HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND HEYDON JJ

WESTFIELD MANAGEMENT LIMITED APPELLANT

AND

PERPETUAL TRUSTEE COMPANY LIMITED RESPONDENT

Westfield Management Limited v Perpetual Trustee Company Limited
[2007] HCA 45
3 October 2007
S210/2007

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with R G McHugh SC and N J Owens for the appellant (instructed by Speed and Stracey Lawyers)

N C Hutley SC with S Flanigan, J C Giles and S J Free for the respondent (instructed by Deacons Lawyers)

CATCHWORDS

Westfield Management Limited v Perpetual Trustee Company Limited

Real property – Torrens system land – Easements – An easement granted the right to go, pass and repass for all purposes to and from the appellant's dominant tenement over the respondent's servient tenement – The appellant sought to use the easement in order to access remoter properties adjoining the dominant tenement – Whether such use was permitted by the easement.

Real property – Torrens system land – Easements – Construction – Whether the expression "to and from" encompassed access across the dominant tenement to remoter properties – Whether the expression "for all purposes" encompassed access across the dominant tenement to remoter properties.

Evidence – Torrens system land – Easements – Construction – Whether evidence was admissible regarding the intention or contemplation of the parties at the time of, or subsequent to, the grant – Relevance of the Torrens Register.

Words and phrases – "for all purposes", "to and from".

Real Property Act 1900 (NSW), ss 31B, 96B.
Conveyancing Act 1919 (NSW), ss 88B, 181A.

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE AND HEYDON JJ. This litigation concerns the terms of an easement conferring a right of way by means of a vehicular ramp under the servient tenement. What is at stake is access to, from and over several parcels of land in the central business district of the City of Sydney. All of these parcels are registered under the provisions of the *Real Property Act* 1900 (NSW) ("the RP Act"). The appellant ("Westfield") is the present registered proprietor of the dominant tenement[1] upon which is erected the multi-storey commercial premises known as "Skygarden". The respondent ("Perpetual") is the registered proprietor of the servient tenement[2] upon which is erected the multi-storey commercial premises known as "Glasshouse".

2 Glasshouse fronts both King Street and a pedestrian precinct known as the Pitt Street Mall which runs at a right angle to King Street. Skygarden abuts the Pitt Street Mall. This pedestrian precinct lacks ordinary vehicular access. Hence the importance for Skygarden of access across the Glasshouse site to King Street.

The legislation

3 Section 88B(2) of the *Conveyancing Act* 1919 (NSW) ("the Conveyancing Act") specifies requirements for the registration of plans which provide for the creation of easements. Upon registration of such plans the easements are created without any further assurance and by virtue of that registration (s 88B(3)(c)). Section 47 of the RP Act provides for the recording of a dealing creating an easement, with entries on the folios of the Register for the land benefited and the land burdened. This was done with respect to the Skygarden land and the Glasshouse land.

4 Section 31B of the RP Act requires the Registrar-General to maintain the Register. The Register comprises, among other instruments and records, both folios and dealings registered therein under the RP Act (s 31B(2)). A "dealing" includes any instrument registrable under the provisions of the RP Act (s 3(1)). Section 96B classifies the Register as a public record and provides for its inspection.

5 Together with the information appearing on the relevant folio, the registration of dealings manifests the scheme of the Torrens system to provide third parties with the information necessary to comprehend the extent or state of the registered title to the land in question. This important element in the Torrens system is discussed by Barwick CJ

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1 Certificate of Title Volume 8638 Folio 220.

2 Certificate of Title Volume 8633 Folio 6.

in *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd*[3]. It will be necessary later in these reasons to refer further to the significance of this for the present appeal.

6 The easement with which this litigation is concerned ("the Easement") was created upon registration of DP 641047 ("the DP") on 26 April 1988. The DP included an instrument ("the Instrument") headed:

> "Instrument Setting Out Terms of Right of Way Intended to Be Created Pursuant to Section 88B, Conveyancing Act, 1919".

7 The terms of the Easement identify it as:

> "Right of Way 6.6 wide and variable limited in height to the strata delineated on the plan."

The attached plan shows entry from King Street and thence by subterranean passage or driveway across and beneath the Glasshouse land to the boundary of the Skygarden land.

