

# SUPREME COURT OF QUEENSLAND

CITATION: *Townsville Port Authority v Max Locke, Registrar of Titles*  
[2004] QCA 294

PARTIES: **TOWNSVILLE PORT AUTHORITY**  
(applicant/appellant)  
**v**  
**MAX LOCKE, REGISTRAR OF TITLES**  
(respondent/respondent)

FILE NO/S: Appeal No 2080 of 2004  
SC No 814 of 2002

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Townsville

DELIVERED ON: 13 August 2004

DELIVERED AT: Brisbane

HEARING DATE: 19 July 2004

JUDGES: de Jersey CJ, Williams JA and Mackenzie J  
Separate reasons for judgment of each member of the Court,  
each concurring as to the order made

ORDER: **Appeal dismissed with costs to be assessed**

CATCHWORDS: REAL PROPERTY – RESTRICTIVE COVENANTS –  
INTERPRETATION – where the Registrar of Titles rejected  
an instrument claimed to be an “instrument of covenant”  
within the meaning of s 97A of the *Land Title Act* 1994 –  
where the appellant’s solicitors then provided the Registrar  
with a proposed amended document, although not formally  
lodging the document – where the appellant challenged the  
Registrar’s refusal to register the instrument, by application  
for judicial review – where the learned primary Judge  
dismissed that application – whether the primary Judge erred  
in concluding that the covenant does not “relate to” the use  
of the lot or a building proposed for it

*Acts Interpretation Act* 1954 (Qld), s 14A  
*Land Title Act* 1994 (Qld), s 97A  
*Property Law Act* 1974 (Qld), s 55

*Auckran v The Pakuranga Hunt Club* (1904) 24 NZLR 235,  
cited  
*Corporate Affairs Commission (SA) v Australian Central  
Credit Union* (1985) 157 CLR 201, cited

*In re The State Electricity Commission of Victoria & Joshua's Contract* [1940] VLR 121, cited  
*Neumann Dredging Co Ltd v Collector of Customs (Qld)* (1987) 79 ALR 588, cited  
*Perpetual Executors and Trustees Association of Australia Ltd v Hosken* (1912) 14 CLR 286, cited  
*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, cited  
*Queensland Heritage Council v The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane* [2000] QCA 378; (2000) 110 LGERA 193, cited

COUNSEL: C L Hughes SC for the appellant  
 B J Clarke, with S A McLeod, for the respondent

SOLICITORS: Suthers Taylor Lawyers for the appellant  
 Crown Solicitor for the respondent

- [1] **de JERSEY CJ:** The issue on this appeal is the registrability, under the *Land Title Act* 1994, of an instrument claimed to be an “instrument of covenant” within the meaning of s 97A of that Act. The Registrar of Titles rejected that claim and refused to register the document. The appellant’s solicitors then provided the Registrar with a proposed amended document, although not formally lodging it. The appellant challenged the Registrar’s refusal to register the instrument, by application for judicial review. The learned primary Judge dismissed that application, and his decision is to be read as a determination that neither the original document nor the proposed amended document would be registrable.
- [2] The instrument concerns land on the Townsville waterfront previously used as a ferry terminal adjacent to the Port of Townsville, but no longer required for that purpose. The appellant operates the Port. A developer, which is not a party in this proceeding, applied to the Townsville City Council for approval to develop the land, by the construction of 26 harbourside residential units in the one building. The Council approved the application, but the present appellant appealed against that decision to the Planning and Environment Court. One infers the appellant was concerned about the risk of residents complaining about an adverse effect on amenity because of the harbour activities of the appellant. The appeal was compromised, to be withdrawn provided the Council amended its approval to add a condition obliging the developer, as registered owner of the land, to execute and register certain “environmental covenants” under s 97A of the *Land Title Act*. The Council amended its approval accordingly. (The approval, which includes its conditions (*Integrated Planning Act* 1997, s 3.5.11(3)(a)) attaches to the land, and binds the owner’s successors in title and any occupier: s 3.5.28.)
- [3] The covenants lodged for registration were included in an instrument naming the developer as covenantor, and the Council as covenantee. The relevant provisions of the instrument follow:
- “In consideration of the Council granting a Development Approval for the Land and for the purpose of fulfilling a condition imposed by the Council in a Development Approval, the Covenantor hereby covenants with the Council as follows:

1. **ACKNOWLEDGMENT OF EFFECTS ON AMENITY AND ENJOYMENT OF USE**

The Covenantor acknowledges that the Land is in the vicinity of the active Port of Townsville and the amenity and enjoyment of the use of the Land may be subject to noise, air particle emissions and other effects associated with Port Activities including but not limited to the movement of persons and the import, export, transshipment, handling, storage and distribution of cargo, live produce, products, minerals and material and any and all vehicle movements relating to any such Port Activities.

