

**RECENT DEVELOPMENTS IN THE LAW OF EASEMENTS IN NSW,
FOLLOWING THE HIGH COURT OF AUSTRALIA DECISION IN
WESTFIELD v PERPETUAL TRUSTEE AND ALSO INCLUDING
CONFLICTS WITH PLANNING CONSENTS (4371)**

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SUMMARY

The ability of a landowner to use parts of the land belonging to another for the benefit and the enjoyment of the landowner's land is a valuable legal right recorded as an easement on the title deeds for both parcels. It is important that the terms of the easement are correctly construed and that the rules of construction are clear and easy to apply. In addition to disputes between the owners of the land benefited and the land burdened there can be conflicts between the proprietary rights of an easement holder and the public interest as evidenced by a development consent granted by a planning authority. Two recent cases in 2007, *Westfield v Perpetual Trustee*,¹ a decision of the High Court of Australia, and *Cracknell & Lonergan v Council of the City of Sydney*,² a decision of the Chief Judge of the New South Wales Land & Environment Court, set out some important principles but also leave some questions still to be answered.

¹ [Westfield Management Limited v Perpetual Trustee Company Limited \[2007\] HCA 45 \(3 October 2007\)](#)

² [Cracknell and Lonergan Pty Limited v Council of the City of Sydney \[2007\] NSWLEC 392](#)

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1 INTRODUCTION TO THE CONCEPT OF EASEMENTS

"No piece of land is sufficient in itself. Its enjoyment invariably depends on its position with regard to other land and upon the respect paid by others to the rights of its owner."³

In order to satisfactorily enjoy and make use of a piece of land it is frequently necessary to also make use of another person's adjoining or nearby land. The ability to use another person's land in connection with a piece of land is often so essential that it needs to be given the permanent status of a legal right. The permanent right is known as an easement in English based law. The English law of easements was developed from and adopted the principles and terminology of the servitudes of Roman law.⁴

An easement may be defined as "a right annexed to land to utilise other land of different ownership in a particular manner (not involving the taking of any part of the natural produce of the land or any part of its soil) or to prevent the owner of the other land from utilising his land in a particular manner".⁵

With the industrial revolution in England in the 18th and 19th centuries, and, here in Australia, where a "new" continent has been developed into a modern vibrant society, easements have become fundamental tools in the development of land for its highest and best use.

The essential characteristics of an easement were summarised in 1956 in the English case of *Re Ellenborough Park*⁶:

- (a) There must be a dominant and a servient tenement.
- (b) An easement must "accommodate" the dominant tenement.
- (c) The dominant and servient owners must be different persons.
- (d) A right over land cannot amount to an easement, unless it is capable of forming the subject matter of a grant.

³ Butt P Land Law (2nd Ed) 1983 p303

⁴ But P, Land Law (5th Ed), 2006 (p1601).

⁵ Halsbury's Laws of England (4th Ed), Vol 14, p4.

⁶ [Ellenborough Park, Re \[1955\] EWCA Civ 4 \(15 November 1955\)](#)

This summary has been adopted with approval by the Courts of Australia. In recent years in Australia the terms benefited land and burdened land have been adopted in substitution for dominant tenement and servient tenement. It is important that the right does not result in the exclusive use of the burdened land. If it does the easement will fail because that will be tantamount to a transfer of ownership.

Accommodating the benefited land means that the easement must confer a real and practical benefit on the benefited land and be reasonably necessary for its better enjoyment. There must be a connection between the easement and the benefited land. This does not mean that the burdened land and the benefited land must be contiguous. This was confirmed by the High Court of Australia⁷ and by the New South Wales Court of Appeal⁸. Nevertheless the two landholdings must be physically close to one another although not adjoining. The easement must also be for the purpose of the use of the land benefited rather than be but a personal advantage accruing to the present owner of the benefited land⁹.

At Common Law, the dominant and servient owners must be different persons because no one can acquire rights against himself or herself. Where land which was in separate ownership came into unity of ownership an easement was extinguished by merger. Section 88B of the Conveyancing Act 1919 overcomes this common law rule for easements created by Section 88B - see Section 88B (3) (c) (ii) and (iii).¹⁰

There have been numerous examples of what rights may be easements and as taken to be capable of forming the subject matter of a grant. The High Court of Australia has upheld an easement for an undefined flow of air. There is a well known statement that the list of possible easements is not closed.

Easements which might be necessary for a development include:

- Access both pedestrian, persons with mobility disabilities, vehicular and public.
- Easement for kitchen exhaust.
- Right to use garbage room.
- Right to park vehicles.
- Easement for electricity substation purposes with associated restriction on use of land positive covenant.

