TOWN PLANNING AND CONVEYANCING.*

Town Planning is a subject of vast importance in the community; and indeed in responsible quarters I think it is just now that the real and vital importance of orderly planning here is being realised. When the Town Planning Act of 1947 was introduced into the British Parliament it was said that the effect of the English legislation would be to create a revolution in the law relating to the tenure of land. That, I think, from a strictly legal point of view was an over-statement; but there can be no doubt whatever that this legislation both in England and in the various States of Australia has had extremely important social and economic consequences. Likewise it is a matter which must concern every lawyer who is concerned with conveyancing.

Prior to the introduction of the Town Planning legislation an owner of land was entitled to use that land in any manner he might think fit, subject only to any general rules of law, both common law and statute law, and also subject to any encumbrances to which the land might have become subject by dealings *inter partes*. That being the position prior to the enactment of this legislation, we find that the purposes and the objects of the legislation are to control the use and the development of land and to impose on land owners various onerous obligations, limiting very much the right which they formerly had as such owners; and the general scheme of the Act in force in this State, as indeed I believe the position to be in all States of the Commonwealth, has been to effect these purposes by means of planning schemes and interim development orders. The planning schemes and orders made thereunder, from the point of view of the conveyancer, raise certain vital questions; and in the time allotted to me this morning, I hope to say something in relation to three of the matters which arise from planning control—firstly, the relationship between planning control and the title to land, secondly, the effect of planning matters upon the description of land which may be included in the particulars of sale under a Contract of Sale, and thirdly, the effect of various conditions of sale which are inserted in contracts dealing with planning matters.

The first of those matters, the question of planning control and title to land, is a topic which has given rise to a very great deal of discussion and difference of opinion not only in judicial decisions but also in legal literature; and perhaps I may take two excerpts from the

* This is an edited transcript of a talk given at the 1966 Law Summer School held at the University of Western Australia.

Australian Law Journal as the text of what I hope to say in relation to the question of planning control and title. In the 35th volume of the Australian Law Journal, at the end of an article, you will find this statement: "Town planning restrictions are not defects of title but of the quality of the land,"[1] and secondly, in volume 23 of the Australian Law Journal, you will find this statement: "It is difficult to see upon what principle it could be held in the absence of fraud that any provision of the ordinance affecting an estate or interest in land would amount to a defect in title."[2]

The first observation I would make is that I have taken each of those excerpts out of its context. Each of them occurs in an article dealing with this particular subject matter, but I refer to them because in my view it would be extremely dangerous to regard either of those statements as constituting an exhaustive or even an accurate statement of what I believe the true position to be. The statements deal with planning control and title. Now the word "title" and the expressions "defect of title" and "matter of title" are ambiguous; and whenever you are discussing any question of planning control and title you must first ask yourself "what meaning do we assign to the word 'title'?—what meaning do we assign to the expression 'defect of title'?"

There are, I think three different senses in which those expressions may be used and which are relevant to our present enquiry. A man may be said to have a good title to land if his position in relation to the land is that he is able to maintain and recover possession against any third party. In that sense I think that the word "title" has little relevance to planning matters. The second sense in which the expression "title" or "defect of title" or "matter of title" is used is that it connotes that there is an encumbrance affecting the particular estate in the land with which we are concerned; and an "encumbrance" is a liability or an obligation which affects the land, arising either from an act *inter partes* or from some statutory provision. Accordingly, in one sense, to say that a person has a good title to land is to say that he owns an estate in the land free from any such encumbrance. There is a third and very important sense in which the expression "defect of title" or "matter of title" is used: it is to indicate any matter which the law requires a vendor to disclose to a prospective purchaser and which, if not disclosed, will result in certain legal

1 R. M. Stonham, *Town Planning Restrictions are not Defects in Title,* (1961) 35 AUST. L.J. 7, at 9.

2 J. W. Every-Burns, *Town and Country Planning and Title to Land,* (1950) 23 AUST. L.J. 541, at 543.

consequences. That is the sense, I think, in which for our present enquiry, the expression "matter of title" and "defect of title" has the greatest significance.

Once we appreciate that there is that ambiguity in the word 'title' and in the expressions to which I have referred, we can proceed to ask to what extent the two citations from the Australian Law Journal may be justified. In substance what those statements say is that planning matters are not defects of title. I have indicated that my view is that those statements are true in a very limited sense only. The first observation I would make is that, as a general rule, restrictions which arise under the Town and Country Planning Act (either under an ordinance made under the Act or under an interim development order) are matters of public law which affect land in general and independently of all questions of title or ownership. I stress that, *as a general rule,* that is the nature of planning restrictions. It is a matter of public law. That was forcibly pointed out by the High Court a few years ago in *Royal Sydney Golf Club v. The Federal Commissioner of Taxation*[3] where, in a joint judgment, it is said that there is all the world of difference between restrictions imposed upon the ownership of land by a general law affecting land in general and on the other hand restrictions which affect merely particular parcels of land.