2. **RESTRICTION ON LIABILITY**

Neither the Council or TPA shall be liable by way of injunction, restraining order, damages or similar relief to the Covenantor, Proprietor or Registered Proprietor for any loss of amenity or enjoyment of the use of the Land from any lawful noise, air particle emissions and other effects associated with Port Activities including but not limited to the movement of persons and the import, export, transshipment, handling, storage and distribution of cargo, live produce, products, minerals and material and any and all vehicle movements relating to any such Port Activities.

3. **COVENANTS FOR BENEFIT OF TPA**

Pursuant to section 55 of the *Property Law Act* 1974, the Covenantor and Council acknowledge and agree that the covenants contained in this Schedule 1 are for the benefit of the TPA (together with Council).

Execution of this Schedule 1 by the TPA shall constitute acceptance by TPA of the benefit of these covenants pursuant to that section 55 of the *Property Law Act* 1974.

4. **AMENDMENT OR RELEASE OF COVENANTS**

The Covenantor, Council and TPA agree that this covenant cannot be amended, released, discharged or removed from registration pursuant to the *Land Title Act* 1994 without the written consent of the TPA to any such amendments, release, discharge or removal.

5. **COSTS OF COVENANT**

The Covenantor and Council will each pay their own legal costs in connection with the preparation, execution, stamping and registration of this Covenant, however, all stamp duty and registration fees and the costs of the

preparation of any plan that may be required in association with the Covenant will be payable by the Covenantor.

## 6. DISPUTE RESOLUTION

- 6.1 If any breach, dispute or difference whatever shall arise between the parties with respect to or arising out of this covenant or any part of it, any party may serve written notice on the other party of the breach, dispute or difference.
- 6.2 Upon receipt of a notice pursuant to clause 6.1 above the parties agree to use their best endeavours to resolve the dispute by mutual agreement within a further twenty one (21) days from the receipt of the notice.
- 6.3 In the event the breach, dispute or difference cannot be resolved by mutual agreement, such breach, dispute or difference shall be referred to a person nominated by the parties or failing agreement as appointed by the Chief Executive Officer of the Environmental Protection Agency to act as an independent expert and not as an arbitrator and whose decision would be final and binding on the parties. Any costs involved will be shared between the parties.”

(As envisaged by cl 3 above, the appellant executed the schedule.)

- [4] The statutory provision under which the instrument was proposed for registration, s 97A of the *Land Title Act*, is in these terms:

**“97A Covenant by registration**

- (1) A lot may be made the subject of a covenant by the registration of an instrument of covenant under this division.
- (2) An instrument of covenant may be registered under this division only if the covenantee under the instrument is the State, or a statutory body representing the State, or a local government.
- (3) The covenant must –
- (a) relate to the use of –
- (i) the lot or part of the lot; or
- (ii) a building, or building proposed to be built, on the lot; or

- (b) relate to the conservation of a physical or natural feature of the lot, including soil, water, animals and plants; or
- (c) be for ensuring that the lot may be transferred to a person only if there is also transferred to the person –
  - (i) another lot that is also the subject of the covenant; or
  - (ii) non-freehold land that, under the *Land Act 1994*, is the subject of the covenant; or
  - (iii) a lot mentioned in subparagraph (i) together with non-freehold land mentioned in subparagraph (ii).

(4) The covenant –

- (a) may be a positive covenant or a negative covenant; and
- (b) is binding on the covenantor and the covenantor’s successors in title.

(5) The covenant must not prevent a person from –

- (a) registering an interest under this Act; or
- (b) exercising the person’s rights under a registered interest; or
- (c) releasing or surrendering a registered interest.

(6) In this section –

“use”, of a building, does not include architectural or landscaping standards for the building.”

