GALLAGHER v RAINBOW and OTHERS

HIGH COURT OF AUSTRALIA

BRENNAN, DAWSON, TOOHEY, GAUDRON and MCHUGH JJ

30 June 1993 – Brisbane; 1 June 1994 – Canberra

Real property – Easements – Scheme of subdivision – Construction of terms of easement – Entitlement to benefit of easement – (QLD) Real Property Act 1861-1988.

In 1985 the Brisbane City Council approved a subdivision of land in St Johns Wood, Brisbane. Lots 13 to 18 clustered around Buckingham Street. Lots 13 and 18 had a frontage to Buckingham Street. Lots 14 to 17 did not. They depended for access to Buckingham Street on a private road running between Lots 13 and 18. The private road was constructed on four slivers of land each being part of one of Lots 14 to 17. Each of the registered proprietors of Lots 14 to 17 owned one quarter of the private road. Each had an easement of way over the other three quarters.

The easements were registered under the provisions of the Real Property Act 1861-1988 (Qld). The terms of the grant of easement were identical. One of the terms was that costs of maintenance and repair of the servient tenements be borne by the registered proprietors for the time being of Lots 14 to 17 as to one quarter each respectively.

The respondents proposed to subdivide each of Lots 16 and 17 into three parcels. The appellant, the owner of Lot 14, objected to the proposal. The appellant's concern extended to the additional use to which the private road would be put by reason of the added owners.

The appellant claimed that the grants of easement precluded further subdivision of the lots concerned or, at the least, use of the private road by anyone other than the registered proprietors of Lots 14 to 17 in the form in which those lots stood at the time of grant.

Lee J at first instance refused to make declarations that the respondents were not entitled to exercise their rights of way for the purposes of subdividing Lots 16 and 17 or that they were not entitled, in the event of subdivision, to exercise rights of way by virtue of the easements in respect of each or any of such subdivided parts of Lots 16 and 17.

The Queensland Court of Appeal (McPherson and Pincus JJA and Thomas J) dismissed the appellant's appeal and held that the benefit of the easements would attach to the dominant tenements in their subdivided form.

Held, per Brennan, Dawson and Toohey JJ (Gaudron and McHugh JJ dissenting):

(i) Whether the owners of subdivided lots of a dominant tenement are entitled to the benefit of an easement is a question of construction of the grant.

(ii) There is a presumption that an easement is appurtenant to the dominant tenement and to each part of it. To the extent that any part of the dominant land may benefit from the 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.

> *Newcomen v Coulson* (1877) 5 Ch D 133; *Re Maiorana and the Conveyancing Act* (1970) 92 WN(NSW) 365; *Crawford Realty Co v Ostrow* (1959) 150 A 2d 5, approved.

(iii) The absence of any express provision in the easements relating to the liability of owners of subdivisions to contribute to the cost of maintaining the road was no

reason for denying to those owners the benefit of the easements appurtenant to the subdivided lot. The covenant in each easement that each original lot will bear a quarter of the cost remains unaffected by the subdivision.

Appeal

This was an appeal from the Queensland Court of Appeal which had dismissed an appeal from a decision by the trial judge refusing to make declarations relating to the exercise of rights of way provided for by certain easements.

D B Fraser QC and *M J Byrne* for the appellant.

P A Keane QC and *J J G Haydon* for the respondents.

Brennan, Dawson and Toohey JJ. This appeal concerns a scheme of easements created to provide street access to four otherwise landlocked properties and the effect on that scheme of a subdivision of two of these properties.

The easements

In 1985 the Brisbane City Council approved a subdivision of about 6 hectares of land in St Johns Wood, Brisbane into 23 lots. Lots 13 to 18 cluster around Buckingham Street. Lots 13 and 18 have a frontage to Buckingham Street. Lots 14 to 17 do not; they depend for access to Buckingham Street on a private road running between Lots 13 and 18. The private road is constructed on four slivers of land, each being approximately 1.5 metres in width and being part of one of Lots 14 to 17. Each of the registered proprietors of Lots 14 to 17 therefore owned one quarter of the private road; each had an easement of way over the other three quarters.

The scheme appears in the plan accompanying this judgment. From the plan it can be seen that Lots 17, 16, 15 and 14 are respectively the servient tenements of the slivers marked "D", "E", "F" and "G". The scheme came into effect on 5 November 1987 in accordance with grants made as follows:

Easement No	Dominant tenement	Servient tenement
J347385R	17	E, F, G
J347386V	14, 15, 16	D
J347388B	16	F, G
J347390M	14, 15	E
J347393V	14	F
J347394X	15	G

All easements were registered under the provisions of the Real Property Act 1861-1988 (Qld) (the Act). In each case the terms of the grant of easement were identical. It is sufficient to set out the following covenants:

1. The grantor and the grantee covenant and it is a condition of this easement that for the duration of the easement the grantor will maintain and repair the servient tenement in a proper state of repair fair wear and tear excluded.

2. The grantor and the grantee covenant and it is a condition of this easement that the costs of maintenance and repair of the servient tenement shall be borne

by *the registered proprietors for the time being* of Lots 14, 15, 16 & 17 on Registered Plan 209227 Parish of Enoggera, County of Stanley as to one quarter each respectively.

3. The grantor and the grantee covenant and it is a condition of this easement that if the condition of the servient tenement deteriorates to such an extent as to necessitate or require replacement thereof *the registered proprietors for the time being* of Lots 14, 15, 16 & 17 on Registered Plan No 209227, Parish of Enoggera, County of Stanley, shall bear the costs of replacement as to one quarter each respectively.

4. If there is any dispute relating to the need to carry out work under this grant of easement; the nature of the work; its reasonable cost or the parties' contribution to the costs, that dispute shall be determined on the application of either the grantor or the grantee by a single person appointed by the President for the time being of the Institution of Engineers Australia Queensland Division. The person appointed shall be a member of the Institution of Engineers Australia Queensland Division having at least five years standing and he shall act as an expert and not as an arbitrator. Each party shall pay its own costs of the determination and the person appointed shall nominate which party or parties shall bear his costs. The determination of the person appointed shall be conclusive and binding on the parties [emphasis added].

