IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

S CI 2014 2175

MAUREEN CARMEL PROWSE — Plaintiff

v

LILIAN MARY JOHNSTONE and others (according to the attached schedule) — Defendants

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JUDGE:	Ginnane J
WHERE HELD:	Melbourne
DATES OF HEARING:	19–20 May 2015
DATE OF JUDGMENT:	11 November 2015
CASE MAY BE CITED AS:	Prowse v Johnstone
MEDIUM NEUTRAL CITATION:	[2015] VSC 621

REAL PROPERTY - Restrictive covenant – Transfer of land – Whether covenants in transfer of land was validly amended in 1912 to insert words of annexation – Proof of person making amendments – Legislative provision under which amendments made – Evidentiary inferences – Presumption of regularity – Whether valid restrictive covenant – Whether burden of covenant ran with the land – *Transfer of Land Act 1890* (Vic) ss 55, 82, 83, 194, 195, 198, *Transfer of Land Act 1958* (Vic) s 88, *Property Law Act 1958* (Vic) s 79.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr S Morris QC and Ms L Hicks	Lukaitis Lawyers
For the Defendants	Mr S Horgan QC and Mr M Townsend	Russell Kennedy

SCHEDULE OF PARTIES

MAUREEN CARMEL PROWSE	Plaintiff
- and -	
LILIAN MARY JOHNSTONE	Firstnamed Defendant
GEORGINA ANTHEA MCNAMARA	Secondnamed Defendant
MATTHEW PHILIP PRESTON	Thirdnamed Defendant
EMMA JANE PRESTON	Fourthnamed Defendant
JAMES ORMONDE LUCAS	Fifthnamed Defendant
ISOBEL CLARK LUCAS	Sixthnamed Defendant
MARK OLIVER SIMMONS	Seventhnamed Defendant
KATRINA MICHELLE ALLEN	Eighthnamed Defendant
WENDY PATRICIA KIMPTON	Ninthnamed Defendant
LORRAINE MARIA BOURKE	Tenthnamed Defendant
TALIA OLIVER	Eleventhnamed Defendant
DAVID HAMISH LAWRANCE OLIVER	Twelfthnamed Defendant
AMANDA O'DELL McDOUGALL	Thirteenthnamed Defendant
RANDY JAMES LAPORTE	Fourteenthnamed Defendant
ASTRIDA COOPER	Fifteenthnamed Defendant
ALASDAIR JOHN LEWARS MACDONALD	Sixteenthnamed Defendant
RHONDA CATHERINE MACDONALD	Seventeenthnamed Defendant
KATHERINE QUINCEROT	Eighteenthnamed Defendant
JAYNE ELIZABETH SIMONSON	Nineteenthnamed Defendant
NEIL KEVIN LAHY	Twentiethnamed Defendant
CATHERINE MARY LAHY	Twenty-firstnamed Defendant

PAUL SWEET	Twenty-secondnamed Defendant
SUE SWEET	Twenty-thirdnamed Defendant
MARK FLEMING	Twenty-fourthnamed Defendant
NICOLE FLEMING	Twenty-fifthnamed Defendant
ROBERT GEORGE MORRIS	Twenty-sixthnamed Defendant
ANGELA MORRIS	Twenty-seventhnamed Defendant
LAURENCE PATRICK EISENTRAGER	Twenty-eighthnamed Defendant

HIS HONOUR:

1 The plaintiff, Mrs Maureen Carmel Prowse, seeks orders in relation to a covenant that is recorded on the title to her property situated at 191-193 Wattletree Road, Malvern ('the property'). She is the registered proprietor of that property. The property is part of the estate known as the Coonil Estate. When the Coonil Estate was subdivided, mainly between 1910 and 1915, covenants, including restrictive covenants, were contained in the transfers of the land.

2 More than a century after a covenant was included in the title to the plaintiff's land, she seeks a declaration that it does not bind her land, on the ground that the words said to constitute a restrictive covenant were not validly inserted in the relevant transfer and, in any event, do not constitute a restrictive covenant.

3 A house was built on and remains on the property. The plaintiff and her late husband purchased the property in 1966. The land is part of the Coonil Estate in Wattletree Road, Malvern. The parent title of the Coonil Estate is contained in Certificate of Title Volume 3442, Folio 352 ('parent title') which was created on 24 June 1910.

4 The registered proprietors of the Coonil Estate before the land was subdivided were Jane Langmore and Arthur Langmore ('the Langmores').

5 The land in the parent title was subdivided into 63 lots by Plan of Subdivision LP5320. Mr Frederick Hagelthorn, was the developer of the subdivision.

6 The plaintiff's land is Lots 7 and 8. The Instrument of Transfer of the plaintiff's land out of the parent title was dated 11 May 1912 and was registered in the Titles Office, now Land Registry Victoria, from 14 May 1912 at 2.48pm. The consideration was £740.

7 The transferors of lots 7 and 8 were the Langmores and the transferee was William Durham Leslie. The Instrument of Transfer was numbered 683810 and was the 22nd of 56 transfers of land out of the parent title to form the Coonil Estate.

8 Mr Leslie paid Mr Hagelthorn £720 and he in turn paid £240 to the Langmores. It appears that Mr Hagelthorn had entered into a contract with the Langmores to purchase the land and then he on sold it to Mr Leslie, rather than himself becoming the registered proprietor and paying stamp duty.

9 Of the 56 transfers from the parent title, all but transfers 12, 14 and 55 contained some form of covenant.[1] However, the covenants were not in a standard form and some have been removed from the relevant certificates of title.

10 The plaintiff seeks declarations that amendments made in 1912 by handwritten deletions and additions to a covenant contained in transfer of land 683810 were not validly made and have no legal effect. Secondly, the plaintiff contends that, if they were validly made, the covenant is not a restrictive covenant but a personal covenant that cannot be enforced against transferees.

11 Prior to the amendments, the covenant in transfer 683810 did not identify the land of the person to receive the benefit of it. One of the amendments was to add the words "registered proprietor or proprietor for the time being of the untransferred part of the land in the said certificate of title".

12 The defendants disputed that the amendments to transfer 683810 were invalidly made and contend that the covenant is a valid restrictive covenant that runs with the land.

13 The terms of the declarations that the plaintiff sought at trial were that:

(a) the land at 191-193 Wattletree Road, Malvern, being the land described in Certificate of Title Volume 3607, Folio 399 and Lots 7 & 8 on Plan of Subdivision LP5320 is not affected by the covenant contained in Instrument of Transfer 683810;

(b) the covenant contained in the Instrument of Transfer is not a restriction within the meaning of the *Subdivision Act 1988*;

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1 Plaintiff's Outline of Argument dated 16 February 2015, [8].

(c) the restriction imposed by the Instrument of Transfer cannot be enforced by a person, other than Jane Langmore, Arthur Langmore, the executors or administrators of Jane Langmore, or the executors or administrators of Arthur Langmore.

14 There are 28 defendants. They are the potential beneficiaries of the covenant contained in transfer 683810. The Registrar of Titles wrote to the plaintiff's solicitor by letter dated 30 June 2014, advising that he did not oppose the plaintiff's application and made no comment in relation to the order that the she seeks.[2]

15 Maddock, Jamieson and Lonie were the solicitors for the Langmores and Mr Hagelthorn and prepared 26 of the 55 transfers of the subdivided land.[3] The remaining transfers were prepared by the purchasers' solicitors. Some transfers were of more than one lot.

16 Mr John Henry Maddock[4] and Mr J Riley of Maddock, Jamieson and Lonie were involved in the transactions on behalf of the Langmores and Mr Hagelthorn.

