In re the Registrar General's Stated Case
[2011] NTSC 69

PARTIES:	IN RE THE REGISTRAR GENERAL'S STATED CASE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	83 of 2011 (21122485)
DELIVERED:	21 September 2011
HEARING DATES:	30 August 2011
JUDGMENT OF:	MILDREN J

CATCHWORDS:

CASE STATED – Land Title Act (NT) s 113 – interpretation – Registrar-General's powers – whether persons affected by the court's decision should be served – applicant takes no particular position as to the answers given to the stated case – power to register an amendment to a registered covenant – whether consent and mortgagees of dominant tenements required – whether Registrar-General may require consent of registered proprietors of dominant tenements – whether consent is necessary where original owner reserved a power of dispensation – whether registered covenant is an interest in land – validity of powers of reservations.

Interpretation Act s 17

Land Title Act ss 4, 10(1), 11(1), 28, 29, 76, 77, 81(1)(b), 108, 109, 112(4), 113, 113(3), 114, 182, 184, 188(1), 188(2), 188(3), 210, 210(3);

Law of Property Act ss 167, 170, 170(1), 171, 172(2), 173(1), 173(2), 173(3)(a), 177

Supreme Court Rules O 18

Jones & Ors v Sherwood Hills Pty Ltd, unreported SC NSW (8 July 1975), followed

Clarke v Burnie City Council [2008] TASSC 75; Elliston v Reacher [1908] 2 Ch 374; Haywood v The Brunswick Permanent Benefit Building Society (1881) 8 QBD 403; Mayner v Payne [1914] 2 Ch 555; Osborne v Bradley [1903] 2 Ch 446; Re Douglas (1928) 29 SR NSW 48; Re Louis and the *Conveyancing Act* [1971] 1 NSWLR 164; Re Priddle (1916) 16 SR NSW 54; Re The *Land Transfer Act*, 1885 and The *Public Works Act 1903* (1905) 25 NZLR 385; Whitehouse v Hugh [1906) 2 Ch 283 referred to

Bradbrook and Neave, Easements and Restrictive Covenants, 3rd Ed Butterworths, Sydney (2011)

J. Baalman, Variation of Restrictive Covenants (NSW) (1948) 21 ALJ 427

Megarry and Wade, The Law of Real Property, 4th Ed Stevens, London (1975)

Peter Butt, Land Law, 6th Ed, Thomson Reuters, Sydney (2010)

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Whalan, The Torrens system in Australia, Law Book Co, Sydney (1982)

REPRESENTATION:

Counsel:

Applicant:	M. Grant QC, Solicitor-General for the Northern Territory
Respondent:	No appearance

Solicitors:

Applicant:	Solicitor for the Northern Territory

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

In re the Registrar-General's Stated Case [2010] NTSC 69
No 83 of 2011 (21122485)

IN THE MATTER OF AN APPLICATION BY THE REGISTRAR-GENERAL PURSUANT TO S.28 OF THE *LAND TITLE ACT*

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 21 September 2011)

[1] This is a Stated Case pursuant to s 113 of the *Land Title Act (NT)* (the LTA) by the Registrar-General for the Northern Territory.

Factual background

[2] Frances Park (Darwin) Pty. Ltd. (the developer) was the developer of a subdivision of land in Stuart Park, known as the "Frances Park Estates." The subdivision comprised ninety nine residential blocks designed for single dwelling occupancy. Prior to the sale of any of the blocks, the developer registered in the Lands Titles Office restrictive covenants over each of the blocks. Section 109 of the LTA permits registration of such covenants even if the land benefited and the land burdened by the covenants is owned by the same registered proprietor. Subsequently the lots have been sold to

individual purchasers. In most, if not all cases, there is a registered mortgage in favour of a lender registered over each lot's separate title.

[3] The provisions of the covenants make it clear that the benefit and the burden of the covenants runs with the land, are binding on all successive registered proprietors, and are enforceable in equity and in contract by successive registered proprietors as a scheme of development.[1]

[4] Clause 4 of the covenants provides:

> Any of these covenants may be waived, released or modified in whole or in part by Frances Park in its absolute discretion.

