Interpreting easements under the Torrens system of title following the decision of the High Court of Australia in *Westfield v Perpetual Trustee*, the ongoing dilemma for those involved in real estate development.

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SUMMARY

The Torrens system of title to land came into operation in South Australia in 1858 and soon spread to all Australian states as a replacement to the English common law or "old system" of title. The Torrens system has been adopted by several other countries around the world including New Zealand, Malaysia, Singapore, Israel, Belize, Kenya, Uganda, Malawi, parts of the Caribbean, some of the Canadian provinces and some parts of the United States of America. The Torrens system is a system of title by registration, not a system of registration of title. Under the Torrens system the Register is all. Nevertheless Australian Courts, applying concepts brought in from the English common law, have used extraneous information, not on the Register, as an aid to the interpretation or construction of easements and other dealings registered under the Torrens system.

In 2007 the High Court of Australia in *Westfield v Perpetual Trustee Company* gave an emphatic judgment bringing those working with Torrens title land back onto the true path, namely it is what is on the Register which must be used to construe the extent of rights and obligations and not other extrinsic evidence. The apparent simplicity of the unanimous decision of the High Court in *Westfield* has presented difficulties in dealing with specific situations. The courts across Australia have striven to make decisions consistent with the judgment in *Westfield* but have sometimes found it a hard task.

These are matters which though fascinating to academics are of vital practical consequence to land developers and their advisors, particularly surveyors. It is essential to know what easements benefit or burden a parcel of land and how to create new easements, to make a development work as designed and approved, both at the outset and into the future.

This paper develops the themes first discussed by the author in a paper given at FIG 2010[1]. It seeks to apply the benefit of two more years of decided cases across the states of Australia and in New Zealand to assist the practitioner in the field to decide how the terms of an easement are to be interpreted so that the extent of the rights granted can be clearly understood and utilised.

[1] http://www.fig.net/pub/fig2010/papers/ts08e%5Cts08e_rendel_4371.pdf

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1 IN CONTEXT OF FIG WORKING WEEK 2012

This paper can be said to fit into the first part of the theme of Working Week – *Knowing the Territory*. The paper sets out to address an essential part of land and real property appraisal. A person assessing a parcel of land for its existing and future development potential must determine what are the bundle of property rights attaching to the land available to the owner. The person also needs to assess if there are any property rights belonging to third parties which may limit the ability of the owner from exercising fully the normal rights of ownership. This assessment process can be called *Knowing the Territory*.

2 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."[2]

Often the highest and best use of a parcel of land can only be achieved, or becomes so much easier or less expensive to achieve if some use is made of nearby land. Sometimes use of the nearby land is needed only temporarily, for example during construction to store materials, park vehicles or swing a crane. At other times the use is needed permanently, for example to provide access or to drain storm water. Where the right to use nearby land is permanent it is called an easement in English based property law. The English law of easements was developed from and adopted the principles and terminology of the servitudes of Roman law.[3]

An easement is described as a proprietary right enjoyed by an owner of land to carry out some limited activity on another person's land.[4]

An easement may also be described 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]

The end of World War II is a commencement marker to date the explosion of populations across the world and its increasing urbanisation. Easements have become essential tools in the development of land in the modern era. Moreover the concept of an easement as a right "to prevent the owner of the other land from utilising his land in a particular manner"

[2] Butt P Land Law (2nd Ed) 1983 p303
[3] Butt P, Land Law (6th Ed) 2010 [16.06]
[4] Butt P Land Law (6th Ed) 2010 [16.07]
[5] Halsbury's Laws of England (4th Ed), Vol 14, p4.

increases in importance as a constraint to development when assessing the potential to use a parcel of land for its highest and best use.

The essential characteristics of an easement were summarised in the 1956 English Court of Appeal 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 owners and occupiers of the dominant and servient tenements 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.

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

(a) confer a real and practical benefit on the benefited land, and

(b) be reasonably necessary for its better enjoyment.

There must also 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 Australia [7] and by the New South Wales Court of Appeal[8]. Nevertheless the two landholdings must be physically close to one another if they do not adjoin. 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 land[9].

