SUPREME COURT OF VICTORIA

Re DENNERSTEIN

HUDSON, J.

4, 5, 6 March, 30 April 1963

Real property—Restrictive covenant—Building scheme—Encumbrance notified on certificate of title—Land affected must be indicated—Notification insufficient to bind transferees—*Property Law Act* 1958 (No. 6344), s. 84.

Assuming and adopting the view of Sholl, J., in *Re Arcade Hotel Pty. Ltd.*, [1962] V.R. 274, that there is power under the Transfer of Land Act to notify as encumbrances on a certificate of title restrictions arising under a building scheme, such a notification will not be effective to bind transferees of the servient land unless not only the existence of the scheme and the nature of the restrictions enforced thereunder, but also the lands affected by the scheme (both as to the benefit and the burden of the restriction), are indicated in the notification, either directly or by reference to some instrument or other document to which a person searching the register has access.

Land bounded by Williams Road on the east and Toorak Road on the south was subdivided into 91 allotments, of which 65 were offered for sale by common vendors at an auction conducted in 1911. Fifty-one allotments were sold at the auction and the other 14 by private sale within the next two years. Each contract of sale with one exception contained a covenant by the purchaser that he or his executors administrators and transferees would not erect or allow to be erected any building to be used for charitable or religious purposes or public entertainment or any hoarding for advertisement and would not build more than one dwelling on the lot, and that such dwelling be restricted to brick stone or concrete materials and to a certain minimum price.

The certificate of title which issued on the registration of each transfer notified the covenants contained in the transfer as an encumbrance but did not give any indication that the covenants arose under a building scheme or as to the land intended to be benefited by such covenants.

In earlier proceedings it had been decided that the covenant was not annexed to any land, and the only question now to be determined was whether, notwithstanding that the covenant was not annexed to any land, it was enforceable against the applicant on the basis that it had been imposed as part of a building scheme. Upon an application under s. 84 of the *Property Law Act* 1958 by a subsequent transferee of an original purchaser of a lot, for a declaration that the covenants did not affect her land,

Held: though there was a building scheme affecting the land of the applicant in favour of the owners of the other lots the subject of the subdivision imposing on the applicant's land the restrictions of the original covenants relating thereto—

Elliston v. *Reacher*, [1908] 2 Ch. 374; [1908-10] All E.R. Rep. 612; *Nottingham Patent Brick & Tile Co.* v. *Butler* (1885), 15 Q.B.D. 261, followed—

nevertheless the applicant took her land free of such restrictions because the notification of such covenants on the certificate of title was insufficient in that it gave no indication that they arose under a building scheme nor of the land to which the benefit thereof was intended to be annexed under such a scheme.

Re Campbell & Cowdy, [1928] 1 D.L.R. 1034, applied.

Application Under s. 84 Property Law Act 1958

The applicant, Beryl Dennerstein, by summons dated 16 October 1961, applied pursuant to s. 84 of the *Property Law Act* 1958 for a declaration as to whether or not land, comprised in certificate of title vol. 4376 fol. 100 and in respect of which she was the registered proprietor, was affected by restrictions imposed by instrument of transfer No. 650684. On 27 August 1962 Dean, J., made a declaration that the land in the hands of the applicant (a subsequent assign of the original purchaser) was not affected by the said restrictions because, in his view, the covenant did not run with the land, and his Honour declined to determine whether the covenant was one arising under a building schedule, because, in his opinion, the question of the existence and

validity of a building scheme could not properly be raised in the proceedings before him. This latter finding was reversed on appeal by the Full Court on 11 December 1962 when it was ordered that the summons be restored to the list for hearing. The Full Court further ordered that, at such hearing, the objectors to the application be confined to contending that the land comprised in the applicant's certificate of title was affected by the restrictions imposed by, and contained in, the instrument of transfer by reason of a building scheme.

Voumard, Q.C., and *R. K. Fullagar*, for the applicant.

Richard H. Searby, for the objectors.

Cur. adv. vult.