- [5] The Registrar determined that the instrument was not registrable for a number of reasons. Principally, he concluded that the covenant did not “relate to the use of ... the lot ... or ... a building proposed to be built, on the lot” (s 97A(3)(a)). As the Registrar put it, in his statement of reasons under the *Judicial Review Act 1991*:

“In the schedule the first covenant is merely an acknowledgement that the land in question may be subject to noise, air particle emission and other effects associated with Port activities.

The second covenant is a clause exempting Townsville City Council and TPA from liability to the covenantor for the matters referred to in the first covenant, while covenants three to six have absolutely nothing to do with the ‘use of the building, or building proposed to be built on the lot’.”

- [6] Additionally, the Registrar considered s 97A(4)(a) required that the relevant covenants be either positive or negative, and that that requirement was not met. He also identified conflict with s 97A(5)(c), which mandates that the covenant not

prevent a person from releasing a registered instrument, in that cl 4 renders any release subject to the written consent of the appellant.

- [7] Finally, the Registrar considered that cl 3 precluded registration of the instrument. His reasons follow:

“By virtue of section 55 of the Property Law Act 1974 the third party can enforce the promise made by the covenantor to the covenantee provided the covenantee has provided consideration, but the third party cannot enforce the promise against the covenantor’s successors in title.

No doubt the covenantor will sell the lot once it has been developed and here lies the problem for the third party. It is for this reason that the “covenants” in the Form 31 have been made for the benefit of the third party, for if the Form 31 was registered, the covenants in the Schedule 1 – Environmental Covenant arguably could be enforced against the covenantor’s successors in title.

In my view, if the legislation insists on the covenantee being the State, or a statutory body representing the State or a local government, to enable the covenant to be binding on the covenantor’s successors in title, then the covenantee has to be one of those bodies and it is not permissible to defeat the intention of parliament by making covenants for the benefit of a third party pursuant to section 55 of the Property Law Act 1974 when that third party is not itself entitled to the benefit of the covenant for the purposes of section 97A of the Land Title Act 1994.”

- [8] Mr Clarke, who appeared for the Registrar, submitted before us that an easement for noise, dust etc, in favour of the dominant tenements of the appellant, could be employed to secure the desired protection (cf. *State Electricity Commission of Victoria and Joshua’s Contract* [1940] VLR 121; *Auckran v The Pakuranga Hunt Club* (1904) 24 NZLR 235; and Bradbrook and Neave: *Easements and Restrictive Covenants in Australia* (Butterworths) 2<sup>nd</sup> ed, paras 1.47-1.52 as to the recognition of “novel easements”). It is not necessary for this court to express any view on that.

- [9] The learned primary Judge, in upholding the Registrar’s rejection of the instrument, took a similar approach. The relevant portion of his reasons for judgment follows:

[36] The covenant instrument is, in substance, designed to protect the Port Authority and the Council from liability to the developer for the adverse affects of activities arising from port operations. On one view, if it relates to any Lot it is to the Port Authority’s land on which port operations are conducted.

[37] Furthermore, a covenant not to sue the Council (a local authority in terms of s.97A(2)) or the Port Authority (which does not fall within the section) in respect of port activities, does not restrict or mandate the use of the subject Lot or any building on it. The artificiality of the endeavours to come within s.97A(3)(a) is further exemplified by clauses 3 and 4 of the schedule forming part of the covenant instrument.

