Restrictive Covenant Update

Leo Cussens Property Law Conference

Session 3: Restrictive Covenants Update

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INTRODUCTION

1. This session is designed to provide you with an update on practice and procedure with restrictive covenants including:

   a) identifying a building scheme, made more clear--*Randell v Uhl* [2019] VSC 668

   b) covenants in terms of settlements--lessons from *Paragreen v Lim Group Holdings Pty Ltd* [2020] VSCA 84

   c) tips for drafting effective covenants.

UPDATE ON PRACTICE AND PROCEDURE

2. The Court is continuing to hear and determine applications pursuant to section 84 of the *Property Law Act 1958* without interruption. The most common provisions are sections 84(1)(a) and (c):

   > (1) The Court shall have power … to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) upon being satisfied:
   >
   > (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Court deems material the restriction ought to be deemed obsolete or that the continued existence thereof would impede the reasonable user of the land without securing practical benefits to other persons or (as the case may be) would unless modified so impede such user; or …

(c) that the proposed discharge or modification will not substantially injure the persons entitled to the benefit of the restriction…1

3. Hearings are largely being conducted by Zoom.

4. More applications are being determined in chambers, by consent.

5. Getting consent orders in early improves the prospects of getting the orders resolved by consent.

6. Judicial Registrars are hearing and determining many applications now, certainly for the first (*ex parte*) return of an application. This is the consequence of a pre-COVID-19 policy decision made by the Court.

7. Private mediations are not being imposed on applications as frequently in recent time, provided assurances are given about the preparedness of practitioners to cooperate in the narrowing of the issues in dispute.

8. Dispensations are still being granted for the provision of unsworn affidavit material. Following recent changes to Part 5A of the *Oaths and Affirmations Act 2018*, affidavits may now be completed remotely by the deponent or authorised affidavit taker:

   a) signing or initialising the affidavit using electronic means;

   b) doing things in each other's 'presence' by audio or audio-visual link; and

   c) signing or initialising a scanned hard copy or electronic copy of the affidavit.

9. The amendments also provide that the Court may admit unsworn affidavits if:

   a) the Court is satisfied that compliance with the Act was not reasonably practicable; and

   b) the unsworn or 'purported' affidavit states why compliance with the Act was not reasonably practicable (see new section 49F).

10. Where filing an unsworn affidavit, the filer should ensure that the deponent:

   a) has been instructed, despite this relaxation of formality, of the need for them to satisfy themselves that the content of the affidavit is true and correct; and

   b) is prepared to swear or affirm the affidavit in the form provided.

11. The filer should also ensure that a formally sworn or affirmed affidavit is filed when circumstances allow.

12. We did notice a slightly lower preparedness to object when the impact of the pandemic first hit, but that appears to have dissipated in more recent months.

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[1] S 84(1) of the *Property Law Act 1958* (Vic).

13. Otherwise, the number of applications appears to be consistent with pre-COVID applications.

14. Beware of the temptation to run a technical argument as a preliminary point as it may add 12-18 months to the process.

IDENTIFYING A BUILDING SCHEME MADE MORE CLEAR -RANDELL V UHL [2019] VSC 668

15. Building Schemes were an early form of estate planning control that sought to avoid issues of contractual privity through the creation of a mutually reciprocal arrangement of covenants.

16. Where a building scheme, or scheme of development is established, all purchasers and their assigns are bound by, and entitled to the benefit of, the restrictive covenant.

17. The elements of a Building Scheme may be summarised as:

    a) the plaintiff and defendant must derive title from a common vendor;

    b) the estate must be laid out prior to sale with the intent to impose restriction on all lots;

    c) the restriction was for the benefit of all lots;

    d) the lots were purchased on the footing that restrictions would apply to all lots; and

    e) the covenant network affected a defined area.[2]

18. However, notwithstanding the frequency with which they are discussed, in Victoria, they are rarely established.

19. Not only do building schemes often break down over the time required for an estate to be established—noting that this was sometimes over the course of a decade or so—but the Courts can be reluctant to enforce them if it is thought that a purchaser didn't receive fair notice of the scheme at the time the land was acquired.

