[2011] WASC 281

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	FERMORA PTY LTD -v- KELVEDON PTY LTD [2011] WASC 281
CORAM	**:**	EDELMAN J
HEARD	**:**	16 SEPTEMBER 2011
DELIVERED	**:**	13 OCTOBER 2011
FILE NO/S	**:**	CIV 2455 of 2010
BETWEEN	**:**	FERMORA PTY LTD Plaintiff AND KELVEDON PTY LTD First Defendant REGISTRAR OF TITLES Second Defendant

Catchwords:

Real property - Easements - Whether easement abandoned - Whether terminated by agreement - Whether terminated by operation of condition subsequent - Whether obsolete - Section 129C *Transfer of Land Act 1893* (WA)

Evidence - Torrens system land - Easements - Construction of easement - Evidence of unregistered deed, purportedly incorporated in the grant - Unregistered deed conferring new rights and liberties and inconsistent with the deed of grant - Whether the unregistered deed is admissible evidence for the construction of the deed of grant

Limitation - *Limitation Act 1921* (WA) - Meaning of 'an action to recover any land' - Meaning of 'corporeal hereditaments ... and any share, estate, or interest in them'

Legislation:

Transfer of Land Act 1893 (WA), s 129C
Limitation Act 1935 (WA), s 3, s 4, s 5

Result:

Easement not discharged

Category: A

Representation:

Counsel:

Plaintiff	:	Mr P G Clifford
First Defendant	:	Mr D R Williams QC & Mr I C Rogers
Second Defendant	:	No appearance

Solicitors:

Plaintiff	:	Lawton Gillon
First Defendant	:	Hardy Bowen
Second Defendant	:	No appearance

Case(s) referred to in judgment(s):

Berryman v Sonnenschein [2008] NSWSC 213
Black v Garnock [2007] HCA 31; (2007) 230 CLR 438
Breskvar v Wall [1971] HCA 70; (1971) 126 CLR 376
C Hunton Ltd v Swire [1969] NZLR 232
Chiu v Healey (2003) 11 BPR 21,241; [2003] NSWSC 857
Commonwealth Bank of Australia v Cluness Matter No 3038/96 [1997] NSWSC 222
Davidson v Elkington [2011] WASC 29
Ecclesiastical Commissioners for England v Kino (1880) 14 Ch D 213
Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22; (2007) 230 CLR 89
Ferella v Otvosi [2005] NSWSC 962
Gallagher v Rainbow [1994] HCA 24; (1994) 179 CLR 624

Grill v Hockey (1991) 5 BPR 11,421
Halloran v Minister Administering National Parks and Wildlife Act 1974 [2006] HCA 3; (2006) 229 CLR 545
Lief Investments Pty Ltd v Conagra International Fertiliser Company [1998] NSWSC 481
Lolakis v Konitsas [2002] NSWSC 889
Long v Michie [2003] NSWSC 233
Markos v OR Autor Pty Ltd [2007] NSWSC 810
Neighbourhood Association DP No 285220 v Moffat [2008] NSWSC 54
Pearce v City of Hobart [1981] Tas R 334
Pekel v Humich [1999] WASC 65
Perpetual Trustees Executors & Agency Company of Tasmania Ltd v Walker [1953] HCA 21; (1953) 90 CLR 270
Pieper v Edwards [1982] 1 NSWLR 336
Re Eddowes (Unreported, QSC, 12 October 1990)
Re Miscamble's Application [1966] VR 596
RK Roseblade & VM Roseblade and the Conveyancing Act [1964-5] NSWR 2044
Sertari Pty Ltd v Nirimba Developments Pty Ltd [2007] NSWCA 324
Shelbina Pty Ltd v Richards [2009] NSWSC 1449
Stephenson v Dwyer [2008] NSWCA 123
Treweeke v 36 Wolseley Road Pty Ltd [1973] HCA 27; (1973) 128 CLR 274
Ward v Ward (1852) 7 Exch 838; (1852) 155 ER 1189
Westfield Management Ltd v Perpetual Trustee Co Ltd [2007] HCA 45; (2007) 233 CLR 528

EDELMAN J:

Introduction

1 The first defendant (Kelvedon) is the owner of land (lot 5485) which has the benefit of an easement over land of the plaintiff (Fermora). The easement was given to facilitate the operation of an abattoir on lot 5485. The easement permits up to 5,682,500 litres of treated water to be discharged each week on to part of Fermora's land from storage lagoons on lot 5485.

2 Fermora wants to develop its land as a lifestyle village. It has approval to do so but it wants the easement removed. The deed of grant of the easement contains a condition subsequent which provides that the easement is to be surrendered in certain circumstances. Fermora says that those circumstances have been satisfied and it also says that Kelvedon has abandoned the easement. Kelvedon has been engaged in trying to recommence abattoir operations and denies that the easement has been surrendered or abandoned.

3 In relation to the issue of construction of the condition subsequent in the grant of easement, this application raises an incidental question concerning the operation of extrinsic evidence in the interpretation of registered instruments. I explain in these reasons why the unregistered deed in this case is not admissible for the purposes of construing the registered grant of easement even though the unregistered deed is referred to in the registered instrument.

4 My conclusion is that the easement was not abandoned, nor did it come to an end by agreement or by operation of a condition subsequent. It should not be extinguished. However, I do not accept the alternative submissions for Kelvedon that this court has no power under s 129C of the *Transfer of Land Act 1893* (WA) to extinguish an easement which comes to an end by operation of a condition subsequent. Nor do I accept that s 4 of the *Limitation Act 1921* (WA) applies to actions to extinguish an easement under s 129C.

