COURT: SUPREME COURT OF TASMANIA

CITATION: *Chick v Dockray* [2011] TASFC 1

PARTIES: CHICK, Victor Horace
v
DOCKRAY, Margaret Joan

FILE NO/S: 670/2010

JUDGMENT APPEALED FROM: *Dockray v Chick* [2010] TASSC 32

DELIVERED ON: 6 April 2011

DELIVERED AT: Hobart

HEARING DATE: 11 November 2010

JUDGMENT OF: Crawford CJ, Porter and Wood JJ

CATCHWORDS:

Real Property – Torrens title – Indefeasibility of title – Exceptions to indefeasibility – Omitted or misdescribed easement – Easements by implication, prescription etc – Whether easement created under doctrine of lost modern grant an easement arising by implication.
Land Titles Act 1980 (Tas), s40(3)(e)(i).
Bryant v Foot (1867) 2 LR QB 161; *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283; *Parramore v Duggan* (1995) 183 CLR 633, referred to.
Aust Dig Real Property [1256]

Real Property – Torrens title – Easements – Other matters – Construction − Inadmissibility of extrinsic evidence − Use of truncated portion of right of way to access dominant tenement via diversion over other land of dominant owner – Whether authorised by terms of easement.
Westfield Management Ltd v Perpetual Trustee Co Ltd (2007) 233 CLR 528, followed.
Aust Dig Real Property [1399]

Real Property – Torrens title – Easements – Other matters – Jurisdiction of court to declare an entitlement to a right of way created under the doctrine of lost modern grant – Whether jurisdiction removed by *Land Titles Act* 1980 (Tas), s138I.
Land Titles Act 1980 (Tas), s138I.
Cook v Collection Corporation of Australia Pty Ltd (2007) 17 Tas R 67; *Terhidy Minerals Ltd v Norma*n [1971] 2 QB 528; *Mills v Silver* [1991] 2 WLR 324; *Oakley v Boston* [1976] QB 270, referred to.
Natural Forests Pty Ltd v Turner (2004) 13 Tas R 44, distinguished.
Aust Dig Real Property [1399]

Real Property – Easements – Particular easements and rights – Rights of way – Construction – Use of truncated portion of right of way to access dominant tenement via diversion over other land of dominant owner – Whether authorised by terms of easement.

Staley v Pivot Group Pty Ltd (No 6) [2010] WASC 228; *Clifford v Hoare* (1874) LR 9 CP 362; *Timpar Nominees Pty Ltd v Archer* [2001] WASCA 430; *Saggers v Brown* (1981) 2 BPR 9329; *Berryman v Sonnenschein* [2008] NSWSC 213; *Butler v Muddle* [1995] 6 BPR 13,984; *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324; *Todrick v Western National Omnibus Company Ltd* [1934] Ch 561; *Krolczyk v Raffan* A62/1991; *Williams v James* (1867) LR 2 CP 577; *Wood v Saunders* (1875) 10 LR Ch App 582; *Paterson and Barr Ltd v Otago University* [1925] NZLR 191, referred to.

Aust Dig Real Property [1491]

REPRESENTATION:

Counsel:

Appellant:	M E O'Farrell SC, A Buckley
Respondent:	P L Jackson

Solicitors:

Appellant:	Toomey Maning & Co
Respondent:	Zeeman Kable & Page

Judgment Number:	[2011] TASFC 1
Number of paragraphs:	70

Serial No 1/2011
File No 670/2010

VICTOR HORACE CHICK v MARGARET JOAN DOCKRAY

REASONS FOR JUDGMENT

FULL COURT
CRAWFORD CJ
PORTER J
WOOD J
6 April 2011

Order of the Court

Appeal dismissed.

Serial No 1/2011
File No 670/2010

VICTOR HORACE CHICK v MARGARET JOAN DOCKRAY

REASONS FOR JUDGMENT

FULL COURT
CRAWFORD CJ
6 April 2011

1 On 26 July 2010, Evans J ordered that the appellant, Mr Chick, and his servants and agents, were restrained from blocking or obstructing access between portion of a registered easement over the servient tenement owned by him to the dominant tenement, owned by the respondent, Mrs Dockray, via a diversion through neighbouring land. It was also declared that immediately prior to 12 April 2001, the registered proprietor of the dominant tenement was entitled to a right of way, pursuant to the doctrine of lost modern grant, which authorised access to lands of the registered proprietor other than the dominant tenement which was the subject of the registered easement. At all material times, the relevant lands have been registered under the *Land Titles Act* 1980.

2 Mr Chick appealed against those orders. He argued that indirect access to the dominant tenement from the servient tenement via a diversion was not authorised by the terms of the registered easement. He also argued that an easement created by the operation of the doctrine of lost modern grant could not be recognised over Torrens system land because it was not an exception to the rule of indefeasibility of title in s40. Finally, he argued that the learned judge did not have jurisdiction to declare that Mrs Dockray had an entitlement to an easement by virtue of the doctrine of lost modern grant because of the abolition of the doctrine on 12 April 2001 by the insertion of s138 into the Act by the *Land Titles Amendment (Law Reform) Act* 2001.

