NEW SOUTH WALES COURT OF APPEAL

CITATION: Sertari Pty Ltd v Nirimba Developments Pty Ltd [2007] NSWCA 324

FILE NUMBER(S):
40202 of 2007

HEARING DATE(S): 30 July 2007

JUDGMENT DATE: 15 November 2007

PARTIES:
Sertari Pty Limited (ACN 003 729 940) - Appellant
Nirimba Developments Pty Limited (ACN 097 985 228) - Respondent

JUDGMENT OF: Tobias JA McColl JA Handley AJA

LOWER COURT JURISDICTION: Supreme Court - Equity Division

LOWER COURT FILE NUMBER(S): SC 5386/06

LOWER COURT JUDICIAL OFFICER: Windeyer J

LOWER COURT DATE OF DECISION: 22 March 2007

LOWER COURT MEDIUM NEUTRAL CITATION:
Nirimba Developments Pty Ltd v Sertari Pty Ltd [2007] NSWSC 252

COUNSEL:
Mr T S Hale SC; Mr M A Izzo - Appellant
Mr S Kalfas SC; Ms A J Tibbey - Respondent

SOLICITORS:
Holding Redlich - Appellant
Deacons - Repondent

CATCHWORDS:
EASEMENT - Torrens System - Construction - Extrinsic evidence not admissible;
EASEMENT - Right of carriageway - Excessive user
EASEMENT - Development application by dominant owner - Reasonably necessary for exercise of rights of dominant owner - Servient owner bound to consent
TORRENS SYSTEM - Easement - Construction - Extrinsic evidence not admissible

LEGISLATION CITED:
Conveyancing Act 1919
Environmental Planning and Assessment Regulation 2000
Real Property Act 1900

CASES CITED:

117 York Street Pty Ltd v Proprietors of Strata Plan No 16123 (1998) 43 NSWLR 504
Jelbert v Davis [1968] 1 WLR 589 CA
Kirkjian v Towers (6/7/87 u/r) Waddell CJ in Eq
Owners Strata Plan No 50411 v Cameron North Sydney Investments Pty Limited [2003] NSWCA 5
Westfield Management Ltd v Perpetual Trustee Company Ltd [2007] HCA 45
Gale on Easements 17th Edition 2002

DECISION:
Appeal dismissed with costs

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40202/07

TOBIAS JA
MCCOLL JA
HANDLEY AJA

Thursday 15 November 2007

Sertari Pty Limited v Nirimba Developments Pty Limited

The appellant, the owner of the servient tenement subject to a registered right of carriageway 7 meters wide, refused to consent to a development application by the dominant owner. This had become necessary because of the proposed development of part of the dominant tenement, with development consent, for the construction of residential buildings comprising 236 units and underground parking for 351 vehicles. The development would greatly increase the traffic on the right of way during the construction phase and afterwards. The trial Judge ordered the servient owner to give its consent to the second development application. The servient owner appealed.

HELD:
(1) Evidence of matters extrinsic to the register under the Real Property Act 1900 other than the physical characteristics of the tenements was not admissible: ***Westfield Management Ltd v Perpetual Trustee Company Ltd*** [2007] HCA 45 applied;

(2) The proposed user of the right of carriageway was not excessive because the grant was for all purposes and at all times in connection with the dominant tenement which at the date of grant comprised 557 acres although the easement placed the whole burden of the maintenance and repair of the servient tenement on the servient owner;

(3) A servient owner can be required to consent to a development application by the dominant owner in respect of the servient tenement where refusal would obstruct the dominant owner in the exercise of his rights under the easement: ***Kirkjian v Towers*** (6/7/87 u/r) Waddell CJ in Eq followed;

(4) The servient owner had no lawful reason for refusing its consent;

(5) The management of vehicle and pedestrian traffic over the servient tenement was a matter for the planning authorities.

ORDER: Appeal dismissed with costs.

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40202/07

TOBIAS JA
MCCOLL JA
HANDLEY AJA

Thursday 15 November 2007

Sertari Pty Limited v Nirimba Developments Pty Limited

Judgment

1 **TOBIAS JA**: I agree with Handley AJA.

2 **MCCOLL JA**: I agree with Handley AJA.

3 **HANDLEY AJA**: This appeal from a decision by Windeyer J raises questions about a right of carriageway over Torrens Title land at Quakers Hill owned by the Appellant. The order appealed against required it to consent in writing to an application for development consent in respect of the servient tenement. The easement was created pursuant to section 88B of the ***Conveyancing Act 1919*** to satisfy a condition in a development consent granted on 18 August 1989 by the Council of the City of Blacktown (the Council) for the construction of a tavern on land which included the servient tenement. The Quakers Inn Hotel was later erected on that land.