Hudson, J., delivered the following written judgment: By summons dated 16 October 1961 Beryl Dennerstein applied pursuant to s. 84 of the *Property Law Act* 1958 for a declaration as to whether or not the land comprised in certificate of title vol. 4376 fol. 100, of which the applicant is registered as the proprietor of an estate in fee simple, is affected by the restrictions imposed by instrument of transfer No. 650684; a declaration as to what upon the true construction of the said transfer is the nature and extent of the restrictions thereby imposed; and a declaration whether the said restrictions are enforceable and if so by whom. In the alternative the applicant by her summons sought an order that the said restrictions be discharged or modified; but having regard to the order made on the first part of the application this alternative has not yet been considered.

The summons was heard on 16 July 1962 by Dean, J., who, after hearing counsel for the applicant and counsel for a number of persons who objected to the granting of the relief sought, and after considering the affidavits filed on behalf of the parties and the exhibits thereto reserved his decision, and subsequently, on 27 August 1962, declared that the applicant's land comprised in the said certificate of title is not affected by the restrictions imposed by or contained in the said instrument of transfer. The ground of Dean, J.'s decision, as stated in his Honour's reasons for judgment, was that the covenant containing the restrictions in question was invalid because the benefit thereof was not annexed to any land and that it was simply a covenant in favour of named persons and their executors, administrators and transferees without words sufficient, expressly or impliedly, to annex the benefit of the covenant to any land.

At the hearing before Dean, J., counsel for the objectors sought to contend that the evidence disclosed a common building scheme and that, because of the existence of such a scheme affecting the land of the applicant, a covenant in the terms contained in the transfer should be held binding upon the applicant, However, his Honour, because of the form of the relief sought in the summons and his view that s. 84 (2) of the Property Law Act pursuant to which it was issued is expressly limited to restrictions imposed by instruments, held that the questions as to the existence or validity of a building scheme could not be raised in the present proceedings.

From the decision of Dean, J., an appeal was brought by the objectors to the Full Court. Though other grounds were included in the notice of appeal those material are grounds 4 and 5. In ground 4 it was contended that his Honour was in error in holding that a question as to the existence or validity of a building scheme could not be raised in

the proceedings, and in ground 5 it was contended that his Honour ought to have held that there was a building scheme affecting the land. On the hearing of the appeal the Full Court, on 11 December 1962, ordered that the judgment and order of Dean, J., be set aside and in lieu thereof it was declared that the benefit of the covenants contained in the said instrument of transfer was not annexed to any land comprised in plan of subdivision No. 5433 lodged in the Office of Titles, unless it was so annexed as a result of a building scheme, and the Court further ordered that the summons be restored to a list and set down for hearing, and that at the hearing the objectors be confined to contending that the land comprised in the applicant's certificate of title is affected by the restrictions imposed by and contained in the said instrument of transfer by reason of a building scheme. Under the order of the Full Court liberty was granted to the parties to adduce at the further hearing further evidence in relation to such building scheme but no such evidence was adduced. I was not furnished with a copy of any reasons for its decision delivered by the Full Court but I take it that the Court's order was based on the view that upon the proper construction of s. 84 (2) of the Property Law Act a declaration may be made that land is affected by a restriction purporting to be imposed by a covenant contained in an instrument of transfer, even though the covenant itself can no longer be enforced by any person, if nevertheless it can be established that the covenant was entered into with the intention of giving effect to a building scheme in relation to lands of which the land transferred formed part and that the applicant is bound thereby. The view taken by Dean, J., that jurisdiction under the section exists only when the restriction is imposed by force of the covenant itself must be taken to have been rejected.

At the hearing before me the questions argued were:—

1. The objectors contended and the applicant denied that upon the evidence adduced in relation to the subdivision, sale, and transfer of the estate of which the applicant's land forms part, it had been established that a building scheme was entered into under which the applicant's land was subjected to restrictions in the terms of the covenant the benefit of which both Dean, J., and the Full Court have held was not upon the proper construction thereof annexed to any land.