⁷ [Gallagher v Rainbow \[1994\] HCA 24; \(1994\) 179 CLR 624; \(1994\) 121 ALR 129; \(1994\) 68 ALJR 512 \(1 June 1994\)](#)

⁸ [Wilcox and Ors v Richardson and Ors Matter No 40559/96 \[1997\] NSWSC 281 \(31 July 1997\)](#)

⁹ [Westfield Management Limited v Perpetual Trustee Company Limited \[2007\] HCA 45 \(3 October 2007\)](#)

¹⁰ http://www.austlii.edu.au/au/legis/nsw/consol_act/ca1919141/s88b.html

- Easement to permit encroaching structure to remain.
- Easement for stormwater detention and overland flow with associated restrictions on use of land and positive covenants.
- Easements for drainage of water or sewage.
- Right to use service bay.
- Right to use loading dock.
- Easement for support of awnings.
- Right to erect signage.
- Easement for electricity purposes.
- Easement for services.
- Easement for support and shelter.
- Easements for emergency egress.
- Easements for asset protection zones against bushfire threat.
- Right to use trolley bay.
- Right to use grease arrestor room.

For anyone dealing with a development parcel, it is essential to know what easements benefiting or burdening the land already exist and what new easements need to be created. It is also essential to know the extent and limitations of the rights under those easements. That is to say, how those easements are to be construed or interpreted and what restrictions on the exercise of these rights there may be.

This paper focuses particularly on the construction of easements following the decision in late 2007 of the High Court of Australia in *Westfield v Perpetual Trustee*¹¹ and also on the possible detrimental affects of planning consents on easements in New South Wales as a consequence of the possible operation of Section 28 of the Environmental Planning & Assessment Act 1979 (NSW)¹².

¹¹ [Westfield Management Limited v Perpetual Trustee Company Limited \[2007\] HCA 45 \(3 October 2007\)](#)

¹² http://www.austlii.edu.au/au/legis/nsw/consol_act/epaaa1979389/s28.html

2 THE IMPACT OF *WESTFIELD* ON EASEMENT LAW IN AUSTRALIA

2.1 Rules of Construction of Easements Before *Westfield*

The Australian system of law is based on English common law as modified by laws made by the parliaments of the Commonwealth of Australia and of the various States and Territories, and also as modified by interpretations by judges of the various Australian courts (Australian common law). The rules of construction of easements as developed by the English courts are generally adopted. However the Australian courts feel free to depart from the principles laid down in English cases and apply their own interpretation. They will also have regard to decisions in other jurisdictions which are based on the common law system, such as New Zealand and some states of Canada and the United States of America. The Australian judges have been encouraged to develop their own rules of construction and pick and choose between the principles by the fact that often English cases are contradictory. Sometimes one principle is in favour and then sometimes another. It must also be said that because the world is changing and the use of property is becoming so complex and far beyond that which was contemplated by the judges in the 18th and 19th centuries and also into much of the 20th century, the common law, being a fluid system of judge made law, adapts and evolves.

Bradbrook & Neave state "Various principles of construction are applied by the courts when assessing the validity of express grants and reservations of easements:

- (a) The grantor must show by appropriate language an intention to grant.
- (b) General words in a grant will be restricted both at law and in equity to that which the grantor has the power to grant.
- (c) The fact that one party grants an easement to another for one particular purpose does not raise any implied covenant that the grantee can use the premises only for that purpose.
- (d) On the subdivision of the dominant land, to the extent that any part of the dominant tenement may benefit from an easement, the easement will be enforceable for the benefit of that part unless the easement, on its proper construction, benefits the dominant land only in its original form.
- (e) Where there is a grant subject to an exception, the exception will be taken as inserted for the benefit of the grantor and will be construed in favour of the grantee."¹³

The general position regarding construction of easements at common law is that the rights of the parties have to be ascertained from the words of the grant. However those words are liable to be cut down by some implication from surrounding circumstances. At common law

¹³ Bradbrook & Neeve 2nd Ed 2000 p71

to construe the words of grant properly it is necessary to look at the surrounding circumstances existing at the date when the grant was made. No alteration can be made in the use or purpose of the easement that goes beyond that contemplated by the parties at the time of the grant, see generally the 1994 judgment of the High Court of Australia *Gallagher v Rainbow*¹⁴ and in particular the judgment of McHugh J. There has been much argument in the courts regarding the mode of user permitted, the purpose and quantity of user and the reasonableness of the user.

By July 2007 when Austin J handed down his decision in *Markos v O R Autor*¹⁵ there was a shift underway. Austin J reviewed the law of construction as he saw it after the New South Wales Court of Appeal decision in *Westfield* in 2006. He concluded that it is necessary to construe an easement having regard to the language of the instrument which creates it and by reference to the surrounding circumstances at the time of the grant. At [51] he said that subjective purpose or contemplation of the parties to the grant are not matters to be addressed, except to the extent that they are reflected in the terms of the grant and the admissible surrounding circumstances. He also pointed out that the permitted use of the burdened land by the owner of the benefited land are limited. Subject to the rights of the benefited owner, the burdened owner has dominion over the land. The benefited owner is entitled to make use of the easement site provided the use does not amount to a substantial interference with the exercise of the rights given by the easement. "Substantial" is equivalent to "material", [55] – [59]. In *Markos* Austin J had regard not only to the words of the grant but also to evidence of the immediate neighbourhood and the use of both the burdened land and the benefited land at the time the easement, a right of way along a passageway 4.57m wide, was granted.