3 For the following reasons, those arguments should be rejected and the appeal should be dismissed.

Facts

4 The land of the appellant, Mr Chick, is the hatched area of land to the north on the plan attached to these reasons. Its northern boundary has a frontage on Lalla Road, which is a public street.

5 The lands of the respondent, Mrs Dockray, consist of five parcels. They are:

- The "dominant tenement", which is the area with boundaries of six bearings marked "A", "B", "C", "D", "E" and "F". It was purchased by Mrs Dockray's predecessors in title, the Walkers, in 1936.
- The "reserve west", which is the area of land to the west of the dominant tenement, marked on the plan with perpendicular lines. Its eastern boundary adjoins the western boundary of the dominant tenement at "A" to "F". It was purchased by the Walkers in 1945.
- The "reserve east", which is the area of land to the east of the dominant tenement, marked on the plan with horizontal lines. Its western boundary adjoins the eastern boundary of the dominant tenement at "H" to "C". It was purchased by the Walkers in 1946.
- A small triangular shaped piece of land marked "N", "E" and "M" on the plan which will be referred to as "the triangle". It was transferred to the Walkers on 20 April 1948.
- The "diversion land", which is a triangular area of land to the east of the dominant tenement and to the north of the reserve east and is marked "G", "H" and "J". Part of its western boundary abuts

the southern-most part of the eastern boundary of Mr Chick's land. It was purchased by the Walkers and transferred to them on 22 January 1948.

6 Mr Chick's land is subject to an easement running along the eastern boundary of his land from Lalla Road at point "Y" to point "B" where the easement meets the dominant tenement which, on the titles, it serves. The diversion land abuts the southern end of the easement on the eastern side. The easement is shown on the plan as a roadway 7.64 metres wide. It was created by transfer in 1937 to serve the dominant tenement only, that is to say it was not created to serve the reserve west, the reserve east, the triangle or the diversion land.

7 The transfer of the easement was expressed to be for the benefit of the Walkers "and the registered proprietor or proprietors for the time being of [the dominant tenement] or any part thereof for his or their tenants servants agents workmen and visitors full and free right and liberty to go pass and repass at all times hereafter and for all purposes and either with or without horses or other animals carts or other carriages motor cars motor lorries and other vehicles into and out of and from such [dominant tenement] or any part thereof through over and along the strip of land thirty-eight links wide extending along the Eastern boundary of" what is now Mr Chick's land.

8 Shortly prior to January 1948 there was a large landslip in a gully at the southern end of the easement, which rendered the roadway along the southern end of the easement impassable from "Z" to "B". Prior to the landslip, the Walkers had been operating a nursery on all of their lands (other than the diversion land and the triangle) and utilised the easement to access them all, notwithstanding that only the dominant tenement was expressly entitled to the benefit of the easement. After the landslip, the Walkers were advised by an engineer that, due to the instability of the gully, it was undesirable to attempt to rebuild the roadway at the southern end of the easement. As a consequence, the Walkers purchased the diversion land in order to divert the roadway across it and around the landslip to the dominant tenement. A roadway was then constructed around the landslip area from "Z" to "Z1" along the path of a gravel road across the diversion land as it presently exists. That road will be referred to as "the diversion".

9 Since 1948, access between Lalla Road and Mrs Dockray's lands has been via the usable portion of the easement from "Y" to "Z", which will be referred to as "the truncated portion of the easement", and then the diversion.

10 In 1964, Mr Chick purchased his land, excluding the portion subject to the easement but also with the benefit of it. Prior to 3 August 1970, he had purchased the land containing the easement and he remains the owner of both pieces of land, which collectively I will refer to as his land. Throughout those transactions, the dominant tenement retained an entitlement to the right of way comprised by the registered easement.

11 Apart from Mr Chick's land, all of the land to which I have referred was owned by the Walkers and their heirs until it was transferred to Mrs Dockray in 2007. The total area of all of the Walkers' lands was about 44 hectares. The titles to the various portions were combined into one title in 1954. For many years a rhododendron nursery was operated from the lands and then it became a rhododendron reserve. It became known in the district as the rhododendron reserve. From at least 1949, Mrs Dockray's predecessors in title used the truncated portion of the easement, coupled with the diversion, to access the rhododendron reserve.

12 The most recent title to the rhododendron reserve is certificate of title volume 198595 folio 1. Its plan is the basis of the plan attached to these reasons. The lettering in the description of the easement accords with the lettering on that plan.

13 There is no substantive difference between the easement as recorded on the title of each party. The easement recorded on the title of Mrs Dockray, volume 198595 folio 1, is:

> "BENEFITING EASEMENT: (appurtenant to the land marked A.B.C.D.E.F. on Plan No 198595) the full and free right and liberty for the Registered Proprietors of the said land within described of their tenants servants agents workmen or visitors to go pass and repass at all times hereafter and for all purposes and either with or without horses or other animals carts or other carriages, motor cars, motor lorries and other vehicles into and out of and from the land marked A.B.C.D.E.F. on Plan No 198595 through over and along the strip of land thirty-eight links wide marked X.Y. on Plan No 198595."