The covenant

17 Instrument of Transfer 683810 contained a covenant by William Durham Leslie in the following terms, which included handwritten amendments in red italics:

> AND the said William Durham Leslie doth hereby for himself, his executors and administrators covenant with the said Jane Langmore and Arthur Charles Langmore ~~and Frederick Hagelthorn~~ their executors and administrators *Registered Proprietor or Proprietors for the time being of the untransferred part of the land in the said certificate of title* that he the said William Durham Leslie his executors administrators or transferees will not at any time or times hereafter quarry on the said land or cart or carry away any stone gravel soil or sand therefrom or make any excavations therein except such as may be necessary for laying the foundation of any building on the said land AND FURTHER that he or they will not erect more than one house on each of the said Lots and that any house so erected shall be of stone or brick or brick and stone with roof of slates or tiles on the main portion therefore at a cost of not less than Six hundred pounds each exclusive of stables and outbuildings and that such building shall not be used for any trade or business AND

2 Affidavit of Michelle Cupples, sworn 29 July 2014, [11].
3 Plaintiff's Outline of Argument dated 16 February 2016, [7].
4 Transcript of Proceedings, *Prowse v Johnstone* (Supreme Court of Victoria, SCI 2014 2176, Ginnane J, 19-20 May 2015), 146 ('T').

> FURTHER that the said William Durham Leslie his executors administrators or transferees will not subdivide either of the said Lots into smaller allotments nor reduce the frontage thereof to a smaller frontage than appears on the said Plan of Subdivision AND the said William Durham Leslie hereby requests that the above covenants may appear an [sic] an encumbrance on the Certificate of Title to be issued in respect of the land hereby transferred and run with the land.

18 The amendments to transfer 683810 were handwritten in red ink and dated 31 May 1912 and were: first, to add the word "and" between " Jane Langmore" and "Arthur Charles Langmore"; secondly, to delete the words "and Frederick Hagelthorn"; thirdly, to add after the words "executors and administrators", the words "and registered proprietor or proprietors for the time being of the untransferred part of the land in said certificate of title".

19 In this judgment, I have generally used the neutral word 'amendment' to describe changes or corrections to instruments that were referred to in the evidence.

20 The plaintiff pointed to initials adjacent to the amendments on transfer 683810 and submitted that they had been placed there by an officer of the Titles Office. There were three sets of initials dated 31 May 1912: one on the left side and two on the right side of the transfer. Titles Office practice was that an amendment deleting words had to be done in a way that did not obliterate the original words. Thus the surname 'Hagelthorn' had been deleted, but not obliterated.

21 Counsel informed me that the records at the Titles Office have been microfilmed and are no longer in paper form. Thus the copies of the parent title, and of transfer 683810 are photographic reproductions of original documents that no longer exist.

22 I enquired of senior counsel for the plaintiff whether the Registrar of Titles had been asked whether he had any views on the issues raised in the proceeding. Senior counsel stated that the plaintiff had contacted a very experienced title searcher with more than 40 years' experience and was in turn informed that there were working papers associated with each document registered. They sought to obtain the documents and were told that they were no longer in existence.

The previous proceeding

23 In a previous proceeding brought in this Court,[5] Cavanough J refused the present plaintiff's application made under s 84(1) of the *Property Law Act 1958* (Vic) ('*PLA*') to modify the restrictions imposed by the covenant in transfer 683810, so far as was necessary, to enable a development proposal to be put into effect. That proposal was that the existing house on lots 7 and 8 be demolished and that a three-storey building, comprising 18 residential apartments, together with a basement car park for 36 cars, be erected on the property.

24 In that proceeding, the plaintiff also sought a declaration under s 84(2) of the *PLA* that the prohibition against the erection of 'more than one house' on each of the two lots of the property would not be breached by the proposed development. Cavanough J also refused that application.

25 The previous proceeding was conducted on the basis that the covenant contained in transfer 683810 was a valid restrictive covenant.

The defendants did not contend that this proceeding was barred by any *Anshun*[6] estoppel or any similar defence, but foreshadowed that they would rely on the question of costs on the plaintiff's failure to advance in the previous proceeding the arguments relied on in this proceeding.

The plaintiff's case

26 The plaintiff contended that the handwritten amendments were made to transfer 683810 on 31 May 1912 by an officer or officers in the Titles Office, probably an Assistant Registrar, on his own initiative. [7]

27 The plaintiff's case was that the amendments were made without lawful authority and were not authorised by any statutory provision.

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5 *Prowse v Johnstone* [2012] VSC 4.
6 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.
7 T 28-9, 33, 60, 70, 148.

28 The plaintiff's theory was that, in April and May 1912, officers in the Titles Office became concerned that covenants in transfers of land of the Coonil Estate contained errors and decided to fix them. The principal error was the failure of the covenants to identify the land of the covenantee. The result of that failure was that the covenant was a personal covenant and not a restrictive covenant. The Registrar or officers in the Titles Office had power to correct that patent error.

29 As appears below, the plaintiff relied on the manner in which many other transfers of Coonil Estate land were amended. The plaintiff submitted that an inference could be drawn that the amendments to transfer 683810 had been made in the circumstances she suggested because of a number of considerations: the colour of the ink used to make those amendments, the date of the amendments being a date after the transfer was signed, and the handwriting and initials used to record the amendments. It could be inferred that the parties had not initialled the relevant amendments.

30 The plaintiff submitted that an examination of, and consideration of, amendments made to covenants contained in other transfers of Coonil Estate land supported the inferences on which she relied.

The plaintiff's second ground

31 The plaintiff relied on a second ground to support the declarations that she sought as an alternative to the first ground. She contended that if the amendments to the covenant in transfer 683810 had been validly made, then the wording of the covenant confined its burden to William Durham Leslie, his executors and administrators or, alternatively, to William Durham Leslie, his executors, administrators and transferees. The plaintiff is neither the executor or administrator nor a transferee of William Durham Leslie, but a subsequent transferee. Therefore, she was not bound by the covenant.

The legislation

32 The plaintiff's first ground depends on the statutory provisions permitting alterations to instruments which formed part of the Register. The legislation in force in 1912 was the *Transfer of Land Act 1890* (Vic) ('*TLA 1890*'), which formed part of the 1890 consolidation of Victorian statutes.

33 The plaintiff also referred to previous legislation affecting the transfer of land in Victoria. The *Real Property Act 1862* (Vic), by s XI(4), gave the Registrar-General power to correct errors in certificates of title, or in the register book or in entries made therein. The *Transfer of Land Statute* 1866 (Vic), by s 129(II), gave the registrar similar powers. The *Transfer of Land Statute Amendment 1885* (Vic), by s 53, introduced the power of the Registrar of Titles to correct any patent error appearing on the face of any instrument lodged for registration without such instrument being withdrawn from the Office.

The Transfer of Land Act 1890 (Vic)

34 Section 5 of the *TLA 1890* provided that the then Commissioner of Titles was to be and was thereby appointed the Commissioner of Titles under the Act. Sections 7 and 8 provided for a Registrar of Titles and Assistant Registrars of Titles. Section 11 provided that everything appointed or authorized or required to be done or signed by the Registrar might be done or signed by any Assistant Registrar and should be as valid and effectual as if done or signed by the Registrar himself. Section 50 provided that Certificates of Title should be in duplicate form and the Registrar should keep a book to be called the 'Register Book' and should register one of the grants of land and the Certificates of Title and delver the other to the proprietor.

35 Other relevant provisions of the *TLA 1890* included:

> 55. Every instrument presented for registration may be in duplicate (excepting a transfer whereon a new certificate of title is required) and shall be registered in the order of and as from the time at which the same is produced for that purpose; and instruments purporting to affect the same estate or interest shall, notwithstanding any actual or constructive notice, be entitled to priority as between themselves according to the date of

registration and not according to the date of the instrument. Upon the registration of any instrument in duplicate, the Registrar shall bind up one original in the register book, and shall deliver the other (hereinafter called the duplicate) to the person entitled.