2.2 The High Court of Australia Decision in *Westfield*

*Westfield*¹⁶ is a case involving a right of way over land in the CBD of Sydney. The right of way had been granted across a development known as Glasshouse for the benefit of the adjoining development Skygarden, which adjoined Imperial Arcade, which in turn adjoined Centrepont. After the creation of the right of way Perpetual Trustee acquired Glasshouse while Westfield acquired Skygarden. Later Westfield acquired the Imperial Arcade and Centrepont sites. Glasshouse was situated on the corner of King and Pitt Streets, Skygarden and Imperial Arcade had frontage to Pitt Street while Centrepont is on the corner of Pitt Street and Market Street. Pitt Street from King Street to Market Street has become a pedestrian mall with limited service vehicle access. The right of way ran from King Street and then by subterranean driveway across and beneath the Glasshouse land to the boundary of the Skygarden land. The dispute arose because Westfield proposed to redevelop all its three sites together and utilise the right of way under Glasshouse so as to enable vehicular access to all three of its sites. The argument was heard by five judges of the High Court of Australia

¹⁴ [Gallagher v Rainbow \[1994\] HCA 24; \(1994\) 179 CLR 624; \(1994\) 121 ALR 129; \(1994\) 68 ALJR 512 \(1 June 1994\)](#)

¹⁵ [Markos v O R Autor \[2007\] NSWSC 810](#)

¹⁶ [Westfield Management Limited v Perpetual Trustee Company Limited \[2007\] HCA 45 \(3 October 2007\)](#)

and the unanimous judgment was delivered by the Chief Justice, Gleeson CJ. Title to all the land in question was Torrens title under the Real Property Act 1900 (NSW)¹⁷. It was not old system (or common law) title. At [37] the Court pointed out that the Torrens system was a system of title by registration. The Register is everything, so, said the Court, "The third party who inspects the Register cannot be expected consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing a third party (or any court later seized of a dispute) in the situation of the grantee" [39]. The Court went on to say that "Evidence is admissible to make sense of that which the Register identifies by the terms or expressions found therein. An example would be the surveying terms and abbreviations which appear in this case [*Westfield*] on the deposited plan" [44].

As a result the Court ignored as inadmissible all the evidence relating to the circumstances leading up to the grant of the right of way, including the planning approval for the Glasshouse and the policies of Sydney City Council at the time of the grant. From *Westfield* one concludes that as regards land where title is under the Torrens system:

- (a) One must begin with the terms of the easement as they appear in the instrument.
- (b) It is an error to look for the intention or contemplation of the parties to the grant of easement outside what is manifested by the terms of the grant.
- (c) To accept the proposition that the user under a registered easement may change with the nature of the benefited land, so long as the terms of the grant are sufficiently broad, does not violence to the principles of the Torrens system.
- (d) The term *all purposes* "encompasses all ends sought to be achieved by those utilising the easement in accordance with its terms".¹⁸ [30].

The Court having carefully analysed the scope of the easement which was *to go, pass and repass to and from the [land] benefited across the [land] burdened*. Because the terms did not talk about going *across the land benefited* the Court concluded that an extension out of Skygarden into Imperial Arcade and Centrepont was not authorised by the easement.

2.3 Construing the Terms of Easements over Torrens Title Land after *Westfield*

There have been several cases which have dealt with the method of construction of registered dealings with Torrens title land after the decision in *Westfield*. The first was by the High Court itself in *Queensland Premier Mines v French*¹⁹. This case required the interpretation of a registered mortgage. At [14] Kirby J said "One of the fundamental purposes of the

¹⁷ http://www.austlii.edu.au/au/legis/nsw/consol_act/rpa1900178/

¹⁸ *Westfield Management Limited v Perpetual Trustee Company Limited* [2007] HCA 45 (3 October 2007)

¹⁹ *Queensland Premier Mines Pty Ltd v French* [2007] HCA 53 (15 November 2007)

Torrens system is to give effect to an important public policy. That policy is that the land title register should be sufficient of itself inform those concerned about the nature and extent of any outstanding interest in relation to the land. The Torrens system deals with matters of underlying title. It is not concerned about side contractual agreements."

