxhay does not extend to the case where the covenantee has no land capable of enjoying, as against the land of the covenantor, the benefit of the restrictive covenant ... When a covenantee has no land, the derivative owner claiming under the covenantor is bound neither in contract nor by the equitable doctrine which attaches in cases where there is land capable of enjoying the restrictive covenant."[32]

[31] [1914] 3 KB 642

[32] at p.660

(iii) The burden of the covenant must have been intended to run with the covenantor's land.

157 This is a question of construction of the covenant. If the wording is that it is made by the covenantor for himself his heirs and assigns then as a general proposition the burden will normally run with the land.

158 By reason of s.79 of the Property Law Act 1928, covenants which were made after the 18th day of December 1929 are deemed to have been made by the covenantor on behalf of himself his successors in title and the persons deriving title under him unless a contrary intention is shown. Whether this adds anything to or changes of law is debateable because it is still necessary to show an intention from the wording that the burden of the covenant was to run with the covenantor's land. The section cannot apply in the present matter.

(iv) That the defendant had notice of the restrictive covenant from information contained in the Register of Land kept under the Transfer of Land Act 1958.

159 At common law and in equity a purchaser of the freehold interest is not bound by a restrictive covenant if he is a bona fide purchaser for value of the legal estate without notice of the covenant.

160 It is well established that if a restrictive covenant is enforceable, it constitutes an interest in equity and is an interest in land. See In Re Nisbet & Pott's Contract[33] and Re Arcade Hotel Pty. Ltd.[34].

161 In Nisbet's Case, supra, Collins, M.R. said at p.403 –

> "That element, no doubt, does enter into consideration, when one comes to inquire what is the position of a person who acquires for value the legal estate in land subject to a right that has previously been created in another person to restrict the user of that land. The right so created is an equitable right, and, therefore, it is one capable of being defeated in certain circumstances by a person who acquires the legal estate for value. The question thus arises whether, in the circumstances of the particular case, there is anything which would

[33] (1906) 1 Ch. 386 at 403

[34] supra, at 281

> make it inequitable for that person to avail himself of his legal estate to defeat that equitable right. ... [A covenant is] a burden imposed upon the land and passing with the land, subject, of course, to this, that it may be defeated by a purchaser for value without notice; but the burden is upon the person who takes the land to show that he has acquired it under such conditions as to defeat the right against him, namely that he had acquired it for value and without notice."

162 The defence was recently summarised by Mummery, L.J. in Barclays Bank Plc. v Boulter[35]. He emphasised that it had to be proven that the purchaser for value did not have either actual or constructive notice of the equitable right or interest and that the burden was on the person raising the defence to plead and prove all the elements.

163 But in the present matter the lots of land owned by the relevant parties are held under Torrens Titles. The object of that system is to enable a person to purchase land and rely upon the information in the register kept pursuant to the Transfer of Land Act and to free him of a concern of equitable interests unless notice was given by the information in the Register of Land.

164 Under the Torrens system the change in legal ownership is effected by registration of the instrument of transfer and not upon the execution of that instrument. Under the system registration is everything and registration cures any defects in the instrument registered. The object of the system and the legislative scheme was summarised by the Privy Council in Gibbs v Messer[36] -

> "The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history and their authors' title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title."

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[35] (1998) 1 WLR 1 at pp.8-10

[36] (1891) AC 248 at 254

165 If any person claimed any interest in land which was registered pursuant to the Act, then it was necessary to give notice of that fact in the register.

166 The Torrens system provided that trusts and equities were not to be recorded in the register (see s.37) and in order to deal with difficult questions relating to notice of equitable interests the Act expressly provided that save in a case of fraud, no person dealing with the registered proprietor was to be affected by notice. See s.43. Further equitable interests were not included in the lists of interest to which a Certificate of Title was subject. See s.42.

167 It followed that in the absence of fraud the registration of any transfer extinguished any equitable interest to which the land was previously subject.

168 Nevertheless the Torrens system provided some form of protection to those claiming an equitable interest by enabling them to register their interest by means of a caveat. See ss.89-91. The effect of these provisions is that any person seeking to register an interest will be held up for 30 days after notice to the caveator which is a period to enable the caveator to take action in court to protect his equity. If he does not take that step, the caveat lapses and the dealing proceeds to registration with the effect of the equity being extinguished.

169 Despite these provisions it has been the practice of the Registrar of Titles in this State for many years to record on a Certificate of Title a memorandum concerning a restrictive covenant.

170 Mr Norman Currey who was Registrar of Titles in this State from 1922 to 1932 wrote in his work, Manual of Titles Office Practice in Victoria (1933) the following at p.125 –

> "(1) Although there is no express authority in the Transfer of Land Act for noting restrictive covenants as encumbrances, the practice of doing so is justified by the fact that such covenants … are in the nature of easements and are not covenants in gross."

171 Argument was put in Langdale Pty. Ltd. v Sollas[37] that such a practice was unlawful and of no effect and accordingly the notation should be ignored. The argument was repeated in Re Arcade Hotel Pty. Ltd.[38] where Sholl, J. concluded that the practice of the Office of Titles in notifying restrictive covenants as encumbrances was lawful.

172 The other two members of the Full Court did not consider the matter and it was further argued in the case of Re Dennerstein[39]. In that latter case, Hudson, J. was prepared to assume that the view of Scholl, J. was correct.

173 In 1964, the Transfer of Land Act 1958 was amended (by Act No. 7130/1964) and s.88 provides that the Registrar shall have power to make a recording of a covenant on the Certificate of Title and any instrument purporting to create or affect the operation of the covenant. See s.88(1).

174 It is important to note that the section deemed the Registrar to always have had that power.

175 The amendment to the Act laid to rest any controversy over the power of the Registrar to record the covenant in the Register of Land.