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[2] *Fitt v Luxury Developments Pty Ltd* [2000] VSC 258, [144]

20. In *Randell v Uhl* [2019] VSC 668, Derham AsJ clarified the notice required before the Court will find a party to be bound by the terms of a building scheme.

21. Previously, it was not entirely clear how far a purchaser would need to search the Register of Titles to be on notice as to the existence of a building scheme.

22. In *Randell*, his Honour found a building scheme had been established, but found the plaintiff not bound by its terms because the existence of a scheme was not evident on the face of the title, or any documents referred to therein:

> 82 ... If it were sufficient notice that the Head Title in this case bears the notification of a building scheme, it would require a person interested in purchasing the Land to search the Register further than the title search indicated and to go back to the Head Title and the original, or first edition, of the Subdivision. That would render conveyancing a hazardous and cumbersome operation beyond what is reasonable to expect.
>
> 83 In summary, I am satisfied that a building scheme was established but the notification of it was not sufficient to give notice of it to the plaintiffs because a search of the title of the Land by the plaintiffs did not, and would not, reveal the existence of the scheme either directly, or indirectly by reference to any instrument referred to in the search of the title.

23. His Honour adopted the reasoning of Kyrou J in *Vrakas*, that, by reason of the operation of the *Transfer of Land Act* and the Torrens system, it was necessary for the notice of the building scheme to be included on the register, raising doubt as to the continued applicability of an implied building scheme:

> 45 …in order to bind a transferee of land registered under the Transfer of Land Act with a restrictive covenant arising under a scheme of development, it is necessary for the notification in the Register to give notice of:
>
> (1) the existence of the scheme;
>
> (2) the nature of the restrictive covenant; and
>
> (3) the identity of the lands affected by the scheme, both as to the benefit and the burden of the restriction.
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> Further, it is necessary that this notice is given in the certificate of title, either directly or by reference to some instrument or other document to which a person searching the Register has access.[3]

PARAGREEN V LIM GROUP HOLDINGS PTY LTD [2020] VSCA 84

24. This case concerned the land at:

a) 38 Walsh Street, West Melbourne (highlighted in yellow, below); and

b) 42–52 Walsh Street West Melbourne (highlighted in red, below) (**Lim Group Land**).

25. The Respondent, Lim Group, owned, 42–52 Walsh Street.

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[3] *Vrakas v Mills* [2006] VSC 463, [45]. Emphasis added.

26. These two properties were separated by the Laneway marked in blue:

27. Lim Group purchased its land in 1996, a portion of which maintained the benefit of a registered carriageway easement over the Laneway. At that time, 38 Walsh Street contained a warehouse.

28. Lim Group began to develop its land. The contractors undertaking the development made extensive use of the Laneway.

29. 38 Walsh Street (the yellow shaded land) changed hands, and the new occupiers began using the Laneway for carparking.

30. In response, Lim Group commenced legal proceedings that were settled by agreement. The Terms of Settlement included that the owner of 38 Walsh Street, then Judisco, would not park on the Laneway.

31. Relevantly, the Terms of Settlement stated:

    a) at Clause 2 that the owners of 38 Walsh Street (**Judisco**), personally, would not park on the Laneway:

    The Defendant undertakes not to park vehicles in the Laneway or allow its servants, agents or invitees to park vehicles in or otherwise obstruct the Laneway.

    b) at clause 7 it was agreed that the Terms of Settlement should bind Judisco and 'its successors in title to the Defendant's Land':

This Agreement shall bind the Defendant and its successors in title to the Defendant's Land and the Defendant warrants that it will bring the terms of this Agreement to the attention of any prospective purchaser prior to that purchaser agreeing to purchase the Defendant's Land.

32. 38 Walsh Street (the yellow land) was again sold and developed into three units. During this subdivision, the northern portion of the Laneway was subsumed into the northern most of the three lots, known as Lot 3, with the remainder of the Laneway shown as common property. The Laneway marked as common property remained burdened by the registered carriageway easement.