[5] The instrument of covenant contains a schedule of provisions which form part of the covenants, which inter alia, prove that there shall be only one dwelling on the land,[2] that prior written approval from the developer is required before commencing to construct a building on the land,[3] providing for design guidelines,[4] as well as other matters. Clause S9 specifically provides that an owner shall seek approval for the development of his or her block within 12 months of the settlement date, and complete the building and fencing within 24 months of that date. There are a number of purchasers who have or will fail to comply with clause S9 and are apparently anxious to sell their lots. These purchasers are concerned that the breach of Clause S9

[1] See clauses 1, 2 and 7, of the covenant and *Elliston v Reacher* [1908] 2 Ch 374; *Re Louis and the Conveyancing Act* [1971] 1 NSWLR 164.
[2] Clause S16(b).
[3] Clause S2
[4] Clauses S3(j) and S3A

will affect adversely their ability to sell. The developer decided to waive or extend the time for compliance with clause S9, excising its powers under clause 4. It proposes to register in the Lands Titles Office an instrument amending the covenant in respect of the relevant lots. Such an instrument is registrable pursuant to s113 of the *Land Title Act,* which is in the following terms:

> **113. Amending covenant or covenant in gross**
>
> (1) A registered covenant or covenant in gross may be amended by registering an instrument of amendment of the covenant or covenant in gross.
>
> (2) An instrument of amendment cannot change a party to the covenant or covenant in gross.
>
> (3) An instrument of amendment must include the consents of all registered mortgagees of the lot burdened by the covenant or covenant in gross.

[6] The Registrar-General has approved a form for, and given directions in relation to, the registration of an amendment of a covenant. It will be necessary to refer to the provisions of the LTA dealing with the powers of the Registrar-General to approve forms and give directions later in this judgment. The relevant form requires that the form be executed by the owner of the land burdened by the covenant, the owner of any land receiving the benefit of the covenant, and the consent of all registered mortgagees of the land burdened by the covenant. If this is required to be done, each of the registered proprietors of all 99 lots would need to execute such an instrument. The developer is concerned that this would pose an onerous and expensive burden on the developer and may be impossible to achieve. The

developer wrote to the Registrar-General inquiring whether this was necessary, given that this is not required by the specific provisions of s 113 of the LTA.

[7] The Registrar-General has stated a case to the Court, pursuant to s 28 of the LTA, in which there are three questions:

1. Does s 113(3) of the *Land Title Act* (NT) permit the Registrar-General to register an instrument of amendment of covenant in respect of a lot within a subdivision where that instrument of amendment includes the consents of all registered mortgagees of the lot burdened by the covenant, but not the consents of all registered mortgagees of the lots benefited by the covenant or the consents of registered mortgages of all lots within the subdivision?

2. May "Form 64- Amendment of Covenant" prescribed by the Registrar-General and by direction issued pursuant to s 210 of the *Land Title Act* lawfully prescribe a requirement for execution of an instrument of covenant by the owner(s) of the land receiving the benefit of the covenant?

3. Where a unilateral power in a registered memorandum of covenant is exercised to amend the covenant, may the Registrar-General lawfully register an instrument of amendment of covenant for that lot which would affect the prior registered interest of the owner(s) of the land receiving the benefit of the covenant without the consent of those owners?

Matters of procedure

[8] Section 28 of the LTA provides:

> **28. Other referrals by the Registrar-General to the Supreme Court**
>
> In any matter under this Act, the Registrar-General may-
>
> (a) apply to the Supreme Court for directions; or
>
> (b) state a case for decision by the Supreme Court.

[9] The Act is silent on the procedure to be followed, and in particular, whether service of the application or stated case is required on any interested party. The assumption is that the jurisdiction of the Court having been exercised, matters of procedure will be governed by the *Supreme Court Rules*. The application to the Court was commenced by Originating Motion, Form 5D, which is appropriate where there is no defendant to the suit. There is no specific provision in either the Act or the Rules requiring service in a case such as the present. Counsel was unable to find any authority which bears directly on the question.