- [38] Clause 3 seeks to invoke s.55 of the *Property Law Act* 1974 to bind the developer's successors in title. Section 55 provides to the effect that a beneficiary to a covenant between others may enforce the promise. In this case, the position of the Port Authority is a step further from the required relationship with the subject Lot for the reasons canvassed. Moreover, 'Promisor' in s.55 does not include successors in title.
- [39] Section 55(5) subjects the operation of s55 to the *Land Title Act*. Nothing in that Act permits registration to give the effect to a promise for the benefit of a third party contended for here. This is in circumstances where the Port Authority lacks standing to be a registered covenant; s.97(2).
- [40] Clause 4 is directed to s.97(D)(1) and (2) of the *Land Title Act* which provides that a registered covenant may be discharged by filing an instrument signed by the covenantee. Clause 4 is apparently not restricted to creating a contractual relationship between the developer and Council.
- [41] The whole scheme of the covenant instrument is to achieve the benefits of registration, this included attaching the covenant to the subject Lot to the benefit of the covenantor (the developer and its successors in title). This cannot be achieved if the covenant can be withdrawn or altered by the registration of an instrument signed only by the 'nominal' covenantee.
- [42] Clause 4 cannot impose an additional condition of registration binding on the subject Lot. It is no more than a contractual arrangement between the developer and the Council."
- [10] I deal first with the question whether the learned Judge erred in concluding that the covenant does not "relate to" the use of the lot or a building proposed for it. Mr Hughes SC, who appeared for the appellant, referred to judicial confirmation of the breadth of that expression: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 387, *Queensland Heritage Council v The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane* [2001] 2 Qd.R. 504, 506.
- [11] In urging a broad application of the expression as used in this provision, Mr Hughes also relied substantially on the circumstances which attended the amendment of the *Land Title Act* in the year 2000 to add this provision, in particular, the simultaneous amendment of that Act and the *Integrated Planning Act*, to similar effect, to allow "the use of covenants, resulting from voluntary arrangements, to be registered on title to achieve town planning objectives in respect of the use of land and buildings". He reminded the court that s 14A of the *Acts Interpretation Act* 1954 requires a purposive approach to the construction of legislation, and submitted that adopting such an approach would establish a broad context within which the requisite limitation, "relate to", falls to be applied.

- [12] But as always, one at least begins these exercises by examining the content of the provision. The regime established by s 97A is quite specific as to parties, subject matter and form. The way it is expressed does not immediately suggest that a particularly expansive approach was contemplated. Further, as pointed out by Mr Clarke, the three species of subject matter for a covenant (s 97A(3)) are disparate, evincing no special adaptation to the particular requirements of local government or planning schemes.
- [13] Mr Hughes referred to the mention in the second reading speech on 23 November 1999 of the prospect of registering “expanded types of covenants” (Hansard, p 5158). That is not helpful in resolving this aspect of the construction of the legislation, particularly when one also notes reference in the explanatory notes (p 13) to “limited types of covenants”.
- [14] Mr Hughes also relied on s 97A(6) in excluding, from the concept of the “use” of a building, architectural or landscaping standards. He submitted those standards would “at best have marginal relevance” to the use of a building, so that the legislature, in excluding them, must otherwise have approached the term “use” of a building in a very expansive way. It is not *ex facie* clear why this provision was included. Mr Clarke draws attention to this statement in the explanatory notes (p 4):  
 “These covenants are purposely limited to exclude things like architectural standards ie the ‘red roof’, ‘white fence’ or all brick construction requirements.”

I accept it seems likely the legislature wished to exclude covenants commonly found in “building schemes”. I do not think anything can be drawn from this exclusion to assist in determining the meaning of s 97A(3)(a) (cf. *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201, 211, *Neumann Dredging Co Ltd v Collector of Customs (Qld)* (1987) 79 ALR 588, 590).

- [15] I turn now to the language of the clauses.
- [16] Clause one of the covenant is an acknowledgement that Port activities may affect the amenity of the subject land. Is that a covenant relating to the use of that land? It is important, in interpreting s 97A(3)(a), to have regard also to the nature of the relevant covenants prescribed by s 97A(4). Section 97A(4)(a) says that a covenant may be either positive or negative, but contemplates that it will be one or the other, the facultative language being explained by the need to remove any doubt arising from the doctrine of restrictive covenants. Accordingly, a covenant will require something to be done, or not done, in relation to the subject land. The acknowledgement in cl 1, while it does in a broad sense bear on, or concern, the use of the subject land, says nothing about how the subject land is to be used or not used. It is a mere acknowledgment that use of other property may have an effect on use of this property. The acknowledgement in cl 1 does not “relate to” use of the subject land in the sense in which that expression is used in the sub-section.
- [17] Clause two of the covenant, on which Mr Hughes concentrated, then excludes any liability in the Council or the appellant for that adverse effect on amenity. Does that exclusion of liability relate to use of the subject land? Realistically, it relates rather to use of the adjacent harbour property. It is that use which would give rise to any

relevant liability. I reject Mr Hughes' submission that it might properly be regarded as relating to the use of both properties. Again the provision, while excluding the prospect that a user of the subject land might recover relief in court against the Council or the appellant, is not a negative covenant in relation to the use of the subject land. It is properly characterized as relating to the use of the harbour property, while negatively burdening an owner of the subject land, but not negatively burdening that owner's use of that subject land. It is the ownership of the subject land which subjects a unit owner to the limitation under cl 2, not any use of it.

