

REAL PROPERTY.

No. 73 of 1962.

AN ACT to amend the *Real Property Act 1862*, the *Real Property Act 1863*, and the *Real Property Act 1886*. [14 February 1963.]

BE it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:—

PART I.

PRELIMINARY.

1—(1) This Act may be cited as the *Real Property Act 1962*. Short title and commencement.

(2) This Act shall commence on the day on which the *Local Government Act 1962* commences.

PART II.

AMENDMENT OF THE REAL PROPERTY ACT 1862.

2 In this Part the *Real Property Act 1862* is referred to as the Principal Act. Citation.

3 After section thirty-three of the Principal Act the following section is inserted:—

“33A—(1) Where in a certificate of title land is described by reference to a sealed plan lodged with the Recorder under Division II of Part XVI of the *Local Government Act 1962*— Effect of reference to sealed plan.

(a) the certificate of title is not conclusive of anything affecting the title to lands not under this Act; and

(b) except as provided in section twenty-eight B of the *Real Property Act 1886* the reference to the sealed plan does not of itself affect the registered proprietor with any equity.

“(2) Every transfer, mortgage, incumbrance, or lease of land described therein as comprised in a certificate of title in which the land is described by reference to such a sealed plan shall be deemed to import a statement that the land is similarly described by reference to the plan.”.

Land under
the Act: How
mortgaged
or incum-
bered.

No. 3, 1961
(N.S.W.),
s. 5.

4 Section fifty-two of the Principal Act is amended by adding the following subsections at the end thereof:—

“(4) In a memorandum of mortgage or memorandum of incumbrance there may be expressed to be included as appurtenant to the land mortgaged or incumbered any easement over other land of which the mortgagor or proprietor is the registered proprietor and the grant or certificate of title of which is specified in the memorandum of mortgage or memorandum of incumbrance.

“(5) When an easement is so expressed to be included the Recorder shall on registration of the memorandum of mortgage or memorandum of incumbrance enter a memorial of the instrument in which the easement is expressed to be included upon the folium of the register book constituted by the grant or certificate of title of the land over which the easement is expressed to be included.

“(6) The easement so expressed to be included shall, when the memorandum of mortgage or memorandum of incumbrance is registered, be deemed to be an easement appurtenant to the land mortgaged or incumbered for the purpose of enjoyment, leasing, or transfer by the mortgagee or incumbrancer, or of foreclosure, and so that upon foreclosure in favour of, or lease or transfer by, the mortgagee or incumbrancer, that easement shall, unless expressly excluded, be created by the order for foreclosure or the lease or transfer and entry or registration thereof.

“(7) Subsections (4), (5), and (6) of this section extend to instruments registered before as well as after the commencement of those subsections, but the Recorder has a discretion whether or not to comply with subsection (5) if the instrument was registered before their commencement.

“(8) A memorandum of mortgage or memorandum of incumbrance of land comprised in, and described by reference to, a sealed plan within the meaning of Division II of Part XVI of the *Local Government Act 1962* contains a sufficient inclusion of easements for the purposes of subsection (4) of this section and no entry shall be made under subsection (5) on the certificate of title of other land comprised in the same plan.

“(9) Where there is a mortgage or incumbrance of land which includes land shown as a lot in a sealed plan lodged with the Recorder under Division II of Part XVI of the *Local Government Act 1962* upon a separate lease, transfer, or discharge, by the mortgagee or incumbrancer of the land shown as a lot, all rights, advantages, and burdens appearing from the sealed plan to be appurtenant to or a burden on the lot have full force and effect as they would if the registered proprietor in fee simple of all the land subject to the mortgage or incumbrance had transferred the lot by reference to the plan.”

5 The Principal Act is amended by inserting after section one hundred and fifteen the following section:—

“115A—(1) The Recorder may of his own motion, and shall on the application of an interested person, call on a person appearing by the register book to have the benefit of a restriction on the enjoyment of freehold land by condition, easement, or otherwise to show cause why the restriction should not be discharged. Removal of conditions, covenants, &c.

“(2) If a person called on to show cause under this section—

- (a) fails to show any cause, the Recorder may make an order declaring the restriction discharged;
- (b) shows good cause, the Recorder shall take no further action, except in respect of costs; or
- (c) shows doubtful cause, the Recorder may summon all persons appearing from the register book to be interested, to attend before him to show whether or not the restriction should be discharged, but if any person so summoned objects to the continuance of the proceedings he shall take no further action.

“(3) The Recorder may where no cause is shown treat the matter as if doubtful cause had been shown.

“(4) Before giving effect to an order discharging a restriction under this section the Recorder shall give notice of his intention so to do in the *Gazette*.

“(5) The Recorder may make orders as to the payment of the costs and expenses of showing cause under subsection (1) and in respect of proceedings under paragraph (c) of subsection (2) of this section and such orders shall be filed in the Supreme Court and proceeded upon like similar orders of a judge in chambers.