[10] I was referred to a passage in *Whalan, The Torrens System in Australia,* [5] where the learned author observes that "the value of the procedure has been somewhat suspect" and cites a number of cases where the Supreme Court of New South Wales has decided cases on a similar provision. In all but two of those decisions, it appears that the stated case has been served on interested parties. The two exceptions, *In re Priddle*[6] and *In re Douglas*[7] show that only counsel for the Registrar-General appeared. The report in each case is silent as to whether or not other interested parties were served. I was also referred to a decision of the Court of Appeal of New Zealand, *In re "The Land Transfer Act, 1885" And "The Public Works Act, 1903"*[8] where

[5] (1982) at pps 43-44
[6] (1916) 16 SR (NSW) 54
[7] (1928) 29 SR (NSW) 48
[8] (1905) 25 NZLR 385

the Registrar-General stated a case for the decision of the Court of Appeal which contained 14 questions. Counsel appeared on behalf of interested parties to argue only two of the questions. It is not entirely clear from the report whether any other parties were served, but it is quite possible they were not. Edwards J said:[9]

> The statute gives the Registrar-General of Land the right to put these questions to the Court, and it is the duty of the Court to answer them. It appears to me, however, that the opinion of the Court so obtained, with respect to matters which affect private rights, and without hearing the persons interested, can be looked upon as no more than as a series of rules to guide the Registrar-General and his officers in the discharge of their duties and that such opinion will not bind the Court, or the Supreme court, in any litigious proceeding in which any of these questions may be raised by persons actually interested in their determination.

Nevertheless, the Court answered each of the questions referred.

[11] In my opinion, the general rule should be, that wherever there are persons who may be directly affected by the Court's decision, those persons should be served. Where there are numerous potential parties, which in this case might number as many as two hundred assuming that each mortgagee also has an interest, the Registrar-General could always apply to the Court to appoint a person who is not a party to be joined as a defendant to represent the interests of all other parties under Order 18 of the *Supreme Court Rules*. No such application was made in the present case. In the present case, I was informed by Mr Grant QC that not even the developer had been formally

[9] At p 414

served, but that the developer had indicated through its solicitors that it did not wish to be heard.

[12] It is doubtful whether I have the power to insist that the Motion be served before hearing the stated case, but to the extent that I have a discretion to refuse to hear it, I think that I should exercise my discretion in favour of proceeding without insistence on service in this case for the following reasons. Clause 4 of the covenants gives the developer an absolute discretion to waive, release or modify any of the clauses in the covenants. This is a common provision in covenants of this sort, and no doubt, a necessary one, to enable minor changes to be made when circumstances have arisen which justify a change, without the need to apply to the Court under s 177 of the *Law of Property Act 2000* (NT) (the LPA). It has not been doubted that similar clauses are binding and effectual.[10] In this case, it is hard to imagine how anyone, whether an owner or mortgagee, would be adversely affected by the proposed changes such as might give rise to an injunction or claim sounding in damages which would be better addressed by making an application to the Court under s 177 of the LPA. So far as the position of the developer is concerned, its position is that it does not wish to be heard. In any event, its lawyers have set out their argument in correspondence with the Registrar-General which is before the Court, and has been addressed fully by Mr. Grant QC, who takes no particular position as to the answers to be given to the stated case. Finally, whatever answers

[10] See for example, the discussion in *Elliston v Reacher* [1908] 2 Ch 374 at 389-392

are given will not be binding on the developer or any one else except perhaps the Registrar-General.

Question one

[13] The LTA, which came into force on 1 December 2000, repealed and replaced the former *Real Property Act and Ordinance* which established Torrens title in the Territory. Both Acts established a system of land registration which confer indefeasible title on owners of registered interests. In general terms, neither Act was interested in equitable interests, except to the extent that there are specific provisions to the contrary. Section 184 of the LTA provides that "an instrument does not transfer or create an interest in a lot at law until it is registered." Section 185 provides that "on an instrument being registered that is expressed to transfer or create an interest in a lot, the interest…vests in the person identified in the instrument as the person entitled to the interest." Section 188 (1) provides that "a registered proprietor of an interest in a lot holds the interest subject to registered interests affecting the lot but free from all other interests." Section 188 (2) (a) provides that "in particular, the registered proprietor is not affected by actual or constructive notice of an unregistered interest affecting the lot." There are some limited exceptions to this dealt with in s 188, (such as an equity arising from the act of the registered proprietor, or the interest of a

lessee in actual possession under a short lease,) or in the case of fraud by the registered proprietor[11] and in the creation of equitable mortgages.[12]

In general, neither the Registrar-General nor the land register established under s 29 is concerned with equitable interests.

[14] Section 114 of the Act provides that Divisions 1, 4 and 5 of the LTA apply to a registered covenant. Section 4 provides that "covenant" has the same meaning as in Division 4 of Part 9 of the LTA. The provisions of the LPA to which I am now turning are all in the relevant divisions of that Act referred to in s 114 of the LTA. The LPA, s 167, defines "covenant" to mean "an obligation (whether positive or negative) in respect of the use, ownership or maintenance of particular land (servient land) that is created for the benefit of other land (dominant land). Section 167 also defines "servient land" and "dominant land". "Servient land" is defined to mean "land the use, ownership or maintenance of which is authorised or restricted by a covenant." "Dominant land" is defined to mean "land having the benefit of a covenant."