176 But what is the effect of the notation?

177 The answer is found in s.88(3) which provides –

> "(3) Apart from the operation of Part III a recording in the Register of any such restrictive covenant charge easement or right shall not give it any greater operation than it has under the instrument or Act creating it."

178 It is clear, in my opinion, that the recording of a restrictive covenant on the folio of the land subject to the burden is no more than notification of the claim that there is a restrictive covenant burdening the land, and the recording does not in any way establish or effect the validity or otherwise of the restrictive covenant.

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[37] [1959] VR 634

[38] [1962] VR 274

[39] [1963] VR 688

179 What the recording does is to give notice to anybody who wishes to acquire an interest in the burdened land that a claim is made by another that there is a valid restrictive covenant affecting the land. But it is viewed as a claim only and the recording on the folio in the Register for Land does not establish its validity.

180 These matters are of importance when determining whether the decision of Re Dennerstein is correct.

181 In my opinion where the Court is concerned with enforcing a restrictive covenant relating to land under the Torrens system, the person seeking to enforce the covenant has to prove that at the time of registration of the transfer concerning the burdened land, the new proprietor had notice through the Register of Land that the covenant burdened the land – see Forestview v Perpetual Trustees WA,[40] Pirie v Registrar-General[41].

182 If there is no information in the Register of Land concerning the restrictive covenant, then a transferee on registration would not be bound by the restrictive covenant except in the case of fraud. See ss.42 and 43 of the Act.

183 It is clear that the registered proprietor holds the land subject to encumbrances as are recorded on the relevant folio of the Register. See s.42(1) of the Act.

184 However there is nothing in the Act which affects the obligation of the person seeking to enforce the covenant of proving that the covenant is enforceable in law against the encumbered land. The recording of the covenant as an encumbrance does not affect in any way its validity, as an equitable interest, and the right to have the covenant recorded as an encumbrance does not qualify or alter in any way the principles of law which determine whether or not a restrictive covenant is enforceable as between successors in title to the original parties to the covenant.

185 It is clear that the noting of the restrictive covenant on the Certificate of Title

[40] supra at pp. 163 and 165

[41] (1962) 109 CLR 610 at 627-8

prevents the purchaser on registration from relying upon the indefeasibility provisions of the Torrens system. See ss.40-42.

186 In my opinion the plaintiff has to prove that notice was given to the purchaser of the burdened land through information in the Register of Land.

187 But the question remains: what notification must be given to the new purchaser to bind that purchaser?

188 This question was considered by Hudson, J. in Re Dennerstein, supra in a case where the person seeking to enforce the covenant had to rely upon a building scheme to establish the entitlement to the benefit.

189 In that case the Court held that the notification of the covenant on the Certificate of Title was insufficient in that it did not adequately identify the land to which the benefit was intended to be annexed nor did it give any indication that the covenant arose under a building scheme.

190 Mr Wikrama in the present matter relies upon that decision and submits that the notification in the Register of Land here was insufficient and inadequate and accordingly the covenant did not bind Luxury Developments.

191 It will be necessary to return to this decision.

Remedy

192 If the plaintiff establishes all of the above elements he also has to establish that he is entitled to an injunction. Like all equitable remedies an injunction lies in the discretion of the court but given proof of all the above matters a court acting judicially would normally determine that it is just and convenient to grant an injunction. See s.37(1) of the Supreme Court Act 1986.

193 Since the covenant is negative in nature the granting of an injunction is usually a

formality – see Doherty v Allman[42] per Lord Cairns.

194 However, a court would refuse to grant an injunction if it would be inequitable to do so. For example, if a plaintiff knowing of a breach waited an inordinate time and took no action and the other party suffered prejudice the court may refuse the grant of an injunction. There may be evidence that the plaintiff has waived compliance or is estopped in some way – see Bohn v Miller, supra.

195 But as a general proposition a restrictive covenant remains enforceable indefinitely – see Mackenzie v Childers[43] (1889) 43 Ch. 265 at 279 – but it is conceivably possible that the whole character of the neighbourhood could have so changed that the covenant is of no value and is unenforceable. See Chattsworth Estates Co. v Fewell[44].

Plaintiffs' Contentions

196 The plaintiffs submit that there are two separate bases for the establishment of their right to enforce the covenant, namely, that the benefit is annexed to the land and the covenant touches and concerns their land and was intended to run with their land, alternatively, that the covenant forms part of a building scheme.

197 They submit that the evidence is clear that they are entitled to enforce the burden.

Defendant's contentions

198 Mr Seiffert gave evidence that he had been advised that prior to acquiring the property with full knowledge of the terms of the covenant that he was told by Mr Hooper QC the restrictive covenant that had no currency.

199 In this proceeding Mr Wikrama for Luxury Developments submitted that it was not bound by the restrictive covenant for three basic reasons –

(i) that the restrictive covenant was too large that is too wide in its

[42] (1878) 3 App. Cas. 709 at 719

[43] (1889)

[44] (1931) 1 Ch. 224

application and seeks to benefit all the land in the sub-division including lands subsequently and previously transferred out of the parent title (see Re Ballard's Conveyance);

(ii) that at best the restrictive covenant was imposed on the land under a building scheme and was unenforceable by reason of the decision in Re Dennerstein's Application, supra;

(iii) that in any event the covenant was void for uncertainty.

200 After I had reserved Mr Wikrama referred me to the decision of Young J in Doyle v Phillips[45].

201 This case refers to the well established principle that the covenant must benefit land owned by the person seeking to enforce it.

202 Mr Wikrama also submitted that the court should refuse the injunction because of discretionary factors of delay and prejudice.