The respective grantors and grantees were named on the first page of the grant of easement but cl 6 extended the connotation of those terms. It provided:

> And it is hereby further agreed and declared that the expression "the grantor" shall where context so admits or requires include Clive Sydney Appleby and Merril Lucienie Appleby and Maree Elizabeth Rainbow and *the transferees and assigns of the grantor* and the registered proprietor or proprietors owner or owners (and their respective successors executors administrators and assigns as the case may be) and the occupier or occupiers for the time being of the servient tenement and the expression "the grantee" shall where the context so admits or requires include *the transferees and assigns of the grantee* and the registered proprietor or proprietors owner or owners (and their respective successors executors administrators and assigns as the case may be) and the occupier or occupiers for the time being of the dominant tenement [emphasis added].

Again in each case, the purpose of the easement was identified in these terms:

> A right of way for the grantee and the registered proprietors and occupiers for the time being of the dominant tenement and all persons authorised by them together with all others having the same rights as the grantee but in common with the grantor and every other person who is for the time being the registered proprietor of the servient tenement at all times day or night and for all purposes ordinarily incidental to or connected with domestic use and enjoyment of the dominant tenement or any part thereof with or without animals carriages wagons motor vehicles and all vehicles of any other description whatsoever, laden or unladen to pass and repass over along or across the servient tenement.

It is clear, as the trial judge held, that the easements were intended to be reciprocal. His Honour also found that at the time the easements were granted no further subdivision of the land was contemplated by the owners of the lots. The basis on which special leave to appeal to this court was granted precludes any review of the rejection by the trial judge and the Court of Appeal of the appellant's argument that one of the registered proprietors of Lot 17 held that land on trust not to subdivide it It was the

proposed subdivision of Lots 16 and 17 by the respondents that gave rise to this litigation. The grant of special leave confines the appeal to "the question of construction of the easements". At the same time, the question of construction cannot be divorced from general principles governing the creation and operation of easements or from the background against which the easements were granted.

The dispute

What Lee J, the trial judge, described as "this bitter dispute between neighbours" began with the purchase by the appellant, Lorraine Cheryl Gallagher, of Lot 14 in the subdivision from Clive Sydney Appleby, Merril Lucienie Appleby and one of the first respondents, Maree Elizabeth Rainbow. The appellant bought under contract dated 27 February 1988 and by March 1991 she had completed the building of a substantial home on the land.

The first respondents, Allan Roy Rainbow and Maree Elizabeth Rainbow, are the registered proprietors of Lot 17. The second respondents, Owen Peter Coaldrake and Lee Ann Coaldrake, are the registered proprietors of Lot 16. The respondents decided to further subdivide Lots 16 and 17 into three parcels each. Assuming the purchasers of the subdivided lots are entitled to the benefit of the easements, the result is that the registered proprietors of eight parcels of land are entitled to the benefit of the easements. Four of those parcels, being newly subdivided from the original Lots 16 and 17, are separated from the slivers of land on which the road is constructed.

The respondents sought and obtained from the Brisbane City Council approval to subdivide Lots 16 and 17 into six lots. The appellant, who claimed that the value and her enjoyment of Lot 14 would be adversely affected by the presence of four additional homes on Lots 16 and 17, objected to the proposal. Her concern extended to the additional use to which the private road would be put by reason of the added owners.

The litigation

The appellant brought an action against the respondents, claiming that the grants of easement precluded further subdivision of the lots concerned or, at the least, use of the private road by anyone other than the registered proprietors of Lots 14 to 17 in the form in which those lots stood at the time of grant. She claimed as well that Mrs Rainbow was bound by statements made by her co-owner and partner in Lot 14, Mr Appleby, those statements resulting in a trust not to further subdivide the lot. But, as mentioned earlier, the trust argument was rejected below and is not before this court.

In her action against the respondents the appellant sought declaratory and injunctive relief. Lee J granted a declaration that the respondents were entitled to the rights of way provided for by easements D, E, F, and G "only in respect of the undivided properties comprising Lots 16 and 17 respectively". However, his Honour refused to make declarations that the respondents were not entitled to exercise their rights of way for the purposes of subdividing Lots 16 and 17 or that they were not entitled, in the event of subdivision, to exercise rights of way by virtue of the easements "in respect of each or any of such subdivided parts of Lots 16 and 17". His Honour awarded $2 nominal damages "past and future" for some acts of

trespass. He refused the injunctive relief claimed relating to the proposed subdivision except to maintain the status quo until the resolution of an appeal by the appellant. This was on the footing that the appellant would not suffer any substantial damage if the subdivision proceeded and indeed might enjoy an advantage. The appellant appealed to the Court of Appeal; her appeal was dismissed. However, while agreeing with the trial judge that the appellant was not entitled to an injunction or to other than nominal damages, the Court of Appeal (McPherson and Pincus JJA and Thomas J) held that the benefit of the easements would attach to the dominant tenements in their subdivided form.

By her notice of appeal to this court the appellant sought similar declaratory and injunctive relief as asked for in her statement of claim. But circumstances had changed since Lee J had delivered judgment and granted an interlocutory injunction. At that time a plan of subdivision had been approved and lodged with the Registrar of Titles. The Court of Appeal refused to grant any further injunction and the plan of subdivision was thereafter registered and new certificates of title issued. The appellant's property has now been sold. In consequence, by the time the appeal to this court was argued the appellant sought only an inquiry as to damages in lieu of the injunction which was no longer available to her. She accepted, as her counsel said, that "the jurisdiction to grant equitable damages in lieu of an injunction depends upon the plaintiff having had that right at some stage during the proceedings".

The Real Property Act

The Act provides for the registration of easements "annexed to or used and enjoyed together with other land under the provisions of this Act".[1] The Act does not dictate the scope of an easement; it provides that, on registration, the estate or interest intended to be granted passes to the registered proprietor of the dominant tenement.[2] When a plan of subdivision of a dominant tenement is registered, the registered proprietor of each subdivided lot must apply for and receive a certificate of title for the particular lot.[3] Section 67 of the Act implies a covenant that the grantor do what is necessary to give effect to the instrument of grant.[4] Section 53 of the Property Law Act 1974 (Qld) provides that, subject to any contrary intention expressed and the provisions of the Real Property Act, covenants relating to any land of a covenantee are deemed to have been made with his or her successors in title.

Construction of the easements

In each case the easement granted in respect of Lots 14 to 17 is expressed to be "for all purposes ordinary [sic] incidental to or connected with domestic use and enjoyment of the dominant tenement or any part thereof". As Thomas J observed in the Court of Appeal:

> Subject to the constraints of domestic use in the purpose covenant, there is no restriction upon the intensity of the use, or the number of co-owners or the number of persons who might come and go from each lot.