8 At the time of creation of the Easement, the registered proprietor of the Glasshouse site was Jamino Pty Ltd ("Jamino") and the registered proprietor of the Skygarden site was Mastwood Pty Ltd ("Mastwood"). Perpetual and Westfield are respectively the present successors in title to Jamino and Mastwood.

The Pitt Street Mall

9 The Pitt Street Mall was created in 1987. This implemented a plan adopted in 1983 by the Council of the City of Sydney ("the Council") for the closure of Pitt Street between King Street and Market Street to traffic. Construction on the Glasshouse site commenced in about 1987. A vehicular ramp under Glasshouse was completed in about 1988, substantially in accordance with the plan in the DP. The Skygarden building opened in 1990.

10 The Council had adopted a building code which at the time of construction of Glasshouse provided for the award of bonus floor space to encourage developers to supply elements of the pedestrian network favoured by the Council. The terms of a condition imposed by the development approval by the Council for Glasshouse have

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3 (1971) 124 CLR 73 at 77-78. See also the remarks of Connolly J in *Hutchinson v Lemon* [1983] 1 Qd R 369 at 372-373.

been the subject of separate litigation between Perpetual, Westfield and the Council. An application by Perpetual for special leave to appeal to this Court against the decision of the New South Wales Court of Appeal in that litigation[4] was heard with the present appeal, but was dismissed[5].

11 At the time of the creation of the Easement in 1988, all four parcels of land had been in separate ownership. In recent years Westfield has acquired, in addition to the Skygarden site, the land upon which stand the commercial developments known as "Imperial Arcade" and "Centrepoint". Imperial Arcade adjoins Skygarden, and Centrepoint adjoins Imperial Arcade. Both Imperial Arcade and Centrepoint front the Pitt Street Mall. Westfield proposes to redevelop together all three sites. It wishes to utilise for that redevelopment the right of way under Glasshouse so as to enable vehicular access from King Street.

The litigation

12 By summons filed in the Equity Division of the Supreme Court of New South Wales, Westfield sought against Perpetual a declaration that the Easement permitted Westfield, as owner of Skygarden, to allow persons or vehicles to use the driveway to continue over (or more accurately, under) Skygarden to access driveways, parking spaces and loading docks to be built on the Imperial Arcade or Centrepoint sites.

13 Brereton J granted declaratory relief to the effect of that sought by Westfield[6]. The Court of Appeal (Beazley, Hodgson and Tobias JJA) allowed an appeal by Perpetual[7] and set aside the orders of Brereton J. The principal reasons of the Court were delivered by Hodgson JA.

14 Westfield appeals to this Court, seeking to reinstate the decision of the primary judge. For the reasons that follow the appeal should be dismissed.

The terms of the Easement

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4 [2006] NSWCA 245.

5 [2007] HCATrans 367 at 5520-5540.

6 [2006] NSWSC 716.

7 (2006) 12 BPR 23,793.

15 It is appropriate to begin with the terms of the Easement as they appear in the Instrument. What are identified as eleven conditions of the "right of carriageway" are set out. It will be necessary to refer to some of these conditions later in these reasons. It is the terms of the opening words of the Instrument which are of immediate importance. They state:

> "*Full and free right of carriageway for* the grantee its successors in title and registered proprietors for the time being of an estate or interest in possession of *the land herein indicated as the lots benefited or any part thereof* with which the rights shall be capable of enjoyment and every person authorised by it, *to go, pass and repass* at all times and *for all purposes* with vehicles *to and from the said lots benefited* or any such part thereof *across the lots burdened*". (emphasis added)

16 This form of words has an affinity to that which, since the commencement in 1931 of the *Conveyancing (Amendment) Act* 1930 (NSW) ("the 1930 Act"), has been the effect given by s 181A of the Conveyancing Act[8] to the creation of a right of way using the expression "right of carriageway". Section 181A extends to dealings under the RP Act (s 181A(4)). The meaning given to the expression "right of carriageway" by the statute may be varied by the instrument in which it is used (s 181A(3)). The words otherwise read in by the statute are as follows:

> "Full and free right for every person who is at any time entitled to an estate or interest in possession in the land herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment, and every person authorised by that person, to go, pass and repass at all times and for all purposes with or without animals or vehicles or both to and from the said dominant tenement or any such part thereof."