33. The Applicants for Appeal (Paragreen) then purchased Unit 3, now known as the Applicant Land (the smaller yellow lot above). At the time of purchase:

a) all advertising material depicted the northern portion of the Laneway as being a part of the Applicant Land and noted as parking space;

b) the Terms of Settlement were included as part of the section 32 documents;

c) the Terms of Settlement were not registered on title of the Laneway as a caveat or covenant;

d) the Applicants were made aware of the Terms of Settlement;

e) received legal advice in relation to the purchase of the Applicant Land;

f) at hearing the Applicant gave uncontradicted evidence that they believed the Terms of Agreement to bind Judisco personally, and the agreement to have now ended.

34. Due to security concerns including break-ins, the Applicant constructed a fence across the Laneway. Further, over time they had:

a) parked their car;

b) erected a chicken coop; and

c) erected children's play equipment.

35. The Respondent (Lim Group) commenced proceedings. At first instance Macnamara J in the County Court found in favour of Lim Group. The Applicants appealed on a number of grounds, however the Court considered the matter in two primary elements:

a) the correct construction and effect of the Terms of Settlement; and

b) the application of fraud for the purposes of sections 42 and 43 of the *Transfer of Land Act.*

Did the terms of settlement bind the successor in title?

36. In support of the assertion that the Applicant, as the successor in title to a signatory of the Terms of Settlement, the Respondent and Judge at first instance referred to clause 7 of the Terms of Settlement and section 79 of the *Property Law Act*.

37. Section 79(1) of the *Property Law Act* acts as a deeming provision and provides a presumption of that a covenant made by owners of land shall be made on behalf of his or herself, their successors in title and all persons deriving title from them:

> (1) A covenant relating to any land of a covenantor or capable of being bound by him, shall, unless a contrary intention is expressed, be 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, subject as aforesaid, shall have effect as if such successors and other persons were expressed.
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> This subsection shall extend to a covenant to do some act relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.

38. The Court found that clause 7 in the Terms of Settlement and section 79 of the *Property Law Act* were satisfactory in ensuring the Terms of Settlement bound the successors in title.

39. The residual question was whether:

> 41. … the Terms of Settlement, binding the successors in title of Judisco, precluded those successors in title from parking in the laneway, or, rather, whether it required the successors in title to preclude Judisco from parking there.

40. It was found that the purpose of the Terms of Settlement was to ensure that successors in title to Judisco, would also be bound by the undertaking contained in that clause not to park vehicles in the laneway or to permit their servants, agents or invitees to do so.

41. No relief was grant on this ground.

Were the applicants bound by the Terms of Settlement

42. The final question placed before the court, was whether the Applicant (Paragreen) should have taken its title free of all unregistered interests pursuant to section s 42 and 43 of the *Transfer of Land Act*.

43. Section 42 and 43 of the *Transfer of Land Act* provide the basis of the presumption of indefeasibility of title. Collectively, section 42 and 43 provided that the certificate of title is to be considered a true and correct representation of the land, and, save in the case of fraud, an purchaser shall inherit a clean title:

> **42 Estate of registered proprietor paramount**
>
> (1) Notwithstanding the existence in any other person of any estate or interest (whether derived by grant from Her Majesty or otherwise) which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, except in case of fraud, hold such land subject to such encumbrances as are recorded on the relevant folio of the Register but absolutely free from all other encumbrances whatsoever, except—
>
> (a) the estate or interest of a proprietor claiming the same land under a prior folio of the Register;
>
> (b) as regards any portion of the land that by wrong description of parcels or boundaries is included in the folio of the Register or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.
>
> **43 Persons dealing with registered proprietor not affected by notice**
>
> Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any land shall be required or in any manner concerned to inquire or ascertain the circumstances under or the consideration for which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

44. The Applicants asserted that, by virtue of sections 42 and 43, the fact that the Applicants had notice of the Terms of Settlement did not disentitle them, as registered proprietors, from relying on the indefeasibility provisions contained in the *Transfer of Land Act*, as section 43 expressly provides mere knowledge or notice of an unregistered interest will not itself constitute fraud sufficient to breach the indefeasibility provisions.

45. The Court found that fraud, for the purposes of sections 42 and 43, refers to actual fraud, involving dishonestly, or 'moral turpitude'. To acquire land with notice of an unregistered interest and to become registered proprietor of it, and to refuse to acknowledge the existence of that interest, is not of itself fraud.