Facts

203 Mr Dowell acquired his land in 1963 and was registered as proprietor on 26th November 1963.

204 Mr and Mrs Fitt were registered as proprietors of their land of 21st February 1995.

205 The plaintiffs' land is situated to the east of the Luxury Development's land and between the western boundary of their land and the Luxury Development's land is another residential block and a small road.

206 Luxury Developments acquired its land in 1998 and was registered as proprietor on 19 May 1998.

207 Mr Seiffert prior to acquiring the land was aware of the terms of the restrictive covenant, took advice from Mr Hooper QC that the restrictive covenant was not current (whatever that means) and purchased the property with knowledge of the terms of it.

[45] (No. 1) (1997) 8 BPR 15,523

208 Subsequently Luxury Developments applied to the Council of the City of Banyule for a planning permit to erect three dwellings on the land. Mr Fitt objected to the grant of the permit. Before the Council determined the matter Luxury Developments instituted a proceeding in the Victorian Civil and Administrative Tribunal (VCAT) contending that Banyule had failed to decide whether the permit should be granted or not and on 12 January 1999 VCAT refused the application. A further application was made to the Council and Mr Fitt again objected to the application. On 26 April 1999 the Council refused the application of Luxury Developments.

209 In May 1999 Luxury Developments appealed to VCAT against the decision and on 17 August 1999 VCAT determined that the appeal be allowed and a permit issue.

210 On 22 August 1999 Mr Fitt wrote to Luxury Developments care of its planning consultant advising of the terms of the restrictive covenant and gave notice that if construction was attempted while the covenant remained in force appropriate legal action would be taken.

211 On 25 August 1999 Banyule City Council issued the planning permit as directed by VCAT. In September 1999 Luxury Developments made application to the City of Banyule for a permit to sub-divide the land into three lots. Again Mr Fitt objected to the application. On 26 October 1999 the City of Banyule certified the plan of sub-division.

212 Mr Fitt and other residents sought a review of that decision at the VCAT on the basis that the permit was inconsistent with the restrictive covenant and VCAT dismissed the application proceeding on the basis that it would not take into account for town planning purposes or sub-division approval the existence of a restrictive covenant on the title to land.

213 Mr Fitt in November and December again wrote to Luxury Developments making it quite clear to Mr Seiffert that the objection still remained and that any works undertaken would be in breach of a restrictive covenant.

214 Mr Seiffert ignored the letters.

215 In January 2000 Mr Fitt became aware that a building permit had been issued although he had observed a hoarding in December that it was proposed to erect three houses on the property.

216 On 14th February 2000 construction equipment arrived on the land and on that day work commenced to excavate and remove soil from the land.

217 Mr Seiffert was and is of the opinion that the restrictive covenant did not apply because Luxury Developments had gone through a town planning process and also obtained a plan of sub-division.

218 Works continued after 14 February and as earlier stated, the plaintiff issued their originating motion on 6 March 2000 and summons on 23 March 2000 culminating in an appearance before the Master on 31 March 2000 when Luxury Developments through Mr Seiffert undertook not to further continue the works.

219 Mr Seiffert gave oral evidence of the progress of the building works to 31st March.

220 He said –

> "To date the excavations, two of the three buildings have undercover garages which had major excavation, footings have been done for all three buildings and brick works have been commenced in two out of the three buildings, basement, garages."

He stated that approximately $75,000 had been spent. He also gave evidence that Luxury Developments had entered into a contract of sale for one of the houses in July/August in 1999 and that it was an unconditional contract of purchase. Later evidence raised doubts about the assertion that it was unconditional.

221 Mr Seiffert's evidence concerning the value of the works resulted in an affidavit from a chartered quantity surveyor who opined the view that the total project cost to date was in the vicinity of $53,696.

222 For present purposes I am prepared to find that the works to date cost in the vicinity

of $75,000. This is supported by a progress claim certificate from the builder which is a confidential exhibit.

223 Mr Seiffert also produced a copy of a contract note signed by two purchasers concerning Lot 2 on the proposed development. It is not in my opinion an unconditional contract. It contained the following special condition in relation to settlement of the sale –

> "On 26 May 2000 or 14 days after notification of registration of the plan of subdivision in the Land Registry of Victoria has been given to the purchaser's solicitor or 14 days after a Certificate of Occupancy for the dwelling has been given to the purchasers' solicitor, whichever shall later occur. Notwithstanding any provisions of this contract, the purchaser shall not be obliged to pay the balance of purchase price until a variation of the covenant now affecting the land has been registered in the Land Registry of Victoria to the effect that each of the lots forming the sub-division will not have more than one dwelling per lot."

224 The evidence amply demonstrates that Mr Seiffert on behalf of Luxury Developments acquired the land with full knowledge of the terms of the restrictive covenant which in my opinion on a plain reading restricts the erection of more than one residential premises on the lot. Despite the objection of the plaintiffs and others and the fact that they informed Mr Seiffert that they would seek to enforce the restrictive covenant he nevertheless pressed on with the planning application, the application for sub-division, the application for building permit and commencement of the building works. He chose to ignore all the correspondence, which he felt was pointless to respond to.

225 In my opinion Mr Seiffert was prepared to chance his arm and take the risk that someone would institute a proceeding to stop his company. He went into battle fully informed of the terms of the covenant and with his eyes open to the prospect of challenge. His whole conduct was of the kind - "try and stop me if you can". He commenced the works and the objectors moved.

226 Mr Seiffert who is an intelligent determined man with much experience in the field

of property development was prepared to "take on" the plaintiffs and their supporters rather than seek to remove or modify the covenant or to have it declared, not enforceable.

227 This is underlined by reference to the provisions of s. 84 of the Act.

228 Section 84 deals with two discrete procedures.

229 The first under s. 84(2) gives the right to a person interested to apply to the courts for a declaration whether or not in any particular case any land is affected by a restriction imposed by any instrument or to seek a declaration as to the true construction of an instrument purporting to impose a restriction and the nature and extent of same and whether it is enforceable.