4 In 1989 the dominant tenement comprising some 557 acres, which had been the site of Schofield Airport, was owned by the Commonwealth. The right of carriageway gave access from Railway Road, which was 66 feet or 20.10 meters wide, to the dominant tenement. A subdivision of the dominant tenement DP853847 created Lot 1 of about two hectares now owned by the respondent, and Narimba Drive.

5 The respondent's land has a frontage to Narimba Drive, also 20.10 meters wide, which is linked to the servient tenement and thus Railway Road but it is otherwise landlocked. Hitherto the use made of the right of carriageway has been moderate because the adjacent areas of the dominant tenement remain undeveloped.

6 In 2005 the respondent applied to the Council for development consent for the construction of two residential flat buildings comprising 236 units with underground parking for 351 vehicles. It appealed to the Land and Environment Court (the Court) from the deemed refusal of this application, and development consent, subject to conditions, was granted by Commissioner Bly on 26 October 2006. In due course it will be necessary to refer to some of the conditions of this consent.

7 The servient tenement runs through the middle of a car park of the Quakers Inn Hotel which is adjacent to its bottle shop. The likely use of the right of carriageway during the construction phase of the residential development on the respondent's land and then by the occupiers of the units and others will constitute development of the servient tenement because of the intensification of its use. The respondent therefore needed development consent for the servient tenement.

8 It made the necessary application to the Council on 6 September 2006 without the consent of the appellant as owner required by clause 49 of the ***Environmental Planning and Assessment Regulation 2000***. Its appeal to the Court, from the deemed refusal of the second development application, has been heard by Commissioner Murrell, who reserved judgment pending receipt of the appellant's consent. It was common ground that the appellant's written consent would retrospectively validate the second development application and its class 1 appeal.

9 The owner of a dominant tenement is entitled to construct improvements on the serviant tenement where this is necessary or convenient for the exercise of the rights conferred by the easement. In ***Kirkjian v Towers*** (6/7/87 u/r) Waddell CJ in Eq held that the owner of the servient tenement could be ordered to consent to the lodgement of a development application for construction of improvements which are reasonably necessary for the proper enjoyment of the easement. This decision has been followed: ***117 York Street Pty Ltd v Proprietors of Strata Plan No 16123*** (1998) 43 NSWLR 504, 521-2; ***Owners Strata Plan No 50411 v Cameron North Sydney Investments Pty Limited*** [2003] NSWCA 5 para [23] per Giles JA.

10 The servient owner's refusal of consent, where this is legally necessary, obstructs the dominant owner in the exercise of rights under the easement. Obstruction by legal means in this way is just as much an infringement of the dominant owner's rights as a direct physical obstruction. The appellant did not challenge the decisions referred to.

11 in ***Kirkjian v Towers*** Waddell CJ in Eq held that the servient owner was bound to grant consent unless there was a "lawful reason" for refusing to do so. There was no such reason in that case because the proposed user of the right of way was not excessive. The first issue in this appeal is whether the user proposed by the dominant owner would be excessive. The right of carriageway was in the following terms:

> "1. **Terms of easement firstly referred to in above mentioned plan**
>
> (a) Full and free right for every person who is at any time entitled to an estate or interest in possession in the land herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment and every person authorised by him and lessees, employees, customers, patrons, invitees and licensees of any business conducted from the improvements erected or to be erected on the dominant tenement to go, pass along and re-pass at all times and for all purposes with or without animals and with or without vehicles or both to or from the said dominant tenement or any part thereof.

(b) The site of the servient tenement shall be maintained and repaired by the registered proprietor thereof, which obligation shall bind his successors in title and assigns."

12 The section 88B instrument states that the right of carriageway is seven meters wide and that the person empowered to release, vary or modify the easement is the Council.

13 Windeyer J held that the words of the grant were clear and since it was a right for all purposes and at all times all persons connected with the proposed residential development were entitled to use the right of carriageway. In these circumstances the question of excessive user, which was essentially one of construction, could not arise.

14 The appellant relied on evidence of extrinsic circumstances, including the physical characteristics of the servient and dominant tenements, and the activities being conducted on the dominant tenement at the time of the grant, to support a narrower construction. In particular it relied on the genesis and purpose of the grant evidenced in the report to the Council of its chief town planner of 4 July 1989 which it acted upon when granting the development consent of 18 August that year.