46. The Court examined *Bahr* and *Aldal* concluding, that whilst each case must turn on its induvial facts. the following principles broadly apply:

a) first, the Court confirmed the long-standing principle that the exception of fraud, in sections 42 and s 43 of the *Transfer of Land Act*, refers to actual fraud, that is, dishonesty or moral turpitude. A finding of equitable or constructive fraud is and of itself insufficient to constitute fraud under the *Transfer of Land Act*, unless the conduct of the registered proprietor, as such, involves actual dishonesty;

b) fraud which attract equitable remedies and fraud for the purposes of the *Transfer of Land Act* are materially different and distinct from each other;

c) where a purchaser took title to the property with the knowledge and understanding, and having acknowledged, that they were bound by the unregistered interest of the plaintiffs; and

d) although the facts of a dispute may give rise to an *in personam* right in equity, this may not amount to actual fraud within the meaning of the *Transfer of Land Act*.

47. The Court was content that the facts of this particular case were not only different from those in *Bahr v Nicolay (No 2)*[4] and *Body Corporate No 12870 v Aldal Pty Ltd*[5], but were materially distinguishable. In particular:

a) there was no evidence that the Applicants had *expressly acknowledged* the Terms of Settlement or agreed to be bound by the covenant;

b) there was *no evidence that the applicants gave an assurance or undertaking* to Mr Ryan, or to Mr Ryan's agent, of the kind that were given in *Bahr;*

c) there was evidence submitted to demonstrate that the Applicant land was purchased *primarily on the assumption and understanding that the Terms of Settlement would not bind the Applicant* and the Laneway may be used for parking;

d) the evidence submitted by the Respondent went *no further than establishing that the Applicants had knowledge of the Terms of Settlement* when they purchased the Applicant Land.

48. In the present case, there was no foundation for a finding that it would be 'contrary to good conscience' for the applicants to not consider themselves bound by the Terms of Settlement, and, in particular, to exercise their legal right, as registered proprietors, to park their vehicle in the section of the laneway owned by them.

49. The Court of Appeal found that in both *Bahr* and *Aldal*, unlike in the matter before it, the new registered proprietors *had expressly acknowledged the existence of the unregistered interest, yet had chosen to ignore it*. It was this express acknowledgment of the interest, not simple notice as provided to Paragreen, that gave rise to fraud sufficient to lift indefeasibility.

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[4] (1988) 164 CLR 604 (***Bahr***).

[5] (2010) 29 VR 81 (***Aldal***).

50. The Court of Appeal indicated that the bar required to met to lift this veil of indefeasibility remains high, and the simple notice as provided to Paragreen was insufficient for the Lim Group to obtain relief. The Appeal was granted on this ground.

TIPS FOR DRAFTING EFFECTIVE COVENANTS

Covenants must now be implemented through an MCP

51. Section 91A of the *Transfer of Land Act* provides the Registrar of Titles has the power to require the lodgement of instrument in an approved form, and specify that form:

> **91A Recording of common provisions**
>
> (1) Any person may lodge with the Registrar a memorandum in the approved form containing one or more provisions which are intended for inclusion in instruments to be subsequently lodged for registration.
>
> (2) The Registrar may retain a memorandum lodged under subsection (1).
>
> (3) The Registrar may prepare and retain a memorandum containing any provisions which seem appropriate for inclusion in instruments to be subsequently lodged for registration.
>
> (4) A memorandum retained by the Registrar pursuant to this section shall, for the purposes of section 114, be deemed to be part of the Register.

52. On 1 July 2018, the *Registrar's Requirements for Paper Conveyancing Transactions* Version 4, requirement 12.2 came into effect.

53. Requirement 12 states that the details of any restrictive covenant, whether by wording or contained on a Plan, must be set out in a Memorandum of Common Provision:

> a. for which any contract of sale is signed on or after 1 July 2018; or
>
> b when there is no contract of sale, the transfer is signed on or after 1 July 2018;
>
> must be contained in a Memorandum of Common Provisions (**MCP**) or MCPs and referred to in the transfer by the MCP number(s).