230 Luxury Developments decided to demolish and build without seeking the court's jurisdiction in this regard. It is a summary procedure, relatively expeditious and inexpensive.

231 The second procedure open under s. 84 is found in sub-s.(1) which gives the court jurisdiction on the application of any person interested in any land affected by a restrictive covenant, to grant an order to modify or discharge the restrictive covenant.

232 Again Mr Seiffert on behalf of his company did not seek to take that step.

233 After the institution of the present proceeding, Luxury Developments did issue a summons seeking to exercise both branches of the jurisdiction in s.84 but the matter at present has been left pending the application by the plaintiffs.

234 I now turn to the plaintiffs' proof.

Entitlement to benefit

(i) Benefit of covenant annexed to some land

235 The operative words of the covenant were –

> "James Henry Porter DOTH HEREBY for himself his heirs executors administrators and transferees registered proprietor or proprietors for the time being of the said land hereby transfer COVENANT with me the said Thomas Michael Burke my heirs executors administrators and transferees the registered proprietor or proprietors for the time being as so much of the land described in Certificate of Title Volume 4480 Folio 895831 as is represented by the Lots on the said plan of subdivision other than the land hereby transferred and every part thereof that the land hereby transferred shall not .."

236 In my opinion the wording of the restrictive covenant establishes that it was the common intention of the parties that the covenant was to be annexed to land being the land not transferred out of the parent title "and every part thereof" and was intended to run with it.

237 The words used are similar to those used in the case of Langdale Pty. Ltd. v Sollas supra and Adam, J. had no difficulty in concluding that the words show that the benefit of the covenant was annexed to the land.

(ii) Benefit of covenant annexed to land identified?

238 In my opinion the wording of the covenant identifies the land to be benefited by the covenant and this covered any land which at that stage had not been transferred out of the original Certificate of Title. That is the position here. The Fitt's land and the Dowell's land was transferred after the making of the covenant.

(iii) The covenant annexed to the whole of the land to be protected as well as to each and every part of it?

239 Mr Wikrama submitted that the words of the covenant were too wide and sought to bind the whole of the subdivision rather than the lots untransferred and each and every one of them.

240 He referred to the decision in Re Ballard's Conveyance supra.

241 The facts in Re Ballard show that an attempt was made in the covenant to cover more land than was necessary to be benefited and did not seek to cover parts thereof. That is not the position here. The wording makes it quite clear that it was to benefit

every part of the subdivisional land and that included the lots then presently owned by Mr Burke, namely those owned by the predecessors in title of each of the plaintiff's land.

242 Section 79A of the Property Law Act 1958 is relevant to this element of proof. The plaintiffs do not have to rely on the section because the wording of the covenant is clear.

(iv) The covenant must touch and concern the land of the covenantee

243 Taking into account the wording of the covenant, the fact that there was a subdivision of some 202 building lots, that there is evidence that the covenant was in a common form in relation to the other lots and that on the face of it it is intended to benefit the land for purposes of occupation and the value of that land it follows in my opinion that the covenant did touch and concern the land of the covenantee.

244 See the reasoning in Langdale Pty. Ltd. v Sollas – see also Re Arcade Hotel Pty Ltd[46].

(v) The plaintiffs and the covenantee have a legal estate in the land

245 Clearly the evidence also establishes that fact.

246 In my opinion the words of the covenant are clear and unambiguous and are not uncertain in their meaning or effect. Accordingly that defence fails.

247 The case of Doyle v Phillips (No.1), supra, does not assist the defendant. In my opinion that case does not apply because the words of the covenant in that case made it clear that the land to which the benefit was to apply was the whole of the land in the plan of subdivision and all told there was some 200 lots. The covenant on the face of it purported to benefit the whole and the person seeking to enforce it only had one lot. Here the words of the covenant made it clear that it was to benefit not only the whole of the land but every part of it.

248 It follows that the plaintiffs have established their entitlement to the benefit of the

[46] supra at p.277

restrictive covenant contained in the Luxury Developments land Certificate of Title. It is unnecessary for the plaintiffs to fall back on the alternative method of establishing their right, namely that the land was subject to a building scheme. But nevertheless I will consider the basis for claiming the benefit of the covenant.

Building scheme

249 It is well established that a restrictive covenant is enforceable by and against persons other than the original covenanting parties when the lands were held by respective owners under a building scheme.

250 The object in requiring agreement to a restrictive covenant in a building scheme is that an estate is being developed in accordance with a plan and that it is vital if the value of each of the lots is to be maintained, that a purchaser should be restrained from dealing with the land in a way which would affect the value of the other lots or depreciate the value and amenities of the area.

251 Once it is established that there is a scheme, the principle is that each purchaser can sue or be sued by every other purchaser for breach of the restrictive covenant.

252 The law on the subject was stated by Hall, V-C in Renals v Cowlishaw[47] where his Lordship said –

> "It may I think be considered as determined that anyone who has acquired land, being one of several lots laid out for sale as building blocks, where the court is satisfied that it was the intention that each one of the several purchasers should be bound by and should as against the others have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenants; and that this right, that is, the benefit of the covenant enures to the assign of the first purchaser, in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be expressed, but may be collected from the

[47] (1878) 9 Ch. D. 125 at 129

transaction of sale and purchase."

Quoted with approval in Spicer v Martin[48].

253 It is also well established that in an action to restrain a breach, it is immaterial whether the defendant acquired the title before or after the date on which the plaintiff purchased his lot.