2. On behalf of the applicant it was contended that even if on the evidence a building scheme was established the applicant was not bound by the restrictions imposed thereby because she became a transferee of the lands she owns without notice of any encumbrances not appearing on the register, and the notification as an encumbrance of the covenant contained in instrument of transfer No. 650684 was unauthorized and even if authorized does not amount to notice of the existence of a building scheme burdening her land with the restrictions contained in such covenant.

The applicant, it was admitted, was a bona fide purchaser for value without notice of anything beyond what appeared on the register.

The applicant's land forms part of an estate situate at South Yarra and known as the "Como" estate which, in 1911, was comprised in certificate of title vol. 3449 fol. 601. It was then owned by Charles Norman Learmouth Armytage, Frederick Wm. Armytage and Harold Augustus Armytage as trustees of the will and codicil of Charles Henry Armytage, deceased. Prior to 25 February 1911 these owners caused the land to be subdivided into 91 allotments having frontages to Williams Road, by which the estate was bounded on the east, to Toorak Road which formed the southern boundary thereof, and to various other streets which were reserved out of the estate The plan of subdivision

prepared was lodged in the Office of Titles and numbered 5433, but of the 91 lots shewn thereon 21 (lots 51 to 71) were deleted and never offered for sale. Of the remaining 70 lots, five (lots 87 to 91) though they remained on the plan, were not offered for sale. The balance of the lots, 65 in number (including lot 44 on which was erected the "Como" homestead) were offered for sale at an auction held on 25 February 1911 and 51 thereof were sold at the auction. The remaining 14 were sold privately on various dates subsequent to the auction—several in June 1911 and others apparently within the next two years. A document said by an employee of one of the firms who conducted the auction (who was present thereat) to be a copy of the contract and conditions of sale which were used at the auction sale was produced and put in evidence. The document is in a form appropriate to a sale of the estate in lots shewn and numbered on a plan of subdivision exhibited by the vendors at the time of sale and contains in addition to the usual conditions the following condition numbered 14:—

"Each purchaser shall enter into covenants with the vendors their executors administrators and transferees that he or his executors administrators and transferees will not erect or allow to be erected any Church State School or building to be used for religious or charitable purposes of any kind or for public entertainment of any kind whatsoever or any hoarding for advertisement. And as to Lots 32 to 38 both inclusive and Lots 72 to 79 both inclusive each purchaser shall enter into covenants with the vendors their executors administrators and transferees that he or his executors administrators or transferees will not build or erect on any one of the said lots more than one house or dwelling or any house or dwelling constructed of materials other than brick stone or concrete or at a cost less than £800 (exclusive of all architect's fees and the cost of erecting any outbuildings or fences or any other buildings or erections the purchaser his executors administrators or transferees may build and erect on such lot) and will not refuse if required so to do within one month from the completion of any such house or dwelling to furnish satisfactory proof that the said sum has been expended in the building or erection thereof. As to the balance of the lots shown on the said plan each purchaser shall enter into covenants with the vendors their executors administrators and transferees that he or his executors administrators or transferees will not build or erect on any lot more than one house or dwelling or any house or dwelling constructed of materials other than brick stone or concrete or at a less cost than £1000 (exclusive as aforesaid) and will not refuse if required so to do within one month from the completion of any such house or dwelling to furnish satisfactory proof that the said sum has been expended in the building or erection thereof."

It will be observed that this condition provides for building restrictions binding the purchaser of every lot shewn on the plan exhibited, which there can be no doubt was plan of subdivision No. 5433. The restrictions, which were to be contained in a covenant to be entered into by the purchaser of every lot with the vendors their executors, administrators and transferees varied, in one respect only as to the 65 lots offered. As to lots 32 to 38, both inclusive, and lots 72 to 79, both inclusive, the cost of the house or dwelling which might be erected was to be not less than £800; as to the balance of the lots the cost was to be not less than £1000. Of lots 1 to 31, 18, including lots 9, 10 and 11 which comprise the land of which the applicant is now the proprietor, were sold at the auction and the remaining 13 subsequently. When these 31 lots were transferred, the transfer in every case included a covenant in the form or to the effect of condition 14 of the conditions of contract