In November 2007 the New South Wales Court of Appeal handed down a unanimous decision of three judges in *Sertari v Nirimba Developments*²⁰. In *Sertari* the Court was dealing with a right of carriageway. The owner of the burdened land attempted to rely on evidence of extrinsic circumstances, including the physical characteristics of the burdened and benefited land and the activities being conducted on the benefited land at the time of the grant, to support a narrower construction of the terms of the easement. When the judge at first instance rejected town planners reports and development consents as being irrelevant to the construction of the grant and also held that the physical characteristics of the two parcels of land and the activities being conducted on the benefited land at the time of the grant could not cut down its plain words, the burdened owner appealed. The Court of Appeal applied *Westfield* saying that *Westfield* confirmed that extrinsic material apart from the physical characteristics of the burdened and benefited land, is not relevant to the construction of instruments registered under the Real Property Act 1900 (NSW). It went on to say "This Court is therefore limited to the material in the [Certificates of Title], the registered instrument, the deposited plans, and the physical characteristics of the tenements. These provide no basis for reading down the clear and unqualified words of the grant. The grant was for all purposes, for use at all times, and extended to every person with an estate in the [benefited land] with which the right was capable of enjoyment, and persons authorised by them." [16]. The Court of Appeal also said that the management of vehicle and pedestrian traffic over the burdened land are matters for the planning authorities. They do not affect the construction of the grant, or questions of excessive user [23].

In *Neighbourhood Association DP285220 v Moffat*²¹ White J of the Supreme Court had to construe an easement *for pipeline and irrigation 1 wide and variable* where the terms were not spelt out in the document of grant. This is known as a "bare easement". The judge held that *Sertari*, following on from *Westfield*, made it obligatory for him to limit his enquiry to the certificates of title, the registered instrument, the deposited plans and the physical characteristics of the land burdened and benefited. There was no evidence as to the physical characteristics of the land involved at the time of the grant of the easement so he had regard to the document of grant and the deposited plan. He was able to conclude from these that the words *for pipeline and irrigation 1 wide and variable* allowed the pumping of treated effluent through a 400 metre long pipeline within the 1 metre wide part of the easement site and its spray irrigation on to the remainder of the easement site which was a rectangular block approximately 50 metres wide and 100 metres long. Had *Sertari* not been so restrictive White

²⁰ [Sertari Pty Ltd v Nirimba Developments Pty Ltd \[2007\] NSWCA 324](#)

²¹ [Neighbourhood Association DP No 285220 v Moffat \[2008\] NSWSC 54](#)

J would have applied the older authorities relating to construction of bare easements and look at evidence of other extrinsic circumstances at the time of the grant.

The application of the statements of principle so simply expressed in *Westfield* and *Sertari* has in practice caused difficulties to the judges in subsequent cases where they have had to wrestle with different circumstances. Nevertheless in *Berryman v Sonnenschein*²² the Court held, applying the principles from those two cases that on the proper construction of a right of carriageway the benefited owner could co-join with the easement site a part of the benefited land for the purpose of creating a turning or maneuvering area, the easement site not being sufficient in itself to permit the whole of the maneuvering to take place there. While in *Dillon v Gosford City Council*²³ the New South Wales Land & Environment Court held that the use of evidence of the physical state of the land at the time of the grant to aid in construction, in the case of ambiguity, was permissible. But the physical state of the land at the time of the grant (an objective fact) cannot be used to establish the subjective intention, contemplation or expectations of the parties to that easement. [30].

In *Trevlind v BMP Manufacturing*²⁴ the Court when dealing with the question of whether a drainage easement benefited only lots and a road (that is, land) or land and also Wyong Council as the local council (as an easement in gross), pointed out that *Westfield* deals with the question of what extrinsic facts are admissible to construe an easement. It held there was nothing in *Westfield* or *Sertari* which either required or justified ignoring the statutory context of Section 88B (3) (a)²⁵ or the common law requirements for a valid easement. [30].

Other cases where *Westfield* has been applied are *Vidakovic v Brisbane City Council*²⁶ and *Shelbina v Richards*²⁷.

2.4 Is *Westfield* Always Applicable?

Westfield was distinguished in the New South Wales Supreme Court decision of *Neighbourhood Association DP285249 v Watson*²⁸. This case dealt with a dispute relating to a development carried out under the Community Titles Acts²⁹. The judge pointed out that the principle expressed in *Westfield* is referable to ascertaining the state of an existing title under the Real Property Act 1900 (NSW). That is because the Torrens system is one of title by registration [409]. He went on to say that Sections 3(2) of the Community Titles Acts both provide that "*This Act is to be interpreted as part of the Real Property Act 1900 but, if there is any inconsistency between them, this Act prevails*". [410] The Community Titles Acts

²² [Richard Frank Horton Berryman & Anor v Robert Sonnenschein & Anor \[2008\] NSWSC 213](#)

²³ [Dillon, Kevin & Anor v Gosford City Council \[2008\] NSWLEC 186](#)