254 The common scheme imposes a special law in respect to it and all subsequent owners are subject to it. As Lord Macnaughton said in Spicer v Martin[49] -

> "They all have a common interest in maintaining the restriction. This community of interest necessarily requires and imports reciprocity of obligation."

255 The essential characteristics of a scheme of development which must be established before a restrictive covenant binds the parties were formulated by Parker J in Elliston v Reacher[50]. His Lordship said –

> "I pass, therefore, to the consideration of the question whether the plaintiffs can enforce these restrictive covenants. In my judgment, in order to bring the principles of *Renals v Colishaw)* and *Spicer v Martin* into operation it must be proved (1) that both the plaintiffs and defendants derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme. of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and (4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors. If these four points be established, I think that the plaintiffs would in equity be entitled to enforce the restrictive

[48] (1888) 14 App.Cas. at p.24

[49] supra at p.25

[50] (1908) 2 Ch. 374 at 384-5

covenants entered into by the defendants or their predecessors with the common vendor irrespective of the dates of the respective purchases. I may observe, with reference to the third point, that the vendor's object in imposing the restrictions must in general be gathered from all the circumstances of the case, including in particular the nature of the restrictions. If a general observance of the restrictions is in fact calculated to enhance the values of the several lots offered for sale, it is an easy inference that the vendor intended the restrictions to be for the benefit of all the lots, even though he might retain other land the value of which might be similarly enhanced, for a vendor may naturally be expected to aim at obtaining the highest possible price for his land. Further, if the first three points be established, the fourth point may readily be inferred, provided the purchasers have notice of the facts involved in the three first points; but if the purchaser purchases in ignorance of any material part of those facts, it would be difficult, if not impossible, to establish the fourth point. It is also observable that the equity arising out of the establishment of the four points I have mentioned has been sometimes explained by the implication of mutual contracts between the various purchasers, and sometimes by the implication of a contract between each purchaser and the common vendor, that each purchaser is to have the benefit of all the covenants by the other purchasers, so that each purchase is in equity an assign of the benefit of these covenants. In my opinion the implication of mutual contract is not always a perfectly satisfactory explanation. It may be satisfactory where all the lots are sold by auction at the same time, but 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. For example, a prior purchaser may be dead or incapable of contracting at the time of a subsequent purchase, and in any event it is unlikely that the prior and subsequent purchasers are ever brought into personal relationship, and yet the equity may exist between them. It is, I think, enough to say, using Lord Macnaghten's words in *Spicer v Martin,* that where the four points I have mentioned 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."

256 The principles stated by Parker J have been cited with approval in a number of Australia cases. See by way of example Cobbald v Abraham[51], Langdale Pty Ltd v Sollas[52] and Cousin v Grant[53]. They have been applied by the Privy Council in

[51] (1933) VLR 385

[52] (1959) VR 637

[53] (1991) 103 FLR 236

Texaco Antilles Ltd v Kernochan[54].

257 Taking each element of proof separately the first element concerns the parties deriving their titles from a common vendor.

258 The evidence overwhelmingly establishes that that was the position and that Mr Burke was the common vendor. Mr Wikrama accepted that that was so.

259 The second element concerns the common vendor laying out the estate for sale in lots.

260 The plan of subdivision divides the whole of Mr Burke's land into 202 building blocks.

261 In my opinion the words of Hudson J in Re Dennerstein[55], are apposite. His Honour said –

> "The evidence clearly establishes that the common vendors … , before the sale which took place on 25 February 1911 laid out the lands included in plan of subdivision No. 5433 for sale in lots subject to restrictions intended to be imposed on all the lots, which, though they varied in one detail – the minimum cost prescribed – are consistent only with a general scheme of development. It is clear also in my view, that the restrictions were intended by the vendors to be and were for the benefit of all the 65 lots intended to be sold, and that the predecessors' in title of the applicant and the objectors respectively purchased their lots from the common vendors upon the footing that the restrictions, subject to which the purchases were made, were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors."

262 The original Certificate of Title together with the plan of subdivision into 202 lots was adduced into evidence. Also tendered in evidence were eight certificates of title together with relevant transfers relating to that plan of subdivision and the sale by Mr Burke to different purchasers. Each title and each instrument of transfer contained the common form of restrictive covenant. The defendant, Luxury

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[54] (1973) AC 609

[55] supra at 692

Developments, did not seek to adduce any evidence to the contrary. In my opinion the evidence overwhelmingly leads to the conclusion that Mr Burke did lay out his estate for sale in lots subject to restrictions intended to be imposed on all lots and which were consistent with some general scheme of development, namely, a building scheme.

263 Further, the plan of subdivision lodged in the Titles Office contained a statement to the effect that all the lots on the plan of subdivision were affected by a building scheme.

264 The third element, namely, that the restrictions were intended by Mr Burke to be and were for the benefit of all lots intended to be sold in my opinion has also been made out. His objective in imposing the conditions is well established from all the circumstances, including the nature of the restrictions, the subdivision into lots for the building of houses and also again by reference to the plan of subdivision having a notation that it was affected by a building scheme.

265 Finally, in my opinion it can be readily inferred that each purchaser of the lots had notice of the fact that Mr Burke was the common vendor, that the estate was laid out for sale in lots and that the restrictions were intended by the common vendor to be for the benefit of all lots sold and intended to be sold. In my opinion the plaintiffs have established the necessary elements to prove that the lots were sold as part of a building scheme.

266 The effect of a building scheme on a restrictive covenant was summarised by Mr Voumard QC in The Law Relating to the Sale of Land in Victoria, 2nd ed. at p.592.

267 The learned author said –

> "To meet this position a further principle has evolved whereby, upon the scheme of development, covenants made by the various purchasers from a common vendor are mutually enforceable, and may thus be enforced by every purchaser of an allotment and his successors in title against every other purchaser of an allotment or his successors in title, taking with notice of the covenant. The basis of the doctrine is that the purchasers have a common interest in maintaining

> the restrictions and that 'this community of interests necessarily requires and imports reciprocity of obligation'."