(prescribing the minimum cost of the dwelling as £1000) save that in no case was the requirement as to furnishing proof of the cost of the house or dwelling included. Consistently with the practice then followed by the Office of Titles, whether it be justified or not, the certificate of title which issued on the registration of each of these transfers, notified the covenant contained in the transfer as an encumbrance. Lots 32 to 38 were all sold at the auction and the transfers thereof included a covenant in the form required by condition 14 (prescribing a minimum cost of £800) save that in these cases also the requirement as to furnishing proof of cost was omitted, and save also that in the case of the transfer of lot 38 the important restriction prohibiting the erection of any church, State school or building to be used for religious, education or charitable purposes or for public entertainment or of any hoarding for advertisement was also omitted. Lots 73 to 79 were sold at the auction. Lot 72 was sold by private sale on some date prior to 28 March 1912. In every case the transfer included a covenant in the same form as that in the transfers of lots 32 to 37. Lots 39 to 50 and lots 80 to 86 which make up the balance of those offered were all sold at the auction on 25 February 1911, and in every case save five the transfer included a covenant in the form of the condition (prescribing a minimum cost of £1000) but omitting any reference to the furnishing of proof of cost. The exception referred to is a transfer (No. 647437) of lots 81 to 85 from the vendors to one Hugo Wertheim. This transfer, executed on 28 March 1911, contains a covenant in the form required by condition 14 save that as in the case of the transfer of lot 38 the restriction prohibiting the erection of any church, State school or buildings to be use for religious, educational charitable purposes or of any hoarding for advertisement is omitted.

The essential requirements for the establishment of a building scheme containing restrictions enforceable in equity by one owner of land against another were stated by Lord Parker in *Elliston* v. *Reacher*, [1908] 2 Ch. 374, at p. 384; [1908-10] All E.R. Rep. 612, in terms that have since been universally accepted. The objectors in the present case who seek to establish and enforce the scheme are owners of lots which formed part of the subdivision of the "Como" estate sold on 25 February 1911 and undoubtedly, therefore, they and the applicant derive title under a common vendor. The evidence clearly establishes that the common vendors, the trustees of the estate of Charles Henry Armytage deceased, before the sale which took place on 25 February 1911 laid out the lands included in plan of subdivision No. 5433 for sale in lots subject to restrictions intended to be imposed on all the lots, which, though they varied in one detail—the minimum cost prescribed—are consistent only with a general scheme of development. It is clear also, in my view, that the restrictions were intended by the vendors to be and were for the benefit of all the 65 lots intended to be sold, and that the predecessors in title of the applicant and the objectors respectively purchased their lots from the common vendors upon the footing that the restrictions, subject to which the purchases were made, were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors. In *Nottingham Patent Brick & Tile Co.* v. *Butler* (1885), 15 Q.B.D. 261, Wills, J., at p. 269, said: "It appears to me that, where the land is put up to auction in lots, and two or more persons purchase according to conditions of sale containing restrictions of the character of those under consideration in the present case, it is very difficult to resist the inference that they were intended for the common benefit of such purchasers, especially where the vendor proposes (as in