…

82. In case it shall appear to the satisfaction of the Registrar that any certificate of title or instrument has been issued in error or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error on any grant certificate of title or instrument, or that any grant certificate instrument entry or endorsement has been fraudulently or wrongfully obtained, or that any grant certificate or instrument is fraudulently or wrongfully retained, he may by writing require the person to whom such document has been so issued or by whom it has been so obtained or is retained to deliver up the same for the purpose of being cancelled or corrected or given to the proper party as the case may require; and in case such person shall refuse or neglect to comply with such requisition, the Registrar may apply to a judge to issue a summons for such person to appear before the Supreme Court or a judge and show cause why such grant certificate or instrument should not be delivered up for the purpose aforesaid; and if such person when served with summons shall neglect or refuse to attend before such court or a judge thereof at the time therein appointed, it shall be lawful for a judge to issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the Supreme Court or a judge for examination.

83. Upon the appearance before the court or a judge of any person summoned or brought up by virtue of a warrant as aforesaid, it shall be lawful for the court or judge to examine such person upon oath, and (in case the same shall seem proper) to order such person to deliver up such grant certificate of title or instrument as aforesaid; and upon refusal or neglect by such person to deliver up the same pursuant to such order, to commit such person to gaol for any period not exceeding six months unless such grant certificate or instrument shall be sooner delivered up; and in such case or in case such person cannot be found so that a requisition and summons may be served upon him as hereinbefore directed, the Registrar shall (if the circumstances of the case require it) issue to the proprietor of the land such certificate of title as is herein provided to be issued in the case of any duplicate grant or certificate of title being lost or destroyed, and shall enter in the register book notice of the issuing of such certificate and the circumstances under which the same was issued.

36 Part XI of the *TLA 1890* was headed 'Rectification of Certificates'. It contained the following provisions:

194. The Registrar may exercise and perform the following powers and duties (that is to say):-

…

(ii) He shall upon a direction of the Commissioner correct errors in the register book or in entries made therein or in duplicate

> certificates of instruments, and may supply entries omitted to be made under the provision of this Act; but in the correction of any such error he shall not erase or render illegible the original words, and shall affix the date on which such correction was made or entry supplied and initial the same; and every error or entry so corrected or supplied shall have the like validity and effect as if such error had not been made or such entry omitted, except as regards any entry made in the register book prior to the actual time of correcting the error or supplying the omitted entry.
>
> …
>
> 195. The Registrar may without the direction of the Commissioner correct any patent error appearing on the face of any instrument lodged for registration without such instrument being withdrawn from the office. Provided always that such correction be made in compliance with sub-section (ii) of the last preceding section, and such correction shall have the same validity and effect as if made under the direction of the Commissioner under the said section.
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> 198. Whenever any instrument caveat surrender discharge of encumbrance writ of *fi. fa.* or other document lodged for registration or in relation to any land title estate or interest or in connexion with any application or dealing is erroneous or defective, the Registrar may require the correction and re-execution or correction only (as the case may require) of such document to be made or procured by the person lodging the same; and if after notice in writing of such error or defect sent through the post in a registered letter marked outside "Office of Titles" addressed to such person he shall fail to procure the same to be amended if it be an instrument or an application to bring land under this Act or to amend a certificate of title within a period of three months, or if it be any other document within a period of twenty-one days from the date of notice, the Registrar may if he thinks fit reject such document and notify such rejection to the person lodging the document, and thereupon half the fees paid on the lodging of the document shall be forfeited and dealt with as a penalty under section one hundred and ninety-six of this Act, and the other half may be returned to the person lodging the document on his withdrawing the same.[8]

Commentaries on the Transfer of Land Act and Titles Office practice

37 The parties referred to legal texts that contained commentaries upon the *TLA 1890* and later legislation and upon the powers of the Registrar to correct certificates of title and upon the noting of restrictive covenants on instruments. The first text referred to was by William Campbell Guest, barrister at law, and later Commissioner of Titles for Victoria and was an annotation of the *TLA 1890*. The extracts of the text

8 These sections were ss 233-234 and 237 of the *Transfer of Land Act 1915* (Vic).

that were referred to did not address matters relevant to the issues in this case.

38 The second text was entitled 'The Australian Torrens System' and was written by James Edward Hogg, barrister, and published in 1905.[9] Mr Hogg, after referring to the Court's powers to rectify the register, stated by reference, in the case of Victoria, to ss 82, 83, 194(II) and 195 of the *TLA 1890*:

> The summary powers of the registry officers under the sections given below are probably intended to be exercised either after the determination of the rights of parties by ordinary judicial proceedings, or where an obvious mistake has been made, and not where questions relating to conflicting rights have to be decided.[10]

39 The third text was the annotation of the *Transfer of Land Acts 1915-1921* by H. Dallas Wiseman, published in 1925.[11] Mr Wiseman stated:

> **(8) Errors in Instruments.**
>
> Before documents are lodged for registration, they should be carefully examined for the purpose of seeing that they are properly prepared and interlineations and alterations properly initialled – i.e., if an alteration was made before the signing of the document, it must be initialled by the witness to the signature of the party affected by the alteration: if made after signing, it must be initialled by the party affected.
>
> When words have been written over an erasure, they must also be written in the margin and properly initialled, as above.
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> **(9) Amendments in Titles Office**
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> No alteration or addition of a material portion of an instrument can be made in the Office after lodgement. Only such amendments as are sanctioned by sec 234[12] of the *Transfer of Land Act 1915* will be made by the Registrar.[13]
>
> …
>
> **(18) Restrictive Covenants in Transfers**
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> A restrictive covenant contained in a transfer will not be notified as an encumbrance upon the Certificate of Title to issue on the transfer, unless such covenant is negative in form and is expressed to be entered into by the transferee, his heirs, executors, administrators, and transferees, with the transferor, as registered proprietor of other land retained by him, his heirs,

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9 James Edward Hogg, *The Australian Torrens System* (William Clowes & Sons, 1905) 842.

10 Ibid 842–3.

11 H. Dallas Wiseman, *The Transfer of Land Acts 1915-1921* (The Law Book Company of Australasia Limited, 1925).

12 See s 195 *TLA 1890*.

13 Wiseman, above n 11, 402-403.

executors, administrators, and transferees, or unless such covenant is negative in form and is shown to have been entered into pursuant to a "building scheme".[14]

40 The fourth text was a 'Manual of Titles Office Practice in Victoria' by Mr Norman Currey, who was the Registrar of Tiles in Victoria from 1922 to 1932.[15] The passages relied on were:

> **RESTRICTIVE COVENANT**
>
> **Noted as Encumbrance –**
>
> (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 [i.e. those affected by the doctrine of *Tulk v Moxhay* (citation omitted) and imposed on certain land for the benefit of other land] are in the nature of easements and are not covenants in gross. The latter, being purely personal and not running with any land, cannot be recognized, for the same reason that easements in gross cannot be registered.
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> (2) …
>
> (3) Must be for the benefit of some land retained by the covenantee (authorities omitted) except in the case of a "Building Scheme".
>
> (4) To bind the assigns of a covenantor a restrictive covenant must be for the benefit of some land of a covenantee (authority omitted).
>
> (5) To run with the land must bind the transferees of the covenantor (authority omitted).[16]
>
> …
>
> **(8) ERRORS IN INSTRUMENTS**
>
> (a) Before documents are lodged for registration, they should be carefully examined to see that they are properly prepared and interlineations and alterations properly initialled, *i.e.*, if the alteration was made before the signing of the document, it must be initialled by the witness to the signature of the party affected by the alteration: if made after signing, it must be initialled by the party affected.
>
> (b) When words have been written over an erasure, they must also be written in the margin and properly initialled, as above.[17]

41 The commentaries did not refer to the processes for amendment or correction of an

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14 Ibid 403.

15 Norman R. Currey *Manual of Titles Office Practice in Victoria* (The Law Book Company of Australasia Limited, 1933) 125, 170, 174.

16 Ibid 125.

17 Ibid 170.

instrument after it had been registered. The plaintiff submitted that any such amendments would have to have been made with the consent of the parties as evidenced by their initials, but contended that that had not occurred in this case.