1. s 51(1); see also s 119A as to the registration of a plan designating a proposed easement
2. s 43
3. s 119(4)
4. ss 43, 44

Furthermore, the terms of each easement are, as Thomas J noted, "consistent with the prospect of subdivision". The easement is for the benefit of the dominant tenement "or any part thereof". The term "grantee" includes transferees and assigns and as well the occupier or occupiers for the time being of the dominant tenement. "Grantor" has a corresponding meaning. The extended meaning of grantee is apt to include transferees of subdivisions of a dominant tenement.

The terms of the respective easements contain no prohibition against the transfer of a subdivided lot or the enjoyment of the easement by the purchaser of a subdivided lot. The enjoyment of the easement by the registered proprietor of a subdivided lot is wholly consistent with the language of the grant. Whether the owners of subdivided lots of a dominant tenement are entitled to the benefit of an easement is a question of construction of the grant. Subject to a qualification relating to excessive user, the general principle is that stated by Jessel MR in *Newcomen v Coulson*:[5]

> It was said that as this was a grant to the owner and owners for the time being of the lands, if the lands became severed the owners of the severed portions could not exercise the right of way. I am of opinion that the law is quite clear the other way. Where the grant is in respect of the lands and not in respect of the person, it is severed when the lands are severed, that is, it goes with every part of the severed lands. On principle, this is clear.

Australian authority is in line with *Newcomen v Coulson*. Thus in *Re Maiorana and the Conveyancing Act* Hope J said:[6]

> Where a vendor owns a parcel of land and conveys part of it to a purchaser, and in the relevant conveyance also grants to the purchaser a right of way from some street or public road to a place within the land conveyed or contiguous with the land conveyed, there is a presumption that the dominant tenement is the land conveyed and every part of it . . . prima facie the inference to be drawn is that the right of way is appurtenant to every part of the land retained and not merely to some part of it.

Other Australian decisions supporting a presumption that an easement is appurtenant to the dominant tenement and to each part of it are mentioned in Butt, *Land Law*.[7]

The presumption favouring accommodation of each part of a dominant tenement when subdivided is also supported by the decision of the Supreme Court of Rhode Island in *Crawford Realty Co v Ostrow*.[8] The Supreme Court there cited with approval a passage from American Law of Property[9] stating that if a dominant tenement is subdivided, "the easements appurtenant to

5. (1877) 5 Ch D 133 at 141
6. (1970) 92 WN (NSW) 365 at 374
7. 2nd ed (1988), pp 307-8, citing as well as *Re Maiorana: Guth v Robinson* (1977) 1 BPR 97017 at 9210-11; *Edwards v Pieper* (Supreme Court of NSW, 2 March 1981), reported only in part in [1981] 1 NSWLR 46; cf *Jennison v Truficante* (1980) 1 BPR 97074
8. (1959) 150 A 2d 5 at 9; see also *Rusciolelli v Smith* (1961) 171 A 2d 802 at 806 to like effect
9. (1952), vol 2, pp 285-6

it become subdivided and attach to each separate part of the subdivided dominant tenement unless this result is prohibited by the terms of its conveyance".[10]

Commenting on *Crawford Realty Co v Ostrow*, Siedel says:[11]

> Easements appurtenant are considered apportionable for two major reasons: first, because subdivision is so common that it is assumed that the parties are considering it as part of normal real estate development, and secondly, because the benefits to the dominant tenement generally outweigh the burden to the servient tenement.

This statement tends to explain rather than to offer a principle. The principle is that an easement is no mere personal right; it is attached to the dominant land for the benefit of that land.[12] To the extent that any part of the dominant land may benefit from the 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.

However, the owners of subdivisions of the dominant tenement may be restricted in their use of the servient tenement within the limits stated by Gale:[13]

> If a severance of the dominant tenement takes place, all its easements which are attached to the tenement and not to the person of the owner will attach to the severed portions.

But, he adds:

> It is obvious, however, that by such severance no right is acquired to impose an additional burthen on the servient tenement. However numerous the occupants of the severed tenement may be, they must still confine themselves within the limits of the right existing at the time of severance.

Goddard[14] puts the matter this way:

> The result . . . appears . . . to be, that if a dominant tenement is divided between two or more persons, a right of way appurtenant thereto becomes appurtenant to each of the severed portions, *if such distribution of the easement is not at variance with the actual or presumed grant under which the right has been acquired* [emphasis added].

The effect of subdivision on the prescribed contribution to the cost of maintaining the private road was considered by the Court of Appeal not to rebut the presumption because the contribution required from each of the original lots would remain the same. The absence of any express provision relating to the liability of owners of subdivisions to contribute to the cost of

10. The court did suggest that in some circumstances a subdivision of the dominant tenement may have the effect of extinguishing an easement by rendering the easement of no value to the land in its subdivided form. But that is not a situation with which we are concerned. Nor are we concerned with a situation in which the easement does not accommodate the subdivided portions for the benefit of which an easement is claimed.
11. *Real Estate Law* (1979), p 92
12. *Ackroyd v Smith* (1850) 10 CB 164 at 187-8; 138 ER 68 at 77-8; *City of Keilor v O'Donohue* (1971) 126 CLR 353 at 369 per Windeyer J
13. Gale, *A Treatise on the Law of Easements* (7th ed, 1899), p 77. The discussion does not appear in the current edition: 15th ed, (1986)
14. Goddard, *A Treatise on the Law of Easements* (8th ed, 1921), p 392 See also Innes, *A Digest of the Law of Easements* (8th ed, 1911), pp 65, 86-7 edited by Goddard, to like effect

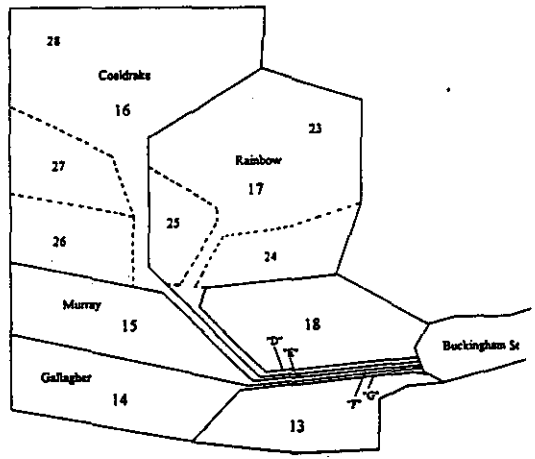
maintaining the road is no reason for denying to those owners the benefit of the easements appurtenant to the subdivided lot. The covenant in the easement that each original lot will bear a quarter of the cost remains unaffected by the subdivision. It was not necessary for the Court of Appeal (nor is it necessary for this court) to determine whether the owner of a subdivided lot who discharges the liability of all owners of the original subdivision is entitled to contribution from the owners of the other subdivided lots of that subdivision.