5 My reasons are set out in the following sections.

1. Background.

2. The issues in this application.

3. Can the Unregistered Deed inform the interpretation of the Deed of Easement?

4. Has the Easement been abandoned?

5. Has the Easement come to an end by agreement?

6. Has a condition subsequent in the Easement been satisfied, bringing the Easement to an end?

7. The power of this court to extinguish an easement under s 129C of the *Transfer of Land Act*.

8. Is the s 129C action time-barred?

9. If this court has the power to extinguish the Easement under s 129C, does it have a discretion to refuse to do so and, if so, should that discretion be exercised?

10. Conclusion.

Background

6 The following affidavits were read into evidence on behalf of Fermora:

(1) An affidavit of Mr Matthew Marinko Pavlinovich sworn on 10 September 2010 (Pavlinovich 1).

(2) Another affidavit of Mr Pavlinovich, sworn on 29 July 2011 (Pavlinovich 2).

(3) A further affidavit of Mr Pavlinovich sworn on 9 September 2011 (Pavlinovich 3).

7 The following affidavits were read into evidence on behalf of Kelvedon:

(1) An affidavit of Mr Ian Charles Rogers sworn on 12 September 2011 (Rogers).

(2) An affidavit of Mr Ronald George Penn sworn on 16 December 2010 (Penn).

(3) An affidavit of Mr William James Linden sworn on 16 December 2010 (Linden).

(4) An affidavit of Mr Herbert Edward Munyard sworn on 16 December 2010 (Munyard).

(5) An undated affidavit of Mr Tony De Giuseppe filed on 17 December 2010 (De Giuseppe).

8 My findings of the facts below derive from these affidavits. In relation to important facts discussed below, I have indicated the source of those facts. None of the facts in the affidavits was disputed, although senior counsel for Kelvedon made two objections. The first was a general objection to any hearsay evidence. But that objection was not pressed in relation to any specific factual matter. The second objection was to the admissibility of evidence concerning an unregistered deed. I will return to that matter below.

9 In September 1992, Moreay Nominees Pty Ltd (Moreay Nominees) was the owner of the land which I will describe as lot 5485. That land is currently described as deposited plan 114980, being the whole of the land in certificate of title vol 1941 folio 548.

10 Moreay Nominees also owned and operated an abattoir called the Tip Top abattoir on lot 5485.

11 Adjacent to lot 5485 is land which I will describe as the Fermora Land. That land is now owned by Fermora Pty Ltd and it comprises the following:

(1) lots 81 and 83 on deposited plan 32453, being the whole of the land in certificates of title vol 2521 folio 361 and vol 2521 folio 363;

(2) lot 89 on deposited plan 39712, being the whole of the land in certificate of title vol 2551 folio 400; and

(3) lots 1 - 35 inclusive on strata plan 49035, being the whole of the land comprised in certificates of title vol 2637 folios 301 - 335 inclusive.

12 On 24 September 1992, Moreay Nominees entered a Deed of Easement. The Deed of Easement was between Moreay Nominees (as Grantee) and Lorica Pty Ltd, Domston Pty Ltd, Park Street Pty Ltd, Judah Sassoon Sadique and Navarel Pty Ltd (as Grantors). At 24 September 1992, the Grantors were the owners of what is now the Fermora Land.

13 The Deed of Easement was the grant of an easement which was registered on 14 October 1992 as an encumbrance (No F12347 E) on each

of the certificates of title for the Fermora Land (the Easement): Pavlinovich 2, attachment 1; and Pavlinovich 1, attachment 3.

14 The purpose of the Deed of Easement was to create an easement which would permit Moreay Nominees (the Grantee) to discharge treated wastewater from the Tip Top abattoir onto part of the Fermora Land which was, at that time, the El Caballo Resort. The El Caballo Land is now part of the Fermora Land. The crucial clause of the Deed of Easement is cl 1 which as follows.

> The Grantor as the registered proprietor of the El Caballo Land DOES HEREBY for itself and its successors in title to the El Caballo Land GRANT unto the Grantee as the proprietor of the Tip Top Land for itself and its successors on title and assigns full, free and uninterrupted right and liberty to discharge whatever volume of treated water the Grantee determines (not exceeding FIVE MILLION SIX HUNDRED AND EIGHTY TWO THOUSAND FIVE HUNDRED (5,682,500) litres per week) from the storage lagoons situated on the Tip Top Land onto the El Caballo Land and into the pipes on the El Caballo Land which will be maintained in good order and repair by the Grantor to accept such discharge PROVIDED THAT the rights and easements created by the Deed and this Grant of Easement shall be surrendered upon the Grantee or its successors in title or transferees ceasing to use the Tip Top land for the purposes of the operation of the Abattoir situate on portion of Avon Location 5485 (other than in respect of any temporary cessation for maintenance repairs on [sic: or] other structural alterations or due to any other cause of whatsoever nature) or upon any of the other events mentioned in the Deed.

15 The reference in cl 1 to 'the Deed' is a reference to a separate, unregistered, deed which was also made by the same parties. For clarity, I will refer to this as the Unregistered Deed. The registered Deed of Easement defined its reference to 'the Deed' (ie the Unregistered Deed) in Recital C as follows:

> Pursuant to a Deed made contemporaneously herewith and made between the parties hereto in relation to the discharge of treated water from the Tip Top Land onto the El Caballo Land ('the Deed') the Grantor has agreed to grant unto the Grantee the right to discharge treated water at the boundary of the Tip Top Land and the El Caballo Land as therein and hereinafter provided.

16 Like the Deed of Easement, the Unregistered Deed is also dated 24 September 1992. It is contained in Pavlinovich 2, attachment 1. The Unregistered Deed provides that the parties are to do all things as may be necessary to enable registration of the Deed of Easement (cl 4). It

purports to bind all the parties and their successors in title (cl 7). It then provides the following in cl 8:

> 8. The rights and easements granted by the Deed and the New Deed of Easement set out in annexure 'B' shall be surrendered by the Grantee if:
>
> (a) the Grantee or its successors in title or transferees cease to use the Tip Top Land for the purposes of the operation of the Abattoir situate on portion of Avon Location 5485 other than in respect of any temporary cessation for maintenance repairs or other structural alterations or operations cease for more than six months for any other cause of whatsoever nature;
>
> (b) the Grantee or its successors in title or transferees deliver for discharge water which is not treated water and the Grantor has given the Grantee 30 days written notice to make the water comply with the treated water requirements and the Grantee fails to comply within that period and in any event the Grantor will not be obliged to accept any water that is not treated water; or
>
> (c) the Licence is terminated for failure by the Grantee to comply with the terms thereof or renewal is refused for breach of the terms of the expiring licence or any substituted form of licence is terminated or refused for the above reasons.