14 The easement recorded on Mr Chick's title to his land, volume 248209 folio 1 is:

> "SUBJECT NEVERTHELESS AND RESERVING for [the Walkers] and the Registered Proprietor or Proprietors for the time being of the other land comprised in Certificate of Title Volume 332 Folio 70 [the dominant tenement] or any part thereof his or their tenants servants agents and workmen and visitors full and free right and liberty to go pass and repass at all times hereafter and for all purposes and either with or without horses or other animals carts or other carriages motor cars-motor lorries and other vehicles into and out of and from such other land comprised in the said Certificate of Title or any part thereof through over and along the said land within described."

15 In 2007, at about the time Mrs Dockray completed her purchase of her land, Mr Chick blocked the way from Lalla Road to her land as it was being used, by erecting a fence at the point where the way was diverted through the eastern boundary of the easement onto the diversion. As a result, Mrs Dockray commenced the action which is the subject of the appeal.

16 In the action, Mrs Dockray sought declarations that the whole of her land had the benefit of the right of carriageway along the road to the point marked "Z" (where the diversion commences) pursuant to a grant made in or about or alternatively, prior to, 1948, which grant had been lost (described in the statement of claim as "the prescriptive easement") and the construction and continued presence of the fence constituted an unlawful obstruction of both the registered easement and the prescriptive easement. She sought an order that Mr Chick remove the fence and an order restraining him and his servants and agents from blocking or obstructing the registered easement and the prescriptive easement.

17 After the commencement of the action, interim orders were made by consent providing for Mrs Dockray to have access to her land via the easement and the deviation. I stated the effect of the final orders in par[1] of these reasons.

Is there an entitlement under the registered easement to use the truncated portion of the easement to access the dominant tenement via the diversion?

18 The trial judge found that the terms of the registered easement permitted the use of the truncated portion of the easement to access the dominant tenement via the diversion. Grounds of the appeal attack that finding.

19 When construing the terms of an easement that is registered under the Torrens system of title, as is the case here, rules of evidence assisting the construction of contracts between parties, of the nature explained by authorities such as *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 350 – 352, do not apply. *Westfield Management Ltd v Perpetual Trustee Company Ltd* (2007) 233 CLR 528 at par[37]. The reason for that is to be found in the principle of indefeasibility of title.

20 It follows, consistently with the scheme of the system, that when a third party goes to inspect the Register and construes the terms of an easement registered on a title, he or she is not expected to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing so as to place the third party in the situation of the grantee of the easement. *Westfield* at par[39]. The only extrinsic evidence that may be used is that necessary to make sense of terms or expressions identified in the property register, such as surveying terms, or abbreviations, which appear on a plan. *Westfield* at par[44]; *Neighbourhood Association v Moffat* [2008] NSWSC 54 at par[41]; *Staley v Pivot Group Pty Ltd (No 6)* [2010] WASC 228 at par[93].

21 For that reason, ground 3 of the appeal must fail. It asserts that the learned judge failed to take into consideration that at the time of the creation of the easement, the diversion land was not owned by the owner of the dominant tenement, the eastern boundary of the easement was fully fenced, no road or track traversed the eastern boundary, and the landslip had not occurred. In accordance with *Westfield*, those items of extrinsic evidence may not be considered when construing the terms of the easement.

22 Therefore, it is the language of the easement that is paramount when construing it. What does it state? It states that the registered proprietor of the dominant tenement has a full and free right and liberty to go, pass and repass, at all times and for all purposes, into, out of and from the dominant tenement through, over and along the strip of land containing the easement. The use Mrs Dockray is making of the strip of land to go to and from the dominant tenement falls squarely within the terms of the easement, notwithstanding that she is also using the diversion to do so. The language does not prohibit her use of the truncated portion of the easement in conjunction with the diversion, so long as she does so only for the purpose of getting to or from the dominant tenement.

23 It is an accepted principle that the use the owner of a dominant tenement may make of a private right of way must be reasonable use, in common with others. *Clifford v Hoare* (1874) LR 9 CP 362 at 371; *Timpar Nominees Pty Ltd v Archer* [2001] WASCA 430 at par[41]; *Saggers v Brown* (1981) 2 BPR 9329 at 9331; *Staley v Pivot Group Pty Ltd (No 6)* (supra) at par[93]. What constitutes reasonable conduct by a dominant tenement owner is essentially determined by reference to the express terms of the easement. *Berryman v Sonnenschein* [2008] NSWSC 213; *Butler v Muddle* [1995] 6 BPR 13,984, 13,987; *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324, (2008) NSW Conv R 56-200 at pars[11] – [16]; *Staley v Pivot Group Pty Ltd (No 6)* (supra) at par[93]. There is nothing about the use Mrs Dockray has been making of the truncated portion of the easement to pass to and from the dominant tenement that is unreasonable. As was pointed out by the learned judge, a finding in her favour will not involve recognition of an encroachment on more of Mr Chick's land than before and in a sense, it will have the reverse effect. It will recognise that the dominant tenement can be and will be accessed without using the southern portion of the easement. A finding that since about 1948 it has not been used from "Z" to "X", a distance of some 90 metres, may well assist Mr Chick to have that portion of the easement extinguished pursuant to the *Land Titles Act*, s108. As a result, he might gain the unburdened use of about 690 square metres of his land.