²⁴ [Trevlind v BMP Manufacturing \[2008\] NSWSC 603](#)

²⁵ http://www.austlii.edu.au/au/legis/nsw/consol_act/ca1919141/s88b.html

²⁶ [Vidakovic & Anor v Brisbane City Council & Anor \[2009\] QPEC 53 \(19 June 2009\)](#)

²⁷ [Shelbina Pty Ltd v Richards \[2009\] NSWSC 1449](#)

²⁸ [Neighbourhood Association DP 285249 v Watson \[2008\] NSWSC 876](#)

²⁹ [Community Land Development Act 1989 No 201; Community Land Management Act 1989 No 202](#)

provide for development consents and plans which are not registered in the Torrens title register to be incorporated by reference into Development Contracts and Management Statements which do become registered dealings in the Torrens register. Because of the operation of Sections 3(2) of the Community Titles Acts this evidence which does not appear on the Register can and indeed must be taken into consideration when construing the Development Contract and Management Statement to determine the rights and obligations of lots owners within the Community Titles scheme.

It is also important to note that *Westfield, Sertari* and the other cases referred to are all dealing with Torrens title land. It cannot be assumed that the common law rules of interpretation will not continue to apply in respect to old system title land. After all in *Shelbina v Richards*³⁰ at [33] Rein J said "(5) Whilst I accept that the process of reasoning by which the Court reached a conclusion as to the construction of an easement in some of the older cases is no longer acceptable given what has been said in *Westfield v Perpetual Trustee* it is only to the extent that reliance was placed upon such reasoning to reach the conclusion that those authorities are now in doubt. I do not accept that the cases are not otherwise relevant." Nevertheless the emphasis of recent times has been on interpreting the easement in accordance with its terms and looking to surrounding circumstances in the situation of ambiguity.

It will also be interesting to see what the courts do when dealing with an easement which was created when one or both parcels was under old system title and where title to the parcels is now under the Torrens system.

2.5 *Westfield Conclusion*

The interpretation of easements is a fundamentally important matter for the development industry. Notwithstanding the High Court's decision in *Westfield* the extent to which an easement gives rights over other land or imposes obligations on land remains a development risk to be taken into account when assessing the development potential of a parcel of land.

3 **CONSENT AND SECTION 28 OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979**

3.1 **Suspensory Power of Council Development Conditions on Prior Restrictions and Easements**

Section 28 of the Environmental Planning and Assessment Act 1979 enable the provisions of an environmental planning instrument to suspend existing property rights to the extent necessary to enable approved or permissible development to be carried out.

³⁰ [Shelbina Pty Ltd v Richards \[2009\] NSWSC 1449](#)

This is a very important and far reaching aspect of property development with implications for existing registered easements and the drafting of future easements. Section 28³¹ reads as follows:

28 Suspension of laws etc by [environmental planning instruments](#)

(1) In this section, "regulatory instrument" means any Act (other than this Act), rule, [regulation](#), by-law, ordinance, proclamation, agreement, covenant or instrument by or under whatever authority made.

(2) For the purpose of enabling [development](#) to be carried out in accordance with an [environmental planning instrument](#) or in accordance with a consent granted under this Act, an [environmental planning instrument](#) may provide that, to the extent necessary to serve that purpose, a [regulatory instrument](#) specified in that [environmental planning instrument](#) shall not apply to any such [development](#) or shall apply subject to the modifications specified in that [environmental planning instrument](#).

(3) A provision referred to in subsection (2) shall have effect according to its tenor, but only if the Governor has, before the making of the [environmental planning instrument](#), approved of the provision.

(4) Where a Minister is responsible for the administration of a [regulatory instrument](#) referred to in subsection (2), the approval of the Governor for the purposes of subsection (3) shall not be recommended except with the prior concurrence in writing of that Minister.

(5) A declaration in the [environmental planning instrument](#) as to the approval of the Governor as referred to in subsection (3) or the concurrence of a Minister as referred to in subsection (4) shall be prima facie evidence of the approval or concurrence.

(6) The provisions of this section have effect despite anything contained in section 42 of the [Real Property Act 1900](#).

3.2 Litigation Arising from Section 28

There have been many cases arising out of Section 28. The most consistent litigators have been the supermarket chains of Woolworths and Coles. The case which first brought Section 28 to prominence is *Ludwig v Cushott*³² dealing with a covenant to protect the view although there were earlier cases.

³¹ http://www.austlii.edu.au/au/legis/nsw/consol_act/epaaa1979389/s28.html

³² *Ludwig v Cushott* 1994 83 LGERA 22

Lennard v Jessica Estates³³

All the cases, as epitomised by the 2008 decision of the New South Wales Court of Appeal in *Lennard v Jessica Estates* make clear that the words of the Environmental Planning Instrument must be carefully examined to determine:-

- what **regulatory instruments** are being addressed by the EPI;
- what **development** is to be enabled to take place.