268 In my opinion the plaintiffs have also established the second method by which they acquire the benefit of the covenant.

269 Mr Wikrama submitted that the decision of Re Dennerstein was against this conclusion because of the lack of information contained in the documents in the Office of Titles.

270 I will consider this case when I come to the question of notice of the burden.

271 I now turn to the plaintiffs' proof that the burden is enforceable against Luxury Developments as owner of the land burdened by the covenant.

Enforcing Burden

(i) Covenant negative?

272 In my view clearly the covenant is negative in not only its form but in substance. Mr Wikrama did not submit to the contrary.

(ii) Covenant for the protection of land retained by covenantee?

273 In my opinion clearly at all relevant stages there were two lots of land, one the dominant land and the other servient land and at all relevant times the covenantee had land which was to be protected. The plaintiffs own land which is intended to be protected by the terms of the covenant.

274 Mr Wikrama did not submit to the contrary.

(iii) Burden of covenant running with the covenantor's land

275 Again on a construction of the covenant it is clear that it was the intention of the parties that the covenant was to run with the covenantor's land and this is clear from the words used.

276 I set out the operative words of the instrument of transfer above in relation to the

benefit. Preceding those words appeared the following –

> "AND in consideration of the premises and to the intent that the covenants hereinafter contained shall respectively be noted on and referred to on the Certificate of Title for the time being of the land hereby transferred as an encumbrance affecting the same and that such covenant shall run with such land and be binding upon the same and the registered proprietor or proprietors for the time being thereof."

277 There can be no doubt that it was the intention of the parties that the covenant should run with the covenantor's land.

(iv) Notice

278 The Certificate of Title concerning the Luxury Developments land noted as an encumbrance the restrictive covenant found in the Instrument of Transfer. Mr Seiffert had full knowledge of the terms of the restrictive covenant and what was noted in the Register of Land.

279 I am satisfied that the plaintiffs have established as part of their proof to enforce the burden, that Luxury Developments at the relevant time had notice of the restrictive covenant. Further, the documents in the Register which were referred to in the Certificate of Title by reference to the Instrument of Transfer showed beyond doubt that the land was subject to a building scheme.

280 On any view the plaintiffs have established all they need to establish on the question of notice.

281 Mr Wikrama on behalf of Luxury Developments submitted that even if there was a building scheme affecting the land, which he submitted was not so, nevertheless Luxury Developments took the land free of any restriction because the notification of the covenant on the Certificate of Title was insufficient in that it gave no indication that it arose under a building scheme. He relied upon the decision of Hudson J in Re Dennerstein, supra.

282 I have already found that the plaintiffs have established that the restrictive covenant

was annexed to the land and hence are entitled to enforce the benefit and that the elements necessary to establish their right to enforce the burden have also been established. Further, I am satisfied that the land held by each party to this proceeding were all subject to a building scheme and that Luxury Developments had notice of that fact through the information in the Register of Land. Accordingly, Mr Wikrama's reliance upon Re Dennerstein is not an answer to the findings made.

283 Nevertheless, Mr Wikrama did refer to Re Dennerstein in some detail and accordingly I will consider its relevance to the present proceeding.

284 That case was an application by the owner of property seeking a declaration under s.84 of the Act that she was not affected by restrictions imposed by an instrument of transfer No. 650684.

285 The applicant's land formed part of an estate known as the Como Estate which in 1911 was comprised in a Certificate of Title. The owners caused the land to be divided into 91 allotments but Lots 51-71 were deleted and never offered for sale. Five other lots though on the plan were never offered for sale. The balance of the lots, namely, 65, were offered for sale on 25 February 1911 and 51 were sold at auction. The remaining 14 were sold privately within the next two years.

286 It was a condition of the sale that each purchaser would enter into a covenant with the vendors and the covenant restrained a purchaser from erecting "on any one of the said lots more than one house or dwelling … at a cost less than £800".

287 The evidence showed that the condition provided for building restrictions binding the purchaser of every lot shown on the plan exhibited which was the plan of subdivision.

288 In accordance with the practice followed by the Office of Titles the Certificate of Title which issued noted the covenant contained in the transfer as an encumbrance.

289 Hudson J had no difficulty in concluding that there was a building scheme from the evidence before the court.

290 Having reached that conclusion he then passed to the second question that was argued. He summarised the argument at p.694. The applicant submitted that having regard to the provisions of the Transfer of Land Acts in force in 1911 when transfer No. 650684 was registered there was no power to notify as an encumbrance on the Certificate of Title issued to the transferee, who was the applicant's predecessor in title, a restrictive covenant depending for its existence on a building scheme. He further contended that even if there was power to do so then notification in the present case was ineffective to bind the subsequent transferees.

291 His Honour noted that Mr Vourmard QC based his arguments upon the provisions of the 1890 Transfer of Land Act.

292 His Honour following Sholl J in the case of Re Arcade Hotel Pty Ltd, supra, held that the practice followed by the Office of Titles in notifying restrictive covenants as encumbrances was justified and that when so notified such a covenant bound the land in the hands of subsequent transferees.

293 As I have said, the practice was given legislative approval in 1964 by the Transfer of Land (Restrictive Covenants) Act 1964, and the Registrar was deemed always to have had the power – see s.88(1).

294 But as Hudson J pointed out the real question was whether the covenant could bind a subsequent transferee if it be proved "to have been entered into pursuant to and as part of a building scheme to which no reference appears in the notification on the register, is a very different one".

295 In that case the notification on the Certificate of Title was to the effect that there was a covenant "by the transferee with his transferors their executors administrators and transferees".