24 Ground 1 of the appeal asserts that the learned judge erred in finding and taking into account that the servient tenement was not disadvantaged by Mrs Dockray's use of the right of way to gain access to the dominant tenement via the diversion, and in finding and taking into account that the servient tenement was advantaged by that. No error of either kind occurred. The findings were appropriate and relevant to the question whether Mrs Dockray's use of the easement was unreasonable.

25 There is also authority for the proposition that the dominant tenement and the servient tenement need not be contiguous. *Todrick v Western National Omnibus Company Ltd* [1934] Ch 561.

26 There are many authorities for the proposition that, subject to the terms of the easement, the owner of the dominant tenement is not limited to one point of exit from the servient tenement on the way to the dominant tenement. I observed in *Krolczyk v Raffan* A62/1991 at 4, the trend in the authorities was to allow it at more than one point. See *Berryman v Sonnenschein* (supra) at par[25]; *Timpar Nominees Pty Ltd v Archer* (supra) at par[53]; *Saggers v Brown* (supra); *Cooke v Ingram* (1893) 68 LT 671; *South Metropolitan Cemetery Company v Eden* (1855) 16 CB 42 at 57 – 58; *Sketchley v Berger* (1893) 69 LT 754. Of course, it must be acknowledged that the observation in *Krolczyk* was made in the context of an easement that abutted the dominant tenement for a considerable distance.

27 Another principle to be found in cases is that in the absence of any clear indication of the intention of the parties, the maxim that a grant must be construed strongly against the grantor is to be applied. *Williams v James* (1867) LR 2 CP 577 at 581; *Wood v Saunders* (1875) 10 LR Ch App 582 at 584; *Paterson and Barr Ltd v Otago University* [1925] NZLR 191 at 194, [1925] GLR 119 at 120.

28 All of the principles to which reference has been made tend to support the conclusion that the use Mrs Dockray has been making of the easement is authorised by its terms and that the language does not prohibit her use of the truncated portion of the easement in conjunction with the diversion, so long as she uses them only for the purpose of travelling to and from the dominant tenement.

29 It was submitted for Mr Chick that when determining the extent of the rights granted by the easement, the primary inquiry should be what was within the reasonable contemplation of the parties at the time of the creation of the easement. Reference was made to a discussion about the matter in *Timpar Nominees Pty Ltd v Archer* (supra) at pars[36] – [39].

30 Most of the cases in which a consideration of the reasonable contemplation of the parties has taken place have concerned the purposes for which the dominant tenement could be used in association with the right of way. For example, a case to which reference was made in *Timpar* was *Jelbert v Davis* [1968] 1 WLR 589, where the question was whether the owner of the dominant tenement could use the right of way to travel to and from the dominant tenement in circumstances where the proposed use of the dominant tenement was a large tourist caravan and camping site, and no longer that of a farm, which was the intended use at the time of the creation of the easement. When such matters have been considered, the question of reasonable or unreasonable use of the right of way has determined the outcome.

31 In the light of *Westfield*, extrinsic evidence of the contemplation of the grantor and grantee cannot be considered in this case. Nevertheless, the plan makes it clear that the contemplation of the grantor and grantee of the easement was that those using it to gain access to and from the dominant tenement would enter and leave the dominant tenement at the southern extremity of the easement, where it abuts the dominant tenement. That may be taken into account, but it is only one matter that may be taken into account. What I find to be determinative in this case is the fact that the relevant use of the right of way is authorised by the terms of the easement, and the use is not unreasonable or excessive. There are many examples of cases in which the rights of the owners of dominant tenements have been upheld, notwithstanding that the grantor and grantee may not have contemplated the issue that arose subsequent to the creation of the easement.

32 For the reasons I have given, the trial judge did not err when he found that the use of the truncated portion of the easement to access the dominant tenement via the diversion was authorised by the terms of the easement.

The finding of an easement based on the doctrine of lost modern grant

33 The learned judge found that the terms of the registered easement do not permit travel across the dominant tenement to other land. Accordingly, his Honour held that under the registered easement, the servient tenement could not be utilised by Mrs Dockray to access portions of the rhododendron reserve other than the dominant tenement. She does not challenge that conclusion.

34 However, because all of the rhododendron reserve has been accessed through the truncated portion of the easement and the diversion since 1948, it is her case that her right to use the truncated portion for that purpose is established by the operation of the doctrine of lost modern grant. I will say more about the doctrine in due course.

35 The learned judge held that on the evidence, the operation of the doctrine had resulted in Mrs Dockray having a right to use the truncated portion of the easement to travel to all parts of the rhododendron reserve via the diversion. In effect, his Honour found that there had been continuous use of that route by Mrs Dockray and her title predecessors, adverse to the interests of Mr Chick and his title predecessors, for over 20 years prior to 12 April 2001, which was the date upon which the *Land Titles Amendment (Law Reform) Act* inserted s138I(2) into the *Land Titles Act*, which declared that "the rule of law known as the doctrine of lost modern grant for the acquisition of easements is abolished".