It may be that the effect of the Act is that the covenant to contribute to "the costs of maintenance and repair of the servient tenement" is so intimately connected with the enjoyment of the dominant tenement that it runs with the land so as to bind purchasers of subdivided lots.[15] But the issue was not pursued in argument and it is unnecessary to reach a conclusion on this matter.

Another matter which did not have to be determined by the Supreme Court was the extent to which use of the right of way by purchasers of Lots 16 and 17 in subdivided form might be intensified to such a degree as to be restrainable as exceeding the subject matter of the grant. Because Lots 16 and 17 had not then been subdivided no factual situation had arisen for determination; the question does not arise before this court. However, Thomas J considered an argument on behalf of the appellant that the construction of houses on new allotments by the first respondents, who are builders, for the purposes of sale was not "domestic use" within the terms of the covenants. His Honour said, and we respectfully agree, that the use would still be for a purpose incidental to or connected with domestic use.

Once it is accepted that the benefit of the easements would pass to the registered proprietors of the lots into which Lots 16 and 17 were subdivided, there can be no question of an injunction to restrain the subdivision or to preclude the consequent attachment to the new allotments of the benefit of the easements. And if an injunction was not available at any stage to the appellant, there can be no question of equitable compensation or damages in lieu of an injunction. This much was accepted by the appellant.

The appeal must be dismissed.



15. See, by way of analogy, *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976) 136 CLR 326, 9 ALR 39

Gaudron J. The facts are set out in other judgments. All that need be noted for present purposes is that the proprietors of four residential allotments (the original lots) granted reciprocal rights of way and, thus, created their own private road. It is in that context that a question arises as to the meaning of the expression "the grantee and the registered proprietors and occupiers for the time being of the dominant tenement". More particularly, the question is whether that expression covers the registered proprietors and occupiers of the several lots into which an original lot is or may be subdivided, as the respondents contend, or whether it refers solely to the proprietor(s) and occupier(s) of an unsubdivided original lot, as the appellant claims. If the words are viewed in isolation, either meaning is open.

Given that a right of way is a right attaching to land and not merely a personal right, there is much to be said for the view that, in the absence of definite indications to the contrary, a right of way should be construed on the basis that, if the original dominant tenement is subdivided, the right of way attaches to each and every lot in that subdivision. However, in this case there are strong and definite indications to the contrary.

As appears from the judgment of McHugh J, each grantor and grantee covenanted for the maintenance and repair of the servient tenement which he or she owned. A further covenant between grantor and grantees provided that the maintenance and repair costs should be borne equally by the registered proprietors of each of the four original lots which were precisely identified as "Lots 14, 15, 16 & 17 on Registered Plan No 209227". If the words "the grantee and the registered proprietors and occupiers for the time being of the dominant tenement" are construed on the basis that they extend to the registered proprietors and occupiers of the several lots into which an original lot is or may be subdivided, the cost-sharing covenant is rendered unworkable. The position is even more unsatisfactory if the matter is approached on the basis which the respondents' argument would seem to allow, namely, that each of the four original lots can be subdivided and re-subdivided into as many new lots as size and shape permit.

As McHugh J illustrates, the cost-sharing covenant simply cannot work according to its terms if the right of way is construed in the manner for which the respondents contend. That being so, that construction should be rejected.

I would allow the appeal.

McHugh J. The question in this appeal is whether the owners of parts of a subdivided dominant tenement are entitled to the benefit of an easement granted for the enjoyment of that tenement. The appeal is brought against an order of the Court of Appeal of the Supreme Court of Queensland. The Court of Appeal reversed an order, made by Lee J in the Supreme Court, which had declared that the owners of the subdivided tenement were not entitled to the benefit of the easement. In my opinion, the appeal against the order of the Court of Appeal should be allowed.

The nature of the dispute

The appellant and the respondents were neighbours. They owned land in a subdivision of 23 lots which had been conditionally approved in 1985. The appellant purchased Lot 14 by a contract dated 27 February 1988 The first

respondents owned Lot 17; the second respondents owned Lot 16. A private roadway gave Lots 14, 15, 16 and 17 access to a public street. The roadway had been formed from strips of land belonging to each of those four lots. Reciprocal easements over each portion of the roadway were given and taken by the owners of those lots. The easements were registered under the Real Property Act 1861 (Qld). A plan of the four lots is annexed to the judgment of Brennan, Dawson and Toohey JJ.

By the terms of the grant of the easement, the owner of each lot was responsible for one quarter of the cost of maintenance and repair of the roadway. Each grant was in identical terms. It contained the following covenants:

> 1. The grantor and the grantee covenant and it is a condition of this easement that for the duration of the easement the grantor will maintain and repair the servient tenement in a proper state of repair fair wear and tear excluded.
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> 2. The grantor and the grantee covenant and it is a condition of this easement that the costs of maintenance and repair of the servient tenement shall be borne by the registered proprietors for the time being of Lots 14, 15, 16 & 17 on Registered Plan 209227 Parish of Enoggera, County of Stanley as to one quarter each respectively.
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> 3. The grantor and the grantee covenant and it is a condition of this easement that if the condition of the servient tenement deteriorates to such an extent as to necessitate or require replacement thereof the registered proprietors for the time being of Lots 14, 15, 16 & 17 on Registered Plan No 209227, Parish of Enoggera, County of Stanley, shall bear the costs of replacement as to one quarter each respectively.
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> ...
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> 6. And it is hereby further agreed and declared that the expression "the grantor" shall where the context so admits or requires include [the named grantors] and the transferees and assigns of the grantor and the registered proprietor or proprietors owner or owners (and their respective successors executors administrators and assigns as the case may be) and the occupier or occupiers for the time being of the servient tenement and the expression "the grantee" shall where the context so admits or requires include the transferees and assigns of the grantee and the registered proprietor or proprietors owner or owners (and their respective successors executors administrators and assigns as the case may be) and the occupier or occupiers for the time being of the dominant tenement.
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> ...
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> A right of way for the grantee and the registered proprietors and occupiers for the time being of the dominant tenement and all persons authorised by them together with all others having the same rights as the grantee but in common with the grantor and every other person who is for the time being the registered proprietor of the servient tenement at all times day or night and for all purposes ordinary [sic] incidental to or connected with domestic use and enjoyment of the dominant tenement or any part thereof with or without animals carriages wagons motor vehicles and all vehicles of any other description whatsoever, laden or unladen to pass and repass over along or across the servient tenement.