17 Between September 1992 and 21 July 1995, the Tip Top Abattoir was in operation with Moreay Nominees as the owners of lot 5485.

18 During that period Moreay Nominees held licences for the operation of the abattoir, granted under the *Environmental Protection Act 1986* (WA) (the EPA licences).

19 On 21 July 1995, Computerised Holdings Pty Ltd (Computerised Holdings) purchased lot 5485 and the Tip Top abattoir from Moreay Nominees. The EPA licence to operate the Tip Top abattoir had been transferred to Computerised Holdings on 17 March 1995. That licence expired on 30 September 1995. Computerised Holdings obtained a new EPA licence for the Tip Top abattoir which ran from 1 October 1995 until 30 September 1996.

20 The following events then occurred from 1995 in relation to the Tip Top abattoir and lot 5485:

(1) On 29 September 1995, Computerised Holdings went into liquidation. The Tip Top abattoir ceased operation: Linden, par 12(g) - (h).

(2) On 15 December 1995, Derby Industries Pty Ltd (Derby Industries) entered into a lease with Computerised Holdings over lot 5485. Derby Industries had previously supplied pigs to Computerised Holdings for slaughter and processing at the Tip Top abattoir: Linden, par 12(c), (f).

(3) From early 1996, the parent company of Derby Industries began preparing a submission to the receivers of Computerised Holdings for the purchase and development of the Tip Top abattoir. These preparations, and the required agreements, progressed during 1996 and early 1997: Linden, par 12(h) - (n).

(4) From September 1996 until February 1999, the Tip Top abattoir was used as a wholesale operation or 'boning room' for processing beef, pig and sheep carcasses from other abattoirs: Linden, par 12(t).

(5) On 12 April 1997, the Shire of Northam granted planning approval for the demolition of the Tip Top abattoir and for its replacement with a cattle and sheep abattoir: Linden, par 19. That approval was renewed on 20 January 2010: Linden, par 20.

(6) On 14 May 1997, Kelvedon purchased lot 5485. Like Derby Industries, Kelvedon is part of the Craig Mostyn group of companies: Linden, par 12(o) and annexure 1.

(7) After May 1997 and during 1998 and 1999, the Craig Mostyn group of companies engaged in substantial preparation which was designed to make the Tip Top abattoir operational again. This included agreements to acquire a pork wholesale business, review of the costs and work necessary to get the Tip Top abattoir operational: Linden, par 12(p) - (s).

(8) On 22 February 2000, Derby Industries obtained a licence under the *Environmental Protection Act* to operate the Tip Top abattoir from the following day. Operations began shortly thereafter: Linden, par 12(v) - (w).

(9) The licence for Derby Industries to operate the Tip Top abattoir was renewed in 2001 and 2002: Linden, par 12(x), (ee).

(10) The operations at the Tip Top abattoir ceased in Easter 2003, although certificates of registration of the Tip Top abattoir, under the *Country Slaughter-House Regulations 1969* (WA), were obtained and maintained between 1999 and 2008: Linden, pars 13 and 16.

(11) After Easter 2003, the operations at the Tip Top abattoir on lot 5485 were transferred to the Linley Valley abattoir on the adjoining lot 8. The infrastructure on lot 5485 continued to be used, and continues to be used, in conjunction with abattoir operations on the adjoining lot 8. That infrastructure includes administration offices, truck wash down areas and holding pens for livestock. The wastewater ponds on lot 5485 also receive wastewater from the Linley Valley abattoir on lot 8: Linden, par 15.

(12) In October 2005, the Shire of Northam was advised by the Craig Mostyn group that it had future plans for the Tip Top abattoir and the Linley Valley abattoir. The affidavit evidence of Mr Linden does not, however, depose to what those plans were or what advice was given to the Shire, other than a request to extend the abattoir operations of the Linley Valley abattoir to include sheep and beef: Linden, par 17.

(13) On 21 October 2005, the Shire advised Derby Industries that the Shire had no objection to the extension of the abattoir operations to include sheep and beef, subject to the necessary environmental and development approvals being met: Linden, par 18.

(14) On 12 April 2007, the Shire granted planning approval to Derby Industries to demolish the Tip Top abattoir and, subject to conditions, for the construction of a sheep and cattle abattoir on lot 8 and lot 5485: Linden, par 19. This approval was extended on 20 January 2010 due to delay by the Environmental Protection Authority in assessing the approved proposal: Linden, par 20.

(15) On 3 December 2009, the Department of Environment and Conservation approved an application by Derby Industries for an intensive piggery and abattoir on lot 5485 and the adjoining lot 8. A licence commencing on 13 February 2010 and expiring on 12 February 2015 was issued under the *Environmental Protection Act*: Linden, par 21.

(16) On 29 April 2010 a works approval was given by the Department of Environment and Conservation under the *Environmental Protection Act* for the construction of the abattoir and livestock holding pens on lot 5485: Linden, par 23.

21 In 2006, Fermora purchased and became the registered proprietor of the Fermora Land.

22 In January 2010, Fermora obtained approval for a lifestyle village on the Fermora Land. One condition of the approval (condition 1.31) concerned odour issues arising from the nearby abattoir. That condition was subsequently replaced with an alternate condition relating to odours, and the alternate condition was cleared by the Shire of Northam on 20 July 2011.