As a general rule, planning restrictions are matters which are imposed by a public law independently of all questions of title. That leads me to a very brief reference to a controversy which raged in England in the legal journals for some years as to the precise effect of planning restrictions and obligations in relation to the use of land. Dr. Harold Potter, who, until his lamented death a year or two ago, was one of the leading academic real property lawyers of England, was the protagonist of the view that planning restrictions had indeed worked a revolution in the law relating to conveyancing. Shortly stated, Potter's thesis was that the effect of planning control is that no man in England any longer owns an estate in fee simple in land, but that all he now has is an estate in fee simple in a *particular use* of land. So he pointed out, the effect of the legislation was that no man could effectively vest in another on a sale of land any greater right than the right to use that land for the particular purpose which happens to be lawful under the planning legislation; and hence he said all that any owner in fee simple now has is an estate in fee simple in the *use* of land and not in the land itself. That view has been

[3] (1954-55) 91 C.L.R. 610, at 624.

almost universally rejected in England; but those who are interested to follow up what Potter said about the matter will find his leading contribution in Volume 13 of the English Conveyancer and Property Lawyer.[4] That view was trenchantly criticised in an article in the 26th volume of the Conveyancer[5] but that criticism is, I think, itself open to criticism. But the real answer to Potter's thesis is, I think, this:—that he did not appreciate the distinction, which our High Court has pointed out, between a general public law which affects land in general and, on the other hand, a transaction *inter partes* which imposes a particular restriction on a particular piece of land. Indeed, in his writing in support of his thesis Potter in substance said this:— where land is subject to a restrictive covenant as to the manner of user then obviously that is a defect of title—which of course it is. A fortiori, he says, where you have restrictions imposed in a much more stringent form by an Act of Parliament it must follow that that also constitutes a defect of title. But the fallacy in his reasoning was that he overlooked what the High Court pointed out in *Royal Sydney Golf Club v. The Federal Commissioner of Taxation.*

We can at least say with confidence that, as a general rule, restrictions imposed upon land in general by a planning ordinance or an interim development order do not constitute defects in title to the land. There is, as far as I am aware, one decision and one only in Australia in which the contrary was held. It was the case of *Persson v Raper*[6] where a judge of the District Court of the State of New South Wales held expressly that restrictions imposed upon land in general by the County of Cumberland planning scheme constituted a defect of title. In view of what the High Court has said it is quite clear, I think, that that decision is erroneous, and that it is now firmly established that as a general rule planning restrictions are not defects of title.

There are other matters which now call for consideration. In a case in England in 1927[7] a question arose as to the effect upon title to land of a resolution which had been passed by a local authority for the preparation of a planning scheme. After the date of that resolution land which, in due course, would have been affected by the planning scheme was sold under a contract which provided that the sale was free from encumbrances; and the purchasers sought to reject the

[4] Potter, *Caveat Emptor,* (1949) 13 CONVEY. (n.s.) 36 and 86.

[5] A. R. Mellows, *The Use and Title,* (1962) 26 CONVEY. (n.s.) 269.

[6] (1950) 69 W.N. (N.S.W.) 10.

[7] In re Forsey and Hollebone, [1927] 2 Ch. 379.

title on the ground that the passing of this resolution constituted a defect of title. It was held both in the court of first instance and later in the Court of Appeal that the effect of the resolution was merely to impose a potential liability on the land and that unless and until that potential liability ripened into an actual liability it could not be said that there was any defect of title. We get much the same thing in a very recent decision in the Supreme Court of Tasmania.[8] In that case land was contracted to be sold free from encumbrances. Prior to the date of the contract a planning scheme had finally been approved, under which the subject property became liable to compulsory acquisition; but at the date of the contract the vendor was not aware of that fact. The purchaser, however, discovered the fact prior to completion and sought to reject the title. But the learned judge held that even though the liability to acquisition arose under a planning scheme which had actually been approved, it did not constitute a defect of title and accordingly, that the contract was valid at common law. I shall have occasion, in a few minutes, to refer to another aspect of that decision, but the point I make at the moment is, that it is in line with *In re Forsey and Hollebone* that potential liabilities or a possibility of acquisition does not constitute a defect of title so as to invalidate a contract according to the rules of the common law.

