

# REVISITING RESTRAINTS ON ALIENATION: PUBLIC AND PRIVATE DIMENSIONS

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*The fee simple interest in land is regarded as the quintessential property right that exemplifies the personal autonomy of ownership. However, counterbalancing this conception is the historical rule prohibiting restraints on the alienation of the fee simple interest, justified either by the doctrine of repugnancy or by the facilitation of the public interest in the free movement of resources. In more recent times the public policy justification has become preeminent, but has itself been diluted by allowing reasonable restraints in the protection of a 'legitimate collateral purpose'. Such purposes are usually conceived as being personal in nature, implicating commercial advantage or freedom of choice in association (eg as between co-owners).*

*This article focuses on the decision of the New South Wales Court of Appeal in *Bondi Beach Astra Retirement Village Pty Ltd v Gora*, which undertakes a lengthy and detailed analysis of the restraint jurisprudence in the context of retirement village accommodation. The relevant restraint was plenary in nature, and on the basis of the existing law one would have given it little chance of being upheld. However, the Court of Appeal held that the restraint was valid, but in doing so departed from the traditional practice of balancing perceived personal and public interests. Rather, the Court recalibrated the contest into competing visions of the public interest.*

*In charting the trajectory of the Australian law of restraints on alienation and drawing on American material, the article explores the concepts of private preference and public interest, and provides insight into the role that property plays in marking a boundary that both separates and joins the two.*

## I INTRODUCTION

A restraint on alienation exists where property is held by a person subject to a restriction on his or her power to transfer or dispose of the property. The restraint may be imposed as a condition in the grant of the property to the restrained party, or may be created by a contract between the restrained party and another, usually (but not always) the person who transferred the property to the restrained party. Because this article is concerned with restraints imposed by contract, the person subject to the restraint will be referred to as the 'grantor' of the restraint, and the

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person receiving the benefit of the restraint will be referred to as the ‘grantee’. (This terminology would be inappropriate where the restraint is imposed in the transfer or ‘grant’ of property itself, where the ‘grantee’ of the property is the party subject to the restraint.) A restraint on alienation is usually express, in that it prohibits alienation altogether, or permits alienation only by a certain type of dealing (eg a short-term lease or a mortgage to a financial institution), or only to a particular class of persons (eg a member of the grantor’s or grantee’s family), or only after a certain period of time (eg two years after the grantor’s acquisition or only after the grantee’s death). Alternatively, a restraint may exist in substance because an attempted alienation by the grantor might give rise to a right in the grantee to acquire the property at a price below its current market value. In this case the grantor is compelled to retain the property or otherwise risk the grantee acquiring it for far less than it is worth.

It is well established that restraints on alienation can be held to be void and unenforceable. This is particularly so where the interest sought to be restrained is the fee simple interest in land. In the writing of Littleton and Coke in England (in the fifteenth and seventeenth centuries respectively), and in that of Chancellor Kent in America (in the nineteenth century),<sup>1</sup> this practice was justified on the basis of the doctrine of repugnancy: estates in fee have the inherent, essential characteristic of transferability, so seeking both to grant the interest (eg the fee simple), but remove one of its essential characteristics (the right to transfer it) is an exercise in contradiction. Fundamentally, it is an attempt to create a new proprietary interest: one that does not, and cannot, exist.<sup>2</sup> Subsequently, however, the doctrine of repugnancy, with its reliance upon the existence of a fixed essence inherent in a proprietary interest,<sup>3</sup> fell out of favour as the justification for the ideal of the free alienability of property. J C Gray,<sup>4</sup> Sir William Holdsworth,<sup>5</sup> and, more recently, Professor Merrill Schnebly,<sup>6</sup> have articulated the now generally accepted position that the ideal of the free alienability of property is based upon public policy. The justifications of Gray and Schnebly in this respect have been

1 See Richard E Manning, ‘The Development of Restraints on Alienation Since Gray’ (1935) 48 *Harvard Law Review* 373, 374–5, 401; *Bondi Beach Astra Retirement Village Pty Ltd v Gora* (2011) 82 NSWLR 665, 694 [142] (Campbell JA).

2 Manning, above n 1, 401.

3 Glanville Williams described the doctrine as spurious and pseudo-logical because it simply assumes what it seeks to prove. The doctrine does not articulate a test for identifying which characteristics are essential and which are not. In particular it does not explain why alienability is an inherent attribute of the fee simple interest. See Glanville L Williams, ‘The Doctrine of Repugnancy of Gifts — I: Conditions in Gifts’ (1943) 59 *Law Quarterly Review* 343, 345, 349.

4 John C Gray, *Restraints on Alienation of Property* (2<sup>nd</sup> ed, 1895) §21, cited in Manning, above n 1, 403.

5 Sir William Holdsworth, *A History of English Law* (Sweet & Maxwell, first published 1903) vol 2, 262, 578; vol 3, 73–87, 103, 111–20; vol 7, 193–238, cited in Williams, above n 3, 349.

6 Merrill I Schnebly, ‘Restraints Upon the Alienation of Legal Interests: I’ (1935) 44 *Yale Law Journal* 961, 964. Schnebly’s work is routinely cited as providing the definitive modern rationale: see Williams, above n 3, 349; Ken Mackie, ‘Contractual Restraints on Alienation’ (1998) 12 *Journal of Contract Law* 255, 255; G J Tolhurst, ‘The Efficacy of Contractual Provisions Prohibiting Assignment’ (2004) 26 *Sydney Law Review* 161, 166–7 n 30. See also *Elton v Cavill [No 2]* (1994) 34 NSWLR 289, 297 (Young J).

catalogued as follows. Restraints on the free alienation of property should be opposed because they:

- (a) obstruct commerce and productivity by working against the most efficient use of the property (either by way of improvement by the current owner or transfer to another);<sup>7</sup>
- (b) concentrate wealth and economic power, to the detriment of the public interest, in the hands of a few;<sup>8</sup>
- (c) encourage ‘survival of the least fit’ by protecting a property owner against the possibility of foolish transactions,<sup>9</sup> which in turn ‘foster[s] paternalism and a weak race, inconsistent with Anglo-Saxon traditions of virility and individualism’;<sup>10</sup>
- (d) allow for the abuse of creditors by denying them the ability to take a borrower’s restrained property, where it was the (apparent) ownership of that property which initially induced the provision of credit;<sup>11</sup>
- (e) allow the ‘dead hand’ of former owners to take precedence over the autonomy of the living.<sup>12</sup>

In more modern and narrower terms, the policy reason for striking down restraints on alienation has been expressed this way:

The rule against unreasonable restraints on alienation is based solely on social policy, not on the rights of the party on whom the restraint is imposed. Underpinning the rule is the belief that development should be encouraged. Under this view, property will be put to its highest and best use if the current owner is allowed to sell the property to others who intend to use it more productively. On the other hand, the law is sensitive to the need for some restraints that occasionally arise. For example, a tenant who expects to make large investments to improve the premises may be willing to do so only if the owner is willing to give him the option to purchase the property at a fixed price. Accordingly, the rule is not that all restraints are prohibited. Rather, a balance is struck; only ‘unreasonable’ restraints are prohibited.<sup>13</sup>

This economic or efficiency justification for striking down restraints on alienation provides a link between concepts traditionally seen as ‘private’ and ‘public’. The former term is usually employed to denote that which relates to individual

7 Herbert A Bernhard, ‘The Minority Doctrine Concerning Direct Restraints on Alienation’ (1959) 57 *Michigan Law Review* 1173, 1179–80.

8 Ibid 1180.

9 Ibid.

10 Manning, above n 1, 403, citing John C Gray, *Restraints on Alienation of Property* (2<sup>nd</sup> ed, 1895), viii–x.

11 Bernhard, above n 7, 1180.

12 Ibid.

13 *McInerney v Slights* (1988) WL 34528 [19] (Chancellor Allen) quoted in *Libeau v Fox* 880 A 2d 1049, 1058–9 (Del Ch, 2006) (Vice Chancellor Strine).

preferences. Where property is freely alienable, through the medium of mutually beneficial exchange, it can be acquired by the person who values it most, measured in terms of willingness to pay. Further, satisfaction of the buyer and the seller's respective individual preferences through such a consensual transaction has a society-wide, or public, benefit as well. Putting resources to their most productive use maximises the total wealth of society.<sup>14</sup> Of course, satisfying the preferences of the current owner and the prospective purchaser by allowing the transfer of an asset free of a purported restraint on its alienation means defeating of the preference of the party who would otherwise have had the benefit of the restraint. However, the increase in social wealth brought about by the efficient use of the asset justifies such an outcome.<sup>15</sup>

As influential as the theory of wealth-maximisation may be, it is of course not the only way of envisioning the relationship between private interests and the public good. As an alternative to the wealth maximising role of property, which he labels 'property-as-commodity',<sup>16</sup> Gregory Alexander has articulated a vision of 'property as propriety'.<sup>17</sup> Under this view, property provides the foundation for a proper social ordering of society.<sup>18</sup> A proprietarian conception of property has

[a]t its core ... the idea that the proper society is more than just whatever emerges from market relations. The properly ordered society may coincide with the market society, but the two are not identical. The market view of society is essentially empty. It can and historically has yielded many different sorts of society. The proprietarian, by contrast, is always committed to some particular substantive view of how society should be ordered.<sup>19</sup>

This article will chart the development in Australia of the law regarding restraints on alienation imposed by contract. It will note that despite the courts never questioning their power to strike down a restraint that is unreasonable in the circumstances, the recent tendency has been to find restraints valid. The primary mechanism for so holding has been the principle that a restraint that gives effect to a legitimate collateral purpose is valid. Until recently, what constituted a legitimate interest was assessed by virtue of the individual interests of the parties.

14 Richard A Posner, *The Economics of Justice* (Harvard University Press, 1981) 60, 61, 64–5.

15 This outcome can be objected to on the basis of the libertarian notion that a person should be able to enjoy their property and contractual rights free from interference from the state, even where doing so might impede societal (or utilitarian) objectives: Robert C Ellickson, 'Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights' (1986) 64 *Washington University Law Quarterly* 723, 723–5. A leading exponent of the libertarian view is Richard Epstein. Epstein argues that the party or parties creating the restraint are in the best position to ascertain its utility, and that the freedom of disposition of property — including disposition with a restraint on later alienation — should be respected. See Richard A Epstein, 'Past and Future: The Temporal Dimension in the Law of Property' (1986) 64 *Washington University Law Quarterly* 667, 704–5, 707, 713–14; Richard A Epstein, 'Why Restrain Alienation?' (1985) 85 *Columbia Law Review* 970, 973–83.

16 Gregory S Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought 1776–1970* (University of Chicago Press, 1997) 1.

17 *Ibid.*

18 *Ibid.*

19 *Ibid.* 3.

In 2011, however, the New South Wales Court of Appeal handed down its decision in *Bondi Beach Astra Retirement Village Pty Ltd v Gora* ('Gora'),<sup>20</sup> in which Campbell JA undertook a lengthy and detailed examination of the English and Australian cases concerning restraints on alienation. The case concerned very comprehensive restraints on alienation imposed upon the owner and occupier of a unit in a retirement village in favour of the operator of the village.<sup>21</sup> Overturning the decision at trial, the Court of Appeal upheld the restraint under the legitimate collateral purpose principle.<sup>22</sup> However, rather than describing the validating purpose in terms of the specific individual interests of the parties, the Court did so in terms of a conception of a proper social ordering divorced from narrow private interests.<sup>23</sup> In this way *Gora* is consistent with Alexander's property as propriety concept.

This article will examine in detail the trial and appeal decisions in *Gora* and identify how those decisions implement or depart from earlier decisions on contractual restraints. After doing so, the article will consider a small number of decisions from the United States of America.<sup>24</sup> These decisions are instructive because, like *Gora*, they also reveal a tendency to uphold restraints on alienation in a way that rejects a correspondence between private financial interests and the public good. These cases offer a vision of the role of property that transcends its function of promoting the efficient use of resources. Instead they hold that restraints on the alienation of property can serve a social good independent of the maximisation of wealth.