296 As his Honour pointed out at p.696 –

> "Upon the true construction this has been held to be a covenant which fails to identify any land in favour of which the benefit thereof is to be annexed. It is only when resort is had to an inquiry as to the

circumstances under which the covenant was entered into, that it may be inferred that it was to give effect to a building scheme to which the owners of land affected by the scheme were parties; only when this has been done can it be postulated that the benefit and the burden of the restrictions were intended to pass to and bind subsequent registered proprietors. No reference to the existence or extent of such a scheme 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."

297 At p.696 his Honour concluded –

> "I have reached the conclusion that, even assuming there is power under the Act to notify as encumbrances on a Certificate of Title restrictions arising under a building scheme, such a notification will not be effective to bind transferees of the land unless not only existence of the scheme and the nature of the restrictions imposed thereunder, but the lands effected by the scheme (both as to the benefit and 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. In the present case these requirements are not satisfied. The covenants contained in the instrument of transfer notified as an encumbrance, though they certainly set out the restrictions, gave no indication that they arose under a building scheme, nor of the land to which the benefit thereof was intended to be annexed, under such a scheme. The applicant therefore had no notice of the existence of the scheme or of the restrictions imposed thereby."
>
> (Emphasis added.)

298 That is not the position here as I have already found.

299 The notification on the front of the Certificate of Title referred to the original instrument of transfer which was numbered and by reference to that instrument of transfer the nature of the restrictions imposed are clearly stated, the lands affected are set out and the plan of subdivision was stated and identified by number. A reference to that plan of subdivision clearly established that it was part of a building scheme. Both the original instrument of transfer and the plan of subdivision would be made available to anybody seeking to search the register.

300 In my opinion the case of Re Dennerstein does not stand in the way of the plaintiffs in this proceeding.

301 Mr Uren QC submitted that the decision was wrong or and should not be followed. He also pointed out that by reason of s.88(1) of the Transfer of Land Act the doubt concerning the practice of noting the covenant as an encumbrance was no longer so.

302 I accept that s.88(1) did empower the Registrar to enter onto a Certificate of Title a memorandum of such covenant and of any instrument purporting to create or effect the operation of such covenant. The sub-section was amended subsequently to Re Dennerstein in 1964 and the present sub-section makes it clear that the Registrar always had the power to enter a notation of the covenant and any instrument purporting to create or effect the operation of such covenant.

303 But that does not in my opinion change the effect of Re Dennerstein. All it does is put beyond doubt that the practice which had been employed by the Registrar of Titles was a valid and lawful one.

304 But the point that was made by Hudson J was that in that case the notation was insufficient to provide the necessary information to a subsequent purchaser.

305 It is unnecessary for me to consider whether the decision in Re Dennerstein is correct. But in my opinion there is a strong argument that the decision is wrong in respect to a requirement that information in the Register must establish the building scheme's existence.

306 Hudson, J. found that there was a building scheme but held that it was necessary in the notification in the Register to identify the land to be benefited and the land which is burdened and also the existence of a building scheme and the nature of the restrictions imposed.

307 In normal circumstances there would be no difficulty in identifying the two pieces of land affected by the scheme. I do not wish to make any observation in respect to that requirement.

308 However, the requirement that the existence of the scheme and the nature of the restrictions imposed thereunder must be indicated in the recording of the

encumbrance either directly or by reference to some instrument or other document to which a person searching the Register has access raises another question.

309 If a land owner wishes to have recorded on a Certificate of Title as an encumbrance the fact that a restrictive covenant binds that land, he makes application to the Registrar of Titles to record the encumbrance.

310 Section 88(1) of the Transfer of Land Act 1958 empowers the Registrar to record the restrictive covenant on the land subject to the burden of it. The Act is silent as to what investigation if any the Registrar should perform before recording the restrictive covenant.

311 The Registrar does have general powers to require the production of documents and information concerning land. See s.104(1), (2), (4) and (6).

312 But there is no requirement in the Act that the Registrar should make a decision as to the validity or otherwise of the restrictive covenant.

313 And it is made clear by s.88(3) that the recording of the restrictive covenant does not in any way affect its validity or invalidity.

314 The validity of a covenant and its enforcement is ultimately a question for the courts where there is a dispute between the parties.

315 But once the restrictive covenant is recorded then that is notice to any person seeking an interest in the burdened land that another person claims the benefit of a restrictive covenant which is enforceable against the owner of the burdened land.

316 As I have said, the recording of the restrictive covenant does not prove its validity and accordingly the owner of the burdened land is entitled to contest its validity.

317 The question of the validity or invalidity of a restrictive covenant and whether it is enforceable in certain circumstances must ultimately be a question for the court.

318 Section 84 of the Property Law Act 1958 provides a speedy and relatively

inexpensive procedure to resolve questions concerning the validity of restrictive covenants.

319 See also s.85.

320 When an application is made to the court then the party seeking to enforce the restrictive covenant would carry the burden of establishing the validity of it and the right to enforce it. The evidence which will be adduced in a particular case will depend upon the circumstances and may be of small compass or alternatively may require substantial proof. But in the end it is a matter for the court.

321 Hudson, J. in support of his conclusion reasoned that if a person purchasing land which was subject to a restrictive covenant had to look into the question outside the information in the Register then the object of the Act would be destroyed in large measure.

322 His Honour said at p.696 –

> "To require a person interested in purchasing one of those allotments to make this determination (i.e. whether there was a common building scheme) 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."

323 In my respectful opinion the object of the Act is satisfied by the recording of the restrictive covenant which would record the nature of the restrictions. Notice is given to the proposed purchaser that the land is subject to a restrictive covenant. The recording does not establish the validity of it. What if the recording referred to the fact that there was a building scheme? Again, that notification does not establish the validity of either the building scheme or the restrictive covenant.