But in order to arrive at a correct conclusion as to the effect of any particular planning provision you must look at the relevant legislation in order to determine precisely the nature and the scope of the limitation or obligation. Take a case which might arise under subsection 8 of section 7A of the Act of Western Australia. Under that provision the statutory authority has power, wherever there has been a breach of the regulations relating to planning control, to serve on the owner of the land a notice requiring that the structure be demolished or be brought into conformity with the regulations. Now I feel no doubt that the existence of a notice of that description constitutes a defect of title. You will find many decisions on cognate matters both in the Courts in England and in the Courts of this country. Demolition notices served under various statutory powers have uniformly been regarded as affecting, in a very real and vital sense, the title to the land; and, as such, they have been regarded as encumbrances which will entitle the purchaser to reject the title unless there is an appropriate provision in the contract precluding him from so doing.

[8] Doust v. Hubbard, (1964) 11 L.G.R.A. 260.

I pass now to another matter in relation to the effect of planning restrictions. What is the effect of knowledge on the part of a vendor which would affect the mind of a purchaser in determining whether he will buy the property or in determining the price which he is prepared to pay? There have been several reported decisions in which a vendor has had knowledge of planning restrictions which might vitally affect the mind of the purchaser but has not brought those restrictions to the notice of the purchaser; and a question has arisen as to the legal effect of his failure to make disclosure. It is here that we must draw a sharp distinction between the attitude of the common law and the attitude of the Courts of Equity. There is no distinction, so far as concerns the *construction* of a contract, between the common law and equity. No matter in which court the question arises the same principles of construction and interpretation will be employed; but where you come to the question—"What remedies are afforded, on the one hand, at common law and, on the other hand, in a Court of Equity?" you find very marked differences. The general principles upon which Courts of Equity withhold or grant relief by way of specific performance and this of course is not intended to be exhaustive are that relief is refused where there has been any want of fairness in the contract, where there has been any unconscionable or harsh dealing on the part of one party, or indeed where the effect of the contract is to produce great hardship on one party even though that hardship is, in some cases, contributed to by his own action or inaction. Those are the general principles upon which Courts of Equity have withheld relief by way of specific performance; and perhaps the high water-mark of the application of those principles will be found in a decision which went on appeal to the High Court from this State in the year 1927. The case is *Summers v. Cocks.*[9] In that case, the vendor was the owner of certain licensed premises and he had a strong suspicion that at the sittings of the Licensing Court to be held a few months hence, the licence might not be renewed; and with that fear in mind, he sold the property to the purchaser (who was the defendant in the action) but without disclosing the fact that he had knowledge of facts which led to a suspicion that the licence might not be renewed. The then Chief Justice of this State held that the failure to disclose those facts to the purchaser had no effect at common law. The contract was perfectly valid and binding, but in the exercise of his discretion (the vendor having sought a decree for specific performance) he held that the decree should be

[9] (1927) 40 C.L.R. 321.

refused; and the High Court upheld that decision. Now that was a case which you could put into the category of "unconscionable dealing" on the part of the vendor in failing to disclose to the purchaser the strong probability that in a month or two he would lose a valuable part of the subject matter of the purchase. These principles have been applied in cases relating to Town Planning. As a general rule, even though the contract may be valid at common law, where you find that a vendor fails to disclose to a purchaser the fact that the current use of the property is not a lawful use or where you find that the vendor is aware of the purpose which the prospective purchaser has in mind in buying the property and the vendor is also aware of the existence of planning restrictions which would prevent him from putting the property to that use, in those cases even though you might have an appropriate provision in the contract which would render it perfectly valid at common law, it is clear that the court has a discretion to withhold relief by way of specific performance; and, as a general rule, it will exercise its discretion by withholding that relief. We may take two decided cases in which that principle was applied. In *Yammouni v. Condidorio,*[10] the subject matter of the sale was a residential property; and under the provisions of the relevant interim development order, some part of the land had been reserved for purposes of road widening at an indefinite future date. The vendor was aware of that fact, but he did not disclose it to the purchaser. Monahan J. held that the existence of this particular burden on the property did not constitute a defect of title, that accordingly the contract was valid at common law, but that by reason of the non-disclosure by the vendor to the purchaser of the knowledge which the vendor had a decree for specific performance should be refused. In this State, as I understand the law, the result of that decision would be that the vendor would be left to his remedy in damages, which is a common law remedy and is in no wise affected by the refusal of the court to decree specific performance. In Victoria we have a statutory provision (which, as I discovered yesterday, apparently is not in force in this State) that wherever a court refuses to decree specific performance or in any action for the return of a deposit, the court may, in its discretion, order the repayment of the deposit. It is a provision which originally was enacted in England in 1925 and we copied in Victoria in 1928. It has indeed proved to be a very beneficial enlargement of the powers of the court; and in the case of which I am speaking, His Honour not only refused to decree

10 [1959] V.R. 79.

specific performance but in the exercise of the statutory power he ordered the return of the deposit. Now that, in effect, was a judicial rescission of the contract; and if, as I have no doubt the position is, the Law Society of this State interests itself in questions of law reform I would commend to its consideration whether a move might not be made to have that particular provision adopted in this State. It is a provision which works extremely well, and, as it appears to me it has been an extremely beneficial enlargement of the jurisdiction of the court. In the Tasmanian case to which I referred a moment ago, the Acting Chief Justice refused to decree specific performance solely on the ground of hardship; and he left the vendor to his remedy in damages at common law, because in Tasmania the particular provision of which I speak is not in force.