## II GORA: FACTS

The Bondi Beach Astra is a building that was converted into a strata scheme and operated as a retirement village. The developer of the scheme was CG Maloney Pty Ltd ('CGM'). In addition to a strata managing agent, a 'service company' was also appointed for the village: Bondi Beach Astra Retirement Village Pty Ltd ('BBA'). A by-law was adopted that purportedly granted to BBA the right of exclusive use of those areas of the common property intended to be used by the residents of the village, subject to BBA properly maintaining and keeping those

20 (2011) 82 NSWLR 665.

21 Ibid 736–7 [321]–[324] (Campbell JA).

22 Ibid 739 [328] (Campbell JA).

23 Ibid 740 [333]–[336] (Campbell JA); 669 [4]–[5] (Giles JA).

24 By contrast, this article will not consider in any detail the English position regarding restraints on alienation, as the English courts have not engaged in any comprehensive way with the question of whether such restraints contravene, or are consistent with, public policy. The vast majority of English decisions deal with restraints imposed in the grant itself, rather than by contract, and have applied the repugnancy doctrine in determining the validity of a restraint. See Kevin Gray and Susan Frances Gray, *Elements of Land Law* (Oxford University Press, 5<sup>th</sup> ed, 2009), 229 [3.1.39]. For a consideration of the exceptional English cases involving contractual restraints, see Scott Grattan, 'Property and Alienation: Rights, Obligations, Restraints' in Nicholas Hopkins (ed), *Modern Studies in Property Law* (Hart Publishing, 2013) vol 7, 379, 394–6.

areas in good repair and granting sub-licences to the proprietors and occupiers of the unit of the village.<sup>25</sup>

In July 1987, Mr and Mrs Evans entered into a contract to purchase from CGM the fee simple in one of the strata units in the retirement village. The purchase price for the unit was \$107 000 and the contract required the purchasers to enter into, and to procure the occupant of the unit to enter into, an ‘occupancy agreement’ (in the form of a deed) and a ‘buyback deed’. Mr and Mrs Evans entered into both deeds when their purchase settled in September 1987.<sup>26</sup>

The occupancy agreement was between: (1) BBA as the ‘Service Company’; (2) Mr and Mrs Evans as owners of the unit (‘Proprietor’); and (3) Mr and Mrs Evans as the occupiers of the unit (‘Occupant’). In the agreement BBA promised to perform certain duties connected with the operation of the retirement village. Mr and Mrs Evans, in their capacities as Proprietor and Occupant, covenanted in clause 7 of the agreement that their right to reside at the Astra, occupy their unit, and use the communal areas would terminate when certain events occurred. These events included the death of the Occupant, where the Proprietor had sold or disposed of the unit, or the Occupant or Proprietor had leased or otherwise parted with possession of, or mortgaged or encumbered, the unit. By clause 8 of the agreement, Mr and Mrs Evans as Proprietor granted BBA the option to purchase their unit for the original purchase price, less BBA’s legal costs and the cost of refurbishing the unit, on the happening of an event set out in clause 7.<sup>27</sup>

The buyback deed was between the same parties as the occupancy agreement, and in it Mr and Mrs Evans covenanted for themselves, the personal representatives of their estates and their successors in title, not to sell the unit except in accordance with the provisions of the deed. If Mr and Mrs Evans wished to sell their unit they would give BBA one month’s notice of their intention to do so. At the end of that month, either they or BBA could, within a period of 28 days, serve a buyback notice on the other. Such a buyback notice would cause a contract to arise under which BBA would purchase the unit for \$107 000 (less BBA’s legal costs and the cost of refurbishing the unit). If neither the Proprietors nor BBA served a buyback notice on the other, the Evans were then permitted to sell the unit to a purchaser who was eligible to live in the retirement village (that is, was aged 55 years or over).<sup>28</sup> Also, for the sale to be permitted, the purchaser was obliged to enter into an occupancy agreement with BBA. This new agreement would be on the same terms as the occupancy agreement between Mr and Mrs Evans and BBA, but with an additional clause that allowed the new purchaser to sell the unit provided that the incoming purchaser also entered into an occupancy agreement with BBA.<sup>29</sup>

Mrs Evans died in January 1995 and no grant of representation was made concerning her estate. Her interest in the unit passed to Mr Evans by right of

25 *Gora* (2011) 82 NSWLR 665, 670 [7], 671 [14].

26 *Ibid* 671–2 [15]–[19].

27 *Ibid* 673–4 [27]–[31], 691–2 [135].

28 *Ibid* 671–2 [15].

29 *Ibid* 692–3 [137]–[139].

survivorship, but this was not recorded on the register. Mr Evans died on 16 September 1997 and probate of his will was granted to his daughters (the respondents) on 27 February 1998. A transmission application relating to the unit was never lodged with the Registrar-General, and Mr and Mrs Evans continued to be recorded as the registered proprietors of the unit.<sup>30</sup>

Between February 1999 and 1 April 2008 solicitors for BBA (the plaintiff-appellant) corresponded with the Evans' executrices (the defendants-respondents) or their solicitors concerning the proposed purchase of the unit by BBA. At no time did the executrices concede that BBA held an enforceable option to purchase of the unit.<sup>31</sup> On 1 May 2008 BBA commenced proceedings against the executrices in the Supreme Court of New South Wales seeking one of the following alternative orders: (1) a declaration that it had validly exercised its option and an order for specific performance of the resultant contract to purchase the unit, or damages in lieu; (2) a declaration that the executrices were not entitled to sell or dispose of the unit otherwise than in conformity with the provisions of the buyback deed; or (3) if the executrices wished to sell or dispose of the unit to a purchaser eligible to occupy a unit in the retirement village, the executrices must cause the purchaser to enter into an occupancy agreement with BBA as contemplated by the buyback deed between the Evans and BBA.<sup>32</sup>

The undisputed valuation evidence was that without being subject to the buyback rights of BBA, the unit would have been worth \$145 000 (rather than \$107 000) at the time it was purchased by the Evans. Uncontested expert evidence showed that in December 2008 the value of the unit without BBA's buyback rights was \$450 000.<sup>33</sup>

### III GORA: TRIAL

BBA's action was initially heard by Bryson AJ.<sup>34</sup> His Honour rejected the executrices' argument that BBA, who was not a party to the contract under which Mr and Mrs Evans purchased the unit, was a volunteer, and thus not entitled to specific performance of the option. His Honour found to be invalid the by-law which purported to vest in BBA the right to the exclusive use of the common property which was in turn to be sub-licensed to residents.<sup>35</sup> This meant that much of what BBA promised the Evans it would do under the occupancy agreement was illusory. The licences and permissions purportedly conferred on the Evans by BBA under the occupancy agreement were to do things they were entitled to do in any case as proprietors of the unit. Additionally, the Evans were entitled to have the services that BBA had contracted to undertake performed by other parties,

30 Ibid 674–5 [32]–[34].

31 Ibid 675–9 [35]–[54].

32 Ibid 670 [11], 679 [55].

33 Ibid 735 [316].

34 *Bondi Beach Astra Retirement Village Pty Ltd v Gora* (2010) 14 BPR 27,743.

35 Ibid 27,754–5 [61]–[65].

such as the strata managing agent. Nevertheless, Bryson AJ found that BBA had provided sufficient value so as not to be a volunteer. Although the strata managing agent was obliged to effect insurance, maintain the common areas, ensure repairs were carried out and pay rates and charges, BBA gave value by also promising that these activities would be performed.<sup>36</sup>

Bryson AJ then had to consider whether BBA had properly exercised the option granted by the occupancy agreement. His Honour stated that two of the documents that BBA's solicitors sent to the executrices or their solicitors constituted a purported exercise of the option, but neither of these acts allowed BBA to enforce the option at the time of the proceedings. The first was a letter of 23 February 1999 in which BBA's solicitors wrote to the executrices stating that BBA 'wish[ed] to exercise its right to re-purchase the unit ...' and requesting the executrices to contact them 'in respect of making arrangements for the re-purchase of the unit ...'.<sup>37</sup> Bryson AJ found that the letter taken as a whole and read in context of the contractual relationship between BBA and the Evans, 'clearly and unequivocally manifested an intention to exercise the option and to require the executrices to comply by transferring the property'.<sup>38</sup> However, his Honour went on to find that the very long period of inactivity that followed the exercise of the option without insisting that the solicitors of the executrices prepare the re-purchase contract, or without preparing the contracts themselves and tendering the payment of a deposit, disentitled BBA to the remedy of specific performance or equitable damages in lieu.<sup>39</sup> In his Honour's words: 'It would be oppressive to wake up this long dead exercise of option and set it in motion again. It is as dead as the dodo, and as incapable of flight.'<sup>40</sup> Bryson AJ also held that damages at common law for breach of contract were not available to BBA against the executrices because the contract had been abandoned, with neither of the parties calling for their advantages, nor performing their obligations, under the contract.<sup>41</sup>

The second purported exercise of the option occurred on 1 April 2008, when BBA's solicitors sent to the solicitors for the executrices a clear and unambiguous notice purportedly exercising the option to purchase. However, Bryson AJ found this notice to be ineffective because s 167 of the *Retirement Villages Act 1999* (NSW) came into operation on 3 December 1999, which caused any option to re-purchase a unit in a retirement village to lapse within 28 days of the death of the proprietor.<sup>42</sup>

36 Ibid 27,755 [66], [68]. Bryson AJ's finding in this regard was upheld on appeal, with Campbell JA stating in *Gora* (2011) 82 NSWLR 665, 690 [125]: 'a promise to ensure that someone who is already under a legal duty to do something will carry out that legal duty is well capable of providing consideration'. Campbell JA also found at 689–90 [124] that BBA had independently provided consideration because what BBA had undertaken to do in the occupancy agreement went beyond what a body corporate was obliged to do under the then applicable statutory provision, namely *Strata Schemes (Freehold Development) Act 1973* (NSW) s 68.

37 *Bondi Beach Astra Retirement Village Pty Ltd v Gora* (2010) 14 BPR 27,743, 27,749 [32].

38 Ibid 27,753 [55].

39 Ibid 27,755–7 [70]–[76].

40 Ibid 27,756 [75].

41 Ibid 27,756–7 [71]–[72], [76].

42 Ibid 27,751 [46], 27,752 [48].



Having found that no enforceable contract existed under which BBA had a right to purchase the unit for \$107 000 (less adjustments), Bryson AJ then considered whether the provision in the *occupancy agreement* which purported to grant such an option would have been invalid in any case, on the basis that it constituted an unlawful restraint on alienation. His Honour found that the purported option was indeed invalid on this basis. The occupancy agreement was to last forever, not being limited by any event such as the death of the Evans or their executrices, or even the Astra ceasing to exist as a retirement village. For so long as the occupancy agreement was in force, there was an implied contractual obligation not to transfer title in a way that would defeat the option.<sup>43</sup> Further, the Evans would not be able to sell, lease or vacate the unit without BBA becoming entitled to purchase the unit for a maximum price of \$107 000. The phenomenon of the decline in the real value of money and the increase in the value of real property were well established when the occupancy agreement was entered into, and were very likely to continue into the future. The Evans were thus forced to retain ownership of the unit unless they were prepared to allow BBA to exercise its option and purchase the unit at well below its then market value. This meant that there was no practical difference between a total and permanent restraint on alienation and the effect of the occupancy agreement.<sup>44</sup> The Evans held a fee simple interest in the unit and it was a long-established legal principle that a purported total restraint of a fee simple interest was void.<sup>45</sup> The same reasoning applied to the grant to BBA of the right of pre-emption in the *buyback deed*, which prohibited the Evans from selling the unit to another party without first offering it to BBA for a maximum price of \$107 000.<sup>46</sup>

In support of his conclusion, Bryson AJ relied upon *Re Rosher; Rosher v Rosher* ('*Re Rosher*'),<sup>47</sup> where a gift of land in a will was made subject to a right of the testator's widow to purchase the land at a price equal to one-fifth of its value at time of the testator's death.<sup>48</sup> His Honour also relied on statements made by two state appellate courts. First, in the New South Wales Court of Appeal decision of *Moraitis Fresh Packaging (NSW) Pty Ltd v Fresh Express (Australia) Pty Ltd* ('*Moraitis*'),<sup>49</sup> Giles JA said: 'That the price at which a right of pre-emption may be exercised is necessarily an undervalue can result in invalidity as a restraint on alienation ...'.<sup>50</sup> In the same case Hodgson JA (Ipp JA agreeing) said that a right of first refusal that prevented the sale of the right to occupy market stands, worth in excess of \$500 000 at the time of the grant and worth \$1.8 million at the time of the trial, without first offering them for sale to the grantee of the

43 Ibid 27,757 [81].

44 Ibid 27,757–8 [81].

45 Ibid 27,758 [82].

46 Ibid 27,760 [93].

47 (1884) 26 Ch D 801, cited in *Bondi Beach Astra Retirement Village Pty Ltd v Gora* (2010) 14 BPR 27,743, 27,758 [85].