The present dispute arose out of a decision by the respondents to subdivide their lots (16 and 17) into three lots each. That meant that eight parcels of land would rely upon the private road for access to the street. The appellant objected to the use of the roadway by the lots resulting from the subdivision

In the Supreme Court, the appellant argued that she was entitled to damages for trespass and nuisance and for an injunction restraining the respondents from using the easement for the purposes of carrying out the subdivision of the land and from proceeding with the subdivision itself. However, after the judgment of the Court of Appeal was delivered, the plan of the subdivision was registered; new certificates of title were issued; and new easements were created. The appellant has now sold her property. As a result, in this court, the only order that she seeks against the respondents is an order for an inquiry as to damages.

The Supreme Court of Queensland

Lee J held that the terms of the grant of the easement precluded the occupiers of the subdivided land from enjoying the easement. His Honour held that the expression "incidental to or connected with the domestic use" in the grant was inconsistent with the subdivision of the land for profit. However, he held that, because the appellant had suffered no damage and might even enjoy an advantage if the subdivision proceeded, she was only entitled to nominal damages of $2.

The Court of Appeal

The Court of Appeal dismissed an appeal by the appellant.[16] Thomas J (with whom McPherson and Pincus JJA agreed), rejected the contention that the subdivision was inconsistent with the stipulation that the easement be used for purposes "incidental or connected with domestic use". His Honour held that it would not infringe the domestic use requirement of the easement because the proposed subdivision was for residential purposes. He also rejected the contention that it was intended that there should be only four users of the easement. His Honour regarded the inequality of liability for repair as immaterial because the appellant was also entitled to subdivide her land. Accordingly, there was no legal inequality.

The construction of a grant conferring an easement

At common law the meaning of an easement conferred by a deed of grant is determined by reference to the language of the grant construed in the light of the circumstances.[17] In *Waterpark v Fennell*,[18] Lord Wensleydale said:

16. *Gallagher v Rainbow* (1993) Q Conv R 54-443

17. *Waterpark v Fennell* (1859) 7 HLC 650 at 684; 11 ER 259 at 272-3; *Newcomen v Coulson* (1877) 5 Ch D 133 at 141; *Cannon v Villars* (1878) 8 Ch D 415 at 420; *Callard v Beeney* [1930] 1 KB 353 at 360; *Johnstone v Holdway* [1963] 1 QB 601 at 612; *The Shannon Ltd v Venner Ltd* [1965] Ch 682 at 691; *Bracewell v Appleby* [1975] Ch 408 at 416-17; *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1975] 1 WLR 468 at 477; *Proprietors Strata Plan No 9,968 v Proprietors Strata Plan No 11,173* [1979] 2 NSWLR 605 at 610-11

18. (1859) 7 HLC 650 at 684; 11 ER 259 at 272-3. This passage was cited and applied by Wright J, as he then was, in *Callard* [1930] 1 KB at 360 in relation to the creation of an easement made by deed. In the same case, Talbot J said (at 358) that evidence of the circumstances existing at the date of the deed are admissible "to see whether there is anything in them which makes it impossible or unreasonable to apply the words according to their primary meaning". However, that is too restricted a view of the use of the extrinsic circumstances surrounding the execution of a deed See *St Edmundsbury* [1975] 1 WLR at 477

> The construction of a deed is always for the court; but, in order to apply its provisions, evidence is in every case admissible of all material facts existing at the time of the execution of the deed, so as to place the court in the situation of the grantor.

An easement over Torrens system land is not created by deed. But a document registered under that system is deemed to be a deed.[19] The principles of construction that have been adopted in respect of the grant of an easement at common law, therefore, are equally applicable to the grant of an easement in respect of land under the Torrens system.[20]

In construing the grant of an easement – whether at common law or under the Torrens system – "the court will consider (1) the locus in quo over which the way is granted; (2) the nature of the terminus ad quem; and (3) the purpose for which the way is to be used".[21] Thus, in *Cannon v Villars*,[22] Jessel MR said:

> Prima facie the grant of a right of way is the grant of a right of way having regard to the nature of the road over which it is granted and the purpose for which it is intended to be used; and both those circumstances may be legitimately called in aid in determining whether it is a general right of way, or a right of way restricted to . . .

In the absence of a contrary indication, the grant is construed against the grantor.[23] Nevertheless, the court will not construe the grant in a way that would enable an easement to be used in a manner that goes beyond the use contemplated by the parties at the time of the grant.[24] The reason for this rule is that every easement is a restriction on the property rights of the owner of the servient tenement. Speaking generally, where there is an alteration in the use of the dominant tenement, the grantee has no right to use the easement for any new and additional purpose of the dominant tenement. This proposition applies to grants by prescription[25] as well as to express grants.

Accordingly, 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.[26] So, in *Harris v Flower*,[27] Romer LJ said:

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19. Real Property Act 1861 (Qld), s 35
20. *Grinskis v Lahood* [1971] NZLR 502 at 508-9; *Hutchinson v Lemon* [1983] 1 Qd R 369 at 374-5
21. *Gale on Easements* (1986, 15th ed), p 292
22. (1878) 8 Ch D at 421. See also *Todrick v Western National Omnibus Co Ltd* [1934] Ch 190; *Bulstrode v Lambert* [1953] 1 WLR 1064
23. *Williams v James* (1867) LR 2 CP 577 at 581; *Wood v Saunders* (1875) LR 10 Ch App 582 at 584; *Callard* [1930] 1 KB at 358
24. *Todrick* [1934] Ch at 206-7; *Jelbert v Davis* [1968] 1 WLR 589 at 595
25. In *Williams* [1867] LR 2 CP at 580, Bovill CJ said: "In all cases of this kind which depend upon user the right acquired must be measured by the extent of the enjoyment which is proved. When a right of way to a piece of land is proved, then that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which that land might be applied at the time of the supposed grant. Such a right cannot be increased so as to affect the servient tenement by imposing upon it any additional burthen." See also *Wimbledon and Putney Commons Conservators v Dixon* (1875) 1 Ch D 362; *RPC Holdings Ltd v Rogers* [1953] 1 All ER 1029; *British Railways Board v Glass* [1965] Ch 538
26. *South Metropolitan Cemetery Co v Eden* (1855) 16 CB 42 at 57; 139 ER 670 at 676; *Harris v Flower* (1904) 74 LJ Ch 127 at 132, *Bracewell* [1975] Ch at 417

> If a right of way be granted for the enjoyment of Close A, the grantee, because he owns or acquires Close B, cannot use the way in substance for passing over Close A to Close B.