The plaintiff's submissions concerning the TLA 1890 provisions for the correction of errors in instruments

42 The plaintiff 's case depended on establishing that the Titles Office's power to correct errors in titles did not permit amendments by a Titles Office officer to transfer 683810. To that end, the plaintiff referred to particular powers conferred by the *TLA 1890*.

The Commissioner's power

43 First, was the power given by s 194(II) providing for the Commissioner of Titles to give directions for the correction of errors in the Register Book or in entries made therein or in duplicate certificates of title. Section 194(II) required that the Commissioner in the correction of errors was not to erase or render illegible the original words and was to affix the date on which the correction was made. The plaintiff submitted that it was highly improbable that the amendments to transfer 683810 occurred following a direction from the Commissioner. If that had been their origin, the Registrar would have noted that direction on the title. The number and nature of the amendments to the transfers of the Coonil Estate land made it unlikely that they were all made following a direction by the Commissioner. The Commissioner's powers were essentially directed at resolving disputes and were in the nature of a quasi-judicial power.[18]

44 Entries made on instruments at the direction of the Commissioner were expressly recorded as having that status. One of the transfers of Coonil Estate land recorded such a direction. It recorded a direction of survivorship given under s 268 of the *Transfer of Land Act 1915* on 9 April 1921 to provide that Arthur Charles Langmore was now the registered proprietor of the balance of the Coonil land contained in the

18 See *National Trustees Executors and Agency Co of Australasia Ltd v Hasset* [1907] VLR 404, 417-421.

parent title. In any event, a direction was not a correction to the instrument.

45 The powers contained in ss 82 and 83 of the *TLA 1890* were not relevant to the issues to be determined in this case.

The patent error power

46 As previously stated, the plaintiff submitted that it was most likely that the Registrar or Assistant Registrar of Titles had made the amendments to the transfer acting under the power to correct a patent error contained in s 195 of the *TLA 1890*. A patent error was an obvious error, which was clear on the face of the instrument that was able to be corrected without reference to the parties.

47 The plaintiff relied on cases dealing with the term 'patent error' where it appeared in other statutes and where that term had been described as meaning an error which was clearly manifest or evident.[19] Whether a document contained a patent error was a question of law. It could not be concluded that transfer 683810 contained a patent error because it contained an enforceable personal covenant, which could not be said to have been inserted in error.

48 The dictionary definition of 'patent' applicable to the term 'patent error' is "open to view or knowledge; manifest; evident; plain".[20]

49 The defendants submitted that the authorities on 'patent error' demonstrated that that it did not apply to situations where the error could only be detected by going behind the record. In addition, because the Court did not know the whole 'factual scenario' associated with the correction to transfer 683810, it could not conclude that there was a patent error in that transfer.

50 The plaintiff submitted that it was unlikely that the amendments were made under the power contained in s 198 of the *TLA 1890*. There was no evidence that the Titles

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19 *Riley v Parole Board of New South Wales* (1985) 3 NSWLR 606, 616 and *Larkin v Parole Board of New South Wales* (1987) 10 NSWLR 57 dealing with the *Probation and Parole Act 1983 (NSW)*.

20 *Macquarie Dictionary* (Macquarie Dictionary Publishers, 6th ed, 2013), 1077. See also the doctrine of error of law on the face of the record and the writ of certiorari: *Craig v South Australia* (1995) 184 CLR 163.

Office had sent the title back to the parties for correction or that the parties' initials were on the transfer.

Reference to other transfers of land in the Coonil Estate

51 The plaintiff submitted that in interpreting a document contained in the Register, reference could be made to other documents contained in the Register. In order to support the inference on which her case was based, the plaintiff took the court to 57 transfers of land that formed part of the Coonil Estate out of the parent title. By this process, the plaintiff sought to establish that amendments, somewhat similar to those made to transfer 683810, had been made to a cluster of transfers, particularly in April and May 1912, in order to identify the land that was to benefit from the particular covenants contained in those transfers. The corrections were said to support the drawing of an inference that, in about May 1912, officers in the Titles Office formed the opinion that a number of covenants contained an error, which they could correct by using the 'patent error' power contained in s 195 of the *TLA 1890*. According to this theory, approximately the first 10 covenants which did not identify the land of the beneficiaries of the covenant 'went through' and then someone formed the view that the covenants in transfers of Coonil Estate land contained an error which could be corrected under the 'patent error' power given to the Titles Office by s 195 of the *TLA 1890*.

52 All the corrections were made in red ink by a Titles Office officer after the transfers had been lodged for registration.

53 The defendants disputed that the other transfers could be relied on and submitted that reference could only be made to the particular transfer and perhaps to other instruments referred to in it.

54 The defendants relied on the decision in *Westfield Management Ltd v Perpetual Trustee Company Ltd*,[21] in which the High Court, in considering an easement, said that evidence was admissible to make sense of what the Register identified by referring

[21] (2007) 233 CLR 528.

to the terms and expressions found therein. But evidence to establish the intention or contemplation of the parties to the grant of the easement was inadmissible. The rules of evidence concerning the admissibility of evidence to assist in the construction of contracts *inter partes* of the nature explained by *Codelfa Construction Pty Ltd v State Rail Authority of NSW*,[22] did not apply to the construction of an easement or, on the defendants' case, to a restrictive covenant.

55 The High Court stated:

> However, in the course of oral argument in this Court it became apparent that what was engaged by the submissions respecting the use of extrinsic evidence of any of those descriptions, as an aid in construction of the terms of the grant, were more fundamental considerations. These concern the operation of the Torrens system of title by registration, with the maintenance of a publicly accessible register containing the terms of the dealings with land under that system. To put the matter shortly, rules of evidence assisting the construction of the contracts inter partes, of the nature explained by authorities such as *Codelfa Construction Pty Ltd v State Rail Authority of NSW*, did not apply to the construction of the Easement.[23]
>
> …
>
> [T]he third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee.[24]
>
> …
>
> It may be accepted, in the absence of contrary argument, that evidence is admissible to make sense of that which the Register identifies by the terms or expressions found therein. An example would be the surveying and abbreviations which appear on the plan in the case of DP.[25]

56 While accepting that the *Codelfa* principles did not apply to the interpretation of a restrictive covenant, the plaintiff submitted that the parent title and the folio for the land affected by a covenant could be referred to as could, in this case, the other transfers of Coonil Estate land.

57 I consider that the plaintiff's first ground requires not so much the interpretation or

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22 (1982) 149 CLR 337, 350-352.
23 (2007) 233 CLR 528, [37].
24 Ibid [39].
25 Ibid [44].

construction of the covenant in transfer 683810, but rather discerning, as a matter of fact, how amendments to it came to be made. For that purpose, any relevant evidence can be relied on.[26] I consider that it is permissible to look at other transfers of Coonil Estate land to see if they assist in determining that question by disclosing an identifiable pattern of amendments to transfers after they were registered. I therefore consider that the plaintiff was able to refer the Court to the other Coonil transfers for that purpose.

The plaintiff's analysis of the 57 transfers

58 The plaintiff provided the Court with photographic copies of the microfilmed parent title and the 57 transfers. The plaintiff also provided the Court and the defendants with a magnifying glass for viewing the handwritten corrections and the initials attached to them. This was an understandable step for the plaintiff to take, but even with the aid of a magnifying glass, the handwritten corrections and associated initials on the transfers were, in many instances, difficult to decipher.

59 The plaintiff provided a table of the 57 transfers listed in accordance with their date of execution. In one column, the table identified, by use of the designator '[*]', the transfers that the plaintiff contended contained a covenant which had been corrected by a Titles Office officer in order to identify the land that would benefit from the covenant.

60 The defendants provided their own table in which the transfers were listed according to the date on which they were registered.

61 I will refer to the transfers in the order in which the plaintiff addressed them.

First group of transfers

62 The first category or grouping of transfers comprised approximately the first 15, in which the covenants did not describe or identify the land to which the benefit of the covenant pertained. Those covenants were therefore personal covenants and

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26 *Evidence Act 2008* (Vic) s 55.

contained no words of annexation. They did not run with the land and a number of them have been removed.[27]

63 However, the plaintiff pointed to corrections or amendments written in black on those transfers, which she contended had been made by the parties before the relevant transfer was lodged for registration and, in most instances, before the parties signed it. Many of those amendments were undated.