23 Fermora now argues that the Easement has been extinguished.

24 Kelvedon says that the benefit of the Easement is critical to the implementation of its proposal for the new abattoir (see Linden, par 22).

The issues in this application

25 The ultimate question in this application is whether the Easement should be discharged. The only issues raised in this application were as follows.

(1) Can the Unregistered Deed be relied upon for the interpretation of the Deed of Easement?

(2) Has the Easement been abandoned?

(3) Has the Easement come to an end by agreement?

(4) Has a condition subsequent in the Easement been satisfied, bringing the Easement to an end?

(5) If the Easement has come to an end, does this court have the power to extinguish the Easement under s 129C of the *Transfer of Land Act*?

(6) Is a s 129C application to extinguish the Easement time-barred?

(7) If this court has the power to extinguish the Easement under s 129C, does it have a discretion to refuse to do so and, if so, how should that discretion be exercised?

26 Although the submissions and originating summons filed by Fermora referred to the Easement as a restrictive covenant, this is not accurate. A restrictive covenant is sometimes, colloquially, described as a 'negative easement' but the two rights are distinct. For instance, a restrictive covenant cannot be acquired by prescription: see W Swadling 'Property' in A Burrows (ed) *English Private Law* (2nd ed, 2008 OUP) page 257 [4.100].

Can the Unregistered Deed inform the interpretation of the Deed of Easement?

27 The only question raised for consideration was whether the Unregistered Deed could be used for the interpretation and construction of the Deed of Easement. It was not suggested that the Unregistered Deed fell within an exception within s 68(1) of the *Transfer of Land Act* nor was it suggested that the Unregistered Deed gave rise to any '*in personam*' rights or privileges between Fermora and Kelvedon independent of the registered Deed of Easement. It was not apparent from the evidence whether or not Kelvedon was aware of the Unregistered Deed prior to this application.

28 If the instrument being interpreted were an ordinary deed of agreement then the answer to the question of construction would be simple. The Deed of Easement refers to another document and, by reference, incorporates it. Common law principles of construction would require that the Unregistered Deed be incorporated by reference if the terms to be incorporated can be 'identified with certainty [and] there [is] no textual or policy consideration which would prevent the incorporation': ***Lief Investments Pty Ltd v Conagra International Fertiliser Company*** [1998] NSWSC 481 (Sheller JA).

29 Until 2007, this common law approach was also the approach taken to construction of instruments registered under the Torrens system. In ***Gallagher v Rainbow*** [1994] HCA 24; (1994) 179 CLR 624, 639 - 640, McHugh J had said that '[t]he principles of construction that have been adopted in respect of the grant of an easement at common law ... are equally applicable to the grant of an easement in respect of land under the Torrens system'.

30 That approach was changed by the decision of the High Court of Australia in ***Westfield Management Ltd v Perpetual Trustee Co Ltd*** [2007] HCA 45; (2007) 233 CLR 528. In that case Westfield had the benefit of an easement conferring a right of way over the land of Perpetual. There were multi-storey commercial premises on both the

dominant and servient tenements. Westfield sought a declaration that the easement permitted it to allow persons or vehicles to use a driveway described in the easement for the purpose of crossing the Westfield dominant tenement to obtain access to further land beyond it. The High Court of Australia held that the declaration should not be made.

31 At the trial in ***Westfield***, extensive extrinsic evidence had been led by Westfield in support of the construction of the grant of easement which Westfield urged should be accepted. In the course of construing the terms of the grant of the easement contrary to the conclusion reached by the trial judge, the joint judgment of the High Court held that much of this evidence was inadmissible. The court disapproved the statement by McHugh J in ***Gallagher*** that the principles of construction of an easement are the same under the Torrens system as they are at common law.

32 The reason for the disapproval of McHugh J's approach was because under the Torrens system of title third parties who inspect the Register cannot be expected to look further than the Register for extrinsic material which might establish facts or circumstances that existed at the time the dealing was registered. The joint judgment of the High Court referred only to one possible exception at (540) [44], saying the following:

> It may be accepted, in the absence of contrary argument, that evidence is admissible to make sense of that which the Register identifies by the terms or expressions found therein. An example would be the surveying terms and abbreviations which appear on the plan found in this case on the DP.

33 Subsequently, in ***Sertari Pty Ltd v Nirimba Developments Pty Ltd*** [2007] NSWCA 324, the appellant had relied on extrinsic evidence of activities being conducted on the dominant tenement at the time of the grant, including a town planning report. The New South Wales Court of Appeal held that this evidence was inadmissible because the consequence of the ***Westfield*** decision was that '[t]his Court is therefore limited to the material in the folio identifiers, the registered instrument, the deposited plans, and the physical characteristics of the tenements' [16] (Handley AJA). This approach has been followed: ***Berryman v Sonnenschein*** [2008] NSWSC 213 [28] (Einstein J); ***Shelbina Pty Ltd v Richards*** [2009] NSWSC 1449 [29] (Rein J).

34 In ***Neighbourhood Association DP No 285220 v Moffat*** [2008] NSWSC 54, White J considered the extent to which reference could be made to extrinsic material in construing the terms of a bare grant. He explained that his view would have been that in cases of a bare grant it is permissible to refer to the objective matrix of facts bearing on the

construction of the instrument, and that ***Westfield*** did not preclude this evidence [35]. His Honour suggested, at [37], that necessity may be a reason for a different approach to the construction of a bare grant from a grant such as that in ***Westfield***. He said that in a bare grant

> if ambiguities cannot be resolved by recourse only to the text of the registered instrument and plan, the person proposing to buy, or to deal with, registered land is necessarily thrown back to an examination of the extrinsic circumstances to see the extent of the rights which have been conferred on the owner of the dominant tenement.

35 However, his Honour considered that the statement of law in ***Sertari*** formed part of the reasons for decision, was unequivocal and encompassed even bare grants.