17 The phrases "to go, pass and repass at all times and for all purposes ... to and from the said dominant tenement ['lots benefited'] or any such part thereof" appear in both the statute and the Instrument. However, for the Easement the activities permitted with respect to the servient tenement (Glasshouse) are "across the lots burdened", an expression not found in the statutory formulation. This expression is apt to describe entry from King Street, and passage across the Glasshouse site of the servient tenement to reach Skygarden as the destination. What is significant for the present dispute is that the Easement does not also speak of activities "across" rather than "to and from" the dominant tenement (Skygarden).

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8 With Sched 8, Pt 1.

18 In that regard, Hodgson JA, who gave the leading reasons for judgment in the Court of Appeal, remarked[9]:

> "Although the words 'to and from [the dominant tenement] or any such part thereof' do not exclude the possibility that the right should extend to going *to* the dominant tenement and then going across it to further land, and then returning across the dominant tenement and then going *from* it across the servient tenement, the words tend to suggest that it is access to and from the dominant tenement that is the purpose of the [E]asement, and not access to further land reached only by going across the dominant tenement. Certainly, if it had been intended that the grant extend to the authorisation of others to go across the dominant tenement to further properties, the words 'and across' could readily have been added." (emphasis in original)

We agree.

"[F]or all purposes"

19 In its submissions, Westfield stressed the significance for the construction of the Instrument of the phrase therein "for all purposes". This was said to be plainly apt to encompass the purpose of accessing Skygarden, the dominant tenement, and from there travelling to some further property.

20 The phrase "for all purposes" appears also in the statutory formulation which has been included in the Conveyancing Act since the commencement of the 1930 Act. Before 1930 it had appeared in easements the construction of whose terms had come before the courts.

21 One such case was *Thorpe v Brumfitt*[10]. There, a grant of a right of way "for all purposes" across the servient tenement did not plainly identify any dominant tenement. Did the grant fail as being an attempt to create an easement in gross[11]? As a matter of

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9 (2006) 12 BPR 23,793 at 23,811.

10 (1873) LR 8 Ch App 650.

11 As had been the outcome in *Ackroyd v Smith* (1850) 10 CB 164 [138 ER 68], an authority analysed in Megarry and Wade, *The Law of Real Property*, 6th ed (2000) at 1080-1081 [18-047]. See also the decision of the English Court of Appeal in *Voice v Bell* (1993) 68 P & CR 441 at 444-445.

construction James LJ and Mellish LJ avoided that result. Mellish LJ[12] construed the phrase "for all purposes" as identifying all purposes which made it necessary to pass between the servient tenement and a triangular parcel of land indicated in the conveyance creating the easement[13]. This decision is significant in two respects. First, it illustrates the importance of the legislative requirement imposed in New South Wales by s 88 of the Conveyancing Act (also introduced by the 1930 Act) for identification of the lands comprising the dominant and servient tenements. Secondly, it emphasises that the "purposes", extensive as they may be, must confer what the law regards as a benefit on the dominant tenement, by making it "a better and more convenient property"; this is something more than a "personal advantage" to the owner of the tenement for the time being[14].

22 More recently, in *Peacock v Custins*[15] the English Court of Appeal considered the phrase "a right of way at all times and for all purposes" in favour of the dominant tenement ("the red land") the owners of which also owned adjacent land ("the blue land"). After reviewing many authorities, including *Harris v Flower*[16], Schiemann LJ (delivering the judgment of the Court also comprising Mance LJ and Smith J) concluded that the terms of the grant did not permit the extended user in favour of the blue land and, further, that this user could not reasonably be described as "ancillary" to the use of the red land[17].

23 The reference in *Peacock v Custins*[18] to user which could be described as "ancillary" to the grant appears to have identified the line of cases holding that, on general principles of conveyancing, the grant of an easement carries with it those ancillary rights which are necessary for the enjoyment of the rights expressly granted[19].

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12 (1873) LR 8 Ch App 650 at 657-658.

13 See *Todrick v Western National Omnibus Co Ltd* [1934] Ch 561 at 583-585.

14 Megarry and Wade, *The Law of Real Property*, 6th ed (2000) at 1080 [18-045].

15 [2002] 1 WLR 1815; [2001] 2 All ER 827.