48 *Re Rosher* (1884) 26 Ch D 801, 801.

49 (2008) 14 BPR 26,339.

50 Ibid 26,355 [82].

right at a price of \$85 971 ‘would be void as a restraint on alienation’.<sup>51</sup> However, these comments were obiter.<sup>52</sup> Second, in the Full Court of the South Australian Supreme Court decision of *John Nitschke Nominees Pty Ltd v Hahndorf Golf Club Inc* (*Nitschke*),<sup>53</sup> Besanko J said that a relevant factor as to whether a right of first refusal infringes the policy of free alienation of land is whether it is exercised with reference to a fixed price.<sup>54</sup>

In coming to this decision, Bryson AJ rejected an argument advanced by BBA that there were public policy considerations which supported upholding the restraint as valid. It was argued that there was public utility in the contractual arrangements that existed between BBA and the proprietors of the units. A potential resident would be able to buy into the village and receive the advantages of its services at a lower price than would otherwise have been the case had the capital gain gone to the owner of the unit rather than the organiser of the village under the buyback arrangement.<sup>55</sup>

Bryson AJ found this argument unappealing, believing instead that the chief public policy argument for the upholding of the restraint was one based upon freedom of contract, ‘in allowing people to pursue what they understand to be their own interests and the means of achieving them, by whatever contracts they choose to make.’<sup>56</sup> Bryson AJ thought this norm to be of ‘high importance’, but that it was nevertheless ‘outweighed by the very long-established public policy consideration favouring free alienability of freehold estates in fee simple’.<sup>57</sup> However, where the proprietary interest subject to the purported restraint is other than a fee simple, there is room for the freedom of contract norm to operate. So, there were other ways of achieving the end of organising retirement villages so that the capital gain on units redounded to the operator rather than the residents, without placing an absolute restraint on alienation of the fee simple estate. For example, rather than receiving a fee simple, a resident may be given the right of occupation of a unit under a contractual licence, or a non-assignable lease or life estate. In this way the policy in favour of freedom of contract could be respected without infringing upon the public policy of the free alienability of a fee simple.<sup>58</sup>

The result in *Gora* at trial was that there was no agreement between BBA and the executrices for the purchase of the unit for \$107 000. Nor did BBA have the

51 Ibid 26,365 [146].

52 Giles JA was not prepared for the restraint argument to be raised on appeal as it had not been raised at trial, and there were possible grounds on which a restraint may be upheld: *ibid* 26,355 [83]. Hodgson JA, who was prepared to allow the restraint argument to be raised on appeal, held that there was no restraint because the right of first refusal, properly construed, did not compel the grantor to offer the right to the grantee at a price of \$85 971, but rather at a price at which the grantor would otherwise sell to another purchaser: at 26,364 [139]–[140].

53 (2004) 88 SASR 334.

54 *Ibid* 370 [122]. However, this statement was also obiter as the price at which the grantor was compelled to offer to the grantee was the price at which the grantor had been offered by, and was willing to sell to, a third party: at 370–1 [124].

55 *Bondi Beach Astra Retirement Village Pty Ltd v Gora* (2010) 14 BPR 27,743, 27,758 [83].

56 *Ibid* 27,758 [84].

57 *Ibid*.

58 *Ibid*.

right to purchase the unit for the same price because the relevant provisions of the occupancy agreement and the buyback deed constituted invalid restraints upon the right of the owner to sell the unit. The executrices were thus free to sell the unit to any person who qualified as a resident of the retirement village.

#### IV GORA: APPEAL

BBA appealed to the New South Wales Court of Appeal consisting of Giles, Campbell and Whealy JJA. The appeal was upheld in part, with the Court declaring that although no binding contract existed in favour of BBA for the purchase of the unit, the executrices were bound by the restrictions of the buyback deed.<sup>59</sup> The leading judgment, delivered by Campbell JA, was extremely detailed and thorough in its consideration of cases dealing with the validity of restraints on alienation.<sup>60</sup> Whealy JA agreed with Campbell JA without further comment.<sup>61</sup> Giles JA also agreed with the reasons given by Campbell JA, but ‘without any need to join in his Honour’s detailed observations on cases on other facts’,<sup>62</sup> and subject to observations of his own made in a short, but clear and compelling, judgment.<sup>63</sup>

The Court of Appeal’s decision in *Gora* is significant in a number of respects.

Firstly, Campbell JA’s judgment pays great attention to the historical origins of the rule that unreasonable restraints on alienation are void. His Honour identified the conceptual foundation of the principle in Littleton’s writings in the late fifteenth century, as transmitted by Coke in the seventeenth century,<sup>64</sup> and then traced its development from its supposed roots in seventeenth century cases through to the present day.

Secondly, it is the first decision by a state appellate court since *Nitschke* in 2006 that reached a conclusion about whether a restraint on alienation was valid or

59 *Gora* (2011) 82 NSWLR 665, 747 [369]. The Court agreed with Bryson AJ that no binding contract for the purchase of the unit existed at the time of the commencement of the proceedings. However, whereas Bryson AJ found that the option had been validly exercised on 23 February 1999 (although the contract had been subsequently abandoned), the Court of Appeal held that the option had not been validly exercised on that, or any other, day: at 682–4 [71]–[86]. The letter would not have indicated to a reasonable recipient that BBA was unequivocally electing to acquire the unit on the terms of the option. The letter did not mention that the purchase price was \$107 000, which was a fundamental flaw. It had to be noted that the recipient of the letter was not Mr Evans, but his executrices, who could not reasonably be expected to be aware of the price at which the option could be exercised under an agreement made by Mr Evans 16 years earlier: at 682 [72]–[74]. The Court of Appeal went on to state that if the option had been validly exercised, Bryson AJ was correct in his conclusion that the contract had been abandoned: at 684–7 [87]–[106].

60 *Ibid* 694–742 [141]–[343].

61 *Ibid* 747 [370].

62 *Ibid* 669 [5].

63 *Ibid* 669 [1]–[5].

64 *Coke on Littleton*, first published 1628, cited in *Gora* (2011) 82 NSWLR 665, 694–8 [142]–[157]. Campbell JA ultimately concluded that, ‘for all the respect that has been paid to *Coke on Littleton* in succeeding centuries, it is insufficient for deciding whether the particular restraints on alienation involved in the present case are void’: at 698 [157].

void. As previously mentioned, in *Moraitis* the New South Wales Court of Appeal raised the issue of whether a specific right of pre-emption infringed the restraints doctrine, but did not ultimately decide the question.<sup>65</sup> The same is true of the decision in *Noon v Bondi Beach Astra Retirement Village Pty Ltd* ('*Noon*'),<sup>66</sup> to be discussed below.

Thirdly, the decision in *Gora* stands alone in Australian jurisprudence in upholding a right of pre-emption that was not limited in time and which could be exercised to acquire land at a price well below market value whenever the owner or the owner's personal representative might desire to sell. In substance this amounted to upholding a total restraint on alienation of a fee simple interest.

Before analysing the judgments in *Gora*, we should note the decision of the New South Wales Court of Appeal in *Noon*, which was decided between the trial and appeal decisions in *Gora*. In *Noon*, the Court of Appeal — consisting of Giles, Macfarlane and Young JJA — considered the operation of buyback provisions in favour of BBA in relation to another unit in the Bondi Beach Astra Retirement Village. An important difference in *Noon*, however, was that the provisions which purported to give BBA the right to purchase the relevant unit from its owner, Mr Noon, were found in the sale contract between Mr and Mrs Noon and CGM, and not in any document between the Noons and BBA. The fact that BBA was not a party to the agreement that granted the option meant that it could not exercise it,<sup>67</sup> and the litigation primarily concerned: (1) whether the option had been granted to BBA or CGM; (2) whether the option had been purportedly exercised by CGM or BBA; and (3) whether the option became exercisable in any case, given that it would only arise if a 'residence contract' to which Mr Noon was a party had been terminated. The Court of Appeal held that the option had been purportedly granted to BBA (and not CGM),<sup>68</sup> that it had been purportedly exercised by BBA (and not CGM),<sup>69</sup> and that the option had not in fact become exercisable because there was no residence contract to which Mr Noon was a party that was being terminated.<sup>70</sup> Because of this it was not necessary for the Court to rule on the argument raised before it, but not the trial court, that the right purportedly granted to BBA to purchase the unit on the death of Mr Noon, at the price at which Mr and Mrs Noon had purchased the unit a decade before, was void as an

65 *Moraitis* (2008) 14 BPR 26,339, 26,365 [146].

66 (2010) 15 BPR 28,221.

67 *Ibid* 28,231 [53] (Giles JA, Macfarlan JA agreeing); 28,246 [192] (Young JA).

68 *Ibid* 28,231 [54] (Giles JA, Macfarlan JA agreeing); 28,246 [191] (Young JA).

69 *Ibid* 28,234 [76], 28,235 [81] (Giles JA, Macfarlan JA agreeing); 28,247 [201]–[202] (Young JA).

70 Giles JA (Macfarlan JA agreeing) held that Mr Noon was not a party to any residence contract, which was defined as a contract by which a person obtains the right to occupy a unit in the retirement village. The only contract to which Mr Noon was a party was the contract for the sale by CGM of the unit to Mr Noon and his wife (who was now deceased). The sale contract was not a residence contract because it did not give the Noons an on-going right to occupy the unit, and certainly not a right that could be terminated by notice, which was a triggering event for BBA's buyback rights. Rather, the sale contract gave ownership of the unit to Mr and Mrs Noon, and their right to occupy the unit derived from that ownership, rather than any agreement: *ibid* 28,232–3 [66]–[70]. Young JA did not disagree with the reasoning of Giles JA in this regard, but did not reach a conclusion on this issue because the court had not heard full argument on the matter: at 28,244 [166]–[170].

unlawful restraint on alienation. Giles JA declined to decide this issue, although he noted that the legislation governing retirement villages contemplated buyback rights and restrictions on transfer.<sup>71</sup> However, Young JA expressed the view, without making a formal finding, that BBA's buyback rights did not constitute an unlawful restraint on alienation. The evidence showed that Mr and Mrs Noon appreciated that the buyback provision meant that they would have a guaranteed buyer for their unit in the future and that they were purchasing their unit at a substantial discount. Because of this, the enforcement of the buyback rights, if they were otherwise enforceable, would not contravene public policy.<sup>72</sup>

It should be noted that the Court of Appeal in *Noon* stated that the buyback provisions before it differed from those dealt with by Bryson AJ at first instance in *Gora*.<sup>73</sup> And on appeal in *Gora*, Campbell JA noted that contract of sale in *Noon* differed 'in numerous respects' from the contracts that he had to consider.<sup>74</sup> Although not expressly identified in either case, one significant difference seems to have been that in *Noon* the only proposed sale that would trigger BBA's buyback rights was a sale by Mr and Mrs Noon themselves,<sup>75</sup> whereas in *Gora* a sale by the personal representative of the estate of Mr or Mrs Evans would trigger BBA's buyback rights.<sup>76</sup> Certainly, in *Gora*, Campbell JA characterised the rights of BBA under the occupancy agreement and buyback deed as 'very great',<sup>77</sup> 'very close to total',<sup>78</sup> 'extreme',<sup>79</sup> and such as to render the unit 'in practice ... inalienable'.<sup>80</sup> By contrast, in *Noon*, Young JA did not comment adversely on BBA's counsel's submission that the restraint before the court was partial, rather than total.<sup>81</sup> So although *Noon* demonstrated preparedness by the Court of Appeal to entertain the argument that a right to buy back property at a price significantly below market value might be valid, it still left much work for the Court to do in *Gora*, where the restraint was not limited to the life of the owner.