the present case) to sell the whole of his property. Where he retains none how can the covenants be for his benefit; and for what purpose can they be proposed except that each purchaser, expecting the benefit of them as against his neighbours, may be willing on that account to pay a higher price for his land than if he bought at the risk of whatever use his neighbour might choose to put his property to Where, therefore, the vendor desires to sell at the auction the whole of his property the inference is strong that such covenants are for the common benefit of the purchasers; and it seems to me that the strength of this evidence is not diminished by the fact that at the sale a considerable number of the lots may fail to find purchasers. In the present instance the vendor put up the lots for sale by auction three times, and always on the same conditions. Is it possible to doubt that he intended and that the purchasers understood that the covenants should enure for the benefit of every purchaser?" In the Court of Appeal the decision of Wills, J., was affirmed. Lord Esher, M.R., pointing out—(1886), 16 Q.B.D. 778, at p. 784—that in each case it is a question of fact whether it is intended by the vendor and the purchasers that each of the purchasers shall be liable in respect of the restrictive covenants to each of the other purchasers. In the present case the vendors offered 65 out of 70 of the lots included in the subdivision. Why the other five lots were reserved from sale and what happened to them and to the area which had been deleted from the plan of subdivision, is not disclosed by the evidence save that it appears that the latter area became a park. But even if it be assumed that these lands remained in the ownership of the vendors, I find it impossible to accept the suggestion made on behalf of the applicant that the real and only purpose of condition 14 of the contract and the covenants entered into by purchasers pursuant thereto was to benefit lands retained by the vendors. It is of course not inconsistent with the existence of the scheme that the vendors, as well as making the sale more attractive to purchasers by offering them the benefit of the restrictions, wished to protect their own interests in respect of any land which they retained.

On behalf of the applicant several points were relied on as negativing the existence of the alleged building scheme. It was said that the land affected by the scheme was not defined. This requirement was, in my view, satisfied by the terms of condition 14 which in terms applied the restrictions to the whole of the area comprising the 65 lots then being offered for sale. Then it was contended that even if the inference might be drawn that the whole of the 51 lots sold on 25 February were sold under contracts which included condition 14, there was no ground for assuming that the 14 remaining lots sold subsequently were also sold under a contract containing this condition. Having regard to the decision in *Nottingham Patent Brick & Tile Co.* v. *Butler* (1885), 15 Q.B.D. 261; (1886), 16 Q.B.D. 778, this, if it were the fact, would not, in my opinion, affect the binding force of the scheme as between the purchasers at the auction on 25 February. However, each of the purchasers of these 14 lots in fact entered into covenants in the terms of condition 14 and I think the reasonable and proper inference is that they did so because they purchased under a contract requiring them to do so. It was also strongly urged that the omission from the transfer of lot 38 and the transfer of lots 81 to 85 of an important part of the covenant required under condition 14 should lead to the inference that these lots, though they were among those sold at the auction on 25 February, were not sold subject to the full terms of condition 14, or in other words that the condition was amended in the relevant contracts before they were signed If this were so it would follow, so it was argued, that

the force attached to condition 14 as supporting the inference of a common intention on the part of the vendors and the various purchasers in relation to the whole of the estate disappeared and that the condition could not be treated as laying down restrictions binding each purchaser to all other purchasers. I find it impossible to accept the view that if condition 14 was read out to those present and bidding at the auction as I would infer that it was the effect thereof in relation to 44 purchasers could be destroyed merely by reason of two other purchasers, subsequent to the auction, refusing to sign their contracts unless some part of condition 14 was omitted. There is of course no evidence that the two purchasers concerned did not sign their contracts with condition 14 unaltered. The omission of part of the covenant from the transfers, signed a month or more after the auction, may well have been the result of some negotiation between the transferees and the vendors subsequent to the sale. If this is what occurred, and I would prefer this inference to the theory put forward on behalf of the applicant, I see no reason why the transferees should not have been bound by the full restrictions imposed by the scheme even though they were in part omitted from the covenant contained in the transfer. I think this objection therefore fails, as does the final objection relied on by the applicant, that the omission from the covenants contained in all the transfers of the requirement that the purchaser should, if required, furnish proof as to the cost of any dwelling erected on the land. This was a matter of no great significance and its omission may well be accounted for by the view that though couched in a negative form in condition 14, in reality it amounted to an affirmative covenant the burden of which could not have been validly imposed on the land.

For these reasons, I have arrived at the conclusion that the objectors have established that there was a building scheme affecting the land of the applicant in favour of the owners of the other lands in the subdivision, imposing on the applicant's land restrictions in the terms of the covenant contained in instrument of transfer No. 650684.