16 (1904) 74 LJ Ch 127.

17 [2002] 1 WLR 1815 at 1824; [2001] 2 All ER 827 at 836.

18 [2002] 1 WLR 1815 at 1824; [2001] 2 All ER 827 at 836. See also *Thomas v Mowbray* [2007] HCA 33 at [25].

19 *Gale on Easements*, 17th ed (2002) at 47 [1-81].

For example, Warner J held in *National Trust for Places of Historic Interest or Natural Beauty v White*[20] that use by visitors of a car park adjacent to an Iron Age hill fort in Wiltshire known as the Figsbury Ring was an "ancillary" user in the required sense. However, it is not necessary for the enjoyment of the rights granted for access to the Skygarden land that those using that access be at liberty to pass beyond Skygarden to other land.

24 It should be added that if the construction of the Instrument urged by Westfield were accepted, and the grant extended to permit use of Glasshouse to pass across Skygarden to other parcels of land, then a further question would arise. This would be whether a grant in those terms would be appurtenant to Skygarden in the sense of the authorities, or be but a personal advantage accruing to Westfield as the present owner of Skygarden. It is unnecessary to determine such a question. This is because the Easement, upon the proper construction of the terms of the grant, does not extend to user of the type for which Westfield contends.

25 The most recent edition of *Gale on Easements*[21] states:

> "The general rule is that a right of way may only be used for gaining access to the land identified as the dominant tenement in the grant."

There follows a detailed analysis of the English authorities, which begins with remarks to that effect by Romer LJ in *Harris v Flower*[22].

26 The decision in that case has been much discussed in later authorities both in England and Australia, a number of which were reviewed by Brereton J at first instance. His Honour concluded that *Harris v Flower* stands for the proposition that:

> "use of an easement cannot be extended, beyond the scope of the grant, to impose a burden greater than that which the servient owner agreed to accept".

27 That statement accords with the following analysis of *Harris v Flower* which is offered in *Gale on Easements* and which we would adopt[23]:

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20 [1987] 1 WLR 907.

21 17th ed (2002) at 334 [9-27].

22 (1904) 74 LJ Ch 127 at 132.

23 17th ed (2002) at 470 [12-79].

> "In *Harris v Flower & Sons* the excessive user by which it was attempted to impose an additional burden on the servient tenement consisted in the use of a right of way for obtaining access to buildings erected partly on the land to which the right of way was appurtenant and partly on other land. A claim was put forward on behalf of the plaintiffs that the right of way had been abandoned, on the ground that, as it was practically impossible to separate the lawful from the excessive user, the right of way could not be used at all. This contention failed, however, the court holding that there had been no abandonment, but that the user of the way for access to the buildings so far as they were situate upon land to which the right of way was not appurtenant was in excess of the rights of the defendants, and a declaration was made accordingly, with liberty to apply." (footnote omitted)

28 However, Brereton J went on to hold:

> "It is not in excess of the grant to use a right of way to access the dominant tenement for those purposes that were contemplated at the time of the grant."

The difficulty is in the phrase "that were contemplated". Contemplated by whom? By what evidentiary means is this contemplation later to be revealed to the court? How do these steps accommodate the Torrens system? To these matters it will be necessary to return.

29 At this stage in the reasons it is important to remark that care certainly must be taken lest the statement in *Gale on Easements* set out above be elevated to the status of a "rule", whether of construction or substantive law. What the statement does provide is a starting point for consideration of the terms of any particular grant. The statement is consistent with an understanding that the broader the right of access to the dominant tenement granted by the easement, the greater the burden upon the proprietary rights in the servient tenement.

30 We return to the terms of the Easement. The access is to go, pass and repass to and from Skygarden and across Glasshouse. The terms do not speak of going, passing and repassing to and from and across Skygarden, and across Glasshouse. The term "for all purposes" encompasses all ends sought to be achieved by those utilising the Easement in accordance with its terms.

The conditions

31 Something more here should be said respecting the set of conditions set out in the Instrument. Clauses (3) and (4) of the conditions are in the following terms:

"(3) Subject to Clause (4) the cost of routine maintenance and repair to the site of the carriageway shall be borne equally between the grantor and grantee.