The decision in *Gora* will be placed in context and examined in terms of the two landmark cases in the Australian law of restraints on alienation. The first of these is the High Court's decision in *Hall v Busst*.<sup>82</sup> This case has provided the starting

71 Ibid 28,239–40 [113]–[117]. His Honour said (at 28,240 [116]):

It would be unwise to attempt an unnecessary decision [as to whether the option was void as a restraint on alienation] when, because it was not raised, there has not been the attention to evidence going to the public policy considerations which would have come had the matter been pleaded and raised below. Whatever decision was come to would suffer from a dubious factual foundation. Such precedential value, if any, as it had might be misleading.

72 Ibid 28,249 [223], [226]–[229].

73 Ibid 28,239 [112] (Giles JA). See also 28,249 [222]–[223] (Young JA).

74 (2011) 82 NSWLR 665,735 [313].

75 See *Noon* (2010) 15 BPR 28,221, 28,224 [19], 28,226 [32], 28,227 [36]. Although if BBA did not exercise its buyback rights, the Noons were permitted to sell the unit, but only to a purchaser who would enter into a buyback arrangement with BBA: at 28,227–8 [36].

76 (2011) 82 NSWLR 665,673 [26], 692 [138], 736 [321].

77 Ibid 736 [321].

78 Ibid 737 [322].

79 Ibid 740 [332].

80 Ibid 738 [325].

81 (2010) 15 BPR 28,221, 28,249 [222]–[223].

82 (1960) 104 CLR 206.

point for later courts in their analysis of the principle, but has not been influential in actually shaping the decisions reached in later cases. The second is the decision of Needham J in *Reuthlinger v MacDonald*,<sup>83</sup> which articulated a basis by which otherwise invalid restraints might be upheld: the principle of the legitimate or valid collateral purpose. It will be seen that this principle has been utilised in several subsequent cases.

### A *The Hall v Busst Foundation*

Although *Hall v Busst*<sup>84</sup> is the seminal case dealing with restraints on alienation, the rule of law it establishes is not clear. The case involved the sale of land and the execution by the purchaser, on behalf of herself, her executors, administrators and assigns, of a deed in favour of the vendor, his executors, administrators and assigns. The uncertainty surrounding the significance of the case is partly because the members of the High Court differed in their construction of the relationship between two clauses of the deed.<sup>85</sup> Clause 3 provided that the purchaser was prohibited from dealing with the land without the written consent of the vendor. Clause 4 provided that the purchaser had to give the vendor one month's notice of a proposed dealing with the land and that during that period the vendor had an option of purchasing the land at a price calculated in accordance with another clause of the deed. That price was a fixed sum, plus the value of additions and improvements made to the land by the purchaser, less deficiencies in chattel property and a reasonable sum for depreciation. The purchaser sold the land otherwise than in accordance with the terms of the deed and the vendor sued for damages.

Dixon CJ construed clause 3 as having an operation that was independent of clause 4, so that if the vendor refused a request by the purchaser to deal with the land but declined to exercise the option, the purchaser continued to be prohibited under clause 3 from dealing with the land. In this way the Chief Justice held that the prohibition in clause 3 constituted a total restraint on alienation in that it prohibited without the vendor's consent, for an indefinite period not limited to the lives of the purchaser and the vendor, a transfer or the creation of any interest in the land.<sup>86</sup> Were such a prohibition included as a condition subsequent in the grant to the purchaser it would undoubtedly be void, 'on the ground of repugnancy to the grant or upon public policy or for that matter ... conceivably ... [as] an indirect effect of *Quia Emptores*'.<sup>87</sup> After quoting several writers who asserted that there should be no difference in the treatment of restraints imposed by way of condition in the grant and those imposed by a covenant in a deed or by simple

83 [1976] 1 NSWLR 88.

84 (1960) 104 CLR 206.

85 The case also concerned whether the option granted was invalid because the price at which it could be exercised was uncertain. Dixon CJ and Fullagar and Menzies JJ held that the option was void on this basis: *ibid* 217, 222, 235. Kitto and Windeyer JJ were in the minority and dissented, believing that the price was sufficiently certain: at 227–8, 245.

86 *Ibid* 214–15.

87 *Ibid* 217.

contract, and stating that each restraint would have the same practical effect on the alienation of land, Dixon CJ concluded that clause 3 was void.<sup>88</sup>

Unlike the Chief Justice, Fullagar J construed clause 3 as not having an operation independent of clause 4. That is, if the vendor were confronted with a request by the purchaser for permission to deal with the land and declined to exercise the option created by clause 4, the purchaser would then be freed from the prohibition in clause 3. However, Fullagar J held that even in these circumstances clause 3 was void as it compelled the purchaser to offer the land to the vendor at a price that could be well below market value even if the purchaser wanted to enter into a short-term lease or to use the land as security for a small loan. Fullagar J said that this was a restraint on alienation imposed on the holder of the fee simple and was therefore void as repugnant to the estate granted.<sup>89</sup> His Honour stated that he agreed with Dixon CJ that restraints on alienation should be dealt with in the same way, whether they be imposed in the grant or by contract, and also that if clause 3 did operate independently (which Fullagar J held it did not), it would 'be obviously void'.<sup>90</sup>

Menzies J agreed with both Dixon CJ and Fullagar J without exploring the differences in their reasoning. His Honour did, however, express the view that general restraints on alienation should be treated in the same manner, irrespective of whether they were imposed by condition or covenant. In each case there would be an adverse effect on the public interest.<sup>91</sup>

Kitto and Windeyer JJ construed the clause as operating in the way that Fullagar J did, that is, that if the vendor declined to exercise the option when entitled to do so the purchaser was then free to deal with the property without the vendor's consent. Kitto J then concluded, without providing reasons, that on such a construction the clause did not prohibit alienation, and Windeyer J agreed.<sup>92</sup> Had clause 3 an independent operation, Windeyer J would have held it void for the reasons given by Dixon CJ, but Kitto J declined to express an opinion on its validity if clause 3 were construed in that manner.<sup>93</sup>

In *Gora*, Campbell JA concluded that a majority in *Hall v Busst* agreed: that a contractual restraint on alienation was to be treated in the same way as a condition in a grant restraining alienation;<sup>94</sup> that the source of potential invalidity of a contractual restraint of alienation is public policy favouring the free alienability of private property;<sup>95</sup> and that clause 3 was invalid as an unlawful restraint on alienation.<sup>96</sup> Because of the differing interpretations as to whether clause 3 operated independently of clause 4, there was no majority reasoning

88 Ibid 217–18.

89 Ibid 223–5.

90 Ibid 223–4.

91 Ibid 235–6.

92 Ibid 229 (Kitto J), 246 (Windeyer J).

93 Ibid.

94 (2011) 82 NSWLR 665, 711 [206].

95 Ibid 718 [234].

96 Ibid 711 [206].

as to the precise reason why clause 3 was invalid.<sup>97</sup> Campbell JA also identified in the judgment of Dixon CJ the principle that ‘it is not possible to do indirectly what one cannot do directly’.<sup>98</sup> We will see below why his Honour saw this as significant.<sup>99</sup>

## B *Reuthlinger v MacDonald and Subsequent Cases*

The second foundational case in the Australian law of restraints on alienation analysed in detail by Campbell JA was Needham J’s decision in *Reuthlinger v MacDonald* (*‘Reuthlinger’*).<sup>100</sup> In this case MacDonald owned non-voting preference shares in a company. Reuthlinger and his wife held 11 000 ordinary shares in the company. Other shareholders, who voted as a block, also owned 11 000 ordinary shares. Pursuant to a contract between MacDonald and Reuthlinger, it was agreed that: (1) MacDonald would convert his preference shares into ordinary voting shares as he was entitled to do under the Company’s Articles of Association; (2) MacDonald would not himself exercise his voting rights in respect of the converted shares, but would irrevocably appoint Reuthlinger as his attorney to exercise the voting rights attached to the shares; (3) MacDonald would not transfer his shares or give the company a transfer notice with respect of the shares until Reuthlinger and his wife had a majority shareholding in the company; and (4) Reuthlinger guaranteed that MacDonald would receive at least the same dividends and capital contributions that he would have received had the shares remained preference shares or were transferred for face value. MacDonald converted his preference shares into ordinary shares as required by the agreement but subsequently, in breach of the agreement, lodged with the company a notice indicating his intention to transfer the shares. Reuthlinger applied for an injunction restraining MacDonald and the company from taking any further steps to effect a transfer of MacDonald’s shares.<sup>101</sup>

Needham J granted the injunction, and in so doing rejected the argument that the agreement that prohibited MacDonald from transferring the shares was an invalid restraint on alienation. His Honour noted that unlike in *Hall v Busst* the restraint on alienation was not imposed in connection with the transfer of the relevant property to the grantor of the restraint.<sup>102</sup> Instead, the restraint operated in respect of property that was already held by the grantor. Had his Honour felt free to do so, Needham J would have decided the case on the basis that the doctrine against restraints on alienation did not apply to those imposed otherwise than in connection with the acquisition by the grantor of the relevant property.<sup>103</sup> However,

97 Ibid.

98 Ibid 738 [326].

99 See below nn 150–1, 155–8 and accompanying text.

100 [1976] 1 NSWLR 88, affd (Unreported, New South Wales Court of Appeal, Street CJ, Glass and Samuels JJA, 20 October 1976).

101 Ibid 90–3.

102 Ibid 94–5, 97, 100.

103 Ibid 99.



Needham J noted that in his judgment in *Hall v Busst*, Dixon CJ referred to, with apparent approval, a passage in an article by Glanville Williams about restraints against alienation.<sup>104</sup> In that passage, Williams referred to restraints imposed by contracts seemingly unconnected with a transfer of the property to the grantor of the restraint.<sup>105</sup> Accordingly, Needham J concluded that Dixon CJ, with whom Menzies J agreed, was implicitly extending his judgment to contractual restraints that were imposed subsequent to and unconnected with any acquisition of that property by the grantor.<sup>106</sup> Even though what Dixon CJ said about restraints on alienation in this context was obiter dicta — as in *Hall v Busst* the contractual restraint was imposed as a part of the transaction by which the grantor acquired the property — Needham J was not prepared to depart from ‘obiter dicta of a considered nature of’ Dixon CJ and Menzies J.<sup>107</sup>

Accordingly, Needham J found that the doctrine of restraints against alienation did apply to restraints imposed by a contract unconnected with the acquisition by the grantor of the relevant property. But this gave rise to the question of what types of contractual restraints were void. His Honour construed *Hall v Busst* as holding that a contractual restraint on alienation was void only where it imposes a total restraint on alienation, and that it could not be used ‘to invalidate any less contractual restriction’.<sup>108</sup> In the case before his Honour the restriction on alienation was not total: it was limited to the joint lives of Reuthlinger and MacDonald. On this basis, *Hall v Busst* did not require the restraint upon MacDonald transferring the shares to be held void. Needham J then advanced a second reason for why the restraint was valid; his Honour adopted the concept developed by Charles Sweet,<sup>109</sup> that a restraint ‘imposed for the protection of a valid collateral object’ is enforceable.<sup>110</sup> The restraint on alienation of the shares agreed to by MacDonald was to facilitate the effectiveness of the irrevocable power of attorney he had granted to Reuthlinger enabling the latter to exercise the voting rights attached to MacDonald’s shares. This was a legitimate purpose, meaning that the restraint was valid.<sup>111</sup>

The decision of Needham J was upheld by the New South Wales Court of Appeal in an unreported judgment.<sup>112</sup> Street CJ said that he found Needham J’s analysis

104 Ibid 97–8.

105 Williams, above n 3, 349–51.

106 *Reuthlinger* [1976] 1 NSWLR 88, 98–9. Needham J did not agree that what Williams had said in the passage in fact supported the proposition that Dixon CJ was advancing: that because of their similarities, both restraints imposed by contract and restraints imposed by conditions in grants should be susceptible to being held void. By contrast, Needham J would have read Williams as asserting that because of their similarities, neither contractual restraints nor restraints imposed as conditions in grants should be so susceptible.