- [18] Clauses three, four, five and six of the instrument plainly could not satisfy the requirements of s 97A(3).
- [19] Mr Hughes referred to *Perpetual Executors and Trustees Association of Australia Ltd v Hosken* (1912) 14 CLR 286, as to the registrability of a mortgage coupled with a guarantee. That decision is not helpful here, where the legislation prescribes in precise terms what may be registered: the question here is whether the covenant falls within those terms.
- [20] It follows that the Registrar was right to refuse to register the instrument. This would apply also to the instrument in its proposed amended form. The substantial amendment was to add a further cl 7 as follows:
- “7. The Covenantor covenants to use the Land, and a building, or building proposed to be built, on the Land:
- 7.1 in accordance with the Development Approval;
- 7.2 subject to any loss of amenity and enjoyment as described in Clause 2; and
- 7.3 subject to the negative obligation that it shall not seek any injunction, restraining order, damages or similar relief as a result of any loss of amenity and enjoyment as described in Clause 2.”

That is no more than a restatement of cl 2. It would not cure the essential difficulty facing the appellant, in that none of the provisions is a covenant relating to use of the subject land.

- [21] While it is not necessary for me to deal with the other grounds on which the Registrar refused registration, I agree generally with his approach, as explained above in his reasons given under the *Judicial Review Act*, reasons substantially endorsed by the learned Judge.
- [22] As to conflict with s 97A(5)(c), requiring that the covenant not prevent a person from releasing a registered interest, cl 4 of the covenant renders any release subject to the appellant's written consent. That provision does thereby “prevent” a person from releasing a registered interest, at least until a consent is obtained: it imposes a clog on release, and thereby does not conform to the statutory provision. If there be any doubt about this, it is removed by the explanatory notes, which say (p 13): “The provision allows the covenantee to unilaterally release the covenant.”

- [23] As to s 55 of the *Property Law Act* 1974, while the appellant's "acceptance" gives it a benefit enforceable against the other parties to the agreement (the Council and the developer), the covenant could not be registered in that form for the simple reason that the appellant does not fall within the range of "covenantees" intended by s 97A(2) to benefit from such registration. Although Mr Hughes submitted there is a "good argument" the appellant is a "statutory body representing the State" (s 97A(2)), that was not the position taken either with the Registrar, or in the proceedings at first instance, and because the aspect has some evidentiary character, the court should not permit its development for the first time on appeal. Mr Hughes accepted he could not advance this point, but submitted that since the only relevant "covenantee" is the Council, it did not matter. I consider that under this instrument, the appellant must be taken to be a covenantee: it has executed the document to ensure it takes the benefit of the promised barring of a right to sue.
- [24] The purpose of this arrangement was to seek to bind the developer's successors in title to the exclusion of liability in the appellant for nuisance arising from the impact of port operations on the residual amenity of the development. That position could arguably be achieved only if the covenant excluding such liability were registered. The prerequisites for registration of covenants under this legislation are precise. In this instance, they are not satisfied. The mechanism advanced is consequently ineffectual to secure the intended result. It would be quite wrong, obviously, to give the legislation an expansive ambit not intended by the legislature, simply to achieve what the parties consider a generally beneficial result.
- [25] I would dismiss the appeal, with costs to be assessed.
- [26] **WILLIAMS JA:** The terms of the covenant (both in its original and proposed amended form) which the appellant seeks to have registered pursuant to s 97A of the *Land Title Act* 1994 ("the Act") and the relevant legislative provisions, are set out in the reasons for judgment of the Chief Justice and I will not repeat them. The issue for determination by this court is whether or not, as the learned judge at first instance held, the Registrar of Titles was correct in refusing to register the covenant.
- [27] Section 97A and associated provisions of the Act were inserted simultaneously with corresponding amendments to the *Integrated Planning Act* 1997 ("IPA"). It is probably correct to say, as submitted by senior counsel for the appellant, that the simultaneous amendments were made for the express purpose of allowing covenants to be registered on title pursuant to the Act "to assist in the regulation of the use of land and buildings otherwise principally controlled by IPA and planning schemes adopted pursuant to its provisions." That is essentially the conclusion to be drawn from a perusal of the Second Reading Speech and the relevant Explanatory Notes.
- [28] According to submissions by counsel for the appellant the problem sought to be overcome in the instant case by registration of the covenant was not unusual in planning and environment matters. Persons carrying on lawful activities on land near to a proposed residential development are often fearful that the residential use of the subject land will result in complaints by residents of that new development that the pre-existing activities impact on their residential amenity. Apparently in planning and environment circles that problem is often described as a "reverse amenity issue"; it was said by counsel that reverse amenity issues frequently arise where new residential development is permitted near existing industrial activity.