[15] Sub-section 170(1) (a) of the LPA provides that "a covenant may be enforced by a person who has the estate in the dominant land that has the benefit of the covenant." Sub-section 173 (2) (a) provides that "a restrictive covenant …is only enforceable against a person who is bound by the

[11] See sub-section 188 (3)
[12] See section 77.

covenant …in respect of conduct by the person that consists of doing an act prohibited by the covenant…" In this case, the covenants specifically provide in clause 1, that the Owner (ie the owner of the land burdened) separately covenants with each and every owner of the land described (ie the owner of each of the 99 lots described as the land burdened) "to observe and comply with these covenants so far as they relate to the Land (defined as the "land burdened") and every part thereof to observe and comply with these covenants so far as they relate to the Land…" Section 172 provides that s 170, 171 and 173 apply "subject to the appearance of a contrary intention in an instrument of covenant.." A mortgagee of servient land is only bound if the mortgagee enters into possession: s 173 (3) (a). The effect of these provisions is that, subject to s 172, the owner of a particular lot can enforce a covenant against any other owner.

[16] Turning now to s 113, the only party specifically mentioned whose consent is required is that of a registered mortgagee of the land burdened by the covenant. The answer to this is that a mortgagee is not a party to the covenants and only becomes bound by the covenants once it enters in possession, vide s 173 (3) (a) of the LPA. There is no express provision entitling a mortgagee in possession to obtain the benefit of a covenant, although a covenant cannot be registered without the consent of a registered mortgagee.[13] However, neither Act requires a subsequent mortgagee to consent to the covenants. In the case of a subsequent registered mortgagee,

[13] *Land Title Act,* s 108

no consent would be necessary. A registered covenant cannot be extinguished without the consent "of all registered mortgagees … of the lot *benefited* by the covenant."[14]

Presumably this provision is necessary to ensure that, in the event of a mortgagee sale, the mortgagee of a lot benefited by the covenant will have whatever commercial advantage there may be in the benefit of the covenant. If a mortgagee exercises its power of sale, consistently with this approach, the transferee's interest is not free from the covenants.[15] Furthermore, a registered mortgage operates only as a charge on the lot or interest for the debt or liability secured by the mortgage.[16]

[17] It was submitted by Mr. Grant QC that the reference in s 113 (3) to mortgagees of the lot *burdened* by the covenant was a mistake by the draftsman, but in considering the provisions as a whole, I do not think there was a mistake. In any event, the words of s 113 (3) are clear and have a sensible meaning. It was not suggested that I could read into s 113 (3) additional words, or change the word "burdened" to "benefited." There being no requirement to obtain the consent of a registered mortgagee of a lot benefited by the covenant, I would answer this question in the affirmative.

[14] *Land Title Act,* s.112 (4)
[15] *Land Title Act,* s.81 (b)
[16] *Land Title Act,* s.76

Question 2

[18] Form 64 is prescribed by the Registrar-General as the instrument of amendment of a covenant. The form provides for the execution by the owner of the land burdened by the covenant as well as by the owner or owners having the benefit of the covenant. The LTA contains no express provision requiring the consent or execution of an instrument of amendment by anyone other than the registered mortgagees of the lot burdened by a covenant. Section 10 (1) of the Act deals only with the execution requirements of an instrument to transfer or create an interest, or to discharge a mortgage, and is not helpful. Section 11 (1) of the Act provides:

> **Consent to be written on instrument etc.**
>
> (1) If the consent of a person is necessary for the transfer or other dealing with a lot, the consent must be-
>
> (a) written or contained on, or form part of, the relevant instrument; or
>
> (b) if the Registrar-General considers it appropriate- lodged with the relevant instrument.