In *Bracewell v Appleby*,[28] Graham J applied this dictum of Romer LJ and held that the owner of a dominant tenement was not entitled to use a right of way for the purpose of gaining access to a house that he subsequently built on adjoining land.[29] In *Jelbert v Davis*,[30] the defendant who owned agricultural land had a right of way to that land over land owned by the plaintiff. Subsequently the defendant converted his land to a caravan park which had more than 200 camping sites. The plaintiff objected to the use of the right of way by caravans and cars that were using the park. The English Court of Appeal held that use of the right of way for such a large number of camping sites was impermissible, as it could not have been within the contemplation of the parties upon the original grant of the easements. The underlying principle was stated by Lord Denning MR as follows:[31]

> ... the true proposition is that no one of those entitled to the right of way must use it to an extent which is beyond anything which was contemplated at the time of the grant.

These cases may be contrasted with *White v Grand Hotel, Eastbourne, Ltd*[32] and *Robinson v Bailey*.[33] In *White*, the conversion of a private residence on the dominant tenement to a lodging house for the drivers of cars whose owners stayed at a nearby hotel owned by the defendants was held not to subject the easement to a use not contemplated at the time of the grant in 1883. At that time, the dominant tenement had one resident with two vehicles. After the conversion it had "many residents of a shifting character with vehicles that do not belong to them".[34] Nevertheless, the Court of Appeal held that the different use was within the terms of the grant. Hamilton LJ said:[35]

> The house in the present case was used as a private dwelling-house in 1883, but with the consent of a third person it might be, as in fact it was, turned into a house which could be used for the purpose of trade.

White v Grand Hotel, Eastbourne, Ltd was applied in *Robinson* where access to a partly completed dwelling house used for storing building materials was held to be within the terms of the grant of the easement to land even though when the grant was made it was contemplated that a dwelling house would be built for occupation on the land. Lord Greene MR

27. (1904) 74 LJ Ch 127 at 132
28. [1975] Ch 408 at 418
29. *Harris* was distinguished by the English Court of Appeal in *Graham v Philcox* [1984] QB 747 but without doubting its correctness. See also *United Land Co v Great Eastern Railway Co* (1873) LR 17 Eq 158
30. [1968] 1 WLR 589. See also *Flavell v Lange* [1937] NZLR 444; Bradbrook & Neave, *Easements and Restrictive Covenants in Australia* (1981) at paras 120-1
31. *Jelbert* [1968] 1 WLR at 595. See also the cases cited there by Lord Denning: *Todrick* [1934] 1 Ch 190; *Malden Farms Ltd v Nicholson* (1956) 3 DLR (2d) 236
32. [1913] 1 Ch 113
33. [1948] 2 All ER 791
34 *White* [1913] 1 Ch at 117
35 ibid

applied the dictum of Hamilton LJ and held[36] that, with the consent of a third party, the land could be used for the new purpose.[37] However, it is not easy to reconcile these two cases with the principle that an easement cannot be used for a purpose that was not contemplated by the parties to the grant. Perhaps the two cases are to be explained on the basis that the parties contemplated that the land might be used for the purposes for which it was ultimately used. But there was no finding to this effect.

Subdivision of a dominant tenement is not of itself sufficient to make any increased use of the servient tenement unreasonable. When a dominant tenement is subdivided, the easement may continue to attach to the subdivided parts.[38] It will usually do so if the grant was made in favour of "every part" of the dominant tenement.[39] Indeed, it has been said that the prima facie inference to be drawn is that the easement "is appurtenant to every part of the land retained and not merely to some part of it".[40] I am unable to accept that there is any such rule.

It is, or at all events was, an established rule of construction that, if a covenant was given for the benefit of the whole of a parcel of freehold land, the presumption was that the covenant did not enure for the benefit of subdivided parts of that land unless a development scheme applied to the land.[41] If that presumption still exists,[42] it is not easy to see any basis for construing a covenant for the benefit of land differently from the grant of an easement for the benefit of land. But in any event, whether or not a covenant or easement is for the benefit of each part of the land affected must depend upon the intention of the parties. That intention is gathered from the terms of the covenant read in the light of the surrounding circumstances. There is no place for artificial presumptions in this process. In *Commonwealth v Amann Aviation Pty Ltd*,[43] I pointed out that the history of the law of evidence had seen an increasing rejection of presumptions and other forms of artificial reasoning. The modern approach favours allowing tribunals of fact to give such probative force to evidentiary materials as they think fit, after having regard to all the relevant circumstances.

Moreover, even if the prima facie inference to be drawn from the grant of an easement is that it is for the benefit of each and every part of the

36. *Robinson* [1948] 2 All ER at 794
37. In *National Trust for Places of Historic Interest or Natural Beauty v White* [1987] 1 WLR 907, *Jelbert v Davis* was distinguished and *White v Grand Hotel Eastbourne Ltd* followed to allow access along the right of way to a carpark. Warner J held that use of the carpark was ancillary to access to the site for which the easement had been granted.
38. *Newcomen* (1877) 5 Ch D at 143
39. See, for example, *Flavell* [1937] NZLR 444
40. *Re Maiorana and the Conveyancing Act* (1970) 92 WN(NSW) 365 at 374; see also *Callard* [1930] 1 KB at 358; *Guth v Robinson* (1977) 1 BPR 97017 at 9210-11
41. *Russell v Archdale* [1964] Ch 38; *Re Jeff's Transfer (No 2)* [1966] 1 WLR 841; *Re Selwyn's Conveyance* [1967] Ch 674; *Re Roche and the Conveyancing Act* (1960) 77 WN(NSW) 431; *Ellison v O'Neill* (1968) 88 WN(NSW) 213 at 221-2 per Walsh JA
42. In England, the presumption now seems to be reversed: *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 WLR 594 at 606-7. In *Gyarfas v Bray* (1990) NSW Conv R 55-519 at 58,879, Bryson J referred to a number of cases in the Equity Division of the Supreme Court of New South Wales where judges had acted on the basis that there was no presumption that a covenant was for the benefit of the land as a whole and did not apply to the subdivisions of that land. His Honour construed the covenant in question without regard to any presumption
43 (1991) 174 CLR 64 at 166, 104 ALR 1

dominant tenement, it does not follow that, upon the subdivision of that tenement, each of the subdivided parts automatically obtains the enjoyment of an easement identical in scope and nature to that enjoyed by the dominant tenement. A dictum of Jessel MR in *Newcomen v Coulson*[44] has been treated as an authority for that proposition.[45] But I doubt that his Lordship was attempting to lay down any presumptive rule. In *Newcomen*,[46] Jessel MR said:

> It was said that as this was a grant to the owner and owners for the time being of the lands, if the lands became severed the owners of the severed portions could not exercise the right of way. I am of opinion that the law is quite clear the other way. Where the grant is in respect of the lands and not in respect of the person, it is severed when the lands are severed, that is, it goes with every part of the severed lands. On principle, this is clear. It never could have been contemplated in the case of an award like this that the property was never to be divided, nor is it to be contended that if a man died and left two or three daughters co-heiresses, and they partitioned the estate, the right of way was lost, and their allotments for ever deprived of access to the highway.

The point that Jessel MR appears to have been making was that, in principle, an easement is capable of benefiting the subdivided parts of a dominant tenement because it is an interest in land and not a mere personal right.[47] I doubt that Jessel MR intended to lay down a rule that, upon a subdivision of the dominant tenement, the easement automatically attached to each and every part of that tenement or even that there was a presumption to that effect.

Whether identical easements attach to the subdivided parts depends upon the construction of the grant and what was in the contemplation of the parties at the time when the easement was created. When an interest in land is created by contract, the intention of the parties is determined by the terms of the grant read in the light of the circumstances known to the parties at the time of the contract. In determining what can fairly be regarded as within the contemplation of the parties in respect of an easement, two circumstances leading to opposite conclusions are usually of great importance. The first is that residential land is so frequently subdivided in Australia that the future subdivision of a dominant tenement can often be regarded as being within the contemplation of the parties to the grant of an easement.[48] The second is that every easement is a restriction on the property rights of the owner of the servient tenement. Consequently, the general rule is that "the burden on the servient tenement cannot be increased either by a substantial alteration in the character and mode of user of the dominant tenement or by an extension of its area".[49] However, ultimately it is a question of the intention of the parties.

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44. (1877) 5 Ch D 133
45. *Guth v Robinson* (1977) 1 BPR at 9210-11
46. (1877) 5 Ch D at 141
47. In a South African case, *Louw v Louw* [1921] CPD 320, a magistrate held that the subdivided parts of a dominant tenement retain enjoyment of an easement. On appeal, Kotze JP said (at 322) that the question had to be decided by reference to "our own law". His Lordship relied upon Roman law authority to support the conclusion of the magistrate.
48. This is the assumption in the United States See Siedel, *Real Estate Law* (1979), p 92
49. *Callard* [1930] 1 KB at 359 per Talbot J

The construction of the grant in this case

In the present case, the purpose of the easement was to give the owners of the four blocks of land access to a public street. To achieve that purpose each owner gave the other three owners an easement over his or her portion of the roadway. Plainly, the parties to each grant intended that the four owners should have equal access and equal obligations in respect of the private roadway. Furthermore, the grant established a relationship between the parties and their successors which was intended to endure indefinitely and which required continual cooperation between the owners of the four domestic blocks. In practice, the parties would need to agree as to whether work was needed on the roadway, when and at what price it should be carried out and who should carry it out. The need for continuing cooperation clearly imported into the agreement both a duty of cooperation and a duty to deal in good faith with each other. Although the benefits and obligations bound the successors of the four owners, the existence of these duties makes it unlikely that it was intended that more than four proprietors would have the benefit and burdens of the grant.

With great respect to those who hold the contrary view, I find it impossible to conclude that the parties contemplated that the carefully worked out scheme entered into by the four proprietors could be thrown out of balance by lots being subdivided. To subdivide two lots into three parcels each would double the amount of wear and tear on the roadway in normal times. Carrying out the subdivision and building new residences would also require a greatly increased use of the roadway by heavy vehicles and equipment. Yet the owner of a lot who did not subdivide would still be obliged to pay one fourth of the cost of repair and maintenance and, when necessary, replacement. I do not think that it is a compelling or even a persuasive argument that each owner had the legal right to subdivide. No doubt each owner had that right. But the question is, was it within the contemplation of the parties to the grant that the right of way could be used by the owners, occupiers and assigns of further lots arising out of the subdivision of an original lot? I can see nothing in the grant or the surrounding circumstances for thinking that it was.

Nothing in the grant indicates that the parties contemplated that one or more lots might be subdivided and the owners of the new lots entitled to use the roadway. When the grant refers to the grantee as including "the transferees and assigns to the grantee and the registered proprietor or proprietors owner or owners . . . and the occupier or occupiers for the time being of the dominant tenement", it is surely referring to the transferees etc of the original lot, not portions of it. If that is so, the respondents gain no assistance from the words "use and enjoyment of the dominant tenement or *any part thereof*" (my emphasis). In any event, the words "any part thereof" seem more consistent with conferring a right on the grantee to use the roadway for every purpose affecting the lot than with attaching the easement itself to each part of the lot.

Not only do the terms of the grant fail to indicate that the parties contemplated that the roadway might be used by the owners of subdivided portions of a lot, but the surrounding circumstances also give no support to that contention. The lots were part of a subdivision "in a small and exclusive estate" approved by the Brisbane City Council on 14 October 1985, subject

to a large number of conditions being observed. The reciprocal easements were entered into on 5 November 1987 and entered in the register book on 15 February 1988. One important condition of the approval of the subdivision was that reciprocal access easement rights be granted over the various access strips. The four easements granted in the present case were identical in terms with easements granted in order to obtain access to lots in three other parts of the subdivision. It is difficult to accept that in November 1987 those entering into the various grants of easements assumed that there would be further subdivisions of the lots of this estate. The assumption that the parties to a grant of easement contemplated that the dominant tenement might be subdivided cannot be made in this case.