Lennard v Jessica Estates examined the operation of Clause 6 (1) of Singleton LEP 1996 which said:

“6(1) if any agreement, covenant of similar instrument prohibits a land use allowed by this plan, then it shall not apply to that land use (to the extent necessary to allow that land use).”

The Court of Appeal held:

- (a) That the section 88B restriction on use of land preventing the construction of certain buildings without prior written consent of Jessica was a prohibition notwithstanding it was a qualified prohibition.
- (b) That “land use” in Clause 6 (1) extended not only to the use of land for a particular purpose but also to the erection of buildings to enable that use to be carried out;
- (c) The expression "a land use" in Clause 6 (1) equated to the defined term “development” in Environmental Planning and Assessment Act 1979 and included the subdivision of land for the purpose of a use permitted by the LEP.

It followed the restriction was suspended by Section 28.

Doe v Cogente³⁴

In 1997 Cowdroy AJ in *Doe v Cogente* held that a provision of an EPI made under Section 28 could suspend the operation of a right of way so that an approved development could go ahead on the burdened land despite infringing on the exercise of the right of way.

Natva Developments v McDonald Bros³⁵

Cowdroy AJ’s views in *Doe v Cogente* were followed in 2004 by Palmer J in the Supreme Court in *Natva Developments v McDonald Bros*. In *Natva*, there were two large adjoining

³³ [Lennard v Jessica Estates Pty Limited \[2008\] NSWCA 121](#)

³⁴ [EDWINA DOE v. COGENTE PTY LIMITED No. 40064 of 1997 \[1997\] NSWLEC 115 \(8 August 1997\)](#)

³⁵ [Natva Developments Pty Ltd v McDonald Bros Pty Ltd & Ors \[2004\] NSWSC 777](#)

parcels of land at Prospect. The lot benefited relied for its only means of access on the right of carriageway running from Stoddart Road the full length of its boundary with the lot burdened. The lot burdened was subdivided by a strata plan into 11 strata lots for use as cold store units. The Council conditions of consent called for some of the off street car parking for the strata development to be located within the site of the right of carriageway. Later the owner of the lot benefited obtained development consent for the construction of 20 industrial units on the lot benefited using the right of carriageway as the means of access from Stoddart Road and using the location of two of the car parking spaces located with the site of the right of carriageway as the point of ingress and egress to and from the dominant tenement and the right of carriageway.

Palmer J summarised the situation as he saw it as:

- (a) The right of carriageway when created gave the owner of the lot benefited the right of access afforded by the grant in accordance with the general law.
- (b) **Because of section 28 the strata subdivision consent rendered inapplicable the rights under the right of carriageway to pass and repass over the car parking spaces.**
- (c) **The rights under the right of carriageway to pass over the car parking spaces could be revived if the strata subdivision consent terminated.**
- (d) **The strata subdivision consent for the lot burdened was itself made inapplicable as far as car parking spaces were concerned by the later consent to develop the lot benefited, saying at [46] that an earlier consent under the Environmental Planning & Assessment Act 1979 was also an instrument caught by the suspensory clause 26 (1) in the Blacktown LEP³⁶.**

But:

- (e) the grant of the right of way is not equivalent to granting the owner of the lot benefited ownership of the site of the right of way.
- (f) where the right of way gives access to the lot benefited along the whole or a substantial part of the boundary between the lot benefited and the lot burdened the grant does not give the owner of the lot benefited the right to gain unlimited access to the lot benefited from every point along that boundary, unless the grant so provides expressly or by implication arising from the circumstances at the time it was made.

³⁶ http://www.austlii.edu.au/au/legis/nsw/consol_reg/blep1988318/s26.html

- (g) construing the grant in the light of the circumstances at the time of grant did not help other than to say it was reasonable to predict that in time the lot benefited would be developed for industrial purposes.
- (h) nevertheless, the owner of the lot benefited is only entitled to access as is reasonable in the circumstances.
- (i) as access to the lot benefited could be obtained elsewhere along the site of the right of carriage way, albeit reducing the number of industrial units from 20 down to 19, it would be an unreasonable use of the right of way to access the lot benefited at the point where the two car parking spaces would be lost as a result.

Trewin v Felton³⁷

In 2007 the Supreme Court held in *Trewin v Felton* that in the case of an easement running along side of a boundary of the benefited land so that the length of it to the benefited land is greater than necessary for a single point of access, the prima facie position is that the benefited owner may have access at a number of places, and may determine from time to time the points of access, which may vary over the years. In this judgment, given before the High Court decision in *Westfield*, the Judge in *Trewin* went on to say "The prima facie position was not displaced in this case by the expression of the easement nor by the circumstances pertaining at the time of creation of the easement, which are of no weight in a case such as the present when the likelihood of the lots passing into separate ownership in the future – with consequential necessary change in the relationship between the lots and the use of the easement – was the reason for its creation." *Trewin* has been applied, after *Westfield*, in *Twomey v Blanch*³⁸ and *McCrow v Chaplin*³⁹. In both cases, more than one access point was permitted to the benefited land from along the length of the right of way, but no more than were reasonably necessary for the use and enjoyment of the benefited land.