There have been numerous examples of what rights may be easements and so are capable of forming the subject matter of a grant. The High Court of Australia has upheld an easement for an undefined flow of air. It is almost a cliché to say that the list of possible easements is not closed.

Easements which might be necessary for a development include:

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[6] Ellenborough Park, Re [1955] EWCA Civ 4 (15 November 1955); [1956] Ch 131.
[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); (1997) 43 NSWCR 4; (1997) 8 BPR 97652
[9] Westfield Management Limited v Perpetual Trustee Company Limited [2007] HCA 45 (3 October 2007); (2007) 233 CLR 528 [21]

- Rights of access - vehicular pedestrian, or specialised for persons with mobility disabilities, or by travellator or for emergency ingress or egress.

- Right to park vehicles.

- Easements for electricity substation purposes with associated restriction on use of land and positive covenant, or for electricity purposes or for services more generally.

- Easements to permit encroaching structure to remain, for rock anchors or to erect signage.

- Easements for drainage of water or sewage, for stormwater detention and overland flow with associated restrictions on use of land and positive covenants.

- Rights to use garbage room, grease arrestor, service bay, loading dock or trolley bay.

- Easement for kitchen exhaust.

- Easement for support and shelter.

- Easement for asset protection zone against bushfire threat.

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 knowledge will assist in the process of making a decision whether or not to purchase a development parcel. The presence of an easement as a blot on the title may be a constraint to future development of the land because of its terms. The lack of an easement, or limitations in the terms of use of an existing easement, may also make a parcel unsuitable for the type of development the purchaser has in mind for it.

This paper focuses particularly on the construction of easements following the decision in late 2007 of the High Court of Australia in *Westfield Management Ltd v Perpetual Trustee Co Ltd*[10].

I am told it was the surveyors working on Westfield's development site who first pointed out the limitations in the easement which proved to be a major constraint to the approved development of that site.

[10] Westfield Management Limited v Perpetual Trustee Company Limited [2007] HCA 45 (3 October 2007); (2007) 233 CLR 528

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

3.1 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 provinces of Canada and states of 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 as the world changes and the use of property becomes more 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 & MacCallum 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."[11]

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

[11] Bradbrook & MacCallum, Easements and Restrictive Covenants 3rd Ed 2011 [4.2]

liable to be cut down by some implication from surrounding circumstances. At common law 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*[12] and in particular the judgment of McHugh J at [10]. 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* [13] 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 *Perpetual Trustee Company Ltd v Westfield Management Ltd*,[14] 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 is limited. Subject to the rights of the benefited owner, the burdened owner has dominion over the land. The burdened 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.

3.2 THE HIGH COURT OF AUSTRALIA DECISION IN WESTFIELD

Westfield [15] is a case involving a right of way over land in the CBD of Sydney. The relevant land was a complete mid-city block of premium retail shopping centres, bounded to the north by King Street and to the south by Market Street. Moving from north to south, at the time of creation of the easement they were called Glasshouse, Skygarden, Imperial Arcade and Centrepoint. The western boundary comprised a pedestrian mall, to eastern boundary, a one-way street.

The right of way had been granted across the development known as Glasshouse for the benefit of the adjoining development Skygarden. Skygarden adjoined Imperial Arcade, which in turn adjoined Centrepoint. After the creation of the right of way Perpetual Trustee acquired Glasshouse, burdened by the right of way, while Westfield acquired Skygarden with the benefit of the right of way. Later Westfield acquired the Imperial Arcade and Centrepoint

[12] Gallagher v Rainbow [1994] HCA 24; (1994) 179 CLR 624; (1994) 121 ALR 129; (1994) 68 ALJR 512 (1 June 1994)
[13] Markos v O R Autor [2007] NSWSC 810; (2007) 13BPR 24, 487 (2007) NSW Conv R 56-190
[14] Perpetual Trustee Company Limited v. Westfield Management Limited [2006] NSWCA 337; (2006) 12BPR 23, 793; (2007) NSW Conv R 56-170 (2007); ANZ Conv R 103
[15] Westfield Management Limited v Perpetual Trustee Company Limited [2007] HCA 45 (3 October 2007) ; (2007) 233 CLR 528