107 Ibid 100.

108 Ibid 101.

109 Charles Sweet, ‘Restraints on Alienation’ (1917) 33 *Law Quarterly Review* 236, 246.

110 *Reuthlinger* [1976] 1 NSWLR 88, 101.

111 Ibid.

112 *Reuthlinger v MacDonald* (Unreported, New South Wales Court of Appeal, Street CJ, Glass and Samuels JJA, 20 October 1976).

of the law relating to restraints and the decision in *Hall v Busst* as ‘admirable’ and ‘entirely convincing’.<sup>113</sup>

Needham J’s articulation of the principle that a restraint will not be void if it serves a valid collateral purpose has proved very influential. It has been used in several subsequent cases to uphold restraints on alienation where a pre-existing relationship between the parties meant that the restraint facilitated an interest of the grantee.<sup>114</sup> For example, in *Vercorp Pty Ltd v Lin* (*Vercorp*),<sup>115</sup> the purchaser of vacant land that formed part of a planned residential estate contracted with the vendor, the developer, granting the developer the right to reacquire the land for the lesser of its then market value or the price at which the vendor sold it to the purchaser. The right would arise in either of the following circumstances: (1) the purchaser had not, within 2 years of the purchase, commenced construction of an approved dwelling on the land (a conditional option); or (2) if the purchaser, within 2 years of the purchase, wished to transfer the land to a third party (a right of pre-emption).<sup>116</sup> An assignee of the right of pre-emption — a joint venture partner of the developer — sought to enforce the right when the purchaser wished to sell the land to a third party, but the purchaser argued that the right of pre-emption was an invalid restraint on alienation. The Court rejected this argument for reasons that included the following. The restraint constituted by the right of pre-emption was for a limited period (2 years from the date of purchase) and the restraint served a legitimate collateral purpose. The grant to the vendor of the option and the right of pre-emption were designed to ensure that high quality homes were constructed on the various lots of the development, which was a benefit to the developer and other purchasers of land within the development.<sup>117</sup>

Another case that adopted the valid collateral purpose principle was *Southlink Holdings Pty Ltd v Morerand Pty Ltd* (*Southlink*),<sup>118</sup> a case not considered in *Gora*. Morerand and Southlink were parties to a joint venture agreement entered into in 1995. The principal object of the joint venture was to have land owned by Morerand rezoned for residential purposes through the efforts and skill of the controller of Southlink, and then sold with the net profit being divided equally between them. The Court construed the agreement as containing implied terms to the effect that Morerand was not to sell the land while the joint venture remained on foot and that the joint venture could be terminated by either party if after a reasonable time the rezoning of the land had not been achieved and there was no reasonable prospect of rezoning within the near future.<sup>119</sup> The land was sold by Morerand in 1999 without it having been rezoned, but while the joint venture agreement was still on foot, and therefore in breach of the agreement.<sup>120</sup> In 2004, Southlink sued Morerand for damages for breach of contract, and Morerand

113 Ibid, quoted in *Gora* (2011) 82 NSWLR 665, 713 [217].

114 See Grattan, above n 24, 396–8.

115 [2007] 2 Qd R 180.

116 Ibid 190 [47]–[49].

117 Ibid 192 [56]–[57].

118 [2010] VSC 214 (28 May 2010).

119 Ibid [3], [23], [29].

120 Ibid [46], [55].

argued, among other things, that the relevant provision of the agreement was an invalid restraint on alienation. Byrne J rejected this argument on the basis that the restriction on transfer by Morerand was collateral to the principal purpose of the joint venture: rezoning the land and selling it at a profit. Additionally, the duration of the restraint was limited: Morerand was free to sell the land once it had been rezoned or a reasonable period had elapsed without that purpose being achieved.<sup>121</sup>

An earlier case which approved the legitimate collateral purpose principle as a justification for upholding the validity of what otherwise would be an invalid restraint on alienation was *Elton v Cavill [No 2]*.<sup>122</sup> Notably, the case also imposed a limitation on the operation of the principle. The case concerned an agreement between the tenants in common of co-owned land on which a building consisting of four home units stood. The agreement gave to each co-owner a right of exclusive occupation of one of the four units and provided that each co-owner was not to transfer or deal with his or her interest as a tenant in common of the land without the consent of the other co-owners. The agreement also stated that any of the co-owners could, in his or her discretion and without giving reasons, refuse to accept a proposed purchaser as a co-proprietor. (At the time the agreement was entered into some of the co-owners had held their interests in the land for a number of years so, like *Reuthlinger*, the contractual restraint was not connected with the acquisition of the property by all of the grantors of the restraint.) Mrs Cavill was a life tenant of a one-quarter share in the land in her own right and held another one-quarter share in her capacity of the executrix of the estate of another former owner. Mrs Cavill contracted to sell the one-quarter share that she held in her capacity of executrix without gaining the consent of all of the other co-owners. The plaintiffs, who held two one-quarter shares in the land, obtained an interlocutory injunction restraining completion of the sale.<sup>123</sup>

In proceedings for final determination of the matter before Young J, Mrs Cavill argued that the provision of the deed prohibiting the sale without the consent of the other co-owners was void as an impermissible restraint on alienation. Young J agreed with this argument. His Honour accepted that the ‘collateral purpose rule’ as proffered by Sweet and endorsed by Needham J in *Reuthlinger* formed part of the law of New South Wales.<sup>124</sup> Further, his Honour held that ‘there is a legitimate interest in a co-owner in having a veto over who should be an owner of other undivided shares in the same property to justify a restraint on alienation which is for the purpose of securing a proper collateral benefit’.<sup>125</sup> However, that was not the end of the enquiry, as it was necessary to ascertain if the restraint served any invalid or illegitimate purpose in addition to the legitimate purpose his Honour had identified. Young J found that the restraint went beyond what was reasonably necessary to protect the legitimate interests of the other co-owners

121 Ibid [44]–[45].

122 (1994) 34 NSWLR 289.

123 Ibid 291–4.

124 Ibid 296, 300.

125 Ibid 300.

in protecting their 'quality of life'.<sup>126</sup> A reasonable protection of that legitimate interest would be to allow the other co-owners to refuse consent to a transfer on reasonable grounds (and not simply at their discretion). Young J then decided that it was not possible to sever that part of the clause that served an illegitimate purpose from the part that served a legitimate purpose so as to allow a right of veto on reasonable grounds only. His Honour felt unable to take such a course because this would be to give the provision an operation that ran contrary to the intention of the parties.<sup>127</sup>

The valid collateral purpose exception received a less warm reception from the Full Court of the Supreme Court of South Australia in *John Nitschke Nominees Pty Ltd v Hahndorf Golf Club Inc* ('Nitschke').<sup>128</sup> A golf club that had been leasing a parcel of land purchased the land from the registered owners, these being a member of the Nitschke family and three companies controlled by members of the family ('Nitschke entities'). The Nitschke entities also owned other parcels of land that abutted the land sold to the Club. As a part of its purchase of land, the Club granted an encumbrance that was registered on the title to the land. Clause 3 of the encumbrance granted to the Nitschke entities a right of first refusal in respect of the land that was to endure for so long as the Nitschke entities owned the adjoining land. Clause 4 of the encumbrance prohibited the Club from selling the land unless the purchaser entered into a similar encumbrance with the Nitschke entities. The Club subsequently desired to sell the land to a party who intended to use it for residential development, and served notices on the Nitschke entities that purported to activate the right of first refusal and force the Nitschke entities to elect whether or not to purchase the land on the terms specified in the notices. The Nitschke entities claimed that the notices were not valid, in that they purported to impose on them terms more onerous than were being offered by the prospective third party purchaser. In the subsequent litigation the Club argued that Clauses 3 and 4 of the encumbrance were invalid restraints on alienation.<sup>129</sup>

The Full Court held that Clause 3 was not invalid, but that Clause 4 was. Besanko J, with whom the other members of the court agreed, upheld Clause 3 on the basis that the right of first refusal did not prohibit dealings with the land other than sales, it endured for only so long as the Nitschke entities owned the adjoining land and that the exercise price was not at a fixed price below market value.<sup>130</sup> By contrast, there was evidence before the Court that at the time the encumbrance was entered into the only likely purchaser of the land would be someone who

126 Ibid 301. Young J referred to an argument made by Mrs Cavill's counsel that the restraint served the illegitimate purpose of allowing the other co-owners complete power to determine the terms on and price at which a co-owner's share in the land could be sold, and this gave in substance to the co-owners a right of pre-emption that did not actually exist: at 300. Campbell JA in *Gora* read Young J's reference to this argument as accepting it: *Gora* (2011) 82 NSWLR 665, 726 [267].

127 *Elton v Cavill [No 2]* (1994) 34 NSWLR 289, 300–1. Because of this finding it was not necessary for Young J to consider another basis upon which the clause might be found invalid. The solicitor who drafted the deed, ostensibly acting for the then current co-owners was — unknown to his clients — in partnership with the plaintiffs in a venture to acquire as many of the units in the building as possible.

128 (2004) 88 SASR 334.

129 Ibid 338–49.

130 Ibid 370–1 [124].

wished to undertake residential development. Further, the evidence suggested that because of the encumbrance such a purchaser would only purchase the land at a substantial discount to what would otherwise be its market value. This was because under Clause 4 the purchaser was obliged to enter into an equivalent encumbrance, including the right of first refusal, with the Nitschke entities.<sup>131</sup>

Besanko J explained that the basis for holding restraints on alienation void was the public policy that private property should be freely alienable, but that there was the countervailing principle that parties should be held to their freely negotiated bargains. For his Honour, this balance could be struck by confining the operation of the rule against restraints ‘within narrow limits’, either by holding that certain restraints are not caught by the doctrine *or* ‘by developing the exception of a lawful collateral object’ as articulated by Needham J in *Reuthlinger*.<sup>132</sup> However, Besanko J had earlier said that this latter method, although seemingly attractive, ‘is not well established, other than perhaps, in New South Wales’.<sup>133</sup> Besanko J did not find it necessary to apply the valid collateral object principle in either holding Clause 3 valid, because of the limited nature of the restraint, or in finding Clause 4 invalid, because of its likely suppression of the purchase price. The fact that Besanko J did not go on to consider whether Clause 4 could nevertheless be upheld on the basis of the valid collateral purpose principle suggests that ultimately his Honour did not believe that the principle was a valid exception to the rule against unreasonable restraints. However, the result reached might nevertheless be consistent with the approach of Young J in *Elton v Cavill [No 2]*: the restraint must not go beyond what is reasonably necessary to protect the legitimate collateral interest. If the Nitschke entities wished to protect the value and amenity of the land they retained against the adverse impact of future residential development of the land sold, they could have done so by imposing a restrictive covenant prohibiting its use other than as a golf club. This would have protected their interest without fettering the ability to sell the land by an ongoing right of first refusal.