“(6) The Recorder shall give effect to an order to discharge a restriction under this section by entering a memorandum thereof on the appropriate folium of the register book and thereupon the order becomes binding on all persons, whether ascertained or of full age or capacity or not, then entitled or thereafter capable of becoming entitled to the benefit of any restriction which is thereby discharged or dealt with, and whether such persons are parties to the proceedings or have been summoned to attend therein or not.

“(7) Any interested person who is aggrieved by the decision of the Recorder to discharge or not to discharge a restriction under this section may appeal to the Supreme Court—

- (a) in the case of a decision not to discharge, within thirty days after he is notified of the decision; and

(b) in the case of a decision to discharge, within thirty days after the publication in the *Gazette* of the notice under subsection (4) of this section,

and the Supreme Court may hear the appeal *de novo* and determine it and provide for the costs thereof and of the proceedings before the Recorder.

“(8) Where it appears to the Recorder or the Supreme Court that any costs or expenses referred to in this section have been occasioned by the existence in the register book of an entry that ought not to have been made, they may, in his or its discretion, be made payable out of the assurance fund.

“(9) The local authority has an interest in all land for the purposes of this section.

“(10) An appeal under this section shall not be heard in chambers.

“(11) Where it appears to the Recorder that the register book shows an interest that does not exist, he may notify the person so appearing to have that interest that in his opinion the entry thereof is worthless and that unless he is first asked to hold his hand he will not less than thirty days after notification strike it out, and if no such request is made he may strike it out accordingly.”.

PART III.

AMENDMENT OF THE REAL PROPERTY ACT 1863.

6 After section eight of the *Real Property Act 1863* the following section is inserted:—

Chambers
not to be
brought under
Principal Act
apart from
land.

“9. A chamber in a building standing on land not under the provisions of the Principal Act shall not be brought under those provisions except where the land itself, with the building, is being brought under those provisions.”.

PART IV.

AMENDMENT OF THE REAL PROPERTY ACT 1886.

Citation.

7 In this Part the *Real Property Act 1886* is referred to as the Principal Act.

8 Section twenty-seven B of the Principal Act is repealed and the following sections are substituted therefor:—

Covenants
between
vendor and
purchaser.

“27B—(1) Where the vendor of land under the provisions of the Principal Act wishes to take a covenant from the purchaser touching and concerning the land and to be enforceable in equity by and against their respective assigns he may

do so by an instrument in accordance with form II D in the schedule, and may lodge the instrument with the transfer giving effect to the sale.

“(2) Except as provided in subsection (3) of this section the Recorder shall enter a notification of the instrument upon the folium of the register book containing the titles of the lands affected by the instrument.

“(3) The Recorder may refuse to enter a notification under subsection (2) of this section where the provisions of the instrument are wholly or in part not enforceable in equity between assigns of the parties.

“(4) A covenant between vendor and purchaser that might have been made by an instrument under this section and has not been so made shall not be enforced in equity between assigns of the parties thereto.

“(5) Where a certificate of title describes the land by reference to a sealed plan lodged with the Recorder under Division II of Part XVI of the *Local Government Act 1962*, any obligations set forth in the plan that could be notified under this section shall have effect as if embodied in an appropriate instrument notified in respect of the titles of all lands appearing by the register book to be subject to the sealed plan.

“(6) Where a transfer between vendor and purchaser contains a condition of defeasance the purpose of which could be had by means of an instrument under this section, the Recorder may refuse to register the transfer until that condition has been deleted and the appropriate instrument lodged in lieu.

“27C Where a notification is entered under subsection (2) of section twenty-seven B, the covenants contained in the instrument notified may be enforced in equity notwithstanding any provision of the Principal Act but have no greater operation or effect by reason of the notification than they would if the lands on the title of which they are notified were not under the Principal Act and the registered proprietor thereof were affected in equity by express notice of the covenants. Effect of notification.

“27D—(1) Where land under the provisions of the Principal Act is to be made subject to a covenant touching and concerning the land for the benefit of other land, whether under the provisions of that Act or not, and enforceable in equity by and against the assigns of the respective proprietors, an instrument as nearly as possible in accordance with form II D in the schedule may be used and lodged for registration. Other covenants.

“(2) Subsections (2) and (3) of section twenty-seven B apply to instruments made under subsection (1) of this section.

“(3) Where land subject to a covenant touching and concerning it and enforceable in equity against the covenantor's assigns by the covenantee's assigns is brought under the

provisions of this Act a memorandum of the covenant, in a form approved by the Recorder, shall be lodged with the Recorder and noted and otherwise dealt with as if it were an instrument made under subsection (1) of this section.

Discharge of covenants.