sites. Glasshouse was situated on the corner of King and Pitt Streets, Skygarden and Imperial Arcade had frontage to Pitt Street while Centrepoint is on the corner of Pitt Street and Market Street. Pitt Street from King Street to Market Street had 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 through Skygarden to service Imperial Arcade and Centrepoint. Perpetual objected. The argument was heard by five judges of the High Court of Australia presided over by the Chief Justice, Gleeson CJ. They delivered a joint judgment. Title to all the land in question was Torrens title under the Real Property Act 1900 (NSW) [16]. 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. The Court said at [39], "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". The Court went on to say, “[That] in the absence of contrary argument, 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. [15]

(b) In the absence of contrary argument, evidence is admissible to make sense of the terms or expressions found in the Register, such as surveying terms and abbreviations on the deposited plan. [44]

(c) Rules of evidence which apply to assist the construction of a contract in a dispute between the parties to the contract do not apply to the construction of a registered easement. [37]

(d) 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 do violence to the principles of the Torrens system. [42]

[16] http://www.austlii.edu.au/au/legis/nsw/consol_act/rpa1900178/

(e) The term *all purposes* "encompasses all ends sought to be achieved by those utilising the Easement in accordance with its terms". [17] [30].

(f) It is an error to look to the intention or contemplation of the parties to the grant of easement. [45]

The Court 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 Centrepoint was not authorised by the easement.

3.3 CONSTRUING THE TERMS OF EASEMENTS OVER TORRENS TITLE LAND AFTER *WESTFIELD*

How do we then approach the task of working out what rights an easement gives to an owner of benefited land to make use of the burdened land? Are the six guidelines taken from the High Court's judgment in *Westfield* as simple as they appear?

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 in November 2007 was by the High Court itself in *Queensland Premier Mines Pty Ltd v French* [18]. This case required the interpretation of a transfer of a registered mortgage. Kiefel J dealt with the matter on an analysis of the terms of the documents on the Register and of section 62 of the *Land Title Act 1994* (Q). Five of the other judges agreed with her without further comment. The remaining judge, Kirby J felt it necessary to make some additional comments and at [14] said, "One of the fundamental purposes of the Torrens system is to give effect to an important public policy. That policy is that the land title register should be sufficient of itself to 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 doing so he made reference to *Westfield*.

Also in November 2007 the New South Wales Court of Appeal handed down a unanimous decision of three judges in *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [19]. 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 to support a narrow interpretation of the rights granted by the easement. The extrinsic evidence consisted of the physical characteristics of the burdened and benefited land, the activities being conducted on the benefited land at the time of the grant, and the report of the local council's planner when it granted consent to the subdivision and required the right of carriageway to be created. The judge at first instance rejected the town planner's report and the conditions of the development consent as being irrelevant to the construction of the grant. He also held that the physical characteristics of the

[17] Westfield Management Limited v Perpetual Trustee Company Limited [2007] HCA 45; (2007) 233 CLR 528
[18] Queensland Premier Mines Pty Ltd v French [2007] HCA 53 (15 November 2007) (2007) 235 CLR 81
[19] Sertari Pty Ltd v Nirimba Developments Pty Ltd [2007] NSWCA 324 [2008] NSW Conv R 56-200

two parcels of land and the activities being conducted on the benefited land at the time of the grant could not cut down the plain words of the grant. In dismissing the appeal by the owner of the burdened land, the Court of Appeal applied *Westfield* saying that evidence of matters extrinsic to the Register other than the physical characteristics of the burdened and benefited land, was not admissible to the construe the instrument of grant registered under the Real Property Act 1900 (NSW). Handley AJA went on to say at [16] "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 or interest in any part of the [benefited land] with which the right was capable of enjoyment, and persons authorised by them." 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 DP No 285220 v Moffat* [20] White J of the Supreme Court of New South Wales had to construe an easement *for pipeline and irrigation 1[metre] 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 J would have applied the older authorities relating to construction of bare easements and looked 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 *R F H Berryman & Anor v R Sonnenshein & Anor* [21] in the Supreme Court of New South Wales Einstein J 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 manoeuvring area, the easement site not being sufficient in itself to permit the whole of the manoeuvring to take place there. While in *Dillon v Gosford City Council* [22] Sheehan J in 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,

[20] Neighbourhood Association DP No 285220 v Moffat [2008] NSWSC 54
[21] Richard Frank Horton Berryman & Anor v Robert Sonnenschein & Anor [2008] NSWSC 213
[22] Dillon, Kevin & Anor v Gosford City Council [2008] NSWLEC 186

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].