I pass now to the second question that was argued. Mr. Voumard for the applicant contended that, having regard to the provisions of the Transfer of Land Acts in force in 1911 when the transfer No. 650684 was registered, there was no power to notify as an encumbrance on the certificate of title issued to the transferee, who was the applicant's predecessor in title, a restrictive covenant depending for its existence on a building scheme. He further contended that even if there was power to do so the notification in the present case was ineffective to bind subsequent transferees. He based his arguments upon the provisions of ss. 50, 74, and 140 of the *Transfer of Land Act* 1890 (No. 1149), which appears to have been the Act applicable at the relevant date.

The provisions contained in these sections and repeated in subsequent consolidations of the Transfer of Land Acts were relied on in two cases in this Court in support of an argument that, notwithstanding a long-standing practice to the contrary in the Office of Titles, there is no authority to notify as encumbrances restrictive covenants upon certificates of titles issued under the Transfer of Land Act. Such covenants, it was said, whether or not they are encumbrances within the definition of s. 4 of the Act, are not encumbrances within the meaning of s. 74, and even when noted on the certificates of title the estate of the registered proprietor is not subject thereto. In *Langdale Pty. Ltd.* v. *Sollas*, [1959] V.R. 634, at p. 638-9; [1959] A.L.R. 1150, the contention and the arguments in support thereof as well as the consequences of

giving effect thereto were stated by Adam, J. The learned judge, however, because he held that having regard to its form, the covenant in the case before him was not enforceable by any person, found it unnecessary to reach a decision on the question. In the later case of *Re Arcade Hotel Pty. Ltd.*, [1962] V.R. 274, Sholl, J., as a member of the Full Court, took a view of the covenant then before the Court which did render it necessary for him to come to a conclusion on the point, which was again relied on. The learned judge after an exhaustive examination of the authorities and the practice which appears to have been followed in this State over a long period, decided that the practice of the Office of Titles in notifying restrictive covenants as encumbrances was justified and that when so notified such a covenant, assuming that in other respects it conformed to the requirements of a valid restrictive covenant, bound the land in the hands of subsequent transferees. The other judges of the Court, Lowe and Gavan Duffy, JJ., took a view of the covenant then under consideration which rendered it unnecessary for them to express any view on the question and did not do so.

However, assuming, as I should be prepared to assume, that the view of Sholl, J., is correct the question that I have to decide in the present case—whether a covenant contained in a specified instrument of transfer noted as an encumbrance but which, regarded merely as a covenant can have no binding effect on subsequent transferees, can nevertheless be treated as binding those transferees if it be proved to have been entered into pursuant to and as part of a building scheme to which no reference appears in the notification on the register, is a very different one. This question was also referred to in the two cases above cited but as in neither case was there sufficient evidence of the existence of a building scheme the question remained unanswered. The argument was stated by Adam, J., at p. 643, in the first-mentioned case and by Sholl, J., at pp. 286-7, in the second case. The latter pointed out that there may be no objection in principle to the annexation of restrictions arising under a building scheme, provided they are expressed in a form of covenant (notified as an encumbrance) which sufficiently identifies the land in favour of which the restrictions are imposed, and this, I think, may be conceded. But can the notification as an encumbrance of a covenant which contains no such indentification be effective? In the Canadian case of *Re Campbell & Cowdy*, [1928] 1 D.L.R. 1034 (to which Adam, J., referred), the view was expressed by Orde, J., that it can not. He said, at p. 1037: "I very much doubt whether the existence of a building scheme which is not clearly defined as to the lands for whose benefit the restrictive condition is imposed in the certificate of ownership, is consistent with the intention and meaning of the Land Titles R.S.O. 1927 c. 158. The whole object of the Act is to define the nature and extent of the title as registered, and so that the certificate of ownership shall disclose the full title of the owner with whatever charges liens and other encumbrances may be registered against it. A purchaser under such a certificate ought not to be put upon inquiry as to anything beyond what the certificate itself discloses. Here the certificates discloses a condition implemented by a covenant apparently for the benefit of the Suydam Realty Co., and it alone. There is nothing on its face to suggest that the restriction is for the benefit of any parcel of land whatsoever. To give to others rights which are not spread upon the face of the register is, in my opinion, quite opposed to the whole intention of the Act. And I think that when restrictive conditions are registered under s. 99 of the Act, if those who impose the conditions intend the benefit of these to attach to and run with other lands, those other lands ought to be clearly defined and set forth in the