Cracknell and Lonegran Pty Ltd v Council of City of Sydney⁴⁰

Also in 2007 Preston CJ in *Cracknell* conducted a thorough analysis of the section 28 cases. He held a right of way is a right belonging to a benefited owner to use, in a particular manner and in connection with the benefited owner's land, the land belonging to the burdened owner. While its creation is often evidenced in the section 88B⁴¹ instrument or a transfer and grant it

³⁷ [Trewin v Felton \[2007\] NSWSC 851](#)

³⁸ [Twomey v Blanch & Anor \[2008\] NSWSC 826](#)

³⁹ [McCrow v Chaplin \[2009\] NSWSC 965](#)

⁴⁰ [Cracknell and Lonegran Pty Limited v Council of the City of Sydney \[2007\] NSWLEC 392](#)

⁴¹ http://www.austlii.edu.au/au/legis/nsw/consol_act/ca1919141/s88b.html

can also be imposed by an order of the Court under Section 88K of Conveyancing Act 1919⁴² or Section 40 of Land & Environment Court Act 1979 NSW⁴³

Preston CJ said the right under the right of way is not the same thing as the agreement or instrument itself. In contrast he says the covenant is an agreement that something has or has not been done or will or will not be done. A restrictive or negative covenant is an agreement which restricts the rights of the covenantor, for example, from using the covenantor's land in a particular way for a particular purpose. He states that a right of way itself is not a "regulatory instrument" within the meaning of Section 28 of the Act or a "covenant, agreement or similar instrument" under clause 44 of the South Sydney Local Environmental Plan, the LEP he was examining.

Was the Judge in *Natva Developments* Correct about Section 28?

The reasoning of *Natva* can be questioned on a number of grounds:

- (a) Was Palmer J right in holding that a development consent issued by a Council pursuant to an LEP and having its force from the EPA Act is a covenant, agreement or instrument imposing restrictions on development? Meagher JA delivering the primary judgment of the Court of Appeal in *Ludwig v Cushott*⁴⁴ in relation to Section 28 made a distinction between rules, regulations, by-laws, ordinances and proclamations comprising one genus, viz documents issued by public authorities; and agreements, covenants and instruments which he said are manifestly not within the same genus but are usually made between private parties.
- (b) *Doe v Cogente*⁴⁵ cannot be relied upon as authority for the proposition that an easement is an agreement, covenant or instrument caught by section 28 as the Court of Appeal in deciding an appeal from Cowdroy AJ's decision and determining the appeal on other grounds expressly stated that: "It should not be assumed, however that we endorse the reasoning of Cowdroy AJ on this [Section 28] issue" – *Cogente v Doe (16 March 1998)*.⁴⁶
- (c) In *Cracknell* Preston C J said at [68] he was convinced that the decision of Cowdroy A J in *Doe v Cogente* is wrong as it relates to section 28 and should not be followed.
- (d) Palmer J could have arrived at the result he did without dealing with Section 28.

⁴² http://www.austlii.edu.au/au/legis/nsw/consol_act/ca1919141/s88k.html

⁴³ http://www.austlii.edu.au/au/legis/nsw/consol_act/laeca1979274/s40.html

⁴⁴ *Ludwig v Cushott* 1994 83 LGERA 22

⁴⁵ [EDWINA DOE v. COGENTE PTY LIMITED No. 40064 of 1997 \[1997\] NSWLEC 115 \(8 August 1997\)](#)

⁴⁶ *Cogente Pty Limited v Doe* (1998) 98 LGERA 162 at 169

3.3 Section 28 and Future Concerns for Easements

There is uncertainty from the case law regarding an agreement or instrument which creates the particular easement containing in the terms of the easement a negative stipulation on what the owner of the burdened land may do.

Examples of these are in the Schedule 8 statutory terms of an Easement for Batter where;

- 2 the owner of the lot burdened must not:-
 - a) interfere with the batter or embankment or the supported offers or
 - b) use the site of this easement or any part of the lot burdened or any other land in a way which may detract from the stability of all the support provided by the batter or embankment.

Or again in Schedule 8 Easement for Overhang:-

- 4 the owner of the lot burdened must not do or allow anything to be done to damage or interfere with the overhanging structure.

There are likely to be more cases arising under Section 28 and whether conditions of development consent override or suspend the operation of easements.

When drafting the terms of easements one will now have to think to the future and seek to clothe the current developer client with the protection of the High Court in *Westfield* and Preston CJ in *Cracknell*. Conversely, when advising a developer on a prospective development one will have to have careful regard to existing easements, covenants and restrictions, the wording of the LEP or other EPI applicable, as well as Section 28.