[19] Mr. Grant QC submitted that the better construction was that this provision is limited in its operation to consents expressly required under the terms of the legislation, such as s 113(3). The other possible construction is that "necessary" should be given a flexible meaning, not restricted to "necessary by a provision of the Act." The Act recognizes that a covenant may be either positive or negative in its operation. It may burden only one lot, or it may burden more than one lot. It may similarly benefit only one lot, or it may

benefit more than one lot. An amendment to a covenant may increase or decrease the benefit or burden on a particular lot. It would be strange, and inconsistent with the overall object and purpose of the LTA, if a covenant could be amended by increasing the burden on a lot without the registered proprietor's consent. I consider that the purposes of the Act will be promoted if the word "necessary" is given a broad meaning to cover at least those situations where the general law would require the registered proprietor's consent for the change to be legally effective. Where the change decreases the burden of a covenant, it would similarly be strange, and I think inconsistent with the overall objectives and purposes of the Act if the owner of a lot having the benefit of the covenant could have the benefits of the covenant whittled away without his consent.

As a matter of interpretation, in my opinion s 11 (1) does apply to the registration of an amendment to a covenant. "Dealing" is defined to mean "an instrument or matter whereby land or the title to land can be affected or dealt with."[17] "Land" is not defined, and therefore takes its meaning from s 17 of the *Interpretation Act* to "include all messuages, tenements and hereditaments, corporeal and incorporeal, of any tenure or description and whatever may be the estate or interest in the land."

[20] The question which arises is whether a registered covenant under the LTA is "land." I have not been able to find any authority which expressly deals with

[17] *Land Title Act,* s.4

that question. One possibility is that a registered covenant is an incorporeal hereditament. Megarry and Wade, in the 1975 (4th) edition of *The Law of Real Property*, said that "logically, no doubt, they should also be included.

But they, being a recent invention and purely equitable, have a quite separate history, and many different characteristics, and therefore stand apart from the older interests which are hereditaments in themselves."[18]. A similar view is expressed in the 6th Edition (2010) of Peter Butt's *Land Law.*[19] The traditional approach has been that restrictive covenants merely create a bundle of rights enforceable in equity, and are not by registration elevated into legal interests. [20] However, in the Northern Territory, the various statutory provisions to which I have referred earlier, have changed the law relating to restrictive covenants, and covenant generally, substantially. Unlike the position in equity which enforces only negative covenants,[21] positive covenants are also enforceable, at least if the covenant was entered into after the passage of the LPA.[22] Unregistered covenants appear to be unenforceable under the legislation, as s 169 of the LPA, which deals with the manner of creation of covenants, requires registration under the LTA regardless of which method is adopted. The right to enforce a covenant depends principally upon the statutes, rather than principles of common law or equity,[23] subject only to a contrary appearance in the

[18] At p 806.
[19] At pp 439-440.
[20] See Sackville and Neave, *Australian Property Law*,8th Edn (2008), para 9.88, p952.
[21] *Haywood v The Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403
[22] LPA, s. 170 (2), s.173 (1)
[23] LPA s. 170, 171, 173(1) and (2).

instrument.[24] Once registered, covenants appear to create interests in the land which are protected by the indefeasibility provisions. The word "interest" is not defined in the LTA, but it plainly envisages that a mortgage is an interest even though it operates under the Act only as a security, unlike a common law mortgage. Sub-section 81 (1) (b) of the LTA, which deals with transfers by mortgagees, refers to instruments of transfer executed by a registered mortgagee vesting in the transferee the mortgagee's interest that is transferred, free from liability of *any other interest* registered after it (ie the mortgage) except a lease, easement or *covenant* to which the mortgagee has consented in writing or to which he or she is a party. Bradbrook and Neave's *Easements and Restrictive Covenants*[25] observe that registration of covenants in the Northern Territory has converted them into legal interests in the land. My conclusion is that a registered covenant is a legal interest in the land. This enforces my initial conclusion that s 11 (1) of the LTA does apply to the registration of an instrument of amendment of a covenant.

[21] Section 210 of the LTA empowers the Registrar-General to issue directions, not inconsistent with the Act, relating to the requirements to be followed in lodging and registering documents under the Act. In issuing directions, the Registrar-General is required to have regard to the objects of the Act, and "the principle that the registered interest of a person in land is not be adversely affected, other than with the consent of that person."

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[24] LPA, s.172
[25] 3rd Edition (2011), p 286, para 12.16 (i)

Sub-section 210 (3) enables the Registrar-General's directions to provide for the "need for lodging consents". In my opinion, the Registrar-General's direction prescribing a requirement for execution of an instrument of amendment of covenant by owners of land receiving the benefit of the covenant, is not only not inconsistent with the Act, but in many cases completely consistent with it, and with the requirements of s 210. I would answer question 2 in the affirmative.