In the cases in which the legitimate collateral object principle was applied, the interest identified as upholding, or potentially upholding, the restraint was a private interest of the grantee. In *Elton v Cavill [No 2]* it was the personal interest of a co-owner in determining the identity of the others with whom he or she would share occupation of the land. In *Vercorp* it was the financial interest of the developer to ensure that the burdened land was developed in a way that would enhance, rather than detract from, the value of the retained parcels. In *Southlink* the interest was of the non-landholding joint venturer to ensure that the joint venture was not frustrated by a premature sale of the land before the anticipated rezoning. In none of these cases, nor in *Nitschke*, was there a wider, public, interest served by the restraint. A case in which such a public interest was implicated is *Wollondilly Shire Council v Picton Power Lines Pty Ltd* (*Picton*

131 Ibid 372 [128]–[129].

132 Ibid 370 [121].

133 Ibid 268 [114].

*Power Lines*'),<sup>134</sup> although the case itself did not endorse the legitimate collateral purpose principle.

In this case the Council sold vacant industrial land to the purchaser, who entered into a covenant: to erect on the land, within eighteen months, industrial premises approved by the Council; not to transfer the land until the erection and use of the premises as approved by the Council; and that the land would be sold back to the Council for the original sale price if the required premises were not constructed within twenty-four months. The purchaser had not constructed the premises within the required period and the Council sought specific performance of the agreement for the sale back to the Council. The purchaser defended the proceedings on the basis that the obligation to re-sell the land was void as a restraint on alienation or because it was a penalty.<sup>135</sup>

The Court of Appeal held that the covenant was valid. It found that the Council had sold the land and took the repurchase rights in order to encourage industrial development in the shire. It had:

the clearest interest in promoting industrial development within the shire for the benefit of the general body of ratepayers and for its long-term benefit as well. The increased employment and general business activity resulting from such development would increase the prosperity of the shire as a whole and would indirectly benefit the Council itself.<sup>136</sup>

This is plain recognition that the covenant entered into by the purchaser served primarily the public interest, and only secondarily the private interest of the Council. However, the Court made this statement not in the part of its judgment dealing with the validity of the restraint, but in that part which rejected that the covenant was void as a penalty. Because the object of the transaction was for the promotion of 'public purposes, and not for private profit', the task of calculating damages would be difficult. This meant that the right of repurchase on breach was more likely to be characterised as a genuine pre-estimate of loss, rather than as a penalty.<sup>137</sup>

The Court took a different approach in dealing with the restraint on alienation argument. In this context the Court first noted that the part of the covenant which prohibited alienation prior to approved use, rather than the construction, of the premises went beyond that which was reasonably necessary to protect the Council's repurchase rights under the covenant. However, if this made that part of the prohibition void, it was severable.<sup>138</sup> In terms of the restraint not to transfer until approved buildings had been constructed, it was intended to have a limited duration, namely a period of no more than two years. The contract of repurchase, which was the other facet of the restraint, did not come into existence when the purchaser desired to sell, but rather by the breach of the purchaser's obligations

134 (1994) 33 NSWLR 551.

135 Ibid 553.

136 Ibid 556.

137 Ibid.

138 Ibid 554.

to construct an approved building. These factors distinguished the restraint from the total restraint in *Hall v Busst*.<sup>139</sup>

The Court in *Picton Power Lines* also noted that any contract of sale, or option, or right of pre-emption in respect of land must at least impliedly restrict the vendor/grantor from alienating the property to a third party in a way that would be inconsistent with the rights of the purchaser/grantee to acquire the land. According to the Court, the negative stipulations that arise out of such contracts ‘stand right outside any legal doctrine which invalidates contractual restraints on alienation’.<sup>140</sup> In *Gora*, Campbell JA analysed in detail the cases cited in *Picton Power Lines* and concluded that they did not support the proposition, although his Honour agreed that the restraint in that case was valid.<sup>141</sup> His Honour concluded that the doctrine could apply to contracts of sale or the grant of an option or right of pre-emption.<sup>142</sup> For our purposes the key point is that in *Picton Power Lines* the Court did not seek to employ the legitimate collateral purpose principle in upholding the covenant. The Court could have, but did not, suggest that there was a legitimate public interest in ensuring that approved premises were constructed within a particular timeframe.

### **C Campbell JA’s Restatement of Issue and Outcome**

After charting the course of Australian cases on restraints on alienation, Campbell JA applied the relevant principle to the restraints in *Gora*. If the restraints were contrary to public policy they would not be enforceable, which meant that specific performance of them would not be granted. Consequently, the options purportedly granted to BBA and the other restraints would not constitute equitable interests in the land and therefore Mr and Mrs Evans enjoyed their registered fee simple unencumbered by interests held by BBA.<sup>143</sup> The restraints imposed by the occupancy deed and buyback deed were ‘very great’.<sup>144</sup> The occupancy deed contained an express general prohibition on the Evans and their successors in title disposing of any interest in the land without the consent of BBA, which could be withheld unreasonably. There were limited exceptions to this prohibition. BBA could not unreasonably withhold its consent to a mortgage by the Evans that maintained BBA’s rights under the agreement, but this would necessarily limit the amount that could be raised under the mortgage because a mortgagee exercising power of sale would be only able to recover the amount payable by BBA on the exercise of its option. There was also an exception in that friends or relatives of the Evans were permitted to stay with the Evans for periods not exceeding 12 months.<sup>145</sup> However, there would be implied into the deed a

139 Ibid 554–5.

140 Ibid 555.

141 *Gora* (2011) 82 NSWLR 665, 716–23 [229]–[256].

142 Ibid 723 [256].

143 Ibid 736 [320].

144 Ibid 736 [321].

145 Ibid 691 [134].

term prohibiting the transfer of the unit in a manner that would defeat the rights of BBA to exercise its option. The buyback deed did permit a transfer to a person entitled to live in the village, but only if such a purchaser agreed to the restrictions that applied to Mr and Mrs Evans. This is something that no sensible purchaser would do, unless it was at a severely discounted price.<sup>146</sup> And in addition to these express and implied prohibitions against dealing, there were the options granted to BBA which enabled BBA to purchase the unit for a fixed price, well below the market value of the unit, whenever the Evans or their executrices desired to sell the unit.<sup>147</sup>

Campbell JA stated that had the restraints been included as a condition in the transfer to the Evans, they would have been void. They applied in perpetuity, substantially restricted any dealing with the property, substantially limited the power of disposition to one potential purchaser only (BBA), and at a fixed price below market value. Alternatively, if another purchaser did acquire the unit, that purchaser was required to enter into a similar agreement with BBA, which would suppress the purchase price.<sup>148</sup> But how does this translate to the context of where the restraint is imposed by contract?

Campbell JA agreed with Needham J in *Reuthlinger* that *Hall v Busst* established the proposition that a restraint on alienation imposed by contract was void if it prohibited for an indefinite period alienation without the consent of the other party.<sup>149</sup> Campbell JA noted that the restriction in *Hall v Busst* was imposed at the same time as the grantor purchased the land, and also that in *Hall v Busst* Dixon CJ was influenced by the notion that it should not be possible to do something indirectly if that thing cannot be done directly.<sup>150</sup> Thus, if one cannot impose a total restraint on alienation in the condition of a grant, one should not be able to impose a total restriction on alienation at the time the grantor of the restraint acquires the property simply because the restriction is in a contract, rather than in the instrument of grant itself.<sup>151</sup> Here Campbell JA laid the foundation for a possible distinction between contractual restraints entered into at the time of the grantor's acquisition of the relevant property, and those entered into at a later time and therefore unconnected with the acquisition.

The key aspect of Campbell JA's judgment is his Honour's endorsement and application of the valid collateral purpose principle articulated by Needham J in *Reuthlinger*. As the principle had been enthusiastically approved of on appeal, Campbell JA felt bound to follow it unless he thought it clearly wrong, which his Honour did not. However, Campbell JA somewhat qualified the principle. Like Needham J, Campbell JA said the rationale for restraints on alienation being struck down lay in the public policy favouring the free alienability of property. And like Needham J, his Honour believed that if the restraint served a valid

146 *Ibid* 737 [324].

147 *Ibid* 737 [323].

148 *Ibid* 737–8 [325].

149 *Ibid* 738 [326].

150 *Ibid*.

151 *Ibid*.



collateral purpose, it might nevertheless be upheld. Further, like Young J in *Elton v Cavill (No 2)*, Campbell JA was of the view that it was necessary to separate illegitimate from legitimate collateral purposes served by a restraint.<sup>152</sup> However, whereas Needham J (and Young J) appeared content not to distinguish between the private and public aspects of the collateral purpose advanced to uphold the restraint, Campbell JA appears to preference public interests over the private interests of the grantee:

If a contractual restraint does indeed have a valid collateral purpose, that can provide a reason for public policy to favour its enforcement. Part of the reason for this, of course, is that public policy will be taken into account in assessing whether a collateral purpose is valid or legitimate. ... I would reiterate the view that I expressed ... that if there are both legitimate and illegitimate purposes in a restraint on alienation and the clause cannot be severed, the court must decide whether, overall, the clause is contrary to public policy.<sup>153</sup>

His Honour was of the view that a collateral purpose is more likely to be legitimate, and to provide a reason for upholding the restraint, if it is consistent with public policy. It is noteworthy what his Honour had to say about *Vercorp* in this regard. Campbell JA did not see the developer's buyback right at the original sale price unless an approved dwelling was constructed within the relevant period as being justified by the developer's private interest in maximising the value of the retained parcels. Rather his Honour saw it as a mechanism for the provision of high quality housing, and thus having a public policy aspect.<sup>154</sup>

One final aspect of Campbell JA's enunciation of the general principles regarding contractual restraints can be noted at this stage, and one that relates back to his Honour's view about the importance of the timing of the creation of the restraint. His Honour was of the belief that a restraint that was imposed after, and not connected with, the grantor's acquisition of the relevant property was more likely to be a manifestation of a legitimate collateral purpose than one that is imposed as part and parcel of the grantor's acquisition of the property.<sup>155</sup> His Honour did not explain why this was the case, and indeed it was clear that in *Gora* the restraint was imposed at the time of transfer. At an earlier point Campbell JA did draw a distinction between a contractual provision imposed for the purpose of restraining alienation and one imposed to achieve a valid collateral purpose.<sup>156</sup> But it would be a rare situation where the restraint was imposed to prevent alienation for its own sake rather than as a means of achieving some other purpose. Even if the rationale for the restraint was not to promote the private economic or personal interest of the grantee (as envisioned in *Elton v Cavill (No 2)*), or some public interest, it would likely be motivated by a desire to keep property within the family (as in *Re Rosher*) or to prevent the spendthrift owner from frittering

152 Ibid 738–9 [327]–[328].

153 Ibid 739 [328].

154 Ibid.

155 Ibid 739 [329].

156 Ibid 738–9 [327].

away the property as a means of support. And as the judgment of Campbell JA indicates, there are several instances where a restraint was imposed at the time of the grantor's acquisition where the restraint did serve a valid collateral purpose. It is unlikely that the dichotomy provides a convincing rationale for treating contractual restraints differently depending upon the timing of their creation.