36 Mr Chick does not challenge the finding of use adverse to his interests. However, by the grounds of his appeal, he maintains two arguments that were unsuccessfully raised at first instance.

Is an easement acquired pursuant to the doctrine an easement arising by implication?

37 The first of those arguments concerns the provisions of the *Land Titles Act*, s40, with regard to indefeasibility of title. Section 40(2) provides that subject to subs(3) and (4), the title of a registered proprietor is indefeasible. By virtue of the meaning of "indefeasible" in subs(1), a title is "subject only to such estates and interests as are recorded on the folio of the Register or registered dealing evidencing title to the land", subject to the exceptions in the section. It follows that Mr Chick's title is indefeasible unless one of the exceptions operates. The easement found by the judge to have been acquired by Mrs Dockray pursuant to the doctrine of lost modern grant is not registered on his title. Mr Chick's case is that for that reason, his title is not subject to the easement.

38 In response, it is Mrs Dockray's case that an exception in s40(3)(e)(i) operates in her favour. It is that the title of a registered proprietor of land is not indefeasible so far as regards "an easement arising by implication or under a statute which would have given rise to a legal interest if the servient land had not been registered land". It is not her case that the asserted easement arose under a statute, and the judge found that it did not. However, it is her case, and the judge accepted it, that the easement pursuant to the doctrine of lost modern grant arose by implication, and that it would have given rise to a legal interest if the servient land had not been registered land.

39 Mr Chick's response, which was rejected by the judge, is that it is not an easement arising by implication.

40 To establish an easement by means of the doctrine, the dominant owner must show that he or she has enjoyed the alleged easement for a continuous period of at least 20 years. Also, there must be shown to have been submission by the servient owner to the use, knowing that it was being exercised as a right. Knowledge may be actual or constructive. If the servient owner has no knowledge of the use, the prescriptive right will not arise. However, acquiescence or toleration with knowledge of the use is sufficient.

41 Historically, the doctrine is founded on a fiction. If the dominant owner proves the required use, the court is required to presume that the easement came into existence by way of a grant or deed that has since been lost. Thus, when explaining the development of the doctrine in *Bryant v Foot* (1867) LR 2 QB 161 at 181, Cockburn CJ said that the jury should be told "that they were bound to presume the existence of such a lost grant, although neither judge nor jury, nor anyone else, had the shadow of a belief that any such instrument had ever really existed". Sometimes judges have referred to a presumption that the right to the easement has been established, without referring to the fiction of a lost grant. Courts have long questioned the use of the fiction. See for example, *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283. That is understandable, given that the presumption upon which the establishment of the right is based cannot be rebutted by establishing that a grant was not in fact made. *White v McLean* (1890) 24 SALR 97; *Thwaites v Brahe* (1895) 21 VLR 192 at 198 – 199; *Auckran v Pakuranga Hunt Club* (1905) 24 NZLR 235; *Terhidy Minerals Ltd v Norma*n [1971] 2 QB 528 at 547 – 552[1].

42 The method of establishing the existence of an easement by means of the doctrine is similar to the method of establishing an easement by means of prescription at common law and under the *Prescription Act* 1934[2], in that all methods have involved proof of a factual state of affairs, including continuous user for a period of time, from which a court will presume an actual right to an easement.

43 In support of Mr Chick's case that an easement established by means of the doctrine is not an easement arising by implication, his counsel referred to the way in which authors have categorised easements.

44 For example, in *Halsbury's Law of England*, 3rd ed, vol 12 (1955), the creation of easements is categorised under three main headings, namely creation by express grant, creation by implication of law, and creation under the doctrine of prescription. That last category is subcategorised into prescription at common law, prescription under the doctrine, and prescription under the *Prescription Act* 1832. Those falling within the description of having been created by implication of law are confined to easements founded upon an implied grant arising in connection with some express grant or disposition of the servient or dominant tenement. At 538, *Halsbury* goes on to say that such a grant can only be implied where both the dominant and servient tenements have been in common ownership, so that the creation of an easement by implication of law may be said to be the outcome of the formal relationship between the two tenements. Similar treatment of the subject is to be found in *Halsbury's* 4th ed, vol 14 (1975), commencing at 30.

45 Similarly, in *Australian Real Property*, 4th ed, by Bradbrook, MacCullum and Moore at 759, easements acquired pursuant to the doctrine and prescription are not treated as easements created by implication. Under that last heading, the authors refer to easements of necessity and intended easements implied in appropriate circumstances in favour of a grantee, as well as a grantor of land; implied grants under the rule in *Wheeldon v Burrows* (1879) 12 Ch D 31; implied grants under general words imported into conveyances by State legislation, and by implication from the description of the land and on simultaneous conveyances by one land owner; and easements arising by implication under statute by reason of the contents of a plan of subdivision.

46 Similar treatment of the subject is to be found in *Bradbrook and Neave's Easements and Restrictive Covenants in Australia*, 3rd ed (2011). Implied easements are considered in a chapter headed the Creation of Easements by Grant or Reservation. Easements created pursuant to the doctrine or prescription are considered in a chapter headed Prescriptive Easements.