Question 3

[22] The third question raises two points, the first being whether a unilateral power of amendment of a covenant is valid, and the second being whether, if it is valid, the Registrar-General may register the amendment without the consent of prior registered owners receiving the benefit of the covenant.

[23] I mentioned earlier that such covenants are quite common and have never been held to be invalid. Some further elaboration is necessary. In *Osborne v Bradley*[26] the plaintiff brought an action on a covenant against the purchaser of land subject to a negative covenant. The question arose as to whether the purchaser was liable to the owner of the land who had the benefit of the covenant. This depended on whether or not the covenant was entered into as part of a building scheme. The covenant contained a provision under which the original vendor reserved the right to vary or waive the conditions with regard to unsold lots. Farwell J held that the evidence did not establish that

[26] [1903] 2 Ch 446

the land was part of a building scheme when sold. As to the provision relating to waiver, he said:

> The mere fact that the vendor has reserved to himself the right to vary the conditions as regards unsold property might not by itself be sufficient to prevent the existence of a scheme in respect of the plots sold before that period.[27]

Farwell J did not hold that such a provision was invalid.

[24] In *Elliston v Reacher,*[28] a leading case on building schemes, one of the questions raised was whether the fact that the original vendor reserved a general right to dispense with the performance of the conditions of the covenant prevented a finding that there was a building scheme. The covenant sought to be enforced prevented the land sold from being used inter alia as a hotel or tavern. Parker J rejected an argument that the dispensing power prevented an inference being drawn that there was a common scheme. There was no suggestion that the provision was unenforceable. The real question was whether the existence of such a provision precluded a finding that there was a building scheme. Hs Honour said:[29]

> Of course the existence of these dispensing powers is a matter for consideration in determining whether the common scheme of restrictions is or is not intended to be for the benefit of the lots offered for sale, but I do not think it is conclusive, or even has any great bearing one way or the other. These powers may well have been reserved so as to give the vendors rights which otherwise could not be effectually exercised because of the existence of a scheme for the common benefit of the various lots. It does not appear to me to be so likely that their insertion is due to a desire to show that there

[27] At p 454-455
[28] [1908] 2 Ch 374
[29] At 389

> was no scheme. If there were no such scheme, no dispensing power would be necessary, and though, of course, clauses of this nature might be inserted ex cautela, there would be no reason on this hypothesis why the particular dispensing power should be confined to hotels, taverns, public-houses, beer-houses, and manufactories and should not also have extended to shops and warehouses.

[25] There are a number of other cases where the courts have upheld the validity of dispensing powers of this nature. In *Whitehouse v Hugh*[30] an owner of an estate was held by the Court of Appeal to be entitled to reserve an absolute power to alter a building scheme. In that case, the condition was upheld against a purchaser from the original purchaser of the land the subject of the covenant. In *Mayner v Payne*[31] it was held that a power to licence a departure from a building scheme may be exercised by the original vendor in respect of land in which he no longer retained an interest. In *Jones & Ors v Sherwood Hills Pty. Limited*[32] Waddell J considered a provision in a restrictive covenant which was used in a building scheme which entitled a third party to release, modify or vary the relevant restrictions. After considering the relevant authorities in some detail, His Honour concluded that there was no reason why a restriction as to the use of the land subject to release variation or modification by a third party having no interest in the land should not be created so as to cause the benefit and burden of the restriction to run with the parcels of the land concerned. His Honour also concluded that there was no reason why the power given was limited to non-radical aspects of the restrictions, that the rules of natural justice did not

[30] [1906] 2 Ch 283
[31] [1914] 2 Ch 555
[32] Unreported, Supreme Court of New South Wales 8/7/1975

apply to any decision made by the party exercising the power, and that Lend Lease Homes Pty limited, the party having the power, could make whatever releases, variations or modifications to the restrictions which suited its own interests.