(4) The cost of repair of damage caused to the site of the carriageway (including all structures, equipment, fixtures and fittings erected or positioned on or over the boundaries of the carriageway which boundaries are shown in the above mentioned plan) by the grantor or grantee, their respective servants or agents shall be borne by such grantor or grantee PROVIDED HOWEVER that in any other case the cost of repair shall be borne equally between the grantor and grantee."

32 In the absence of further clear words it might be considered unduly burdensome upon the owner for the time being of Glasshouse that it meet one half of the costs associated with access to remoter lots. That no such further provision was made is consistent with the construction adopted in these reasons of the terms of the grant of the Easement. Further, cl (4) attributes responsibility to the respective parties for the costs of repair of damage caused to the site of the carriageway by the grantor or grantee, and otherwise provides for them to bear equally the costs of repair. No attention has been given to the costs of repairs occasioned by those utilising the Easement to pass across and beyond Skygarden.

33 Clauses (7) and (8) are as follows:

"(7) The grantor and grantee shall at their own cost separately insure and keep insured at all times during the life of the right of carriageway the structure of the carriageway and all associated fixtures and fittings (including but not limited to signage) for loss or damage thereto arising as a direct result of their respective use of the carriageway.

(8) The grantor and grantee shall at their own cost separately effect and maintain at all times during the life of the right of the carriageway public risk insurance covering their respective legal liability to third parties (including the other party) for property damage and bodily injury arising out of their respective use of the carriageway."

No provision is made for insurance against loss or damage arising as a result of use of Glasshouse by the owners for the time being of tenements beyond the boundary of Skygarden. Nor is the obligation to effect public risk insurance so drawn as to deal with the range of uses for which Westfield contends. The same may be said of the limited indemnity required by cl (9). This reads:

"(9) The grantee shall indemnify and keep indemnified the grantor against all actions, claims, suits, demands and losses arising from any default act or omission of the grantee its servants or agents in the use of the right of carriageway."

34 On this point, Hodgson JA remarked (and we agree)[24]:

"[I]f Skygarden could authorise Imperial Arcade and Centrepoint to use the right of way for access to their premises, it seems anomalous that Glasshouse should be required to submit to this where there is no requirement for Imperial Arcade and Centrepoint to maintain insurance, along the lines provided in cll (7) and (8) of the [E]asement. It would also be anomalous that there was no indemnity from Imperial Arcade and Centrepoint of the kind provided in cl (9) of the [E]asement."

Extrinsic material

35 In going on to allow the appeal, Hodgson JA (again correctly) remarked that the decision of the primary judge appeared to be the product of an error in preparedness to look for the intention or contemplation of the parties to the grant of the Easement outside what was manifested by the terms of the grant. Extensive evidence of that nature had been led by Westfield on affidavit with supporting documentation.

36 In this Court, counsel for Perpetual submitted that some but not all of the extrinsic evidence had been admissible; in particular, the evidence said to supply part of the "factual matrix" but which post-dated a deed dated 26 February 1988 containing a covenant to grant the Easement was inadmissible. So also was said to be evidence of the subjective intention of the then owner of Glasshouse which had not been communicated to the then owner of Skygarden. Perpetual accepted that what had been admissible was evidence of a preceding oral agreement between those parties: this had been to the effect that the Easement was to permit access to Skygarden via Glasshouse.

37 However, in the course of oral argument in this Court it became apparent that what was engaged by the submissions respecting the use of extrinsic evidence of any of those descriptions, as an aid in construction of the terms of the grant, were more fundamental considerations. These concern the operation of the Torrens system of title by registration, with the maintenance of a publicly accessible register containing the terms of the dealings with land under that system. To put the matter shortly, rules of

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24 (2006) 12 BPR 23,793 at 23,811.

evidence assisting the construction of contracts *inter partes*, of the nature explained by authorities such as *Codelfa Construction Pty Ltd v State Rail Authority of NSW*[25], did not apply to the construction of the Easement.

38 Recent decisions, including *Halloran v Minister Administering National Parks and Wildlife Act 1974*[26], *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[27], and *Black v Garnock*[28], have stressed the importance in litigation respecting title to land under the Torrens system of the principle of indefeasibility expounded in particular by this Court in *Breskvar v Wall*[29].