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1 However, the presumption may be rebutted by evidence that the alleged grantor was under a legal incapacity to make a grant. *Angus v Dalton* (1878) 4 QBD 162 at 175, 186; *Thwaites v Brahe* (1895) 21 VLR 192 at 198 – 199; *Fernance v Simpson* (2003) 11 BPR 20,955, [2003] NSWSC 12 at par[35].

2 Now repealed by the *Land Titles Amendment (Law Reform) Act*, s22.

47 Nevertheless, the view is expressed in *Halsbury's Laws of Australia* at par[355-12220] that s40(3)(e)(i) is phrased broadly enough to permit prescriptive easements, and that was also the view of Professors Bradbrook and Neave in the 2nd edition of their work, at 257. They submitted that prescriptive easements and easements arising under the doctrine of lost modern grant were capable of acquisition over land under the *Land Titles Act*.

48 Their argument was as follows. The exception in s40(3)(e)(i) of "an easement arising ... under a statute which would have given rise to a legal interest if the servient land had not been registered land" seemed, to the authors, to be aimed specifically at the *Prescription Act* 1934. They considered that three reasons could be advanced in favour of the applicability of this type of prescriptive easement to land under the Act. First, it seemed to them illogical for the law to recognise one category of prescriptive easement (under the *Prescription Act* 1934) but not the other category (under the doctrine of lost modern grant). Second, prescriptive easements created under the doctrine of lost modern grant were definitely recognised under the now repealed *Real Property Act* 1862 (see *Wilkinson v Spooner* [1957] Tas SR 121) and there was no evidence that the legislature intended to change the law in that regard. Third, an argument could be made that the wording of the section "an easement arising by implication ..." is sufficiently broad to include easements arising under the doctrine of lost modern grant.

49 Concerning the second of those reasons, there was more than a mere lack of evidence that the legislature intended to change the law. There was evidence suggesting an intention not to do so.

50 The *Real Property Act* 1862 was repealed with the enactment of the *Land Titles Act*, which introduced the present form of s40(3)(e)(i) and (ii). The explanation for s40(3)(e)(i) and (ii) in the clause notes to the 1980 Bill included the following:

> "At the common law an easement can only operate at law if it is created by a grant under seal, or where the existence of a grant is implied, eg, by prescription under the Prescription Act 1934, or under the doctrine of lost modern grant. ...
>
> Under this Act an easement can only operate at law if it is created by the prescribed form and registered, but by analogy with Smith v Ritchie [(1919) 15 TLR 60] the Bill has been drawn to provide
>
> (i) That where, but for this Act an easement would have operated at law, the right of a registered proprietor is always subject to it ... "

51 That passage demonstrates that an easement under the doctrine was regarded as an easement arising by implication and that it was to be an exception to indefeasibility. Because of the clause notes, the judge came to the conclusion that s40(3)(e)(i) had that effect. No doubt his Honour considered that the clause notes were extrinsic material under the *Acts Interpretation Act* 1931, s8B, and that his Honour could have regard to them because there was obvious ambiguity and obscurity in the drafting of the subparagraph. It has not been suggested by Mr Chick that the clause notes may not be used in that way.

52 Such an interpretation is also supported by what was held by the High Court in *Delohery v Permanent Trustee Co of NSW* (supra) when describing a right to an easement under the doctrine as based on a contractual obligation which is implied by law. At 313 – 314, the court said:

> "The foundation, however, of the plaintiff's right being a grant or agreement on the part of the owner of the adjoining land, using those terms in the sense, not of an actual document which has been lost, but in the sense of a contractual obligation which is implied by law from proved or admitted facts, it is, of course, still open to the defendants to show such a state of facts as will exclude the implication."

53 The interpretation is also supported by the statement of Toohey J in *Parramore v Duggan* (1995) 183 CLR 633 at 650, that the intention of s40(3)(e) is to give protection to those easements, legal or equitable, which are or were incapable of registration under the *Land Titles Act* or the *Registration of Deeds Act* 1935.

54 For these reasons, the judge did not err when he concluded that an easement acquired under the doctrine is an exception to indefeasibility under s40(3)(e)(i).

Did the Court have jurisdiction to declare that Mrs Dockray had an entitlement to the easement?

55 The second of Mr Chick's arguments was that the judge had no jurisdiction to make a declaration that Mrs Dockray was entitled to a right of way pursuant to the doctrine of lost modern grant. It was his case that the only way she could establish the existence of the easement was by applying to the Recorder of Titles for a vesting order under the *Land Titles Act*, s138J. The judge disagreed, following what was held by Holt AsJ in *Cook v Collection Corporation of Australia Pty Ltd* (2007) 17 Tas R 67.

56 With the heading "Possessory Title", PtIXB was inserted into the *Land Titles Act* on 12 April 2001 by the *Land Titles Amendment (Law Reform) Act*. Division 2 is headed "Right to Acquire Easements". In it, s138I(1) provides that "this Division supersedes the rules of the common law for the acquisition of easements by prescription" and s138I(2) provides that "the rule of law known as the doctrine of lost modern grant for the acquisition of easements is abolished". Section 22 of the amending Act repealed the *Prescription Act* 1934.