Furthermore, under the terms of the grant, the grantor was to "maintain and repair the servient tenement in a proper state of repair fair wear and tear excluded" and "the registered proprietors for the time being of Lots 14, 15, 16 & 17" were to bear the costs of maintenance and repair "as to one quarter each respectively". If Lots 16 and 17 were subdivided, those obligations would cease to exist because the lots themselves would cease to exist. How then could the appellant, as owner of the servient tenement, enforce the obligations of the registered proprietors of Lots 16 and 17? The answer made in the Court of Appeal by Thomas J, who gave the leading judgment, was "that the new owners, as assignees of parts of the dominant tenement, will remain bound by the covenant".[50] His Honour also said that it would seem that, as between themselves, the new owners would have a right of contribution, but that it was unnecessary to pursue the point. His Honour went on to say:[51]

> ... the substance of the matter will be that the benefit of the existing easements over Lot 14 will continue in favour of all persons to whom the subdivided parts of Lots 16 and 17 are assigned, and so that such persons remain collectively liable for the burdens of the existing easement; and the existing easements in relation to which Lots 16 and 17 are the servient tenements will continue in favour of the proprietors of Lot 14 who will remain liable for their quarter contribution to the repair and maintenance.

It appears that his Honour thought that each owner of the new lots had the same obligation as the original registered proprietor. His Honour cited no authority in point for that proposition. After referring to cases concerning leasehold covenants, where assignees had been held bound by the burden of the covenants, however, his Honour said that there was no reason why a similar approach should not be taken in relation to covenants in easements. But, it is not easy to see any relevance between the burden of covenants running with a leasehold and the owner of a freehold being bound by a covenant entered into by an owner of the land of which the freehold was once part.[52] I do not think that cases on leaseholds are any authority for holding that the owners of the subdivided lots are responsible for the obligations of the owners of the original lots.

50. (1993) Q Conv R at 59,396
51. ibid at 59,397
52. See Skapinker, "Does an easement accommodate each subdivided part of the dominant tenement?" (1993) 67 *Australian Law Journal* 606 at 611

A person who is named in a deed and accepts a benefit under that deed is bound by any associated obligation under the deed. In *Tito v Waddell (No 2)*,[53] Megarry V-C, after referring to the "benefit and burden" principle, said:

> One form of the principle is as a technical rule relating to deeds. If a person is named as a party to a deed, but does not execute it, the deed will nevertheless be held to bind him if he knowingly takes the benefit of it. In that form, it is not much more than part of a rule for determining who are to be treated as being parties to a deed. In another form, the rule is that if by an indenture to which A and B were the only parties A granted land to B for life with remainder to C, on terms that the land was to be held subject to certain conditions, then if C entered after B's death and took the land by virtue of the indenture, he thereupon became bound by the conditions, even though he was no party to the indenture.

Furthermore, a successor in title to a person bound by a deed may be bound by obligations in the deed if the successor in title takes a benefit conferred by the deed.[54] However, a person who is not a party to or named in a deed is not bound by every one of its obligations merely because that person takes a benefit under the deed. In *Rhone v Stephens*,[55] Lord Templeman, with the concurrence of the other Law Lords, said:

> I am not prepared to recognise the "pure principle" that any party deriving any benefit from a conveyance must accept any burden in the same conveyance. Sir Robert Megarry V-C relied on the decision of Upjohn J in *Halsall v Brizell*.[56] In that case the defendant's predecessor in title had been granted the right to use the estate roads and sewers and had covenanted to pay a due proportion for the maintenance of these facilities. It was held that the defendant could not exercise the rights without paying his costs of ensuring that they could be exercised. Conditions can be attached to the exercise of a power in express terms or by implication. *Halsall v Brizell* was just such a case and I have no difficulty in wholeheartedly agreeing with the decision. It does not follow that any condition can be rendered enforceable by attaching it to a right nor does it follow that every burden imposed by a conveyance may be enforced by depriving the covenantor's successor in title of every benefit which he enjoyed thereunder. The condition must be relevant to the exercise of the right.

Assuming that the benefit and burden principle extends to persons who are not parties to or named in a deed,[57] it is difficult to fit the principle to the facts of this case. It is hardly to be supposed that each owner of a subdivided lot acquired an obligation to pay to the appellant a one-fourth share of the costs of maintenance and repair although the new owner obtained a substantially lesser interest in the roadway. And I can see no basis in legal principle for holding that the owners of the subdivided lots became collectively liable for that one-fourth share. Furthermore, a parcel of land created by the subdivision need not necessarily be part of the private roadway. Indeed, that appears to be the case with all the newly created

53. [1977] Ch 107 at 289
54. *Rhone v Stephens* [1994] 2 WLR 429; *Halsall v Brizell* [1957] Ch 169; *ER Ives Investments Ltd v High* [1967] 2 QB 379; *Frater v Finlay* (1968) 91 WN(NSW) 730; *Rufa Pty Ltd v Cross* [1981] Qd R 365
55. [1994] 2 WLR at 437
56. [1957] Ch 169
57. Cf *Tito v Waddell (No 2)* [1977] Ch at 294-5

parcels not retained by the respondents. *Re Ellenborough Park*[58] establishes that land may be entitled to the benefit of an easement although it does not adjoin the servient tenement. But the fact that immediate access to these new lots is from other lots and not from the roadway makes it difficult to hold the owners of the subdivided land liable to contribute to the repair of the roadway. It is even more difficult to see the basis on which each owner of the subdivided land would have a right of contribution from owners whose lands form no part of the roadway.

Furthermore, it is difficult to see how the owners of the new lots could enforce the obligation to repair against the original parties to the grant or their successors. In *Liverpool City Council v Irwin*,[59] Lord Cross of Chelsea said that "the general principle [is] that the law does not impose on a servient owner any liability to keep the servient property in repair for the benefit of the owner of the easement". The owners of the new lots are not parties to the grant and they are not the successors of the original owners who continue to retain their ownership of the strips of land which make up the road.

When regard is had to the terms of the grant and all the circumstances of the case including the recency, form and conditions of the subdivision, I think that the best interpretation of the grant is that the parties contemplated that the roadway would be used by four domestic households only. Because that is so, the appeal must be allowed.

Order

Appeal dismissed with costs.

Solicitors for the appellant: *Bayliss Rodgers*.

Solicitors for the respondents: *Sly & Weigall Cannan & Peterson*.

GRAEME JOHNSON
SOLICITOR

58 [1956] Ch 131
59 [1977] AC 239 at 259