54. Schedule 6 of the same *Registrar's Requirements for Paper Conveyancing Transactions*, provided the proforma wording of the covenant to be instituted both as separate and stand-alone documents, as well as those instituted by way of plan:

> **Transfers under the TLA**
>
> The following wording must be used:
>
> The registered proprietors of the burdened land covenant with the registered proprietors of the benefited land as set out in the restrictive covenant with the intent that the burden of the restrictive covenant runs with and binds the burdened land and the benefit of the restrictive covenant is annexed to and runs with the benefited land.
>
> Burdened land: the Land
>
> Benefited land: [set out]
>
> Restrictive covenant: MCP [set out MCP number(s)]

Expiry date: [dd/mm/yyyy]

Plans

The following wording must be used except for the wording in square brackets:

The registered proprietors of the burdened land covenant with the registered proprietors of the benefited land as set out in the restriction with the intent that the burden of the restriction runs with and binds the burdened land and the benefit of the restriction is annexed to and runs with the benefited land.

Burdened land: [set out]

Benefited land: [set out]

Restriction:

The burdened land cannot be used except in accordance with the provisions recorded in MCP [set out MCP number(s)].

[or]

The burdened land cannot be used except in accordance with Planning Permit [set out reference].

[and/or]

[Set out the details of the restriction on up to a maximum of a single sheet of the Plan. The single sheet may include diagram(s). Standard drafting practices apply. The font size must be no smaller than 2.5mm.]

Expiry date: [dd/mm/yyyy]

55. Covenants are now, no longer contained in the traditional Instruments of Transfer.

56. Pursuant to *Land Use Victoria Customer Information Bulletin 175*, the details of any restriction to be created in a plan must be:

    a) contained in one or more MCP and referred to in the plan by the MCP number(s); or

    b) a short-form restriction limited to a single sheet of a plan; and/or

    c) by reference to a planning permit.

Ensure you cover the legal formalities of a covenant

57. For a covenant to be legally valid, three elements are required:

    a) it must be negative in nature;

    b) it must touch and concern the land; and

    c) it must be annexed or assigned to the land.

Covenant must be negative in nature

58. A covenant must be negative in that it must restrain a person from dealing with their land in a certain way. Whether a covenant is negative is assessed by the court as a question of fact. It is therefore immaterial whether the wording is phrased as a positive requirement.[6]

59. For example, if a covenant states that a person must use a dwelling as a private residence only, although this appears positive, it can be construed as negative in nature, as, it is a covenant not to use the premises for any other purposes other than a dwelling.[7]

60. In contrast, an obligation to maintain landscaping to a particular standard would be positive in nature and would fall foul of this rule. It is partly for this reason that section 173 of the *Planning and Environment Act 1987* was introduced. This is a statutory power to create agreements that run with the land, but in contrast to restrictive covenants, 'section 173 agreements' can be positive or negative in nature.

Covenant must touch and concern the land

61. The requirement that the benefit of a covenant must 'touch and concern' the land, can be seen in *Smith and Snipes Hall Farm v River Douglas Catchment Board*[8] and *Town of Congleton v Pattison*.[9]

62. In *Snipes Hall*[10], the covenant required landowners of land abutting a river to maintain the riverbank. The riverbank fell into disrepair and caused flooding. Whilst the requirement, or burden, to maintain the riverbank may be considered to be positive in nature, the benefit, that the river would not flood, was found to directly affect, or touch and concern, the land. Tucker LJ explained that to touch and concern the land:

> … it must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land, and it must then be shown that it was the intention of the parties that the benefit therefore should run with the land.[11]

63. In contrast, the landowner in *Town of Congleton v Pattison*[12] operated a silk mill on his land. The covenant affecting his land barred people from outside the Parish from working at the mill. The Court found that such a covenant did not go to the mode of occupation of the land, but rather sought to limit foreigners from being able to find work, and as such it did not touch and concern the land.

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[6] *Fitt & Anor v Luxury Developments Pty Ltd* [2000] VSC 258, at [151].

[7] Anthony P Moore, Scott Grattan, Lyndren Griggs, *Australian Real Property Law* (Thomson Reuters, 6th ed, 2016); *Thamesmead Town Ltd v Allotey* [1998] 3 EGLR 97.