57 The only other section in Div2, s138J, provides:

> "**138J Acquisition of easements by possession**
>
> A person who has used or enjoyed rights which may amount to an easement at common law for a period of 15 years, or 30 years in the case of a person under disability, may apply to the Recorder in an approved form for an order in accordance with Division 3 vesting an easement in respect of those rights in him or her."

58 The procedure for the vesting of easements by the Recorder is in Div3, ss138K to 138Q. The applicant must satisfy the Recorder that written notice of the claim has been given to the servient owner, and within 30 days after receipt of the notice, the servient owner may lodge an objection with the Recorder (s138K(1), (2)). If the servient owner does not lodge a notice of objection, the Recorder must consider the application (s138K(3)), but if the servient owner does lodge it, the Recorder may not consider the application unless satisfied that the applicant would suffer serious hardship if the application was not granted (s138K(4)). That requirement is a significant departure from the rules under common law and the *Prescription Act* for the acquisition of an easement by virtue of long-term use.

59 Section 138L(1) governs what an application must show. It includes that during the relevant period, the applicant has enjoyed the easement as of right; the easement has not been enjoyed by force or secrecy; the enjoyment of the easement has not been by virtue of a written or oral agreement made before or during the relevant period, unless the applicant can show that the period commenced after any such agreement had terminated; there has been no unity of seisin of the dominant and servient tenements; and the servient owner knew, or as a reasonable owner of land diligent in the protection of his or her interests ought to have known, of the enjoyment of the easement. The applicant is required to produce evidence from at least one other person in support of the easement claimed. By subs(2), an application is usually required to be supported by a plan of survey, with field notes, of the land in respect of which the easement is claimed.

60 Under s138Q, if the Recorder decides to vest an easement, the Recorder must make recordings in the Register necessary to give effect to it, and its effect on the dominant and servient tenements, and may call in certificates of title, grants and duplicate registered dealings for the purpose of making those recordings.

61 It was submitted for Mr Chick that the provisions of s138I that the rules of the common law for the acquisition of easements by prescription are superseded, and the doctrine of lost modern grant for the acquisition of easements is abolished, mean exactly what they say and that it is irrelevant that a claimant may assert that an easement was acquired pursuant to the doctrine prior to the commencement of the section. It was submitted that effectively from the date of the commencement of the section, the only way in which the existence of an easement may be established against registered land by virtue of long-term use is by the Recorder vesting the easement upon an application made under Div3.

62 It was the case under the *Prescription Act* that the necessary period of enjoyment of an easement had to immediately precede the commencement of an action in which the claim for the prescriptive right was made. That is because s4 provided that the necessary period "shall be deemed and taken to be the period next before some proceeding wherein the claim or matter to which such period may relate shall have been or shall be brought into question". The *Prescription Act* of the United Kingdom had a similar provision. As a result of it, the Court of Appeal held in *Hyman v Van Den Bergh* [1908] 1 Ch 167 that the right to an easement under the statute was not absolute and indefeasible, even after 20 years of enjoyment, unless and until some action or suit was commenced in which the right was called into question. Until that occurred, the right remained inchoate and no title to the easement had been acquired.

63 However, that is not the case with an easement acquired under the doctrine of lost modern grant. The period need only be in gross. The doctrine operates by presuming from the fact of long user at a point in time that an easement was actually granted at some time in the past prior to the user supporting the claim, and that the grant has been lost. If, prior to the action, the use has been interrupted after the necessary period of long use has been satisfied, the grant implied by the law is still assumed to exist. *Tehidy Minerals v Norman* (supra); *Mills v Silver* [1991] 2 WLR 324 at 328; *Oakley v Boston* [1976] QB 270 at 275.

64 It was because of those principles and the abolition of lost modern grant on 12 April 2001 by the insertion of s138I(2) into the *Land Titles Act*, that Mrs Dockray sought to establish, and it was declared by the order of the judge to have been established, that immediately prior to that date she, as the registered proprietor of the rhododendron reserve, was entitled to the right of way pursuant to the doctrine.

65 Although the doctrine was abolished on 12 April 2001, there was no suggestion in the Act that abolished it (the *Land Titles Amendment (Law Reform) Act*) that easements that had been acquired by reason of the doctrine prior to that date were extinguished. That may be regarded as significant having regard to the fact that the *Land Titles Act*, s105(7), was left untouched. It provides that "on application in writing for that purpose, the Recorder may record in the Register any easement over or appurtenant to registered land which the Recorder is satisfied has been recognized by an order of the Supreme Court". Clearly, the presumption against the retrospective operation of statutes should apply. See *Maxwell v Murphy* (1957) 96 CLR 261 at 267; *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194.

66 Reliance was placed by counsel for Mr Chick on *Natural Forests Pty Ltd v Turner* (2004) 13 Tas R 44 as authority for the proposition that all of PtIXB is retrospective in its operation. That is not accepted. The case is only authority for the proposition that s138U, which provides for the purposes

of an application for title to land by adverse possession that any period during which council rates have been paid by or on behalf of the owner is to be disregarded, is retrospective in operation and is not restricted to any period of payment of rates after the commencement of PtIXB on 12 April 2001[3]. Further, the case concerned an application for title to land, based on adverse possession and s138T and the *Land Titles Amendment (Law Reform) Act*, s19, played significant parts in the thinking of Underwood J (as he then was) in that case. They play no part in this case.