[26] Some criticism of Waddell J's judgment is made by the authors of *Bradbrook and Neave's Easements and Restrictive Covenants*[33] because it was suggested that his Honour did not deal with the argument of Baalman[34] that a provision of this kind may be contractual only and may not intrude into the realm of real property so as to create an interest in land known as a restrictive covenant. That was the conclusion reached on the facts in *Osborne v Bradley*[35] but not in *Elliston v Reacher*[36], the difference being that in the former case the evidence did not support a conclusion that there was a common scheme, whereas in the latter case each of the purchasers had entered into the same covenants with the original vendor. I think that the authorities referred to by Waddell J fully justify his Honour's conclusions. In most cases, covenants in building schemes require the purchasers of land which was purchased as part of a building scheme to enter into direct covenants with the original vendor upon a re-sale. Clause 7 of the covenants in this case is in these terms. The question of whether clause 4 of the

[33] See footnote 25, at para 19.10
[34] J. Baalman, *Variation of Restrictive Covenants(NSW)* (1948) 21 ALJ 427, 461.
[35] [1903] 2 Ch 446
[36] [1908] 2 Ch 374

covenants runs with the land or is only binding in contract is likely to prove academic. In any event, I consider that under the Northern Territory legislation, covenant 4 is binding as one of the stipulations which runs with the land, as it effects an exception to the benefit of the covenants for the benefit of the dominant land owners and therefore alters their enforceability under s 170 of the LPA. However, I do not by this, decide that such a clause could permit increasing the burden of a covenantee without his consent.

[27] However, there is also the question whether, if such a provision in a covenant exists which would be valid under the general law is inconsistent with the provisions of the LTA. A similar question was considered by Blow J in *Clarke v Burnie City Council*[37]. Under the Tasmanian legislation, there was no power to register an instrument which released or modified any of the covenants. His Honour concluded that although it was common practice to include such covenants, Parliament did not intend to cover the field by the provisions which enabled covenants to be amended or modified, and that the powers of the subdivider's successor in title to release or waive the covenant were validly reserved. The Northern Territory LPA was enacted as the result of the recommendations of the Report on the Law of Property by the Northern Territory Law Reform Committee. It is clear that the LPA was intended to come into force at the same time as the LTA, and it is for this reason that s 114 of the LTA incorporates by reference the provisions of the LPA dealing with covenants.

[37] [2008] TASSC 75

However, there is nothing in the Report which throws any light on the question.

[28] I am unable to see how s 113 of the LTA is inconsistent with a unilateral power of amendment. Nor do I think that s 177 of the LPA is inconsistent with such a power. In my opinion, s 177 creates a power in the Court to amend or extinguish covenants, but there is nothing in that section which excludes the parties from reaching agreement on these matters themselves, otherwise why have s 113 of the LTA and if the parties can reach agreement, why can they not have an arrangement conferring a power of modification on the developer or for that matter a third party? One argument which counsel suggested was that there may have been a dealing between the parties which affects the power to unilaterally amend the Deed. However, until the amendment is registered, it would seem to me that any such amendment is unenforceable and would not be binding on a third party whether with or without notice and therefore of no interest to the Registrar-General. The conclusion I have reached is that such a power of reservation is valid and enforceable.

[29] This brings me to the final question which is whether the Registrar-General may register the variation without the consent of the owners of prior registered interests having the benefit of the covenant where such a power of variation exists. As Mr. Grant QC points out, there is no express provision permitting the registration of an instrument that would adversely affect a prior registered interest on the basis of reference to a right appearing in the

covenant. However, the right is more than a contractual right. It is a right binding on all those who are bound by the scheme whether as owners having the benefit or the burden of the covenant. It cannot be said that purchasers were unaware of this provision. It is not specifically prohibited by s 113 of the LTA. An instrument, once registered, takes effect as a deed, and is conclusive evidence of the contents of the instrument.[38] There is nothing necessarily inimical with the concept that a power may be conferred enabling even a disposition of an interest without the consent of the registered proprietor. Such a power is regularly enforced by mortgagees when, after exercising a power of sale, a transfer is registered. The Registrar-General is able to read the terms of the covenant to see whether such a power exists, and if it is found in the covenant when registered, it is, as I have said, conclusive evidence that the power exists, and is able to look at the instrument lodged under s 113 to see if it has been validly exercised. In my opinion there is nothing which in these circumstances would deny the Registrar-General the power to register such an instrument, assuming that it had been validly executed and otherwise complied with s 113 (3). In such a case, execution by the other registered proprietors would not be "necessary" under s 11 (1) of the Act. I suggest that the problem could be overcome by preparing a specific form to overcome this type of problem, using the Registrar-General's powers under s 210. The form should indicate that the instrument is executed in accordance with the relevant provision of the

[38] *Land Title Act, s.* 182

covenant, and stating the relevant provision. In my opinion the question should be answered in the affirmative.

Conclusions

[30] I would answer each question, Yes.