



## Property & Conveyancing Team Briefing

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Alf Macolino

### Better check that encumbrance again!

Readers might remember my article from November 2020 [Better check that encumbrance](#) which outlined the High Court case of *Deguisa* decided that month which laid out the ground rules very clearly for what is necessary if an encumbrance in South Australia is to be enforceable against subsequent owners of the land.

The failure to follow the rules prove fatal in that case and has again proved fatal in a recent Supreme Court decision delivered on 10 January 2024 in the case of *Rayo*. Here is why.

In the late 1960s Arndale (Marion) Pty Ltd started the development of the Marion Shopping Centre at Marion. It must have been a bit worried about competitors buying up land around the centre and erecting shops and feeding off all its efforts. Therefore, it registered an encumbrance over a number of pieces of adjoining land prohibiting owners of that land from developing the land for the purpose of the business of a 'retailer of goods of any description'. The encumbrance was to last 15 years until 31 March 1981 and had a couple of minor exceptions for government offices, a hotel and a petrol station.

It achieved its aim, and the Marion shopping centre has gone from strength to strength. So much so that the developer was deregistered in 1980 after presumably selling out to Westfield. This meant that it was not around to remove the encumbrance in 2023. ASIC, in which all assets of a deregistered company vest said that it was not interested in taking any steps to 'assert, exercise, enforce or waive any rights the company may have' in relation to the encumbrance.

Therefore, the owners of the adjoining land with the encumbrance on it had to trot off to the Supreme Court to get the encumbrance removed.

Developers will be familiar with the concept of the rent charge of \$0.10 per year always recorded on the front

page of an encumbrance. It is often for ludicrous periods such as 3,999 years, and in this case, it was forever!

The reason the rent charge exists is that it is a device thought up by a clever lawyer in the 1930s to enable the encumbrances at Springfield to be created and be enforceable. Without the rent charge you cannot register the encumbrance which contains all the planning and development restrictions-lawyers call these restrictive covenants.

Problem was that in the *Rayo* case, the encumbrance omitted to link the rent charge to the planning and development restrictions.

What this meant was that although the rent charge on its own was recoverable, the failure to link it meant that the restrictions in the encumbrance were not regarded as being a registered interest in the land and therefore could not bind any subsequent purchaser of the land. They bound the original owner of the land who signed the encumbrance because that was a contract between that owner and Arndale (Marion) Pty Ltd.

The encumbrance did not specify what land was entitled to the benefit of the planning and development restrictions. This meant that the restrictions did not 'run with the land', so the owner of the adjoining land was not bound by them.

The court decided that the 15-year restriction on the development of the adjoining land had long since passed and imputed an intention on the parties to the encumbrance that it would be removed after the 15 years.

The court had no hesitation in ordering the Registrar General to remove the encumbrance which it said was a 'barnacle on the register'. Curiously, the Court did not even refer to *Deguisa* in reaching this conclusion.

## What are the lessons from this?

If you want your encumbrances to 'stick' for the benefit of your development for a long time, get them drafted properly and follow the rules. If you have bought some land and there is an encumbrance on the land (particularly an old one) and which is not convenient for what you want to do, get a good property lawyer to go over it with a fine-toothcomb and see if *Rayo* and

*Deguisa* (and a couple of other cases) can assist you in getting it removed.

If you want to get removed, it will not be cheap, as *Rayo* made it clear that whilst the court can order the Registrar General to remove the encumbrance it will only do so after determining the substantive issue of whether the encumbrance is enforceable.

“ *Encumbrances are only enforceable against subsequent owners if they are correctly drafted* ”

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If you require any further information, please contact a member of O'Loughlins' Property & Conveyancing Team:



**Hamish Archibald**  
Partner  
[hamish.archibald@oloughlins.com.au](mailto:hamish.archibald@oloughlins.com.au)



**Tamara Ludlow**  
Senior Conveyancer  
[tamara.ludlow@oloughlins.com.au](mailto:tamara.ludlow@oloughlins.com.au)



**Clare O'Mahoney**  
Associate  
[clare.omahoney@oloughlins.com.au](mailto:clare.omahoney@oloughlins.com.au)



**Alf Macolino**  
Consultant  
[alf.macolino@oloughlins.com.au](mailto:alf.macolino@oloughlins.com.au)

### CONTACT

Level 2, 99 Frome Street  
Adelaide SA 5000  
+61 8 8111 4000  
[admin@oloughlins.com.au](mailto:admin@oloughlins.com.au)

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