67 The correct conclusion is that after 12 April 2001, an easement created by the doctrine of lost modern grant can no longer be acquired, but easements created under the doctrine prior to 12 April 2001 remain unaffected by the amending legislation.

Conclusion

68 For the reasons given, the appeal should be dismissed.

[3] The date was incorrectly referred to in the judgment in *Natural Forests Pty Ltd v Turner* as 26 April 2001.

File No 670/2010

VICTOR HORACE CHICK v MARGARET JOAN DOCKRAY

REASONS FOR JUDGMENT

FULL COURT
PORTER J
6 April 2011

69 I have had the advantage of reading the reasons for judgment of Crawford CJ. I agree with those reasons and would also dismiss the appeal.

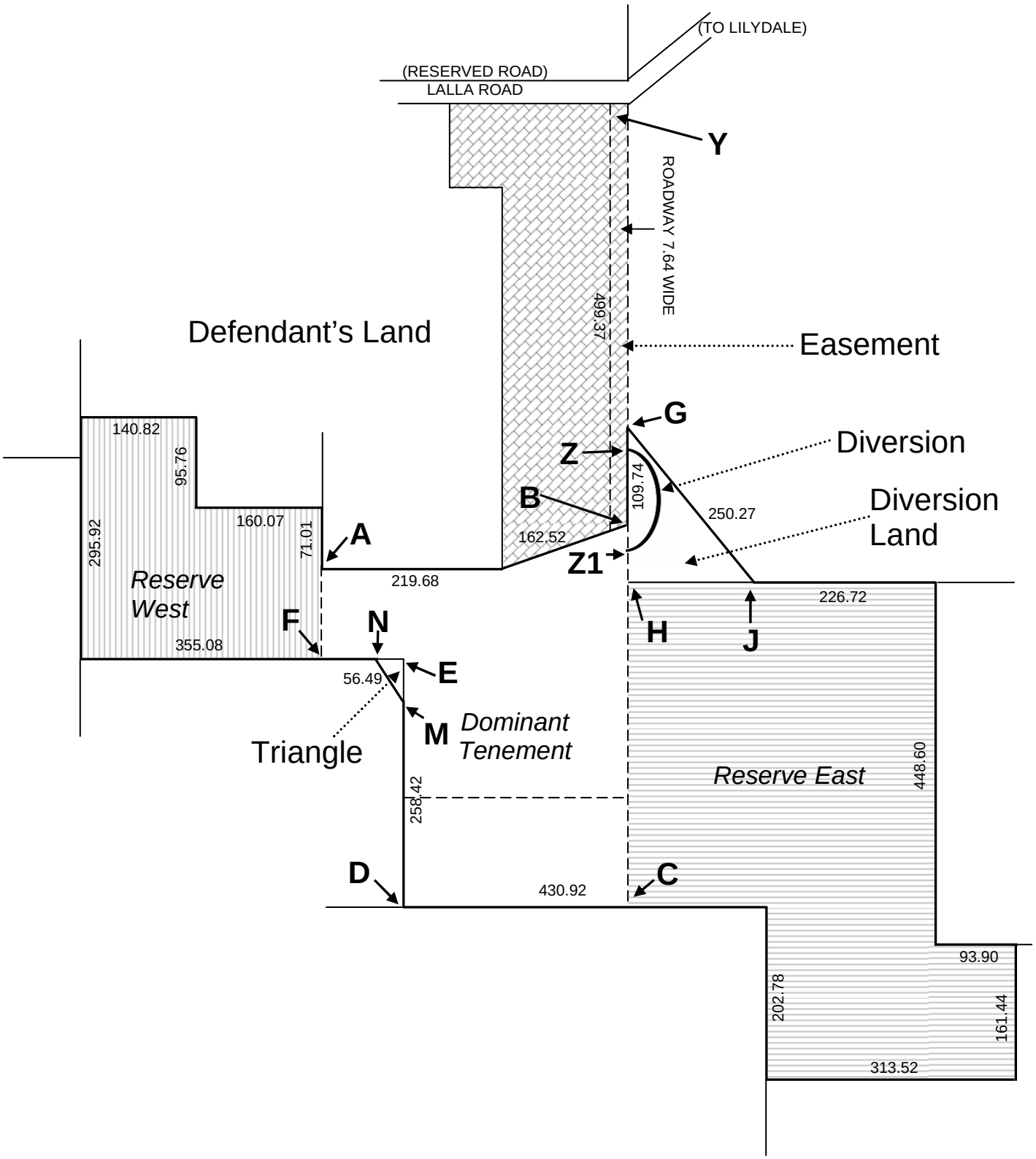
File No 670/2010

VICTOR HORACE CHICK v MARGARET JOAN DOCKRAY

REASONS FOR JUDGMENT

FULL COURT
WOOD J
6 April 2011

70 I agree with the reasons for judgment of Crawford CJ and the conclusion he has reached that the appeal should be dismissed.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