His Honour repeated his earlier reason why contractual restraints imposed in connection with the grantor's acquisition of the property should be treated in the same way as restraints imposed by condition in the grant, implying that such a contractual restraint would be more likely to be held void than one imposed subsequent to, and independent of, the grantor's acquisition. And this reason was the acceptance of Dixon CJ in *Hall v Busst* that substance should prevail over form in determining the validity of a restraint. However, Campbell JA ultimately stated that he did not need to make a decision about this, because if the basis of determining the validity of the restraint was public policy, public policy clearly supported the restraint in this case being upheld.<sup>157</sup> Implicit in this approach is that public policy factors can validate a contractual restraint on alienation entered into in connection with the grantor's acquisition of property, even though the traditional approach applied to restraints inserted in the condition of a grant would result in the grant being void. Thus, although his Honour did not say so expressly, it appears that Campbell JA was sympathetic to Needham J's inclination in *Reuthlinger* — ultimately not given effect to — that the similarity of contractual restraints and conditional grants required that both should be held valid, rather than both being held invalid.

Later in his judgment Campbell JA indicated his preference for having regard to substance over form when he referred with disapproval to a reason given by Bryson AJ at trial as to why the restraint should be held invalid. That reason was that there were various ways of structuring the transaction between the retirement village operator and the resident to give the operator of a retirement village the right to repurchase a unit from a proprietor (or his or her estate) at a fixed price below market value *that did not involve* the resident receiving a fee simple in the unit. For Bryson AJ the availability of achieving this end through a life estate or a long term lease or a contractual licence was a reason to strike down the arrangement where implemented through the resident receiving a fee simple. By contrast, Campbell JA saw the ability to achieve legitimately this result through granting an interest other than a fee simple as a reason for holding that it could also be done by granting a fee simple.<sup>158</sup> This preference for substance over form, which also logically necessitates the consistent treatment of restraints imposed by a conditional grant and those imposed by contractual provisions, would strongly

157 *Ibid* 739–40 [330]–[333]. His Honour also stated that holding restraints in conditional grants void on the ground of repugnancy might now be regarded as archaic (at 741 [339]):

Many of those cases are influenced by the concept of the restraint being repugnant to the grant, which in turn was influenced by medieval conveyancing principles about the impossibility of limiting an estate after a fee simple. The outcomes of those cases do not necessarily translate into the different universe of discourse applicable to contractual restraints on alienation, which is dependent solely on public policy.

158 *Ibid* 741 [338], 741–2 [341].

suggest that if faced with a restraint in the grant itself, Campbell JA would apply the public interest test that he saw as applicable to contractual restraints, rather than the traditional approach centring on repugnancy.

In any case, Campbell JA concluded that the arrangement implemented by the buyback deed did serve the public interest by facilitating the provision of accommodation for the aged:

... as the obligations of BBA in the occupancy agreement ... show, it was intended that BBA would provide services of substantial and important kinds to the residents. Further, the provision of accommodation at a significant discount to the value that a unit would have had without the buy-back provision would assist in its being affordable for aged people. Undoubtedly, one of the purposes of including the buy-back provisions was to assist BBA to make a profit, but that is not inconsistent with the buy-back provisions being characterised, overall, as being for the purpose of the valid collateral objective of assisting in the provision of housing for aged people. That is so even if the purpose would not comply with all the requirements for a valid charitable gift. While the covenant in cl 2 of the buyback deed [restricting the Evans' power to dispose of the unit] is not an option, it is there for the purpose of ensuring that BBA will always have the right to acquire the unit on the terms of the option. It is justified by the same collateral purpose as justifies the option.<sup>159</sup>

His Honour's reference to the charitable purpose of providing relief for the aged underscores his focus on the public purposes advanced by the restraint. This was the legitimate collateral purpose that validated a very strict restraint, rather than the private interest of BBA in generating a profit, or the private benefit captured by a purchaser acquiring the unit at a discounted price and being assured of having a buyer when desiring to sell. This sets *Gora* apart from the other cases applying the principle that were based on private interests of the contracting parties.

## D Judgment of Giles JA

We now turn to the shorter (one page) judgment of Giles JA. His Honour also saw the task of the court in considering the validity of a restraint on alienation as determining whether the public policy favouring the free alienability of land is outweighed by other factors. Such factors would include the 'purpose of the parties to the restraint', which was something that Campbell JA did not emphasise in his judgment, and 'the social utility of permitting restraints of that nature',<sup>160</sup> which Campbell JA certainly did emphasise. But overall, Giles JA saw the question as being whether 'on balance the public interest is better served by permitting the restraint'.<sup>161</sup>

159 Ibid 740 [336].

160 Ibid 669 [4]. Giles JA had expressed this view in *Moraitis* (2008) 14 BPR 26,339, 26,354–5 [81].

161 *Gora* (2011) 82 NSWLR 665, 669 [4].

For Giles JA, the public interest was clearly served by the restraint because it allowed prospective residents of a retirement village to avail themselves of such accommodation for a reduced capital outlay. His Honour went on to say:

As retirement villages are conducted, the result will not be that property is taken out of commerce because it is inalienable. It will be cycled through successive residents of the retirement village. Public policy does not require that the restraints be struck down.<sup>162</sup>

What is significant about Giles JA's reasoning here is that his Honour is contesting the assumption that the restraint does in fact affect the free alienability of the particular property right at all. This is reasoning that Campbell JA did not employ. It harks back to Giles JA's statement in *Moraitis*, that regard should be had to the nature of the property as a commodity and the market in which it is bought and sold.<sup>163</sup> The potential duration of a resident's occupation of a unit is limited due to his or her age and inevitable future health issues. Because retirement accommodation can only be accessed by those of 55 years and older, there will not be an open market for a resident to sell. It is largely the proximity of death or incapacity, rather than desired alienation, which marks the natural boundary of a resident's occupation. So, what is fundamentally at stake is who will be entitled to the capital gain in regard to the value of the unit when a resident's occupation comes to an end, usually through death or the need for a higher level of care, and not through a desire to alienate for some other reason. And the Court in *Gora* made a persuasive argument why this should go to the operator of the village, given that residents as a class have had the benefit of lower entrance costs.<sup>164</sup>

### **E Gora: A Public Conception of Property**

In identifying the importance to society of providing accommodation for the aged, the Court in *Gora* gave expression to a conception of property as a means of a proper social ordering. The values that underpin the way in which property rights are allocated are not limited to the satisfaction of individual preferences and the efficient use of resources. There is a benefit to society in a strata unit being occupied by someone of advanced (or at least advancing) years, rather than by someone else who was simply willing and able to pay more for it on the open market. In certain contexts the rules that promote the free alienability of property should be able to be displaced by private agreement, especially where the private agreement serves the public, and not merely private, interest.

<sup>162</sup> Ibid 669 [5].

<sup>163</sup> *Moraitis* (2008) 14 BPR 26,339, 26,355 [81].

<sup>164</sup> What this line of argument fails to recognise, however, is that for various reasons residents of retirement villages may wish to relocate elsewhere. Restraints such as the one in *Gora* prevent a proprietor from selling a unit during his or her lifetime to an eligible third party for the unit's market value. This may very well have the practical effect of precluding such relocation because of a lack of funds. See generally Aviva Freilich et al, 'Security of Tenure for the Ageing Population in Western Australia' (Summary, COTAWA (Council of the Ageing Western Australia), November 2014) ch 6.

The decision in *Gora* is unusual in the Australian context in that it presents a public policy reason for upholding an extensive restraint on alienation other than the argument that there is a public interest in people being held to their contracts. We now turn to a small selection of cases from the United States of America that articulate ways in which the tension between private preferences and the public interest might be resolved.

## V RESTRAINTS ON ALIENATION IN THE UNITED STATES

An American case that raised similar issues to those in *Gora* is *City of Oceanside v McKenna* (*McKenna*).<sup>165</sup> The California Court of Appeal had to consider the validity of a restraint imposed upon the owner of a condominium unit that prohibited the owner from ceasing to occupy the unit as a principal place of residence and from renting or leasing the unit. The condominium development was constructed on land acquired by an agency of the City of Oceanside for US\$1.1 million for the purpose of providing new housing for persons of low to moderate income and to provide an owner-occupied environment. To this end, the agency sold the land to a developer for US\$300 000. As required by the terms of the sale at below fair market value, the developer constructed replacement dwellings and imposed on those units, for a period of at least ten years, certain covenants, conditions and restrictions. These included eligibility requirements for initial and subsequent purchasers based upon income, as well as the restrictions requiring residence in, and prohibiting the renting out of, the unit.<sup>166</sup>

The defendant, McKenna, purchased a unit in the condominium but later attempted to rent it out when he obtained employment that required him to relocate to San Francisco. The City and its agency sought an injunction to prevent McKenna from renting out the unit. The bases on which McKenna opposed the injunction included the argument that the prohibition on renting the unit was an unreasonable restraint on his powers of alienation and therefore contrary to and unenforceable under the California Civil Code.<sup>167</sup> The Court of Appeal rejected this argument.

In assessing the reasonableness of the restraint the Court had to weigh the justification for the restriction against its adverse consequences. The greater the quantum of the restraint in terms of duration, the type of alienation prohibited and the size of the class precluded from receiving a transfer of the property, the stronger the policy reason required to support its validity.<sup>168</sup>

The Court found that there was a clear and identifiable policy that supported the restriction. The City had spent in excess of US\$1 million in public funds in subsidising the provision of housing for persons of low to moderate income

165 215 Cal App 3d 1420 (Ct App, 1990).

166 Ibid 1422–3.

167 Ibid 1423, 1426–7.

168 Ibid 1427.

in a manner that fostered an owner-occupier community. The City's purpose was to provide a stabilised community and to prevent the adverse impact caused by speculation by investors: the inflation of prices and a shortage of available properties caused by keeping units vacant while awaiting resale. In this way the restriction formed part of the City's redevelopment goals for the area.<sup>169</sup>

The restriction in *McKenna* was certainly narrower in scope than that in *Gora*. The provision appeared to prohibit retaining ownership while out of occupation, so presumably the unit could be sold to a purchaser who met the income qualification and would reside there. Further, the prohibition was to last for ten years only, although perhaps it could be extended. But, as in *Gora*, the Court relied heavily on the public policy behind the restriction, contrasting the facts of the case with those involving a private condominium. But even in that context, the Court said that restrictions could be imposed provided that they were reasonable.<sup>170</sup>

A recent American case dealing with a prohibition upon an owner leasing in the context of a private 'common interest' residential community is *Cape May Harbor Village and Yacht Club Association Inc v Sbraga* ('*Sbraga*').<sup>171</sup> In this case the community consisted of 24 single-family homes, common areas, and a marina with 40 boat slips. Although the Declaration of Covenants and Restrictions made by the homeowners' association that governed the community initially permitted the leasing of homes in the community subject to various conditions, the Declaration was amended to prohibit absolutely the leasing of homes. Following her divorce, Sbraga, one of owners in the community, decided to sell her home when the depressed real estate market had recovered. In the interim, she sought to lease her home on a weekly basis in the holiday season. The Association applied for an injunction against Sbraga leasing her home on the basis that it contravened the relevant provision of the Declaration. Sbraga opposed the application on the ground that the provision was an unlawful restraint on her powers of alienation.

When the matter came before the Appellate Division of the Superior Court of New Jersey, the restraint was found to be reasonable, and the grant of an injunction was affirmed. In determining the reasonableness of the restraint, the Court was to weigh 'the utility of the restraint against the injurious consequences of enforcing the restraint'.<sup>172</sup> For the purpose of the calculus, the Court adopted the factors set

169 Ibid 1427, 1429.

170 Ibid 1428–9.

171 22 A 3d 158 (NJ Super AD, 2011).