There are now many other cases where *Westfield* has been discussed and applied.

3.4 IS *WESTFIELD* ALWAYS APPLICABLE?

In *Trevlind v BMP Manufacturing* [23] White J in the Supreme Court of New South Wales 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. He held there was nothing in *Westfield* or *Sertari* which either required of justified ignoring the statutory context of section 88B (3) (a) of the Conveyancing Act 1919 (NSW) [24] or the common law requirements for a valid easement. [30].

Westfield was distinguished in the New South Wales Supreme Court decision of *Neighbourhood Association DP285249 v Watson* [25]. This case dealt with a dispute relating to a development carried out under the Community Titles Acts [26]. Biscoe AJ pointed out that the principle expressed in *Westfield* is referable to ascertaining the state of an existing title under the Real Property Act. That is because the Torrens system is one of title by registration: [409]. He went on to say that Section 3(2) of the *Development Act* and Section 3(2) of the *Management* Act each provides 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 provide for development consents and plans and consultants' reports which form part of those consents to be incorporated by reference into Development Contracts and Management Statements. Unless copied and attached to a Memorandum recorded in the register under section 80A of the Real Property Act[27], and there is no obligation to do this, the development consents, plans and consultants reports forming part of those consents do not become part of the 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: see [411] and [412].

It is also important to note that *Westfield*, *Sertari* and the other cases referred to are all dealing with Torrens title land. In *Broadcast Australia Pty Limited v Kim Noonan & Anor*[28] Bergin C J in Eq was dealing with a right which had been acquired by compulsory process over land when it was general law or old system land, not Torrens land as it became some years later.

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[23] Trevlind v BMP Manufacturing [2008] NSWSC 603
[24] http://www.austlii.edu.au/au/legis/nsw/consol_act/ca1919141/s88b.html
[25] Neighbourhood Association DP 285249 v Watson [2008] NSWSC 876 (2008) 162 LGERA 322
[26] Community Land Development Act 1989 No 201; Community Land Management Act 1989 No 202
[27] http://www.legislation.nsw.gov.au/maintop/view/inforce/act+25+1900+cd+0+N
[28] Broadcast Australia Pty Ltd v Kim Noonan & Anor [2011] NSWSC 1524 (12 December 2011)

She held at [47] that there are different considerations pertaining to old system land. The restrictions or limitations imposed by the High Court in *Westfield* for the construction of easements created over Torrens land did not apply to the construction of the right she was considering.

In *Shelbina v Richards* [29] at [33] Rein J held that the approach taken in *Westfield* was pertinent, but went on to say "*(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.*"

In the NSW Court of Appeal in *Alliance Engineering Pty Ltd & Anor v Yarraburn Nominees Pty Ltd & Ors* [30]Sackville AJA with whom the other two judges agreed, when construing a registered lease over Torrens land of a hotel with gaming machine licences, suggested at [54], that the principles of construction in *Westfield* may be confined to instruments like easements because they involve *indefeasibility*, which attaches only to those covenants or provisions that are so intimately connected with the estate or interest created by the registered instrument that they are to be regarded as part of that estate or interest. He suggests that extrinsic circumstances might play a part in the construction of provisions in a registered instrument that cannot be regarded as part of the estate or interest in land created by the instrument.

3.5 *WESTFIELD* IN PRACTICE

Four recent cases illustrate the practical application of the principles of *Westfield* some four to five years on.