4 CONCLUSION

Westfield makes the task of drafting the easement more onerous, the words will 'count' more than ever. For surveyors, whose job it is to define by plans the location of easements as they relate to different parcels of land, there are potential commercial risks if they stray beyond their allotted role into drafting the grant of an easement, which is the task of a lawyer. In defining the physical limits of the easement, care needs to be taken. The potential for physical blight on the burdened land from use of the easement and intensification of that use by benefited user is very real, as highlighted by *Sertari*.⁴⁷ The surveyor and the lawyer need to work together as a team for the benefit of the client.

⁴⁷ [Sertari Pty Ltd v Nirimba Developments Pty Ltd \[2007\] NSWCA 324](#)

After *Westfield* it is very firmly established that for Torrens title land the Torrens Register rules: Torrens property rights are paramount. *Doe v Cogente* looks likely to have been the high water mark for section 28. *Cracknell* has strongly rebutted the reasoning for the decision. Furthermore in 2004 in an easement case dealing with different issues, the High Court of Australia in *Hillpalm v Heavens Door*⁴⁸ had already put to bed the risk of a second register (that is council's consent register).

Consent granted by the council for development on the benefited land will facilitate intensification of the use of the burdened land where an "all purposes" wording has been used in the terms of the easement. The historical circumstances surrounding the grant of the easement will be no impediment. Burdened landowners will have to argue the reasonableness of the proposed user and the broader the terms of grant, the more difficult that will be.

If general words will be given effect, is the use of the statutory short forms⁴⁹ warranted? If the client is agreeing to grant an easement across their land the consultants have an obligation to define the purpose of use restrictively and to set out conditions of use, as was the situation in *Westfield*. Relying on the planning authorities to impose limits on user of easements on the benefited owner has not proved to be the panacea for the burdened owner⁵⁰. Nor is getting development consent for the burdened land a 'fix all', especially if section 28 has no application as an easement is not a regulatory instrument on which the planning consent can have a suspensory effect⁵¹.

Finally it needs to be remembered that notwithstanding *Westfield*, developers can still make applications for orders by the Court for the compulsory grant of easements benefiting their land coupled with the payment of compensation to the burdened landowner⁵².

⁴⁸ [Hillpalm Pty Ltd v Heaven's Door Pty Ltd \[2004\] HCA 59; 220 CLR 472; 211 ALR 588; 79 ALJR 282 \(1 December 2004\)](#)

⁴⁹ Conveyancing Act Schedule 8 - http://www.austlii.edu.au/au/legis/nsw/consol_act/ca1919141/sch8.html and Schedule 4A - http://www.austlii.edu.au/au/legis/nsw/consol_act/ca1919141/sch4a.html

⁵⁰ [Nirimba Developments Pty Limited v Blacktown City Council & Anor \[2008\] NSWLEC 1229](#), the sequel to [Sertari Pty Ltd v Nirimba Developments Pty Ltd \[2007\] NSWCA 324](#)

⁵¹ [Cracknell and Lonergan Pty Limited v Council of the City of Sydney \[2007\] NSWLEC 392](#)

⁵² Conveyancing Act section 88K http://www.austlii.edu.au/au/legis/nsw/consol_act/ca1919141/s88k.html, and Land & Environment Court Act section 40 http://www.austlii.edu.au/au/legis/nsw/consol_act/ca1919141/s88k.html

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BIOGRAPHICAL NOTE

Sandy Rendel is a partner in the leading New South Wales regional law firm of RMB Lawyers. He was admitted as a solicitor of the Supreme Court of New South Wales in 1972. He has been a Law Society Accredited Specialist in Property Law since 1995. Sandy operates at the value added end of property law, with a strong focus on property development and planning, joint ventures and major sales and purchases. He has acted for developers of some of the largest residential subdivisions in the Illawarra, south of Sydney. Sandy has extensive expertise with Torrens title. He also has experience with Old System title, including title conversion, and with Strata title and Community title.

Because of his work with the development industry he has long had an interest in the drafting and enforceability of easements, restrictions on use of land and positive covenants. He has been watching with interest the direction in which this area of law has been moving in Australia for more than a decade.

Sandy is an active member of many professional organisations, including the Urban Development Institute of Australia (NSW) Southern Chapter. He has delivered papers to the UDIA Southern Chapter, the Southern Group Institute of Surveyors NSW, and RMB Property Developers Master Classes. He was a conference delegate and delivered a paper to the South East Australian Surveying and Spatial Information Congress 2009. Sandy also has strong community links. He is a life member of Kiama Rugby Club and Kiama Show Society. He was Show Society President in 2005 and 2006 and has been Committee Chairman of the Kiama Regional Wine Show from its inauguration in 2004.

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