register and the certificate of ownership". The views here expressed appear to be appropriate in the consideration of a similar question arising under the Victorian Transfer of Land Acts. A similar view has been expressed in an article by Mr. Baalman in 27 A.L.J. 366, "Common Building Schemes and the Torrens System". Conceding therefore, contrary to the first argument presented by Mr. Voumard on behalf of the applicant, that the right to enforce a restrictive covenant arising under a building scheme is an interest which may be treated as an encumbrance within the meaning of s. 4 and notified as such on the certificate of title under ss. 47 and 72 (of the 1890 Act) the question appears to me to be whether this has been done in the present case. What has been notified is simply a covenant by the transferee with his transferors their executors, administrators and transferees. Upon its true construction this has been held to be a covenant which fails to identify any land in favour of which the benefit thereof is to be annexed. It is only when resort is had to an inquiry as to the circumstances under which the covenant was entered into, that it may be inferred that it was to give effect to a building scheme to which the owners of lands affected by the scheme were parties; only when this has been done can it be postulated that the benefit and the burden of the restrictions were intended to pass to and bind subsequent registered proprietors. No reference to the existence or the extent of such a scheme is contained in the covenant, and, for all that appears in it, the covenant may have been intended to have no greater effect than what the law would give it.

But it was contended by Mr. Searby on behalf of the objectors that from the transfer it would appear that the land was transferred out of a certificate of title which comprised an area of land known as the "Como" estate, that from an inspection of the lodged plan of subdivision of this estate the lots therein could be identified and by searches of the transfers of those lots, it could be ascertained as a matter of reasonable inference that the transfers were made pursuant to a common building scheme and what were the lands affected thereby and subjected to the burden and entitled to the benefit of the restrictions imposed by the scheme.

In my view, a purchaser of land under the Transfer of Land Act is not bound to prosecute inquiries and searches and make deductions such as would be involved if Mr. Searby's contentions were accepted. Even when all the materials and evidence in relation to the circumstances under which an estate has been subdivided and sold are available it is not by any means easy to determine whether the sale of allotments in the estate has been made under or pursuant to a common building scheme. To require a person interested in purchasing one of those allotments to make this determination after obtaining the necessary evidence perhaps years after the original sale if it is available would render conveyancing a hazardous and cumbersome operation, and, in the case of dealings in land under the operation of the Transfer of Land Act, would defeat the object of the Act and destroy in large measure the efficacy of the system sought to be established thereby.

I have reached the conclusion that, even assuming there is power under the Act to notify as encumbrances on a certificate of title restrictions arising under a building scheme, such a notification will not be effective to bind transferees of the land unless not only the existence of the scheme and the nature of the restrictions imposed thereunder, but the lands affected by the scheme (both as to the benefit and the burden of the restriction) are indicated in the notification, either directly or by reference to some instrument or other document to which a person searching the register has access In the present case these requirements

are not satisfied. The covenants contained in the instrument of transfer notified as an encumbrance, though they certainly set out the restrictions, give no indication that they arose under a building scheme, nor of the land to which the benefit thereof was intended to be annexed, under such a scheme. The applicant, therefore, had no notice of the existence of the scheme or of the restrictions imposed thereby. She did have notice that the covenants contained in the instrument of transfer had been entered into by her predecessor in title but those covenants as she had no doubt been advised are no longer enforceable by any person and, therefore, she took her transfer free of the restrictions contained therein and is entitled to a declaration accordingly.

There will be a declaration that the applicant's land being the land comprised in certificate of title vol. 4376 fol. 100 is not affected by the restrictions contained in instrument of transfer No. 650684.

Declaration accordingly.

Solicitor for the applicant: *Maurice Goldberg.*

Solicitors for the objectors: *Purves & Purves.*

F. G. DYETT
BARRISTER-AT-LAW