15 Windeyer J rejected the town planner's report and the terms of the development consent as irrelevant to the construction of the grant. He also held that the physical characteristics of the tenements and the activities being conducted on the dominant tenement at the time of the grant could not cut down its plain words. The appellant again sought to rely on this extrinsic material but the decision in ***Westfield Management Ltd v Perpetual Trustee Company Ltd*** [2007] HCA 45 has since confirmed that extrinsic material apart from the physical characteristics of the tenements, is not relevant to the construction of instruments registered under the ***Real Property Act 1900***: paras [5], [37] - [41].

16 This Court is therefore limited to the material in the folio identifiers, 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 dominant tenement with which the right was capable of enjoyment, and persons authorised by them.

17 Mr Hale SC for the appellant relied on clause 1(b) of the grant which placed the whole burden of the maintenance and repair of the servient tenement on the servient owner and evidence of the heavy use of the servient tenement which was likely to occur during the construction phase. The car park, including the pavement of the servient tenement, had not been constructed to carry heavy traffic of this nature and the positive obligation imposed by clause 1(b) was likely to prove burdensome to the appellant. The traffic once the units were fully occupied would also impose an indefinitely continuing financial burden on the servient owner. This was likely to increase if there was further development on the dominant tenement.

18 In my judgment this evidence cannot effect the construction of the clear words of the grant. The dominant tenement is very large, the servient tenement is very small, the use is for

all purposes, and the whole burden of maintenance and repair is clearly imposed on the servient owner. In ***Westfield*** (above) the easement made provision for the cost of routine maintenance, repairs and insurance to be shared between the owners of the tenements, and made provision for the cost of repairing accidental damage. These provisions supported the narrower construction of the grant adopted by the Court. It is not possible to use clause 1(b) in this way as no other construction is fairly open.

19 The final question is whether the financial burden which the proposed development would impose on the appellant, as servient owner, constitutes a "lawful reason" for its refusal of consent. Waddell CJ in Eq did not explain what he meant by "lawful reason". In ***Owners Strata Plan No 50411 v Cameron North Sydney Investments Pty Limited*** [2003] NSWCA 5 Giles JA, who was the only member of this Court to consider that question, referred at para [23] to the decision of Young CJ in Eq gat first instance who had extended the ***Kirkjian v Towers*** principle to a strata corporation asked to consent to a development application by the owner of a strata lot. He said "by saying unless there is lawful reason not to do so his Honour meant unless it is unlawful". It seems that the unlawfulness he referred to relates to the proposed development.

20 The authorities have not otherwise elucidated the meaning of "unlawful" in this context. In my judgment whatever else it may mean it must include cases where the proposed user would be excessive and thus not authorised by the easement. Such user is unlawful because it is a trespass on the land of the servient owner: ***Gale on Easements*** 17th Edition 2002 pp353, 469-71. I have already held that the proposed user would not be excessive. The apparently unfair financial burden that the increased use would place on the servient owner would be lawful and in these circumstances the appellant was bound to give its formal consent to the second development application.

21 The Council has the power to release vary or modify the terms of the grant, and the appellant could have sought a variation or modification which would impose an obligation on the respondent to meet the cost of repairing and upgrading the road on the servient tenement in whole or in part. There was no suggestion that it had taken this course but Commissioner Bly, in granting development consent for the residential buildings, imposed conditions requiring the respondent to make a sizeable contribution to the repair and upkeep of the servient tenement. He dealt with this matter in para [32] of his reasons of 25 October 2006 (2/338) where he said:

> "Notwithstanding that the terms of the easement require the second respondent to maintain the right of carriageway it is not unreasonable in the circumstances of this case that the applicant be responsible for the repair of any damage caused in the short term and, in the longer term for the making of a significant and continuing contribution towards its maintenance."

22 The formal consent, which would include the final form of the conditions proposed, was not before this Court but there was nothing to suggest that the conditions did not fairly adjust the financial burdens created by the increased use of the servient tenement. There is no reason to suppose that the Council would be prepared to vary or modify the right of way to impose a greater burden on the respondent. However it may be appropriate, at some stage, for the Council to modify the registered easement by incorporating the relevant conditions of consent so that these appear on the title.

23 The management of vehicle and pedestrian traffic over the servient tenement and in the car park may well create problems, including problems of public safety, especially at peak times, but these are matters for the planning authorities. They do not affect the construction of the grant, or the question of excessive user. While the servient owner, and persons authorised by it, are also entitled to use the servient tenement, the evidence does not establish that the increased use by the dominant owner would unreasonably interfere with the reasonable use of the servient tenement by the servient owner. Accordingly the principles in ***Jelbert v Davis*** [1968] 1 WLR 589 CA do not assist the appellant at this stage.

24 The appeal should be dismissed with costs.

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LAST UPDATED: 15 November 2007