64 The first transfer, transfer 635244, was dated 22 October 1910, was said to be an example of this practice. The copy of that transfer was a black and white copy. The transfer had been amended to add the name of Mr Hagelthorn as a covenantee. This transfer was probably initialled by Mr J Riley, the clerk for the solicitors Maddock, Jamieson and Lonie, who witnessed the Langmores' signatures on many of the transfers and who in all likelihood used the initials 'JR'. However, the plaintiff said that it was not critical to her case whether Mr J Riley had made or initialled the amendments. It was sufficient to note that the corrections were made in black ink and to conclude that they were initialled before the parties signed the transfer. The plaintiff sought to establish a pattern whereby amendments made before lodgement were written in black and initialled by the parties or their representatives.

65 Transfer 635244 also contained an amendment to the right of carriageway which it recorded. That correction appeared to be initialled with the initials 'JM' with what the plaintiff contended was a looping type of initialling. The defendants, in contrast, described the initials 'JM' as containing a 'florid J'. The plaintiff contends that the initials were probably made in red ink.

66 The plaintiff submitted that it was "very likely" that the 'looping type' 'JM' initials appearing in transfer 635244 were the same initials 'as were used in transfer 683810. Again, however, the plaintiff emphasised that her case did not depend on establishing that the initials adjacent to the critical amendments to transfer 683810 were to be read as 'JM'. At one point in argument, the plaintiff appeared to concede

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[27] Transfer 14 was of the land for establishment of the Malvern Bowling Club and did not contain a covenant.

that the initials 'JM' could well refer to Mr Maddock.[28]

67 The defendants submitted that the 'JM' were the initials of Mr John Henry Maddock, of Maddock, Jamieson and Lonie, the vendors' solicitor and the solicitor for Mr Hagelthorn.

68 The second transfer, transfer 635535, and the fourth transfer, transfer 643753, were further instances, on which the plaintiff relied, of amendments being made in black ink before the parties signed the particular transfer.

Transfers the plaintiff contended contained amendments made by the Titles Office

69 The first transfer which the plaintiff contended contained amendments made by a Titles Office officer was transfer 660601 which was dated 29 August 1911. It contained red ink amendments dated 30 May 1912 to insert as covenantees the names of the Langmores, their executors and administrators, 'the registered proprietor or proprietors for the time being of the untransferred part of the land on the said certificate of title' and to delete the name of 'Frederick Hagelthorn'.

70 The plaintiff relied on transfer 674899, dated 13 January 1912 and amended on 13 March 1912, which was the transfer of Lots 1 (on which the Coonil mansion was erected), 36 and 37.[29] The transferee was Mr Frederick Hagelthorn who, as the plaintiff pointed out, as at the date transfer 683810 was executed, owned land that was capable of being benefited by the covenant in that transfer. Despite that fact, his name had been deleted from transfer 683810 by corrections made in red ink.[30]

71 The plaintiff contended that transfer 674899 also contained an addition by the Titles Office under the heading 'Encumbrances referred to' of the words: 'the special railway conditions, if any, contained in the Crown grant'.[31]

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28 T 146.
29 Cabrini Hospital now stands on this land.
30 T 31.
31 A similar amendment was made to transfer 675216.

72 The plaintiff contended that this addition was initialled by the same person who had initialled the amendments to transfer 683810, using the 'JM' initials. The defendants submitted that, as this addition was not an amendment to annex the benefit of the covenant to land, it did not provide any guidance about Titles Office practice of relevance in this proceeding.

73 It is unnecessary to describe in any detail the other transfers that formed part of the first group of transfers, save to note they also contained examples of amendments made in black ink.[32]

74 The first in time of the transfers which the plaintiff contended had been amended by the Titles Office for the purposes of identifying the land of the covenantee was transfer 676443 which was dated 21 December 1911 with amendments dated 17 May 1912. It contained some of the amendments made to transfer 683810. It was prepared by Sugden & Cornwall solicitors, but the Langmores' signatures were witnessed by Mr J Maddock. The initials attached to the amendments appear to be 'TSC'.

75 Next was transfer 676519 dated 28 February 1912, which contained amendments made in red ink on 4 April 1912. The plaintiffs noted that they failed to identify that the land of the Langmores was the land benefited by the covenant. This transfer was prepared by Williams & Matthews, solicitors for the purchaser, but again the Langmores' signatures were witnessed by Mr J Maddock. The initials 'JR' and 'JM' appear to be on the transfer. The defendants submitted that the transfer had multiple initials and that it was not clear who made the changes or who had initialled or approved them.

76 Transfer 676748 was dated 27 February 1912 and contained amendments dated 30 May 1912. It contained amendments made in black or red ink. The amendments made in black amending the names of the covenantee were accompanied by the initials 'LMcK,' which were the initials of the purchaser Leonore McKail. The plaintiff submitted that that amendment had been made before the transfer was

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32 They were transfers 642131, 643948, 654299, 656185, 658003, 658173, 662345 and 670393.

signed. There were also amendments in red to add the words 'registered proprietor or proprietors for the time being of the untransferred part of the land in the said Certificate of Title'. This transfer was prepared by Morgan & Fyffe solicitors for the purchaser. Again, Mr J Maddock witnessed the Langmores' signatures. The initials to the red ink amendments appear different to the previous 'JM' initials, as they no longer contain the florid 'J'.

77 Transfer 680320 was dated 2 April 1912 with amendments dated 15 May 1912. It contained amendments which had been initialled by 'JR'. It also contained three amendments made in red ink. The first added the words 'and transferees' so that the covenant was made not only on behalf of the covenantor and his executor and administrators, but also on behalf of her transferees. The second added a reference to the land of the covenantees. The third added the words 'or transferees' as covenantors. The fourth replaced the word 'now' with 'or'. This transfer was prepared by Doyle and Kerr solicitors and again the Langmores' signatures were witnessed by Mr J Maddock. The initials to the amendment were said to be the same as those on transfer 683810. They appear to be the initials 'JM' with the loop. The defendants submitted that it was not possible to know whose initials they were.

78 The next transfer was 680403 executed on 2 or 7 April 1912. The amendments were in red ink and dated 16 May 1912. The corrections in red ink added the words:

> and transferees, registered proprietor or proprietors for the time being of the land now described in Certificate of Title.

79 However, these words were inserted in the wrong location in the covenant so that they described the interest of the purchaser and covenantor, rather than the vendors and covenantees, for whose benefit the covenant was designed to endure. The amendments to transfer 680403 appear to have had a number of initials added to them. They appear to contain the 'JM' initials. Mr J Maddock witnessed the Langmores' signatures, although his firm did not prepare the transfer.

80 Transfer 680403 also contained corrections made in black ink, which the plaintiff submitted bore the initials of either Mr J Maddock or the person who witnessed the

purchaser's signature on the transfer.

81 Transfer 680524 was dated 4 April 1912 with amendments dated 18 May 1912. This transfer was handwritten. The amendments were again designed to identify the land of the covenantee, but were also inserted in the wrong place and did not have that effect. The amendments were initialled by 'JM'. The transfer was prepared by Wisewould Duncan Wisewould, presumably the purchaser's solicitors. Mr J Riley witnessed the Langmores' signatures.

82 Transfer 682997 was dated 23 April 1912, with amendments dated 10 June 1912, which added the words 'registered proprietor or proprietors for the time being of the untransferred part of the land… in the Certificate of Title'. The transfer was prepared by the purchaser's solicitors and again the Langmores' signatures were witnessed by Mr Riley. It is unclear whose initials were attached to the amendments, the plaintiff suggested that they were 'IMR or some initials similar', but they are very hard to read.

