

Better check that encumbrance!

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Fulham is a nice suburb of Adelaide laid out on what were predominantly market gardens. At 538 Henley Beach Road, Fulham, there is a block of land which had a house on it. The owner of the property got development approval to divide it and build two townhouses on it.

On the title to the property, there was a registered encumbrance, much like tens of thousands of blocks of land all over South Australia. Their history dates back to the early 1930s when they were developed to restrict development in the suburb of Springfield although the concept goes back to 19th century England.

This Fulham encumbrance was in favour of the original owner of the land who divided it into 52 blocks of land in the mid-1960s.

The encumbrance prohibited the use of the land for anything other than 'a dwelling house for private residential purposes' and prohibited the erection of any block or blocks of flats, home units or other multiple dwellings.

The encumbrance purported to have this restriction for the benefit of a 'common building scheme'. The problem was that the encumbrance itself did not refer to what other blocks of land were within the common building scheme or what land was to receive the benefit of the encumbrance. The only reference to a common building scheme was a handwritten reference on the back of the encumbrance which said: 'this encumbrance forms portion of a common building scheme'. There was no map in the encumbrance or other way of working out what blocks of land were within this common building scheme.

The issue was this. If the encumbrance was valid, the developer could not do the development. If it was not valid the developer could proceed in accordance with the development approval.

And so it came to pass that a legal case wound its way from the District Court through to the Full Court of the Supreme Court of South Australia on an Appeal and ultimately on 4 November 2020 it became the subject of

a unanimous judgement of the High Court of Australia on an appeal from the Supreme Court. It pitted the developer against a couple of the descendants of the original owner and one of the owners of another block of land in the original division.

The descendants and the other owner were victorious in the District Court and they convinced two of the three judges in the Supreme Court that they were correct and that the encumbrance was enforceable. Unfortunately for them, they did not convince the Chief Justice of the Supreme Court and all of the five judges of the High Court including the Chief Justice of that Court.

In short the developer won the case. The encumbrance was not enforceable.

The legal reasons why the case was won by the developer make lovely reading for lawyers and have to do with fundamental principles which underlie the Torrens Titles system. One of these principles is that a person searching the title is entitled to know by the search of that title and the documents registered against that title the extent of any registered restrictions or other matters affecting the use of that land.

Applying that principle to the facts of the case, the encumbrance did not identify which land was entitled to the benefit of the encumbrance as part of the common building scheme. It would have required the purchaser to go back through the chain of titles and documents lodged at the LTO and also try and track down a map which showed the land but which was not registered at the LTO to find out which land had the benefit of the encumbrance. The High Court made it crystal clear that this type of searching was what the Torrens Title system was designed to abolish. This made it inevitable that the encumbrance was unenforceable.

If the encumbrance had accurately defined the common building scheme by reference to a map registered at the LTO or attached to the encumbrance or in some way clearly defined within the encumbrance, then it would have been enforceable.

In short, a person stuffed up the drafting of the encumbrance.

The descendants and the owner of the other parcel of land were ordered to pay the developer's legal costs in all three courts. Both parties had Queen's Counsel appearing so this could not have been a cheap exercise for anyone involved.

Why does that matter to you as a developer or purchaser of land?

Well for a start, there are now another 51 parcels of land near 538 Henley Beach Road in Fulham which are capable of division. You would think that would improve the development potential of those parcels of land.

So if you are a developer buying existing blocks of land with an encumbrance on them, it would pay to get a lawyer to carefully check the wording and see if the encumbrance prohibiting further division or division on certain grounds or having other restrictions is legally enforceable.

“ High Court makes the law crystal clear..... ”

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