[8] [1949] 2 All ER 179.

[9] [1808] EWHC KB J66.

[10] *Smith and Snipes Hall Farm v River Douglas Catchment Board* [1949] 2 All ER 179.

[11] *Smith and Snipes Hall Farm v River Douglas Catchment Board* [1949] 2 All ER 179 at 183.

[12] [1808] EWHC KB J66.

64. When assessing whether the benefit touches and concerns the land, the benefitted land will need to be sufficiently proximate to the burdened land for it to be capable of receiving the benefit.[13] There is no need for the lands to be contiguous, however both parcels must be 'in same the neighbourhood'.[14] Thus, land in Mildura could not reasonably be said to be land that benefits from burdened land in Hawthorn.

Covenant must be annexed to the land

65. Common law principles requiring the benefit and burden of a covenant to be annexed to the land are now reflected in sections 78 and 79 of the *Property Law Act 1958* (Vic).

66. Section 78 of the *Property Law Act 1958* (Vic) provides a statutory presumption that any person deriving title under the covenantee, being the owner of the originally benefitted land, will, all other factors being equal, take the benefit of the covenant:

> (1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed.
>
> For the purposes of this subsection in connexion with covenants restrictive of the user of land successors in title shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.[15]

67. Similarly, section 79 of the *Property Law Act 1958* (Vic) provides the further presumption that the land burdened by the covenant will continue to be burdened, even if it passes out of the ownership of the original covenantor:

> (1) A covenant relating to any land of a covenantor or capable of being bound by him, shall, unless a contrary intention is expressed, be 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, subject as aforesaid, shall have effect as if such successors and other persons were expressed.
>
> This subsection shall extend to a covenant to do some act relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.

68. The practical effect of section 78 and 79 of the *Property Law Act 1958* (Vic) is that, save where expressly set out in the covenant to the contrary, the benefit and burden of the covenant will pass to the subsequent possessors in title to the original covenanting parties.

The use of an MCP has resulted in fresh challenges

69. Careful attention must be paid to the precise wording of the covenant and the descriptions of both the benefitted and burdened land, to avoid the creation of uncertainty or failure to appropriately identify the affected land.

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[13] *Clem Smith Nominees v Farrelly* (1978) 20 SASR 227.

[14] *Clem Smith Nominees v Farrelly* (1978) 20 SASR 227 at 249.

[15] Section 78 of the *Property Law Act 1958* (Vic).

70. Recently, I have seen an instance in which a large parcel of land was in the process of being subdivided and the benefit was conferred to the parent title of the subdivision. However, once the covenant was attached to the newly created lots, the parent title from which these lots were created no longer existed. The Titles Office refused to register the covenants on the grounds they were uncertain and no benefitted land was identified.

Be precise in your language

71. Attention to detail is key in drafting and preparation of a covenant. Some factors which should be kept in mind:

    a) specific and accurate description of the benefitted land, both initially and throughout the document;

    b) specific and accurate description of the burdened land;

    c) consistency of terms; that is best to avoid, for example, referring to the benefitted land as 'the Land', 'the lot', 'the allotment' all within the same document; and

    d) the comingling of singular, plurals or undefined units of measurement. For example, there is continuing tension between the use of the 'a' and 'one', in the context of 'a' dwelling house and 'one' dwelling house'.

72. To avoid covenants which lack of the desired specificity, it may be beneficial to tailor each covenant to the individual lot or lot type. This is particularly relevant in large scale subdivisions where proforma covenants are attached to all lots, regardless of size, or appropriate development or use.

73. Avoid simply copying and pasting from contracts of sale.

Don't rely on external documents to give meaning to the Covenant

74. Try to ensure a covenant is self-contained and does not rely on the use of other documents to shed light on its meaning.[16]

75. A key principle of this Torrens System is that the Register is a true and correct representation of the land, and so a person inspecting the Register need not make extensive further investigations.[17]

76. Hence, the use of extrinsic documents, such as communications between the original covenanting parties; contracts of sale; diary entries; or other documents intended to shed light on the subjective intention of the signatory parties cannot be used to aid in the construction or interpretation of the restrictive covenant. See *Westfield Management Limited v Perpetual*

[16] *Codelfa Constructions Pty Ltd v State Rail Authority (NSW)* (1982) 41 ALR 467; *Westfield Management Limited v Perpetual Trustee Company Limited* [2007] HCA 45.