Currumbin Investments Pty Ltd v Body Corp Mitchell Park Parkwood CTS[31]

Judgement was delivered by the Queensland Court of Appeal on 10 February 2012. The case dealt with a dispute over an easement for sewerage with detailed defined terms which terminates so that it adjoins an easement which was granted some 6 months beforehand as a bare easement for drainage and stormwater. In other words the earlier easement was an easement with no conditions or terms set out in the document of grant. Fryberg J, with whom the other two judges concurred, held that the easement for sewerage (granted second in time) gave the owner of the benefited land the right to pass sewage through a pipe in the easement site and a further right to discharge this sewage from the end of the pipe at the boundary of the burdened land. However the express terms of the grant did not and could not entitle the owner of the land benefited to pass sewage through the land outside the burdened land. Put simply the easement granted the right to pass sewage through the burdened land.

[29] Shelbina Pty Ltd v Richards [2009] NSWSC 1449 [2009] ANZ Conv R 10-007; [2010] NSW Conv R 56-255; 14 BPR 27,123
[30] Alliance Engineering Pty Ltd & Anor v Yarraburn Nominees Pty Ltd & Ors [2011] NSWCA 301
[31] Currumbin vParkwood [2012] QCA 9

The owner of the land benefited attempted to bring in evidence from the Council file relating to the subdivision and also from the developer's town planners file to explain that the earlier easement *was intended* (my emphasis) to carry sewage to connect up to the public sewerage system. The benefited owner argued that regard could be had to this extrinsic material to establish *the intention* (my emphasis) of the grantor and the grantee at the time of the grant because the easement was a bare easement.

Fryberg J at [46] said that, "What the [High Court] in *Westfield* held was to be disregarded was evidence which not only established facts and circumstances at the time of the creation of the registered dealing but which also placed the third party in the situation of the grantee (or for that matter, the grantor – the reasoning would be the same)."

Fryberg J went on to conclude at [47] to [50] that the High Court, the judgment of Hodgson JA in the Court of Appeal in *Westfield* and the decision of the New South Wales Court of Appeal in *Sertari* all held that consideration of the physical characteristics of the burdened land and the benefited land is permissible because usually these physical characteristics may freely be observed by any third party interested in them. He pointed out that depending on the nature of the characteristics in question or the possibility of change in the characteristics over the period since the easement was granted situations may arise where the physical characteristics may not be able to be taken into account consistently with the principles of the Torrens System. He said at [49], that having regard to the physical characteristics of the burdened and benefited land was not limited to the case of bare easements. However for the same reason that physical characteristics may change over time he suggested that extrinsic evidence of use being made of the parcels at the time of grant was also problematic. "If the question of construction is to be approached from the point of view of a third party inspecting the register, it may be that the scope for consideration of extrinsic evidence is reduced over time."

Fryberg J also dealt with problems arising when a registered instrument expressly incorporates an unregistered document by reference. Here the third party inspecting the register must be taken to have notice of the document but may be unable to obtain a copy of it, for example because it may have been lost or destroyed. He said at [53], "We must take it, I think, that the important consideration in determining whether information or a document can be so used is whether the information or document was and remains publicly available to third parties without unreasonable effort, expense or delays". In the case in question the documents were not publicly available and nothing in the register hinted at their content. He ruled that the extrinsic evidence from the Council and planners files must be disregarded in construing the terms of the easement.

However Fryberg J had little difficulty in holding that "drainage" in the earlier easement referred to drainage of both stormwater and sewage. He reached this position by having regard to ordinary usage of the words and the statutory context in which the easement was created. The definitions in both the Oxford English Dictionary and the Macquarie Dictionary led him to the view that sewerage is a subset of drainage. Accordingly the owner of the

benefited land did have the right to pass sewage through the later easement site and then through the site of the earlier easement and so dispose of it into the public sewerage system.

Femora Pty Ltd v Kelvedon Pty Ltd[32]

In contrast to *Currumbin Investments v Parkwood*, Edelman J of the Supreme Court of Western Australia in *Femora* when applying *Westfield* placed great emphasis on the limitations in *Westfield* and *Sertari* saying that the material to be looked at was what was in the certificates of title, the registered instrument, the deposited plans and the physical characteristics of the burdened and benefited land. Edelman J at [39] held that the exception which the High Court tentatively put forward in *Westfield* without the benefit of argument on the point, (evidence is admissible to make sense of that which the Register identifies the terms or expressions found therein, *Westfield* [44]) must be of narrow compass. He said at [36], "[A] new exception for incorporation by reference should not be accepted". He held that an unregistered deed which had been incorporated by reference in the registered grant of easement could not be admitted into evidence to assist the interpretation of the grant of easement.