36 The question here is whether the Unregistered Deed could fall within the exception accepted by the High Court of Australia, for the purposes of the ***Westfield*** case, without the benefit of argument before it. There are two reasons why it should not, and why a new exception for incorporation by reference should not be accepted here.

37 First, the rationale relied upon by the High Court for excluding extrinsic materials generally is the importance of the Torrens system. At (539) [38], the High Court referred to a number of cases concerning the importance of the indefeasibility principle. Each of these cases emphasised that the Torrens system is one of title by registration not registration of title: ***Halloran v Minister Administering National Parks and Wildlife Act 1974*** [2006] HCA 3; (2006) 229 CLR 545, 559 - 560 [35] (Gleeson CJ, Gummow, Kirby & Hayne JJ); ***Farah Constructions Pty Ltd v Say-Dee Pty Ltd*** [2007] HCA 22; (2007) 230 CLR 89, 167 - 172 [190] - [198] (the Court); ***Black v Garnock*** [2007] HCA 31; (2007) 230 CLR 438, 443 [10] (Gummow & Hayne JJ).

38 The High Court also referred to two cases which made the same point in relation to easements. One of those cases was ***Pearce v City of Hobart*** [1981] Tas R 334. At the pages of that case which were cited (349 - 350), Everett J quoted from ***Breskvar v Wall*** [1971] HCA 70; (1971) 126 CLR 376, 386, that the 'title [registration] certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor'.

39 Viewed in light of this rationale, the exception which the High Court tentatively applied in ***Westfield***, without the benefit of argument on the

point, must be of narrow compass. The broader the exception, the greater the difficulty for third parties inspecting the register to determine the nature of the rights and liberties to which they are subject. This is exemplified by the difficulty encountered by Fermora (the party entitled to the benefit of the grant) in locating a copy of the Unregistered Deed which was executed and which was without missing pages: Pavlinovich 1, pages 4 - 5 [6], and annexure MMP 4.

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

41 Secondly, and perhaps reinforcing the first point, if the Unregistered Deed were admissible material then immediate difficulties would be encountered in reconciling the terms of the Unregistered Deed with the terms of the registered Deed of Easement. Even apart from the new provisions for surrender in cl 8(b) and cl 8(c) of the Unregistered Deed, there are direct inconsistencies between cl 8(a) and the proviso in the Deed of Easement.

42 The Deed of Easement provides that rights and easements shall be surrendered in certain circumstances, with a proviso 'other than in respect of any temporary cessation for maintenance repairs [or] other structural alterations or due to any other cause of whatsoever nature'. Clause 8(a) of the Unregistered Deed provides for the surrender in the same circumstances, but subject to a different proviso: 'other than in respect of any temporary cessation for maintenance repairs or other structural alterations or operations cease for more than six months for any other cause of whatsoever nature'. Clause 8(a) purports to remove the 'any other cause' by which temporary cessation will fall within the proviso. Clause 8(a) also uses the same words to create a substantial new restriction on the proviso in relation to the cessation of operations. As I explain below, the cessation of operations is a different matter from the

(permanent) *use* of the land for the *purposes* of the operation of the abattoir.

43 The Unregistered Deed is not admissible evidence for the construction of the indefeasible rights and liberties contained in the Deed of Easement.

Has the Easement been abandoned?

44 The notion of abandonment of an easement is the same whether under s 129C (or its equivalents) or at common law: ***Davidson v Elkington*** [2011] WASC 29 [39] (Hall J); ***Long v Michie*** [2003] NSWSC 233 [10] (Austin J); ***Grill v Hockey*** (1991) 5 BPR 11,421, 11,424 (McLelland J). The question to be asked is whether all the circumstances demonstrate a manifested (ie objective) intention to abandon the easement.

45 In ***Treweeke v 36 Wolseley Road Pty Ltd*** [1973] HCA 27; (1973) 128 CLR 274, the question of abandonment of an easement arose. The easement was a right of way to a beach at Double Bay. It was described by McTiernan J as 'a pleasant amenity' (284). Most of the right of way had been almost impassable for about 30 years due to obstructions including vertical rock faces and an impenetrable bamboo plantation. The majority of the High Court of Australia held that the lack of use of the right of way did not amount to abandonment. In the majority, McTiernan J quoted from ***Ward v Ward*** (1852) 7 Exch 838; (1852) 155 ER 1189 that '[t]he presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise that presumption. ... The non-user, therefore, must be the consequence of something which is adverse to the user' (839; 1190).

46 Although courts have sometimes spoken of a long period of non-use giving rise to a presumption of abandonment, that language is better avoided by modern courts: ***Long v Michie*** [19]. A presumption is a standardised inference of fact. It arises when common experience shows that the existence of one fact, which is proved, generally involves the existence of another fact. A long line of authority disproves any suggestion that a common experience with easements is that a period of non-use, even a long period of non-use, is a consequence of abandonment. The period of non-use will only be one factor in assessing whether a person has abandoned the easement.

47 The concept of proof of abandonment by evidence of acts showing an intention to abandon derives from Roman law. But even then it was

not common. WW Buckland, the Regius Professor of Roman law, remarked of *derelictio* in Roman law that 'people leave their land for long periods for many reasons other than intention not to own it, and as land usually has some value it does not seem that *dereliction* of land was common': P Stein (ed) *A Textbook of Roman Law: From Augustus to Justinian* (3rd ed, 1963) 207.

48 More recently, in ***Chiu v Healey*** (2003) 11 BPR 21,241; [2003] NSWSC 857, Young CJ in Eq said that 'an abandonment occurs when the dominant owner *has made it clear* that neither he nor his successors in title will make any use of the easement though it is not to be lightly inferred. ... Long non-user will be good evidence, but will not necessarily be sufficient to establish abandonment' [36] (emphasis added).

49 Similarly, it is insufficient to show abandonment merely that the owner of the dominant tenement is unable to use the easement, particularly if the inability to use it is not permanent: see ***Ecclesiastical Commissioners for England v Kino*** (1880) 14 Ch D 213.