[17] *Breskvar v Wall* (1971) 126 CLR 376.

Trustee Company Limited [2007] HCA 45, which involved an Easement, but the same principles are believed to apply to restrictive covenants, at [35]-[39]:

> 35 In going on to allow the appeal, Hodgson JA (again correctly) remarked that the decision of the primary judge appeared to be the product of an error in preparedness to look for the intention or contemplation of the parties to the grant of the Easement outside what was manifested by the terms of the grant. Extensive evidence of that nature had been led by Westfield on affidavit with supporting documentation.
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> 36 In this Court, counsel for Perpetual submitted that some but not all of the extrinsic evidence had been admissible; in particular, the evidence said to supply part of the "factual matrix" but which post-dated a deed dated 26 February 1988 containing a covenant to grant the Easement was inadmissible. So also was said to be evidence of the subjective intention of the then owner of Glasshouse which had not been communicated to the then owner of Skygarden. Perpetual accepted that what had been admissible was evidence of a preceding oral agreement between those parties: this had been to the effect that the Easement was to permit access to Skygarden via Glasshouse.
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> 37 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 contracts *inter partes*, of the nature explained by authorities such as *Codelfa Construction Pty Ltd v State Rail Authority of NSW*[18], did not apply to the construction of the Easement.
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> 38 Recent decisions, including *Halloran v Minister Administering National Parks and Wildlife Act 1974*,[19] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,[20] and *Black v Garnock,*[21] have stressed the importance in litigation respecting title to land under the Torrens system of the principle of indefeasibility expounded in particular by this Court in *Breskvar v Wall*.[22]
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> 39 The importance this has for the construction of the terms in which easements are granted has been remarked by Gillard J in *Riley v Penttila*[23] and by Everett J in *Pearce v City of Hobart*.[24] The statement by McHugh J in *Gallagher v Rainbow*,[25] that:
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> > *"[t]he principles of construction that have been adopted in respect of the grant of an easement at common law ... are equally applicable to the grant of an easement in respect of land under the Torrens system",*
>
> is too widely expressed. The 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

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[18] (1982) 149 CLR 337 at 350-352.

[19] (2006) 80 ALJR 519 at 526 [35]; 224 ALR 79 at 88.

[20] (2007) 81 ALJR 1107 at 1150-1152 [190]-[198]; 236 ALR 209 at 266-269.

[21] (2007) 237 ALR 1 at 4 [10].

[22] (1971) 126 CLR 376. See also *Figgins Holdings Pty Ltd v SEAA Enterprises Pty Ltd* (1999) 196 CLR 245 at 264 [26]-[27]

[23] [1974] VR 547 at 573.

[24] [1981] Tas R 334 at 349-350.

[25] (1994) 179 CLR 624 at 639-640.

registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee.[26]

77. Avoid referring to documents that do not form part of the register.

Make the covenant limited in time

78. In its paper on the reform of restrictive covenants and easements in Victoria, the Victorian Law Reform Commission has recommended the introduction of expiry dates into covenants:

> 6.149 We think that a specified expiry date should be included in all covenants. Following the discussion in our consultation paper of the different time periods, we recommend that restrictive covenants created in future should have a maximum duration of 20 years, as in the Northern Territory. After the covenant expires, it should be open for renegotiation.
>
> 6.150 A duration of 20 years will be sufficient to protect the interests of developers and initial purchasers who contribute to the establishment of a new subdivision. More than 90 per cent of homeowners who take out a mortgage to buy a home will not be there in 20 years time. In its most recent report on housing mobility and conditions, carried out in 2007–08, the Australian Bureau of Statistics found that: 'for owners with a mortgage, 58% of … persons had spent more than 5 years in their current dwelling and 9% had spent more than 20 years'.

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[26] cf *Proprietors Strata Plan No 9,968 v Proprietors Strata Plan No 11,173* [1979] 2 NSWLR 605 at 610-612.