324 Indeed, according to Mr Currey's Titles Office practice written in 1933, the practice in those days was to require a developer prior to selling any lots to lodge a statutory declaration which asserted – "(2) That all the lots on the said plan of subdivision are

subject to a definite scheme, in pursuance of which the respective purchasers are required to covenant that (here set out the covenants)."

325 Once lodged the encumbrance would note a building scheme. But that does not establish that there is a valid building scheme or that the restrictive covenant is valid and enforceable.

326 In my opinion it is strongly arguable that the burden which rests upon a plaintiff seeking to enforce a restrictive covenant on the question of notice is to have the restrictive covenant recorded as an encumbrance on the Certificate of Title which of course can incorporate other documents in the Register of Land. This recording does not establish validity or enforceability. Those are matters for the court.

327 It follows that in my opinion if it was necessary to apply the reasoning in Re Dennerstein in the present case, my provisional view is that it should not be followed.

328 In my opinion the object of the Act is not defeated and indeed is given effect to by the notation of a restrictive covenant which sets out the nature of the restrictions and identifies the land. In my opinion it is strongly arguable that it is not necessary to assert anywhere in the Register that the land is subject to a building scheme although it would be wise to do so. That is assuming that the present practice of the Titles Office permits that to be done.

329 A consideration of the Titles Office practice today shows that the Registrar does not record in the Register that a restrictive covenant is part of a building scheme or require extraneous evidence that it was created as part of a scheme. The application to record a covenant is a standard form and requires the following information to be provided, namely, full land description including Volume and Folio, reference of the burdened land, the full name of the applicant, the full land description including Volume and Folio of the benefited land, the instrument creating the covenant and signature by the applicant. Of course the terms of the covenant in the particular instrument may make reference to a building scheme. The requirement in the 1920s

and '30s of lodging a statutory declaration has been discontinued.

330 In my view there is a very strong argument that the recording must make it clear that there is a restrictive covenant, identify the land to be benefited and set out the restrictions and other questions concerning the basis upon which it is said to be valid and enforceable are matters for the court and not required to be part of the information in the Register of Land.

331 It follows that if there had not been a reference to a building scheme on the Plan of Subdivision in the present matter, I would have nevertheless been strongly inclined to hold that there was sufficient notice to Luxury Developments on the Register of the existence of a restrictive covenant burdening its land and the nature of same.

Discretionary considerations

332 Luxury Developments commenced building works on 14 February 2000 in the knowledge that the plaintiffs and particularly Mr Fitt had warned Mr Seiffert that if it commenced building works they would take legal proceedings.

333 The plaintiffs issued their originating motion on 6 March 2000 and Mr Seiffert continued with the building works to 31 March. Luxury Developments have spent approximately $75,000 on the works to date. A proportion of the cost was incurred after the proceeding was instituted.

334 The covenant in question is a restrictive one and as a general rule the court will grant an injunction and discretionary factors are of little moment. See Post Investments Pty Ltd v Wilson[56], Hawthorn Football Club v Harding[57].

335 I am satisfied that there are no discretionary factors which would preclude the plaintiffs enforcing their right. Luxury Developments proceeded with this development with full knowledge that it had been opposed at every step by the plaintiffs and others and with the knowledge that there was a substantial probability

[56] (1990) 26 NSWLR 598 at 643

[57] (1988) VR 49 at 58 and 60

that a proceeding would be brought against it. Further, Luxury Developments did not take advantage of the course that was open to it to approach the court under s.84 of the Property Law Act to determine the question before commencing the building works.

336 I reject the submission that the plaintiffs have been guilty of laches. The defendant continued with the works for a substantial period after service of the proceeding. Its damage has been increased accordingly. Further taking into account the circumstances the granting of the injunction would not affront this court in its equitable jurisdiction.

Conclusion

337 In my opinion the plaintiffs have established the necessary requirements to enforce the benefit of the covenant in equity against Luxury Developments which purchased the land with full knowledge of the terms of the covenant and is bound by the burden.

338 This result accords with the justice of the situation. The covenant was entered into in 1927 by parties who intended that it should be binding not only them, but their successors in title and since that date to the present, successors in title of the relevant lots have proceeded on that assumption.

339 The lots were sold as part of a scheme which established the law of the subdivision aimed at preserving the value of the area and its amenities.

340 The decision gives effect to the philosophy which underlies the law of contract, namely, that the bargains of honest men should be upheld but also gives effect to the doctrine established in Tulk v Moxhay, namely, that if the covenant did not bind the land "it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless" – per Lord Cottenham in Tulk v Moxhay[58]. The same underlying philosophy applies to the Burke subdivision. The

[58] supra, 2 Ph at 777

landowners wish to maintain the value of their land and that was the purpose of the restrictive covenant.

341 The law has recognised now for many years that some restrictive covenants have outlived their usefulness and should be extinguished or modified. That procedure was open to Luxury Developments and still is. It decided not to pursue it prior to commencing the building works.

342 Subject to submissions from counsel I propose to make the following orders –

(i) a declaration that the land at 270 Lower Heidelberg Road East Ivanhoe Victoria being the land more particularly described in Certificate of Title Volume 5344 Folio 793 is burdened by the restrictive covenant noted on the Certificate of Title;

(ii) a declaration that each of the plaintiffs is entitled to enforce the restrictive covenant referred to in paragraph (i) hereof against the defendant;

(iii) that the defendant by itself or its servants or agents or otherwise be restrained from erecting or causing or permitting to be erected on the land more than one dwelling house contrary to the terms of the restrictive covenant noted in Instrument of Transfer No. 1336298 referred to on the said Certificate of Title.

343 I will hear the parties on the question of costs.