50 All of the circumstances of the case must be considered in order to determine whether the circumstances are such that an intention to abandon is manifest. As Frederick Pollock said in *An Essay on Possession in the Common Law* (1888) 16, '[c]onduct which would almost be evidence of abandonment with regard to one kind of land may with regard to another be as good evidence of use and occupation as can be expected'.

51 The circumstances of this case do involve a significant period of non-use of the Easement. But the evidence falls far short of manifesting an intention to abandon. The Tip Top abattoir ceased operation in September 1995. But, as I have set out above at [20](3) - (15), Computerised Holdings and then Kelvedon, as the registered proprietors of lot 5485, were involved in activities for the following 14 years which manifested a possible intention to use the Easement in the future for abattoir activities. There was no manifested intention to abandon the Easement.

Has the Easement come to an end by agreement?

52 This submission was that the Easement had come to an end by agreement, within the terms of s 129C(1)(b). The submission was that the Easement had come to an end because the 'persons ... for the time being or from time to time entitled to the easement ... have agreed to the same being wholly or partially extinguished'. Plainly, Kelvedon as the person entitled to the Easement for the time being has not agreed to it being

extinguished. So counsel for Fermora submitted that Kelvedon must be deemed to have agreed that the Easement be extinguished because it was bound by the Easement itself and because the 'agreement' is in the Deed of Easement.

53 The short answer to this submission is that s 129C(1)(b) is concerned with actual objective agreement, ie expressions of consent, by the persons entitled to the easement. In relation to the equivalent provision in New South Wales, it has been held that it requires an intention to become contractually bound: ***Stephenson v Dwyer*** [2008] NSWCA 123 [102] - [107] (Mason P, Hodgson & McColl JJA). Simply by taking the benefit of an Easement which was subject to a condition subsequent, Kelvedon did not agree to extinguish the easement.

Has a condition subsequent in the Easement been satisfied, bringing the Easement to an end?

54 In written submissions Fermora did not indicate the basis upon which it was said that the Easement should be surrendered. The focus of Fermora's written submissions was on the terms of the Deed of Easement. The written submissions of Kelvedon addressed directly the question whether the condition in the Deed of Easement for 'surrender' of the Easement was satisfied. Although the submissions of both parties were presented as a concern with 'agreement', the legal characterisation of Fermora's submission, and the manner in which it was opposed, was an argument concerning whether the Easement had come to an end by operation of a condition subsequent.

55 When I raised this matter with counsel in oral argument, neither counsel demurred from this characterisation of Fermora's argument as one concerning a condition subsequent (ts 3, 34, 43 - 44).

56 Senior counsel for Kelvedon did not suggest that the grant of an Easement could not be subject to a condition subsequent. He was correct not to take this point. Although I can find no authority directly on the issue, in ***Lolakis v Konitsas*** [2002] NSWSC 889 [39] (Campbell J) it was assumed that an easement could be subject to a condition subsequent, the non-performance of which could cause the grant to become ineffective. Further, there is considerable authority recognising the operation of conditions subsequent to determine estates in land generally; there is no reason why the same principles should not apply to easements.

57 In ***Commonwealth Bank of Australia v Cluness Matter No 3038/96*** [1997] NSWSC 222, Young J (as his Honour then was) explained in an

appendix to his decision that twentieth century contract lawyers have used the term 'condition subsequent' in different ways. The sense in which that term is used here, and the most accurate sense in which it is used in the law of property, is as a condition (here the condition of 'surrender') the occurrence of which will bring the property right to an end for the future.

58 In ***Perpetual Trustees Executors & Agency Company of Tasmania Ltd v Walker*** [1953] HCA 21; (1953) 90 CLR 270, Dixon CJ explained the nature of a 'true' condition subsequent as a condition which operates 'in defeasance of an estate to which it is annexed' (278). At (278), the Chief Justice quoted from Lord Cranworth for the proposition that

> where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine: ***Clavering v Ellison*** (1859) 7 HLC 707, 725; 11 ER 282, 289.

Although Dixon CJ was in dissent in that case it was not on this point: see (290 - 291) (Fullagar, Kitto & Taylor JJ).

59 The condition subsequent in cl 1 of the Deed of Easement is that the easement 'shall be surrendered' if the owner or successor in title of lot 5485 ceases to use it 'for the purposes of the operation of the Abattoir situate on [lot 5485]'. There then follows a proviso '(other than in respect of any temporary cessation for maintenance repairs on [sic: or] other structural alterations or due to any other cause of whatsoever nature) or upon any of the other events mentioned in the [Unregistered] Deed'.

60 One argument in written submissions for Kelvedon (pars 31 - 34) was that the proviso was too uncertain to be enforced. The basis upon which this argument of uncertainty was put was that the Deed of Easement provided no indication as to what length of time constituted a temporary cessation. Counsel for Fermora asserted that the Deed of Easement and condition subsequent was certain because it provided precise identification of the abattoir (ts 61).

61 No submission was made by Kelvedon that the condition subsequent in the Deed of Easement was too uncertain to be enforced due to the words 'or upon any of the other events mentioned in the [Unregistered] Deed'. The Unregistered Deed is an instrument which Kelvedon submitted, and which I have accepted, is inadmissible for the purposes of construction of the Deed of Easement. Since this matter was not argued before me it is not a matter which I need to decide.

62 For two reasons, I do not accept the submission by Kelvedon that the condition subsequent is too uncertain to be enforced due to the vague nature of 'temporary cessation'.

63 First, there is a difference between, on the one hand, the need for certainty and precision in a clause in order for it to be valid and, on the other hand, the occurrence of events to which the application of the clause might be difficult: ***Perpetual Trustees*** (288) (Dixon CJ). In the case of 'temporary cessation' these words of the clause have sufficient certainty to be valid even if, as in this case, later circumstances might arise where the application of the clause might be difficult.