- [29] One can well understand why in those circumstances the owner of land on which lawful industrial activity is taking place would want to object to new residential development being permitted on adjoining or nearby land. Further, one could well understand why the owner of land on which industrial activity was being carried on would like to obtain a promise from the new residential landowners that no action would be brought in nuisance with respect to the pre-existing industrial activity.
- [30] Clauses 1, 3, 4, 5 and 6 of the covenant as originally drafted do not contain any covenant, promise or restriction relating to the use of the land to be developed. The only relevant promise for present purposes is that found in clause 2 which provides that neither the Townsville City Council nor Townsville Port Authority “shall be liable by way of injunction, restraining order, damages or similar relief” to persons defined as “Covenantor, Proprietor or Registered Proprietor” for “any loss of amenity or enjoyment of the use of the Land from any ... effects associated with Port Activities”.
- [31] In the proposed amended covenant additionally the Covenantor “covenants to use the Land ... or building proposed to be built, on the Land ... subject to the negative obligation that it shall not seek any injunction, restraining order, damages or similar relief as a result of any loss of amenity and enjoyment as described in Clause 2.”
- [32] The critical question, as identified by the Registrar of Titles, and the learned judge at first instance, is whether or not either covenant is within the ambit of operation of s 97A(3). The covenantee is expressly stated to be Townsville City Council and in consequence the requirements of s 97A(2) are met. The real question is whether or not the covenant (in either form) relates to the use of the lot or part of the lot, or to the use of a building proposed to be built on the lot.
- [33] The covenantor named in the document sought to be registered is T.W. Hedley (Investments) Pty Ltd, the registered proprietor of the land at the time it sought approval from the local authority for a development permit permitting the construction of a multiple dwelling containing 26 units on the land. In the covenant the definition of “covenantor” is extended to include “any successors in title”.
- [34] In the document under the heading “Description of Lots Subject to the Covenant” there is reference to Lot 5 on CP909857, Title Reference 50180579. The term “Land” in the covenant was then defined as meaning “the area” so identified.
- [35] Perhaps significantly the expressions “Owner”, “Proprietor” and “Registered Proprietor” were all defined as relating to the “Land” so identified.
- [36] Clearly the covenant (in either form) has some relationship to Lot 5 on CP909857 because the promise contained in clause 2 relates to “any loss of amenity or enjoyment of the use of the Land”. But the promise itself does not directly affect the use of that land. The promise does not permit the use of the “Land” for any purpose, restrict the use of the “Land” in any way, or otherwise in any way affect the use that may be made of the “Land”. The promise has more affinity with the use made of nearby land, in particular land owned by the Townsville Port Authority; in effect the owner of Lot 5 permits the Townsville Port Authority to continue using its land in the way it has used its land in the past and acknowledges that such use will

not constitute an actionable nuisance. In consequence the promise has more to do with the use of land owned by the Townsville Port Authority than with the use of Lot 5.