83 Transfer 683694 was dated 2 May 1912 and contained undated amendments in black ink with the 'JR' initials attached to them. One amendment added the words of description of the covenant and annexation. The plaintiff submitted that the parties made the amendments.

84 Transfer 683610 was the transfer in issue in this proceeding with amendments dated 31 May 1912. I have described these amendments earlier in this judgment.

85 Transfer 689278 was dated 30 May 1912 with amendments dated 24 or 26 July 1912. An amendment on the first page of the transfer added words designed to identify the land of the covenantee. There were four initials and four dates. The transfer was prepared by the purchaser's solicitor. It is difficult to identify who witnessed Mrs Langmore's signature. One of the amendments deleted Mr Langmore's name as a signatory. It had the 'JR' initials It is impossible to decipher the other initials.

86 Transfer 692263 was dated 15 June 1912 and it contained undated amendments in

red ink concerning a right of carriageway. A substantial part of the instrument had not been reproduced in the document produced to the Court. The transfer was prepared by Maddock, Jamieson and Lonie.

87 Transfer 692264 was dated 15 June 1912 and was prepared by Maddock Jamieson and Lonie. The amendment dated 14 August 1912 was to the description of the land. It was initialled by 'JM'. Mr Riley witnessed the Langmores' signatures.

88 Transfer 694020 was dated 3 September 1912 with amendments dated 12 September 1912. It was prepared by Maddock Jamieson and Lonie. Mr J Riley witnessed the Langmores' signatures. It contained undated amendments in black ink initialled by 'JR'. The amount of the purchase price was amended. It also contained amendments in red ink probably initialled by 'JM'. The words 'heirs' were added to the covenant in a number of places.

89 Similar amendments to insert the word 'heirs' were made to transfer 694722, which was dated 12 September 1912. The amendments were dated the same day.

90 Transfer 731001 dated 18 November 1913 contained amendments, but the plaintiff did not contend that they were made by a Titles Office officer after lodgement, but rather were made before the transfer was executed. However, the plaintiff contended that the significance of transfer 731001 lay in it being the first of the transfers containing an amendment initialled by the Langmores and Mr Hagelthorn or his attorney. It reinforced the inference that the amendments to transfer 683810 were not made by the parties, because the initials on transfer 731001 differed from those on transfer 683810.

91 The defendants submitted that the amendments to transfer 731001 were not relevant because they were not made in order to annex the benefit of the covenant to the land.

The remaining transfers on which the plaintiff relied

92 In addition to transfers occurring near the time of the execution of transfer 683810, the plaintiff relied on a number of transfers executed at a later time that contained

amendments in red ink, that she contended were made by officers in the Titles Office.

93 Transfer 721352 was dated 20 July 1913 and contained amendments dated 12 August 1913. It is unclear who initialled the amendments. They added the words 'heirs' and 'transferees'. The transfer was prepared by Angus A Sinclair, solicitor for the purchaser. Mr Riley witnessed Mr Langmore's signature. Mrs Langmore's signature was witnessed by Mr White, a bank manager of Berwick.

94 Transfer 731965 was dated 12 November 1913 with amendments dated 14 February 1914. The amendments added the word 'transferee' to the covenantor section of the transfer. It is difficult to decipher the initials to that amendment. The transfer also contained amendments in black ink which 'JR' initialled. An amendment to the date of the transfer was made on its second page with different initials. The transfer was prepared by the purchasers' solicitors. Mr Riley witnessed Mr Langmore's signature and a bank manager witnessed Mrs Langmore's.

95 Transfers 732121 was dated 26 November 1913 and contained undated amendments in black initialled by 'JR'. It also contained amendments in red ink to the description of the land. They appear to have been made on 11 February 1914 and initialled 'EAL'. The purchaser's solicitor prepared the transfer and Mr Maddock witnessed the Langmores' signatures.

96 Transfer 735629 was dated 19 January 1914 and was prepared by Maddock Jamieson and Lonie and contained amendments dated 2 February 1914 to the title particulars of the land. It also contained amendments in black to the execution clause to show that Mr Hagelthorn had signed the transfer by his attorney. It is difficult to decipher the initials to those amendments. Mr Maddock witnessed the Langmores' signatures.

97 Transfer 736945 was dated 22 January 1914 with amendments dated 21 February 1914 adding the word 'executors' to the description of the covenantors. It was prepared by the purchasers' solicitor, but Mr Maddock witnessed the Langmores' signatures. It is difficult to decipher the initials accompanying the amendments. It

also contains some black ink amendments.

98 Transfer 738586 was dated 20 February 1914 and was prepared by Maddock Jamieson and Lonie. It contained red ink amendments dated 25 March 1914 to the description of the covenantees, the covenantors and of the land. The initials could be 'JM', although they are difficult to decipher. Mr Maddock witnessed the Langmores' signatures.

99 Transfer 748821 was dated 1 June 1914 and was prepared by Maddock Jamieson and Lonie. It contained red ink amendments dated 30 June 1914 on the first page changing the description of the Crown portion details of the land and initialled by 'RB'. Mr Maddock witnessed the Langmores' signature.

100 Transfer 749242 was dated 22 May 1914 and contained undated amendments in black ink to the execution clause which were again initialled by 'JR'. Mr Riley witnessed the signature of Mr Hagelthorn's attorney. The plaintiff submitted that these amendments were made at the same time as the amendments to the execution clause. Mr Maddock witnessed the Langmores' signatures.

101 Transfer 750144 was dated 12 June 1914 and contained red ink amendments dated 30 June 1914, to correct the detail of the Crown portion of the land. Maddock Jamieson and Lonie prepared the transfer and Mr Maddock witnessed Mr Langmore's signature, but it was deleted with Mr Riley initialling the deletion.

102 Transfer 765214 was dated 1 December 1914 with amendments dated 16 December 1914 in red ink to add the words 'and transferees' to the covenantor section of the covenant. It was prepared by the purchaser's solicitor and the Langmores' signatures were witnessed by Mr J Riley and another person whose signature is difficult to decipher. It is also difficult to decipher the initials attached to the amendments.

103 Transfer 765602 was dated 30 November 1914 with amendments dated 18 December 1914. One of the amendments added the words 'heirs' and 'transferees registered proprietor or proprietors for the time being of the land now comprised in Certificate

of Title Volume 3442 Folio 688352' as the covenantees which had been omitted from the original transfer. The transfer was prepared by the purchaser's solicitors Crisp Cameron & Hanby. The Langmores' signatures were witnessed by Mr J Riley. It is not clear who initialled the amendments. There were also amendments, written in black, deleting and inserting words connected with a right of drainage.

104 Transfer 774671 was dated 30 April 1915 and contained red ink amendments to the number of the plan of subdivision dated and initialled on 2 June 1915. It is difficult to decipher the initials. Mr Riley witnessed the Langmores' signatures.

105 Transfer 775485 was dated 20 May 1915 and was prepared by Maddock Jamieson and Lonie and contained undated amendments in black ink, to the execution clause. The amendments bear the 'JR' initials of Mr Riley.

106 Transfer 778538 was dated 23 June 1915 and was prepared by Maddock Jamieson and Lonie and contained a minor amendment dated 15 July 1915 to the description of the carriageway. It appears to contain the 'JM' initials.

107 Transfer 780847 was dated 26 June 1915 and was prepared by Maddock Jamieson and Lonie. Mr Riley witnessed the Langmores' signature. It contained an amendment dated 23 August 1915 to remove the right of drainage.

108 Transfer 796703 was dated 4 March 1916 and was prepared by Mills & Oakley, who presumably were the purchaser's solicitors. Mr J Maddock witnessed Mrs Langmore's signature. It contains undated black ink amendments concerning the purchase price. The plaintiff submitted that the amendments were made at the time of execution by the purchasers.

109 Transfer 835439 was dated 14 September 1917 with amendments made on 21 September 1917 and 12 October 1917. It was prepared by Maddock Jamieson and Lonie It contained black ink amendments initialled by 'JR'. It also contained red ink amendments adding the words 'hereby transferred', which appear to bear the initials 'GEB'. Mr Riley witnessed the Langmores' signatures.