He said at [40], "The concept of conferral of title by the process of registration sits uncomfortably, at the very least, with the attempted *alteration* and *addition* of rights and liberties in a registered instrument by incorporation of an unregistered instrument. It is one matter to allow reference to extrinsic material to make sense of terms and expressions used in a registered grant, such as surveying terms and abbreviations on a plan… But it is quite another matter to permit the incorporation of documents, such as the unregistered deed, to add to, amend, or alter rights or liberties in a registered document. If those variations to the registered rights and liberties were to obtain protection of indefeasibility, the goals of a system of title by registration could be substantially impaired".

DEXUS Funds Management Limited v Blacktown City Council[33]

DEXUS is a good example of how important it is to review titles and investigate easements before purchasing development sites to properly assess the development potential of the land and its constraints. Like *Westfield*, this case is an example of an attempt to use a right of way benefiting Lot A to benefit Lot C (Lot A plus Lot B).

DEXUS was the owner of Plumpton Market Place, a shopping centre in suburban Sydney approved in 1993 as a sub-regional centre. *DEXUS* objected to the grant of development consent to a 7,000 square metre rival shopping centre to be built next door. The rival shopping centre would have used as the means of access for the vast majority of vehicles, including service and delivery vehicles, the right of way across Plumpton Market Place. The

[32] Fermora Pty Ltd -v- Kelvedon Pty Ltd [2011] WASC 281

[33] DEXUS Funds Management Limited v Blacktown City Council (No 3) [2011] NSWLEC 230 (30 November 2011)

easement benefited only part of the land making up the site of the proposed new shopping centre.

In the NSW Land & Environment Court Pain J held at [14] and [15], that in the absence of the owner's consent, use of the right of way was impermissible (in the way it was proposed in the development consent granted by the Council). There was no basis upon which the owner of the land benefited was presently entitled to utilise the right of way for the benefit of land not within the grant of the right of way. That finding was arguably sufficient to ground the declaration *DEXUS* was seeking, namely that the development consent granted by the Council was void and of no effect. Pain J went on to find other failings by the Council before making that order.

Richard Van Brugge & Anor v Meryl Lesley Hare & Anor [2011] NSWC 1364[34]

A residential property on a steeply sloping block of land in the Sydney suburb of Seaforth overlooking Middle Harbour was accessed by using a mechanical inclinator which was permanently fixed to a rail constructed on the site of a right of way only 2.47 metres wide.

A dispute occurred and the owner of the burdened land wished to prevent the owner of the benefited land from using the inclinator because the right of way spoke of using vehicles. It did not refer to using the burdened owner's inclinator, which was a fixture to the land. It was argued the benefited owner had to supply their own inclinator which was impossible because of the physical characteristics of the landform and the presence of the burdened owner's inclinator.

Slattery J in the NSW Supreme Court said that both the authority of *Westfield* and *Sertari* and logic supported the proposition that the Court could take into account the physical characteristics of the two blocks of land in construing the terms of the right of way. He said, "It is difficult to give content to the rights under an easement unless some account is taken of the physical characteristics of the tenements. Otherwise the parties are engaged in an empty debate about the meaning of words in an instrument without reference to what is happening on the ground:"[34] – [36].

He went on to hold that the terms of the easement entitled the benefited owners to use the existing inclinator. But in doing so they must exercise that right in a way that was necessary and reasonable: [50].

3.6 *WESTFIELD* SUMMARY

The interpretation of easements is a fundamentally important matter for the development industry.

[34] Richard Van Brugge & Anor v Meryl Lesley Hare & Anor [2011] NSWSC 1364 (4 November 2011)

Following the High Court's decision in *Westfield*, where title is under the Torrens system, there are limitations on the materials to which regard may be had when construing the terms of an easement over land. These are summarised as:

(a) One must begin with the terms of the easement as they appear in the instrument.