64 Secondly, in ***Perpetual Trustees***, in reasoning with which the other members of the court agreed (290 - 291), Dixon CJ said that a condition which required a widow 'to reside' at the premises was not too uncertain to be enforced. Dixon CJ referred, with approval, to English decisions including one which upheld the validity of a clause which required a person to do acts including taking up permanent residence in England. Dixon CJ emphasised that permanence, in that context, involved intention. Although there might be some uncertainty in the application of the words 'to reside' the Chief Justice held that the words were sufficiently certain. They had a core content which 'applied to a particular dwelling and to a period of time regarded as indefinitely continuing and subject to termination only by a change in residence' (289). Similarly, in this case there is also a core content to the phrase 'temporary cessation' which provides it with sufficient certainty.

65 The question which then remains is whether Computerised Holdings, or Kelvedon (as registered proprietors of lot 5485) ceased 'to use the Tip Top land for the purposes of the operation of the Abattoir situate on portion of Avon Location 5485 (other than in respect of any temporary cessation for maintenance repairs on [sic: or] other structural alterations or due to any other cause of whatsoever nature)'.

66 There are two possible constructions of this condition subsequent. The construction which was essentially advanced by Fermora was that the condition subsequent is concerned with the actual operation of the Tip Top abattoir so that if the physical output of that particular abattoir ceased, other than temporarily, then the condition subsequent would be satisfied.

67 One submission on behalf of Kelvedon was that the condition subsequent is concerned with intention to operate lot 5485 as an abattoir,

rather than the physical output of the particular abattoir. The proper construction of the condition subsequent therefore requires consideration of whether there is a manifested permanent intention to cease using the land for the purpose of an abattoir.

68 The condition subsequent is not entirely clear. But the better construction of it is that which was advanced by Kelvedon for four reasons.

69 First, the condition subsequent focuses upon the *purpose* of the use of the land. Like the meaning of 'reside' in ***Perpetual Trustees*** a focus upon the purpose of the use of land is a focus on the intention of the owner or occupier. The ordinary meaning of 'purpose' is an intention or an aim: *New Shorter Oxford English Dictionary*, page 2421; *Macquarie Dictionary*, page 1430.

70 Secondly, 'temporary cessation' is in contradistinction to 'permanent' cessation. The only way in which it could be ascertained whether a cessation of the use of lot 5485 for the purpose of the operation of the abattoir is temporary or permanent is to consider the manifestations of the intention of the owner of lot 5485 (ie the 'objective' intention).

71 Thirdly, although the word 'abattoir' is capitalised in the condition subsequent, it is not a defined term. The reference in the condition subsequent to the possibility of structural alterations demonstrates that the abattoir which is intended to continue in operation need not be the same abattoir as the existing Tip Top abattoir.

72 Fourthly, there is said to be a principle of last resort where in cases of ambiguity a grant of easement is to be construed against the grantor (ie Fermora): ***Ferella v Otvosi*** [2005] NSWSC 962; (2005) 64 NSWLR 101, 108 [21] (Hamilton J).

73 For these reasons, a reasonable person inspecting the register would conclude that the Easement would be 'surrendered' only if there were evidence of an intention that the use of lot 5485 for the purposes of operation of an abattoir would permanently cease.

74 Senior counsel for Kelvedon made an alternative, valiant, argument that, contrary to the fact explained above at [20](1), the abattoir operations on lot 5485 had not ceased on 29 September 1995. I do not accept this submission.

75 The evidence on behalf of Kelvedon itself was unequivocal that from 29 September 1995, the Tip Top abattoir ceased operation: Linden, par 12(g) - (h). Although, from May 1997 until the present day, the Craig Mostyn group has been endeavouring to recommence abattoir activities on lot 5485, the simple fact is that for 16 years there has been no abattoir activity on lot 5485, and even if abattoir use recommences, it will not be at the Tip Top abattoir because that abattoir is intended to be demolished.

76 Senior counsel for Kelvedon argued that lot 5485 had not ceased to be used as an abattoir because there were other activities (including 'boning') going on there to support a different abattoir on another property. He argued that the word 'abattoir' should not be confined to the activity of slaughter. That submission about the meaning of 'abattoir' is contrary to all of the evidence, including the evidence relied upon by Kelvedon. For instance, Mr Linden referred to the various activities at the Tip Top abattoir as 'abattoir (slaughter), boning, wholesaling and processing operations': Linden, par 14. Mr De Giuseppe and Mr Munyard both equate abattoir activities with slaughter: De Giuseppe, pars 5 - 6; Munyard, pars 6 - 7. Mr Penn also refers to abattoir as 'slaughter': Penn, par 8.

77 More importantly, the submission that the operation of an 'abattoir' does not involve slaughter is contrary to the ordinary meaning of that term. An 'abattoir' is defined in the *Macquarie Dictionary* and the *Oxford English Dictionary* as a slaughterhouse: *Shorter Oxford English Dictionary*, page 3; *Macquarie Dictionary*, page 2.

78 Although the Tip Top abattoir (slaughter) operations ceased on 29 September 1995, the owners of lot 5485 did not intend for those operations to cease permanently. As I have explained at [20](3) - (15), Computerised Holdings and then Kelvedon, as the registered proprietors of lot 5485, were involved in activities for the following 14 years which manifested a possible intention to use the Easement in the future for abattoir activities.

79 In other words, the evidence is that the owners of lot 5485 did not (permanently) cease to use the Tip Top land for the purposes of operation of the abattoir on lot 5485.

The power of this court to extinguish an easement under s 129C of the *Transfer of Land Act*

80 An additional argument advanced by senior counsel for Kelvedon was that even if a condition subsequent were satisfied, this court has no

power to extinguish the Easement under s 129C. I have considered whether this submission could form an alternative ground for my decision. But I do not accept the submission.