110 There were a few remaining transfers of land in the Coonil Estate to which the plaintiff referred, but they did not form a significant part of the pattern which the plaintiff sought to draw.[33]

The Plaintiff's submissions about the significance of the 57 transfers

111 The plaintiff submitted that in order to determine the issues in dispute, the Court had to make findings of fact, including by inference, based on the civil standard of proof. The Court was then required to make holdings of law based on those findings of fact.

112 The plaintiff submitted that the 57 transfers demonstrated a pattern of conduct in making amendments to the transfers of the Coonil Estate land. I have already set out the plaintiff's submissions that sought to establish that pattern and I will not repeat them.

113 The plaintiff submitted that it was common ground that amendments to the covenants made in black ink and initialled were made before, or at the time that, the parties executed the transfer concerned. It was asserted to be common ground that the red ink amendments were made by an officer in the Titles Office after the particular transfer was lodged.

114 It was also common ground that the first dozen or so transfers contained personal covenants.

115 The plaintiff submitted that it was likely that more than one officer at the Titles Office may have made amendments to the transfers and that that explained the presence of different initials.

116 It was unlikely that the amendments had been made pursuant to the power in s 198 of the *TLA 1890*, because the document lacked any indication to that effect and because the pattern of amendments that had been made. There was no document evidencing the consent of the parties to the amendments.

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33 Transfers 712362, 720331,721299,729703,730961 and 731786: see T 42–4, 48.

117 The plaintiff submitted that the recording of the covenant on the title did not have any effect on the validity of the restrictive covenant. She relied on the statement of Gillard J in *Fitt v Luxury Developments Pty Ltd*,[34] 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.
>
> 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.

118 The plaintiff also submitted that the description of the land having the benefit of the covenant in transfer 683810 was ambiguous because transfer 683810, which contained the covenant was registered on 14 May 1912 and another transfer 676748 of Coonil Estate land was registered the following day, 15 May 1912, although it was actually executed on 27 February 1912. The amendments to transfer 683810 were not made until 31 May 1912. So the untransferred Coonil Estate land which the covenant in transfer 683810 benefited was different in composition on 31 May 1912 than it had been on 14 May 1912. It was unclear therefore what land was being burdened by the covenant.

The defendants' submissions

119 The defendants relied on s 88(3) of the *Transfer of Land Act 1958* ('*TLA 1958*') that provides:

> 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.

120 Section 88(1) provides that, in the specified circumstances, the Registrar has the power, and is taken to have always had the power, to record on a folio of the Register a restrictive covenant affecting the parcel of land to which the folio of the Register relates or any instrument purporting to vary or release the operation of a

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34 [2000] VSC 258 [178]-[179] ('*Fitt's Case*').

restrictive covenant.

121 The defendants submitted that the effect of s88(3) was that the registration of the transfer containing the covenant cured any defect in the instrument.

122 The defendants also relied on the provisions of ss 40-43 of the *TLA 1958*, in particular s 41 for the proposition that the Certificate of Title is conclusive evidence of title. They submitted that absent fraud, the terms of the registered instrument, including the restrictive covenant recorded on it, are binding upon the registered proprietor. They also relied on the statements of the High Court in the *Westfield Management* Case.[35]

123 Thirdly, they submitted that there were many ways that amendments might have been made to the instruments of transfer. These included amendments made under ss 82, 83, 194(II) and 195 of the *TLA 1890*. In addition, s 198 provided for corrections or amendments to be made to an instrument after it has been lodged for registration.

124 The commentaries on the transfer of land in Victoria did not deal with the Titles Office practice with post-lodgement amendments. If the law permitted reference to the transfers executed after transfer 683810, there appeared to be a practice of amendments to instruments lodged for registration, with the amendments being executed by the parties or their lawyers.

125 The defendants disputed that there was ambiguity about which land benefited from the covenant in transfer 683810 as amended on 31 May 1912 and relied on s 194(II) *TLA 1890*, which states in relevant parts:

> except as regards any entry made in the register book prior to the actual time of correcting the error or supplying the omitted entry.

126 Transfer 683810 only had effect upon its registration. Transfer 676748 was registered before the amendment of transfer 683810, which occurred on 31 May 1912 and therefore did not obtain the benefit of the restrictive covenant contained in transfer

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35 (2007) 233 CLR 528.

683810.

127 The defendants submitted that there was no evidence on which to make a finding as to how the alterations to transfer 683810 occurred. The amendments to it contained three sets of initials and three dates. It could not be said whose initials they were. Alternatively, the defendants submitted that the initials 'JM' which appeared on transfer 683810 were Mr John Maddock's, the vendors' solicitor who acted for the Langmores and Mr Hagelthorn in the transfers of the Coonil Estate land.

128 The defendants submitted that in drawing inferences about how the amendments had been made the Court must act on evidence that raised a reasonable and definite inference. The evidence must do more than give rise to conflicting inferences of equal degrees of probability which left the choice between them a matter of conjecture.[36]

129 The defendants submitted that even if an officer in the Titles Office wrote and initialled the amending words, it was only speculation whether that had occurred after the parties had been requested by the Registrar to amend or correct the transfer and after they had authorised the amendment or correction to be made. The Titles Office had power to make that request under s 198 of the *TLA 1890*. The parties may have authorised their solicitors to initial amendments to the transfer. The working papers might have contained correspondence from the parties related to the giving of that authority, but they were no longer available.

130 The more probable inference was that after the lodgement of transfer 683810, the amendments made to the transfer were initialled by the parties or their attorneys.

131 The defendants submitted that covenants contained in, or added to, transfers lodged after the addition of the covenant in transfer 683810, could not be of assistance because the court could not look at subsequent conduct in interpreting an *inter partes* instrument.[37] A prudent solicitor would not be expected to conduct searches of all 57

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36 *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125, 141.

37 *FAI Traders Insurance Company Ltd v Savoy Plaza Pty Ltd* [1993] 2 VR 343.

transfers.[38]

132 The defendants submitted that the transfers that were signed outside the cluster of transfers in May and June 1912 were of no assistance. They were mainly prepared in a typed form with the land benefited annexed. The defendants submitted that a number of the transfers on which the plaintiff relied to establish a pattern of conduct, for example, transfers 721352 and 765602 were signed two years after transfer 683810 and did not provide guidance on how the amendments to it came to be made.

133 The initials of the amendments on the transfers varied and they might have been the initials of different purchasers of the particular lots.

134 There was no consistency in the wording of the amendments. A number of amendments made to transfers after 31 May 1912 added different words to those added to transfer 683810.

Conclusion on the plaintiff's first ground

135 In my opinion, the evidence presented by the plaintiff does not prove on the balance of probabilities that the amendments to transfer 683810, including to identify the land that benefited from the covenant, were invalidly made by a Titles Office officer purporting to rely on the patent error power contained in s 195(II) of the *TLA 1890* or, indeed, that they were made at the initiative of a Titles Office officer.

136 I consider that the plaintiff has not established the pattern of conduct on which she relied. The transfers do not reveal a uniform pattern of how the amendments came to be made. Attempting to recreate events of a century ago is always difficult and made more difficult by the unavailability of the working papers associated with the transfers.

137 To the extent that it is possible to read the initials recorded next to amendments of particular transfers, they appear to reveal the initials of a number of different people. In several instances the initials were impossible to read.

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38 *Burshill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (1971) 124 CLR 73, 77-8.

138 There were many amendments made in red and not all were expressed in the same terms. There appeared to be no consistent pattern. No expert evidence was called to attempt to decipher the initials placed next to the amendments and to express an opinion about whether they could be matched to anyone who had signed the transfers or witnessed the signatures to the transfers.

139 It is at least as probable as the plaintiff's theory that the parties may have realised that transfer 683810 required amendment and that, at their initiative or request, the Registrar required such correction under s 198 of the *TLA 1890*, because the parties advised him that the dealing was erroneous or defective. The parties may then have made or procured the amendments to the transfer.