172 Ibid 168, quoting the *Restatement (Third) of Property: Servitudes* (2000) § 3.4.

out in the *First Restatement of Property*,<sup>173</sup> noting also the degree of financial and personal interaction between the members of a cooperative or condominium.<sup>174</sup> The restraint had been imposed by the Association, which was comprised of the homeowners, for the worthwhile purpose of ‘preserving the stable residential character of the community’.<sup>175</sup> The prohibition upon leasing was not likely to have a substantial impact on homeowners because the granting of leases to third parties was not a usual practice, and indeed it was contrary to the established custom of the community since its creation. The imposition of the restraint was not capricious; rather the Association had a rational basis for believing that the ‘peace and tranquillity of the community’ would be adversely affected if weekly lettings were allowed.<sup>176</sup> The prohibition was not imposed as a matter of spite or malice against Sbraga, as it applied to all homeowners, and Sbraga, herself, only wished to lease out her home as an interim measure until it was sold. Therefore the only potential factor tending towards the invalidity of the restraint — its indefinite duration — was ameliorated, leaving the circumstances of the case overwhelmingly in favour of upholding the restraint.<sup>177</sup>

The decision in *Sbraga* is certainly consistent with the valid collateral purpose principle that has been articulated in the Australian cases, as well as in *McKenna*. The restraint, while not total, was substantial, but went to serve the legitimate interest of the community in maintaining the amenity of their home ownership. The number of members and the physical size of the residential development meant that in *Sbraga* the interests that were implicated were not merely private and financial. There was a distinct community dimension to the purpose of the restraint. However, those interests were clearly not as ‘public’ as those in *Gora* and *McKenna*, in that they lacked the society-wide reach that was present in those other cases.

A case that turns on its head the notion that restraints need a justification to be held valid is *Libeau v Fox*,<sup>178</sup> a decision of the Court of Chancery of Delaware, and which involved the following facts. In 1986 three friends, Libeau, Fox and

173 *Restatement (First) of Property* (1944) § 406, Comment on Clauses (a) (b) and (c). Factors tending to favour the reasonableness of the restraint are:

(1) the one imposing the restraint has an interest in the land which he is seeking to protect by the enforcement of the restraint; (2) the restraint is limited in duration; (3) the enforcement of the restraint accomplishes a worthwhile purpose; (4) the type of conveyances are ones not likely to be employed to any substantial degree by the one restrained; (5) the number of persons to whom alienation is prohibited is small; (6) the one upon whom alienation is imposed is a charity.

Factors tending against the reasonableness of the restriction are:

(1) the restraint is capricious; (2) the restraint is imposed for spite or malice; (3) the one imposing the restraint has no interest in the land that is benefitted by the enforcement of the restraint; (4) the restraint is unlimited in duration; (5) the number of persons to whom alienation is prohibited is large.

174 *Sbraga*, 22 A 3d 158, 167–8 (NJ Super AD, 2011).

175 *Ibid* 169.

176 *Ibid*.

177 *Ibid*.

178 880 A 2d 1049 (Del Ch, 2005). The aspect of the case dealing with the restraint on alienation argument was approved by the Supreme Court of Delaware: *Libeau v Fox* 892 A 2d 1068 (Del, 2006).

Vargas together purchased for US\$162 500 a beach house as joint tenants. None of them had the resources to buy the house alone. At that time they entered into an agreement which provided that if any of the co-owners wanted to sell her interest, she must first offer it to the two other co-owners at its appraised value. If neither of the other co-owners elected to purchase the share, it could be sold to a third party who was willing to enter into the same agreement, but before the sale to the third party was actually concluded the other co-owners were to be given another opportunity to buy the share on the same terms, or to find another buyer, or to sell their own share. If two co-owners wanted to sell their shares, the whole property would be sold unless the third co-owner bought those shares.<sup>179</sup>

In 2002 Libeau learned that the beach house was worth between US\$850 000 and US\$950 000 and decided to sell her share. Libeau offered to sell it to Fox and Vargas at its appraised value, but they declined to purchase her share. Instead of then trying to sell her share to a third party, Libeau sought an order for a partition sale of the property. Fox and Vargas opposed the application.<sup>180</sup> Under Delaware law, the agreement between the co-owners constituted an effective waiver of the right to bring a partition suit. Although it did not expressly prohibit the commencement of a partition application, the agreement did provide for a procedure for the sale of the co-owners' individual interests that was inconsistent with the co-ownership coming to an end through partition.<sup>181</sup> In response, Libeau asserted that the agreement was void as an unreasonable restraint on alienation because it prevented her from 'exiting' the property at an economically attractive price.<sup>182</sup>

At trial, Vice Chancellor Strine rejected the argument. His Honour said:

Libeau underestimates the difficulty of grounding a claim for the avoidance of a contract on a conflict with public policy. Delaware courts are rightly reluctant to accept such arguments. And when they do, it is not because a person has entered into a contract that has become financially inconvenient for them to honor, but because the enforcement of the contract threatens a well-recognized policy interest of concern to our polity in general. That is, this exception does not exist as a sword for parties to avoid their contracts when avoidance suits their personal interests, but as a shield to protect the community in general when the terms of a contract endanger the public interest.<sup>183</sup>

This approach reverses the one that we have seen throughout this article. This has been that the starting point is that a substantial restraint on the alienation of a fee simple interest is invalid. The effective onus is then on the party who desires to uphold the restraint to show that it should be upheld because, for example, it protects a legitimate private interest of the grantee or that it promotes a public

179 *Libeau v Fox* 892 A 2d 1068, 1070 (Del, 2006).

180 *Ibid.*

181 *Ibid* 1071.

182 *Libeau v Fox*, 880 A 2d 1049, 1058 (Del Ch, 2005).

183 *Ibid.*



policy. This was the approach taken in both *Gora* and *McKenna*. Instead, in *Libeau v Fox* the Vice Chancellor advocated starting from the assumption that the restraint is valid, and that in order for it to be shown otherwise, its adverse impact upon a sufficiently public policy must be identified.

It was undoubtedly true that the inability to exit the co-ownership arrangement through a partition sale was financially disadvantageous to Libeau. Under a partition sale Libeau would receive one-third of the market value of the property, as a purchaser would purchase the entire fee simple free from Fox's and Vargas' interests. Without a partition sale, and without Fox or Vargas agreeing to purchase her share for the appraised value of the property, Libeau would only be able to sell to a purchaser willing to become a co-owner of the property with Fox and Vargas and without having the right to force a partition sale. Expert evidence suggested that in financial terms Libeau would be at least 20% worse off if she were only permitted to sell her one-third share to a purchaser with Fox and Vargas remaining as co-owners, than she would be if she were able to have the entire property sold via a partition sale and take one-third of the proceeds.<sup>184</sup>

However, the fact that Libeau would suffer financial disadvantage if held to the contract she had voluntarily entered into, and from which she obtained the benefit over many years, 'is not a circumstance that presents any obvious conflict with a larger Delaware public policy'.<sup>185</sup> The purpose of Libeau, Fox and Vargas in banding together was to acquire for vacation purposes a beach house that they could not afford individually. This was a personal goal rather than an economic one, but it was wholly benign and not a threat to the public policy of Delaware:

That the Housemates sought to buy the Beach House to actually enjoy it, rather than as an economic investment, might offend some in the Chicago school, but not anyone who appreciates an Atlantic sunrise, a night out at the Starboard, or the serenity of a wintertime walk along the ocean strand. By its very nature the Agreement among the Housemates was designed to enable them, at a low upfront cost, to maximize their enjoyment of life, not their future bank accounts. There is nothing wrong with that goal.<sup>186</sup>

Importantly, the goal of Fox and Vargas securing ongoing vacation accommodation did not prevent Libeau from exiting the arrangement by selling her interest. The restraint did not, therefore, operate in an unreasonable, arbitrary, or punitive manner.<sup>187</sup> The one objectionable aspect of the agreement was that, as written, it was not limited to the lives or ownership of Libeau, Fox and Vargas. There was the potential that the restraint could continue indefinitely and might become

184 Ibid 1061.

185 Ibid 1059.

186 Ibid 1060–1. For *Strine VC*, the opposite view — that the pressing need for development meant that economic exploitation could be equated with the public interest — was of 'ancient vintage', but had become 'hoary': at 1058–9. The Vice Chancellor also said: 'Far from expressing an unbridled desire to see land transfer to whoever will pay the highest price, the political branches of government have attempted to strike a reasoned balance that facilitates the rational procession of land development, while protecting uses of land ... that ... are thought socially valuable.': at 1059.

187 Ibid 1061. At the time of trial Libeau had received an offer to purchase her share from a buyer willing to submit to the restraint and at a price that would represent a substantial return on her 'investment'.

unreasonable in the future. As at the time the agreement was entered into the intention of the parties was to provide for a right of accommodation throughout their retirement, the Vice Chancellor felt at liberty to rectify or 'reform' the agreement so that the restraint was to expire when all of the original parties had died or sold their interest.<sup>188</sup>

## VI CONCLUSION

In *Gora* the Court was confronted with an almost complete restraint on alienation. The grantor was unable to transfer the property during his lifetime without giving the grantee the right to acquire it at well below market value. On the grantor's death the grantee had a similar right of acquisition, which if not properly exercised would nevertheless result in the grantor's estate being bound in the same way as the grantor was during his lifetime. On the basis of *Hall v Busst*, there was a strong basis for the restraint being held invalid.

However, the Court applied the legitimate collateral purpose principle, which had its origins in Australian law in the judgment of Needham J in *Reuthlinger*, to uphold the restraint. In other Australian cases where the principle had been applied, courts relied upon the individual interests (preferences) of the grantee of the restraint, whether financial (as in *Southlink*), or the amenity of occupation (such as in *Elton v Cavill [No 2]*). In *Picton Power Lines*, the Court had an opportunity to justify upholding the restraint on the basis of the public interest in promoting economic activity in the region, but let it pass by, holding, against the weight of later authority, that the necessary limitation imposed by the grant of pre-emptive rights is outside the prohibition of restraints on alienation. In *Noon*, Young JA hinted that a substantial restraint in the retirement village setting might be upheld, but did not indicate the precise basis on which this might be done. In the trial court decision in *Gora* that invalidated the restraint, Bryson AJ countered the significance of the public policy relating to the free alienability of land with the public policy of holding people to their freely bargained contracts. However, the policy identified by his Honour is a formal one only in that it takes individual preferences as simply given, and is agnostic about how a society should be substantively ordered.

By contrast, Campbell JA in *Gora*, having regard to the general law of charities and modern statutory regimes regulating the operation of retirement villages, accepted the propriety of a social organisation in which special arrangements are made for the care of the elderly. Giles JA, while not accepting that the restraint would adversely affect the transfer of units within the retirement village context, in any case also accepted the existence of a clearly articulated public policy in this regard. The patent strength of society's commitment to the provision of special

188 Ibid 1062–4. Strine VC also ordered reformation of the agreement so that the parties held as tenants in common, rather than joint tenants, but on appeal the Supreme Court of Delaware overturned that aspect of the Vice Chancellor's judgment as such a reformation would not be consistent with the intention of the parties: *Libeau v Fox*, 892 A 2d 1068, 1072–3 (Del, 2006).

accommodation for the elderly meant that the almost total restraint on alienation could be upheld.

The decision in *Gora* aligns with the approach in the bundle of American cases we have considered. The belief that property rights should be distributed in accordance with a particular conception of propriety, rather than simply left to allocation by the market, underpinned the upholding of the restraints in these cases. In *McKenna*, and then *Sbraga*, the notion that the occupation of residential housing by owners rather than renters constitutes a particular form of virtue was used to justify the restraint. In *McKenna* this notion was part of a city-wide plan to provide a stable community for low-to-moderate income earners; in *Sbraga* the concern was for the amenity of the much more economically privileged owners in an exclusive residential community. In *Libeau v Fox*, the relevant restraint was upheld even though it was for the private purpose of the provision of holiday accommodation for the lifetime of the co-owners, none of who could secure that end without the financial contribution of the others. Although the case concerned private preferences, it insisted that the economic goal of resources moving to their highest valued use can be outweighed by other, non-financial, concerns. In this way these cases, like *Gora*, subscribe to the view that the way in which property rights are held in society should at times be guided by a substantive (public) vision of the good, rather than simply left to the (private) concerns of the market.