(b) Evidence is admissible, in the absence of contrary argument, to make sense of the terms or expressions found in the Register, such as surveying terms and abbreviations on the deposited plan.

(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 do 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."[35]

(e) Extrinsic evidence of the physical characteristics of the land is allowed to assist in construing the easement: *Currumbin Investments v Parkwood* and *Van Brugge v Hare*.

(f) Extrinsic evidence of physical characteristics or use may become difficult to prove over time.

(g) Extrinsic evidence of the use of the land at the time of the grant may be allowed to assist in construing the easement if *Currumbin Investments v Parkwood* is followed, but this proposition is contrary to *Sertari*, *Fermora* and other decided cases.[36]

(h) Material may be incorporated by reference in the terms of an easement by attaching the material to a memorandum which is filed under section 80A of the *Real Property Act* NSW 1900 [37]or its equivalent and so has become part of the Register. While *Currumbin Investments v Parkwood* suggests that other material may be incorporated by reference *Fermora v Kelvedon* is emphatically against this proposition. Section 80A(6) raises the possibility that there may be other means of incorporating material by reference. But from the practical point of view of accessing this material that too may disappear over time unless recorded on the Register itself by use of a memorandum under section 80A of the *Real Property Act* 1900 (NSW).

(i) 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.

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[35] Westfield Management Limited v Perpetual Trustee Company Limited [2007] HCA 45; (2007) 233 CLR 528 [30]

[36]eg Neighbourhood Association DP No 285220 v Moffat [2008] NSWSC 54, Richard Frank Horton Berryman & Anor v Robert Sonnenschein & Anor [2008] NSWSC 213, Shelbina Pty Ltd v Richards [2009] NSWSC 1449 [2009] ANZ Conv R 10-007; [2010] NSW Conv R 56-255; 14 BPR 27,123

[37]http://www.legislation.nsw.gov.au/maintop/view/inforce/act+25+1900+cd+0+N

4 CONCLUSION

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.

Ideally that risk will be assessed before a development parcel is purchased, and certainly as part of the development application preparation process and before construction has begun.

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 terms of an easement, which is normally 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 a benefited user is very real, as highlighted by *Sertari.* The surveyor and the lawyer need to work together as a team for the benefit of the client.

After *Westfield* it is very firmly established that for Torrens title land the Torrens Register rules: Torrens property rights are paramount.

Consent granted by the planning authorities 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 as evidence of intention will not be admissible to read down the concept of "all purposes". Burdened landowners will have to argue the reasonableness of the proposed user and the broader the terms of the grant, the more difficult that will be.

If general words will be given effect, is the use of the statutory short forms prudent?[38] 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.* The dispute in *Van Brugge v Hare* would have been avoided if the easement had been drafted to include terms relating to the use and maintenance of the inclinator as the easement was being granted when the infrastructure was already in place.

It is wise not to try to incorporate other documents into the terms of the easement by reference unless a statutory mechanism such as a memorandum under section 80A of the Real Property Act 1900 (NSW) is utilised.

[38] 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

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 owner [39].

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 to benefit their land coupled with the payment of compensation to the burdened landowner[40].

It follows that surveyors and engineers need to work closely with lawyers in a team approach to ensure that the terms of easements are not only clear and unambiguous but also deal with all necessary matters regarding use, future maintenance and regulation of the easements. That way the opportunity for disputes in future years will be limited.

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BIOGRAPHICAL NOTE

Sandy Rendel is a partner in RMB Lawyers, a leading regional law firm in New South Wales, Australia. 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 Property Council of Australia, Illawarra Chapter (NSW). He has delivered papers to the UDIA Southern Chapter, the Southern Group Institute of Surveyors NSW, RMB Property

[39] 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 [2008] NSW Conv R 56-200

[40]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

Developers Master Classes and the University of Wollongong. He was a conference delegate and delivered a paper to the South East Australian Surveying and Spatial Information Congress 2009 and the FIG Congress 2010. 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 a Committee member of the Kiama Regional Wine Show from its inauguration in 2004, serving as inaugural Committee Chairman until 2011.

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