39 The importance this has for the construction of the terms in which easements are granted has been remarked by Gillard J in *Riley v Penttila*[30] and by Everett J in *Pearce v City of Hobart*[31]. The statement by McHugh J in *Gallagher v Rainbow*[32], that:

> "[t]he principles of construction that have been adopted in respect of the grant of an easement at common law ... are equally applicable to the grant of an easement in respect of land under the Torrens system",

is too widely expressed. 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

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25 (1982) 149 CLR 337 at 350-352.

26 (2006) 80 ALJR 519 at 526 [35]; 224 ALR 79 at 88.

27 (2007) 81 ALJR 1107 at 1150-1152 [190]-[198]; 236 ALR 209 at 266-269.

28 (2007) 237 ALR 1 at 4 [10].

29 (1971) 126 CLR 376. See also *Figgins Holdings Pty Ltd v SEAA Enterprises Pty Ltd* (1999) 196 CLR 245 at 264 [26]-[27].

30 [1974] VR 547 at 573.

31 [1981] Tas R 334 at 349-350.

32 (1994) 179 CLR 624 at 639-640.

registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee[33].

40 It is true that in *Overland v Lenehan*[34] Griffith CJ admitted extrinsic evidence to show a misdescription of the boundaries of the land comprised in a certificate of title. This is a matter now dealt with in the RP Act by the provisions in Pt 15 (ss 136-138) for the cancellation and correction of instruments. Subsequently, in *Powell v Langdon*[35] Roper J accepted as applicable to the construction of a particular grant of a right of way (apparently over land under the RP Act) a statement by Sir George Jessel MR in *Cannon v Villars*[36]. This was that the content of the bare grant of a right of way *per se* was to be ascertained by looking to the circumstances surrounding the execution of the instrument, including the nature of the surface over which the grant applied.

41 The situation with which the Australian courts were concerned in the above cases bore little resemblance to that in the present case, where the evidence goes to the intentions and expectations of the parties to the Instrument respecting the development of an area in the central business district of Sydney.

42 To some degree the attraction of "the common law approach to the construction of grants of easement"[37] has been to counter arguments that a right of way may be used only for the purposes for which the way was used at the time of the grant. But to accept the proposition that the user under a registered easement may change with the nature of the dominant tenement, so long as the terms of the grant are sufficiently broad[38], does no violence to the principles of the Torrens system.

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33 cf *Proprietors Strata Plan No 9,968 v Proprietors Strata Plan No 11,173* [1979] 2 NSWLR 605 at 610-612.

34 (1901) 11 QLJ 59 at 60.

35 (1944) 45 SR (NSW) 136 at 137.

36 (1878) 8 Ch D 415 at 420.

37 *Grinskis v Lahood* [1971] NZLR 502 at 508.

38 Megarry and Wade, *The Law of Real Property*, 6th ed (2000) at 1153-1154 [18-197].

43 Subsequent changes in circumstances may found an application under s 89 of the Conveyancing Act for modification or extinguishment[39]. The conduct of the immediate parties to a dispute may found a personal equity of the kind considered in *Mayer v Coe*[40] and accepted in *Breskvar v Wall*[41], and also may bear upon a claim for injunctive relief, as Kearney J indicated in *Andriopoulos v Marshall*[42]. But this was not what was involved in the significance attached by the primary judge to the evidence of what may or may not have been in the contemplation of Jamino and Mastwood, or their affiliates and advisors, at or before the grant of the Easement in 1988. These matters were used to guide, if not control, the construction of what appeared on the Register.

44 It may be accepted, in the absence of contrary argument, 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 on the plan found in this case on the DP.

45 But none of the foregoing supports the admission in this case of evidence to establish the intention or contemplation of the parties to the grant of the Easement.

Conclusion and orders

46 The appeal fails and should be dismissed with costs.

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39 An example is *Treweeke v 36 Wolseley Road Pty Ltd* (1973) 128 CLR 274.

40 (1968) 88 WN (Pt 1) (NSW) 549.

41 (1971) 126 CLR 376 at 387.

42 (1981) 2 BPR 9391.