“27E—(1) A covenant noted under section twenty-seven B or section twenty-seven D may be discharged by an instrument in accordance with form II E in the schedule executed—

(a) where the land to which the benefit of the covenant is annexed is subject to the Principal Act, by the registered proprietor of that land and any other persons having a registered interest in that land; or

(b) where the land to which the benefit of the covenant is annexed is not subject to the Principal Act, by a person entitled wholly to discharge the covenant.

“(2) When an instrument made under this section is lodged for registration the Recorder shall enter a notification of it on the relevant folium of the register book.

“(3) Where an instrument is executed under paragraph (b) of subsection (1) of this section the Recorder is not concerned to investigate the title of the person executing it.

Short form of fencing covenant.

“27F Where an instrument in accordance with form II D in the schedule contains a covenant that the vendor shall not be required to fence there shall be implied in lieu thereof a covenant that notwithstanding anything contained or implied in the *Boundary Fences Act 1908*, the vendor shall not be required to contribute to the cost of erecting, repairing, or maintaining any boundary fences between the sold land and any adjoining land belonging to the vendor and that the vendor shall at all times be indemnified and kept indemnified by the purchaser his personal representatives and assigns against all claims and demands in respect of any such boundary fences; with a proviso that the covenant shall cease and determine when and so soon as the adjoining land of the vendor shall be sold for valuable consideration.

Conversion of fencing conditions into covenant.

“27G—(1) Where a transfer executed before the commencement of this section contains the words ‘subject to fencing condition’ and no certificate of title thereon has been issued at the commencement of this Act an instrument in accordance with form IID in the schedule containing a covenant that the vendor shall not be required to fence shall be deemed to have been executed by the parties and to have been lodged with the transfer.

“(2) Where a certificate of title contains the words ‘subject to fencing condition’ an instrument of the tenor described in subsection (1) of this section shall be deemed to have been executed by the parties to the transfer giving rise to the use of those words in the certificate and those words shall be

deemed to be a notification of that instrument as if the Act enacting this section had commenced on the same day as the *Real Property Act 1947*.

“27H—(1) Registered easements over or for the benefit of land under the Principal Act and covenants notified on the grant or certificate of title thereof under section twenty-seven B are not affected by unity of seisin of that land and of other land appearing from the register book to have the benefit or burden of the easement, or identity at any time of the parties to the covenant, unless they are expunged from the register book as provided in subsection (2) of this section. Effect of unity of seisin on registered instruments.

“(2) Subject to subsection (3) of this section, where a registered proprietor in fee simple of lands under the Principal Act is tenant in fee simple of other lands, and could if he held those other lands by a trustee join with that trustee in releasing—

- (a) any registered easement for the benefit of the first-mentioned lands over the other lands or over the first-mentioned lands for the benefit of the other lands; or
- (b) any covenant notified on the certificate of title of the first-mentioned lands the burden or benefit whereof runs with the other lands,

the Recorder shall, on his application and payment of the prescribed fee, make such amendments to the certificate of title of the first-mentioned lands and the certificate of title, if any, of the other lands as he would if such release were produced to him.

“(3) A registered easement or notified covenant comprised in a sealed plan lodged with the Recorder under Division II of Part XVI of the *Local Government Act 1962* shall not be dealt with under subsection (2) of this section, but only under section four hundred and eighty-one of that Act.”.

9 The schedule to the Principal Act is amended—

Amendment of schedule.

- (a) by omitting form II B; and
- (b) by inserting after form II C the following forms:—

“FORM II D.

(Section 27 B.)

MEMORANDUM OF AGREEMENT.

I A.B. of _____ hereinafter called the vendor being the registered proprietor of [*here describe the land being sold*] hereinafter called the sold land and also of [*here describe the land retained by the vendor*] hereinafter called the vendor's own land and I C.D. of _____ hereinafter called the purchaser have for ourselves and our respective heirs and assigns covenanted and agreed as follows:—

In witness whereof the vendor and purchaser have hereunto set their respective hands and seals this _____ day of _____

" FORM II E.

(Section 27 E.)

MEMORANDUM OF DISCHARGE OF COVENANT.

I [or We] A.B. as registered proprietor
of an estate in fee simple as set forth, &c. [and C.B. as registered
proprietor of a mortgage as set forth &c. or as the case may be] or I
A.B. of as tenant in fee
simple of or as the case may be hereby dis-
charge the land referred to in volume folio of
the register book from the burden of a covenant set forth in

In witness whereof I have hereunto signed my name

this day of in the presence
of E.F."

TOWN BUILDING.

No. 74 of 1962.

AN ACT to make provision for building up to bound-
aries in cities and towns. [14 February 1963.]

BE it enacted by His Excellency the Governor of Tasmania,
by and with the advice and consent of the Legislative
Council and House of Assembly, in Parliament assembled,
as follows:—

Short title
and com-
mencement.

1—(1) This Act may be cited as the *Town Building Act*
1962.

(2) This Act shall commence on the day on which the
Local Government Act 1962 commences.