I can summarise what I have been trying to say in the last 20 minutes in this way—where there is any question of non-disclosure of knowledge which a vendor has and which might affect the judgment of the purchaser in determining whether to buy the property, then you must consider, on the one hand, what the position is at common law and, on the other hand, what the position is in equity and what would be the fate of a vendor who had failed to make disclosure if he sought a decree for specific performance.

I pass now to the second of the broad matters to which I referred earlier, and that is the effect of inserting in a contract words descriptive of the use to which the property might be put. For example, where you find in particulars of sale that the property is described as "valuable shop premises" but the real position is that the land is situated in a residential zone under the Town and Country Planning legislation, does the vendor perform his contract by offering a property which lawfully may be used, subject to any non-conforming use, for residential purposes only? The answer, I think, must be that there is explicit in the description a promise or contract by the vendor that the property may lawfully be used for the purpose implied in the description and that where, owing to restrictions imposed by the planning legislation, the property cannot be used for that purpose, the purchaser is entitled to say to the vendor—"You are not able to convey or transfer to me a property which complies substantially with that described in the contract and accordingly I elect to rescind."

I had hoped to be able to say quite a deal more about that question, but my time has expired. Perhaps I may crave an extension of about three minutes to refer to the last of the matters to which I referred earlier, namely—the question of conditions of sale in relation to planning matters. A common enough condition in contracts of

sale in my State reads somewhat in this way:—"The purchaser buys subject to any restrictions imposed by and subject to the provisions of the Planning Acts." It is fondly imagined by many practitioners that if you have such a provision in your contract, then no matter what the circumstances, a vendor can never be in trouble by reason of planning matters. Nothing could be further from the truth. The true legal effect of such a provision in a contract is that it protects a vendor against restrictions or obligations arising under the Planning Act of which he has no knowledge; but it does not protect him from the duty to disclose relevant restrictions and obligations of which he is aware or, indeed, of which he ought to be aware; and it is clear, I think, that where there has been non-disclosure such as I have mentioned then even in the case of a contract containing that provision the vendor would fail if he sought specific performance. The Town and Country Planning legislation has undoubtedly imposed additional duties upon a solicitor acting for a purchaser of any property; and to perform his duty to his client, the solicitor should do one or the other of two things. One very wise course is to make exhaustive preliminary enquiries as to the use to which the property may lawfully be put and make certain that it can lawfully be put to the use which your client has in mind. But unfortunately (I don't know the position here), in my own State in 90% of the cases the contract of sale comes to the solicitor already signed; and thus the time at which preliminary enquiries could be made is long past. In those circumstances, that is, where your client does not consult you prior to the signing of the contract, it is plainly the duty of the solicitor to find out from his client the purpose for which the property is being bought, and then to endeavour to have inserted in the contract a provision making that contract conditional upon its being discovered, prior to completion, that the property can be used for the desired purpose. If you want guidance for conditions of sale of that description, you will find precedents (which, of course, would need a great deal of moulding to meet local conditions) both in the conditions of sale used by the Law Society of England and also in what are known as the National Conditions of Sale.[11] Those are the English conditions, and they can easily be moulded to meet local requirements. Now the final point, and it is one of great importance, that I would make, is this:—that even where there has been the opportunity of making preliminary enquiries before the contract is signed it is still the duty of the solicitor to deliver appropriate requisitions on title

11 WALFORD, CONDITIONS OF SALE (2nd ed.), 330.

directed to planning matters. If your preliminary enquiries have been sufficiently full, it will in most cases be sufficient to deliver a requisition enquiring whether the position is still the same as was disclosed by the preliminary enquiries; because, between the date of those preliminary enquiries and completion, circumstances may well have altered. As to that particular duty, I would commend to the perusal of every practitioner a decision in 1956 in England—*Goody v. Baring*.[12] But I particularly commend this decision to every practitioner for a different reason. It points out, in no uncertain terms, the dangers which are inherent in the same solicitor acting for both the vendor and the purchaser upon a contract for the sale of land. *Goody v. Baring* itself was an action for negligence against a solicitor who acted for both parties, and there was very trenchant criticism of his having done so. Although that aspect of it has nothing to do with Town Planning, I may perhaps be pardoned for commending it to you all.

L. VOUMARD.*

12 [1956] 1 W.L.R. 448.

* *Q.C.; of the Victorian Bar.*