- [37] It is significant in my view that the covenant (in either form) does not define the “amenity” which the owner of Lot 5 is seeking to protect; there is no reference in the document to residential amenity and it cannot be said that the covenant relates to the use of the subject land for residential purposes. It is true that the agreement to enter into the covenant was consequential upon an application for approval for residential development on Lot 5, but the covenant in the form proposed to be registered is not limited to protecting residential amenity associated with Lot 5. Undoubtedly because the covenant was in consequence of the proposed residential development the learned judge at first instance approached the construction of the covenant on the basis that it was protecting residential amenity. That is a good way of testing the meaning and effect of the covenant, but it must be remembered that the covenant is not expressly so limited.
- [38] The Registrar of Titles declined to register the covenant in its original form because it did not relate to use of either a lot or a building on the lot, that is either the use of Lot 5 or a building on that Lot. In so concluding he gave the word “use” its ordinary and natural meaning. In my view he was correct in so doing. It follows that he was correct in concluding that to be registrable the covenant must relate to a purpose for which a building proposed to be built on the lot can be used or otherwise be related to a use to be made or not to be made of that land. That was also the approach taken by, and conclusion reached by, the learned judge at first instance.
- [39] I am of the view that the additional clause in the proposed amended covenant makes no difference. Even with the additional wording s 97A(3) is not satisfied.
- [40] That is sufficient to justify the conclusion that the appeal must be dismissed. I would, however, indicate my agreement with all that has been said by the Chief Justice in his reasons.
- [41] The only point argued at first instance and on appeal was whether or not the covenant (either in its original or amended form) was registrable. No submissions were made as to the consequences, particularly with respect to registered proprietors of units in the building to be erected, of registration. It would appear that, in the events which have happened, if the covenant were now to be registered it would be subsequent to the registration of a community titles scheme. The court has not been asked to consider whether, for example, the covenant in the terms found in the document before the court would be binding on a registered proprietor of a unit pursuant to a community titles scheme if it was registered after the unit holder became registered proprietor though lodged prior to that date.
- [42] In the circumstances the appeal should be dismissed with costs.
- [43] **MACKENZIE J:** I have had the opportunity to read the reasons for judgment prepared by the Chief Justice and by Williams JA. Since I agree with their analyses of the covenants and legislative provisions, which are set out in detail in the Chief Justice’s reasons, extended reasons to the same effect on my part would be

superfluous. I only wish to emphasise what are, in my view the important elements in reaching the conclusion that the appeal should be dismissed.

- [44] Firstly, it may be accepted that the amendments to the *Land Title Act* 1994 and the *Integrated Planning Act* 1997 in 2000 implemented a scheme to enable covenants to be registered if they fell into the categories in s 97A and particularly s 97A(3) of the *Land Title Act*. However, also accepting that the term “relate to” is entitled to a wide operation (*Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602 at 620; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 387; *Queensland Heritage Council v The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane* ([2001] 2 Qd R 504 at 506) and that a purposive approach to interpretation of legislation is necessary by virtue of s 14A of the *Acts Interpretation Act* 1954, the limits of operation of the legislation must be determined by reference to the legislative context in which the relevant provisions appear. Neither the breadth of the phrase “relate to” nor a purposive approach can extend the meaning of a statute beyond that which is apparent by reference to the context.
- [45] Secondly, it may be accepted that an entity such as the appellant is faced with a dilemma in a case where desirable development in the vicinity of its undertaking is proposed but there is a risk that, if it proceeds, the nature of the entity’s undertaking may generate potential nuisances. The desire of the appellant to guard itself against litigation without taking steps to oppose the proposed development outright is also understandable. The question is whether the objective of achieving the balance of interests may be accomplished within the context of the legislative scheme under consideration.
- [46] Thirdly, I do not accept that exclusion of architectural and landscaping standards from the concept of “use” in the definition in s 97A(6) is of persuasive importance in determining the meaning of s 97A(3) for present purposes. Whether the covenant relates to use of the relevant lot or part of the lot or a building or building proposed to be built on a lot falls to be determined by proper characterisation of the intended scope of s 97A as a whole.
- [47] In the final analysis, an obligation, whether in terms of the original covenants or the amended covenants, the effect of both of which is that anyone who becomes a proprietor of a lot within the development must use it without complaining about what otherwise may be an actionable nuisance arising from the use of the appellant’s land, is, even on the most generous interpretation, a very attenuated relationship with the use of the proprietor’s lot or building. In my opinion, the proper conclusion is that covenants in the form in which they were lodged for registration did not reach the threshold of ones which “relate to” the use of the lot or part of a lot or a building or building proposed to be built on the lot.
- [48] In my view for the reasons given by the Chief Justice and Williams JA the Registrar correctly refused registration. I agree with the orders proposed.