140 The amendments to transfer 683810 bear the initials 'JM', which may well be the initials of the Langmores' solicitor, Mr John Henry Maddock, who witnessed their signature on many transfers.

141 Where competing inferences are reasonably open on the evidence, in order for the court to draw an inference in favour of a party who bears the onus of proof, the inference must be the most probable.[39] Inferences must be based on evidence and not on speculation.

142 The plaintiff has not proved on the balance of probabilities that the amendments to transfer 683810 were made by any officer in the Titles Office.

143 The proposition that a number of persons at the Titles Office would suddenly commence amending covenants without the prior consent of the parties seems implausible.

144 It is also significant that, in two transfers amended at relevant times, the amending words of annexation were inserted in the wrong place. It might be thought unlikely that the Titles Office seeking to correct a patent error, as the plaintiff contends it was, would make such errors.

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39 *Holloway v McFeeters* (1956) 94 CLR 470, 477, 480 and *Box Hill Institute of TAFE v Johnson* [2015] VSCA 245 [37].

145 I do not accept the defendants' indefeasibility argument. I do not consider that s 88(3) of the *TLA 1958* has the effect of establishing that the restrictive covenant is deemed to have been validly made. No authority was cited in support of that proposition and it is contrary to the express statement of Gillard J in *Fitt's Case*.[40]

146 I do not accept the plaintiff's argument that there is an ambiguity as to the land that benefits from the covenant in transfer 683810 as amended on 31 May 1912. By reason of the provisions of s 194(II) of the *TLA 1890*, that amendment could not operate retrospectively to affect entries made in the Register Book, prior to the amendments made on 31 May 1912.

147 I raised with the parties the relevance of the presumption of regularity to the plaintiff's attack on the validity of the amendments to transfer 683810. That presumption can be particularly persuasive in circumstances where 'the matter is more or less in the past and incapable of easily procured evidence'.[41] However, the presumption is applicable only where it is clear under what statutory provision a step was being taken. That is not the case here.

148 I am prepared to accept that the difference between the amendments made in black and those made in red reflects whether the amendments were made before or after transfers were lodged for registration. But, that contrasting colouring of amendments throws little light on how the amendments came to be made.

The plaintiff's second ground

149 The second ground on which the plaintiff relied assumed that the amendment to the covenant in transfer 683810 was validly made. The plaintiff argued that, even with the amendment, the covenant was not effective to create a restrictive covenant. The addition of the words 'or transferees' did not apply to transferees taking after the

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40 *Fitt's Case* [2000] VSC 258.

41 *Kingham v Sutton* [2002] FCA 506 [59] (Wilcox and Marshall JJ) quoting from *Wigmore, Evidence in Trials at Common Law* (Little, Brown and Co, 3rd ed, 1981) vol 9, [2534]; *Re Thomson* [2015] VSC 370; *Johnson v Director of Consumer Affairs Victoria* [2011] VSC 595 [56]-[69].

first transferee and therefore the covenant did not run with the land.[42]

150 The plaintiff submitted that a restrictive covenant should describe the persons bound by the covenant as including all transferees in that part of the instrument, naming the persons bound by it, rather than relying on the content of the covenant to do so.

151 The defendants submitted that it was sufficient that the covenant, read as a whole, made clear whom it bound. The reference to 'transferees' meant all transferees, subsequent as well as immediate. They also relied on the fact that the covenantor, Mr Leslie, requested in the transfer that the covenant appear as encumbrances on the Certificate of Title and run with the land.

152 The defendants submitted that s 79 of the *PLA,* which retained the wording originally enacted in s 79 of the *Property Law Act 1928*, made it unnecessary to state on whose behalf the covenant was made. Section 79 provides that unless the contrary intention is expressed, covenants are deemed to be made by the covenantor on behalf of himself, his successors in title and the persons deriving title under him or them and their successors in title

> and, subject as aforesaid, shall have effect as if such successors and other persons were expressed.

153 The defendants relied on the practice of the Titles Office in support of its submission that the reference to 'transferees' in the covenant in transfer 683810 included subsequent transferees. That practice was referred to in Mr Currey's book, where it is stated that:

> A restrictive covenant contained in a transfer will not be notified as encumbrance upon the Certificate of Title to issue on the transfer, unless such covenant is negative in form and is expressed to be entered into by the transferee, his heirs, executors, administrators and transferees, with the transferor, as registered proprietor of other land retained by him, his heirs and executors, administrators, and transferees, or unless such covenant is negative in form and is shown to have been entered into pursuant to a 'building scheme.'[43]

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42 The plaintiff relied on *Re Dennerstein* [1963] VR 688.

43 Currey, above n 15, 174.

154 In *Blue Concept Pty Ltd v Christine Farnan*,[44] McDonald J summarised the effect of the authorities on the issues raised by the plaintiff's second ground as follows:

> The construction of the terms of the covenant begins with consideration of the ordinary meaning of the words contained therein, read in context. The objective is to ascertain the intention of the parties as revealed by the language of the covenant. The plaintiff's contention that it is not bound by the obligations created by the covenant cannot be reconciled with the plain meaning of the words contained in the covenant. The covenant records the express intention of the covenantor that the covenant 'shall run with the said land' and 'be binding on the registered proprietor or proprietors for the time being. This language weighs heavily against the plaintiff's contention that the obligations created by the covenant expired prior to it becoming the registered proprietor of the land.
>
> A covenant which runs with the lands binds the successors in title to the original parties to the transfer. The covenant which runs with the land is to be distinguished from one which creates personal obligations as between the parties to a transfer of land.[45] (citations omitted)

155 The decision in *Re Dennerstein*,[46] upon which the plaintiff relied, was not relevant because it dealt with the question of whether a building scheme existed.

156 The defendants relied on the proposition that in interpreting a restrictive covenant any doubt should be construed against the covenantor or grantor.[47] The plaintiff submitted that that rule was one of last resort and, in any event, the principle was wrong and should not be followed. She also submitted that the principle, if it did exist, was not applicable as transfer 683810 was prepared by the solicitors for the covenantee. She further submitted that if otherwise there was scope for the principle to operate, it had no application, because there was insufficient doubt as to the meaning of the covenant.

Conclusion on the plaintiff's second ground

157 In order for a covenant to bind subsequent transferees, it is necessary to show from its wording, that the burden of the covenant was intended to run with the

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44 [2015] VSC 125.
45 Ibid, [10].
46 [1963] VR 688.
47 *Ferella v Otvosi* (2005) 64 NSWLR 101 [15]–[23].

covenantor's land.[48] As Gillard J stated in *Fitt's Case*:[49]

> 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.[50]

158 The intent of the parties to the covenant is to be objectively ascertained. The words of a restrictive covenant must always be construed in their context and upon a reading of the whole of the instrument.[51]

159 I consider that reading transfer 683810, as a whole and objectively, indicates an intention that subsequent transferees are to be bound by the covenant and that it was to run with the land. It contains the words 'as transferees'. It also contains an express request that it run with the land. This appears in the last four lines of the covenant which state:

> AND the said William Durham Leslie hereby requests that the above covenants may appear [as] an encumbrance on the Certificate of Title to be issued in respect of the land hereby transferred and run with the land.

160 I consider that the intent of the parties to the covenant contained in transfer 683810 is sufficiently clear from the words of the covenant. They reveal that the benefit of the covenant was to run with the land. The covenant is, therefore, a restrictive covenant that binds the plaintiff. It is unnecessary to apply the principle that, in the case of doubt, the covenant is to be construed against the covenantor.

Conclusion

161 The proceeding is dismissed. I will hear the parties about costs.

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48 *Fitt's Case* [2000] VSC 258 [158]; Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (LexisNexis Butterworths, 3rd ed, 2011) 381.

49 *Fitt's Case* [2000] VSC 258.

50 Ibid [93].

51 *Prowse v Johnstone* [2012] VSC 4, [52].