81 Section 129C(1)(a) of the *Transfer of Land Act* provides as follows:

> **129C. Supreme Court's powers as to easements etc**
>
> (1) Subject to subsection (1a), where land under this Act is subject to an easement or to any restriction arising under covenant or otherwise as to the user thereof or the right of building thereon, the court or a judge may from time to time on the application of any person interested in the land burdened or benefited, or any local government or public authority benefited, by the easement or restriction, by order wholly or partially extinguish, discharge or modify the easement or restriction upon being satisfied -
>
> (a) that by reason of any change in the user of any land to which the easement or the benefit of the restriction is annexed, or of changes in the character of the property or the neighbourhood or other circumstances of the case which the court or a judge may deem material the easement or restriction ought to be deemed to have been abandoned or to be obsolete or that the continued existence thereof would impede the reasonable user of the land without securing practical benefits to other persons or (as the case may be) would unless modified so impede such user; or
>
> (b) that the persons of full age and capacity for the time being or from time to time entitled to the easement or to the benefit of the restriction whether in respect of estates in fee simple of any lesser estates or interests in the land to which the easement or the benefit of the restriction is annexed have agreed to the same being wholly or partially extinguished, discharged or modified or by their acts or omissions may reasonably be considered to have abandoned the easement or to have waived the benefit of the restriction wholly or in part; or
>
> (c) that the proposed extinguishment, discharge or modification will not substantially injure the persons entitled to the easement or to the benefit of the restriction.

82 The application for discharge of the easement was initially brought by Fermora by reference to s 129C generally. Written submissions were filed by Kelvedon which addressed each of the three limbs of s 129C. However, at the hearing, counsel for Fermora submitted that he relied only upon subsection (1)(b) (ts 3).

83 As I have explained above at [52] - [53] the reference to 'agreement' in s 129C(1)(b) does not include conditions subsequent. However, the section needs to be read as a whole. Subsequent to the hearing I invited any submissions from the parties concerning how s 129C(1)(b) might be construed together with other provisions in the section including s 129C(1)(a). Counsel for Fermora indicated in written submissions that he also relied upon s 129C(1)(a).

84 It would be very surprising indeed if, for example, a very clear condition subsequent had the effect of bringing a grant of easement to an end, yet this court did not have the power to extinguish the easement. Such a surprising conclusion is negated by the plain terms of s 129C(1)(a): if a condition subsequent were satisfied, bringing a grant of easement to an end, this would be a circumstance 'of the case which the court or a judge may deem material [in which] the easement or restriction ought to be deemed to ... be obsolete'.

85 As to the words 'other circumstances which the court may deem material', these have been said to admit 'the widest field of evidentiary material': ***Markos v OR Autor Pty Ltd*** [2007] NSWSC 810 [90] (Austin J); ***RK Roseblade & VM Roseblade and the Conveyancing Act*** [1964-5] NSWR 2044, 2046 (Else-Mitchell J).

86 As to 'obsolete', this includes 'no longer relevant to circumstances presently obtaining': ***Re Eddowes*** (Unreported, QSC, 12 October 1990) (Ambrose J) citing ***C Hunton Ltd v Swire*** [1969] NZLR 232, 234 (Wilson J); ***Re Miscamble's Application*** [1966] VR 596, 601 (McInerney J).

87 Further, in ***Westfield*** the High Court referred to a similar provision to s 129C in New South Wales, namely s 89 of the *Conveyancing Act 1919* (NSW). The High Court described the provision in general terms as concerned with permitting modification or extinguishment where there is a subsequent change in circumstances (540) [43]. The satisfaction of a condition subsequent is a subsequent change in circumstances.

88 For these reasons, if it had been necessary to do so, I would have concluded that this court has the power to extinguish an easement upon the occurrence of a condition subsequent expressed to cause the easement to be surrendered.

Is the s 129C action time-barred?

89 A further issue which was raised by senior counsel for Kelvedon, although in oral submissions only, was whether any action to discharge the Easement was time barred. It was argued that if even if an action to extinguish the Easement under s 129C had accrued in 1996 then that action was now time barred. I have also considered whether this submission could form an alternative ground for my decision. I do not consider that it can.

90 Senior counsel referred to the *Limitation Act 1935* (WA). This is the applicable limitation statute to this submission. The *Limitation Act 2005* (WA) applies only to causes of action that accrue after its commencement date (which was 12 November 2005): s 4(1).

91 The *Limitation Act 1935* provides in s 4 as follows:

> No person shall make an entry or distress, or bring an action to recover any land or rent, but within 12 years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within 12 years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.

92 The term 'land' is defined in s 3 to include:

> [M]essuages and all corporeal hereditaments whatsoever, and any share, estate, or interest in them or any of them, whether the same is a freehold or chattel interest, and whether freehold or held according to any other tenure.

93 Although an easement is 'land' for the purposes of the *Limitation Act 1935*, the action to discharge an easement is not an action 'to recover any land or rent'. Upon the discharge of the easement nothing is 'recovered' by the landowner. A liability is extinguished. Put another way, 'recover any land' in s 4 is concerned with an action for possession. Easements are not possessed.

94 The conclusion that s 4 does not apply to actions to discharge easements because they are not actions 'to recover land' is also reinforced by s 5. That section provides that an action to recover any land does not accrue 'until such land is in the actual possession of some person not entitled to such possession'. If an action to discharge an easement were an action 'to recover land', s 5 would be unintelligible. An easement is never

'possessed' so it would be impossible to determine when the time period would commence for the purpose of s 5.

95 There is another reason why s 4 of the *Limitation Act 1935* does not apply. This is because, as Templeman J succinctly said in ***Pekel v Humich*** [1999] WASC 65 [111] - [112], the definition of land in s 3 does not include easements.

96 The language in s 3 of messuages and corporeal hereditaments is not the language of the modern law. A messuage is a dwelling house. A corporeal (from corpus, or body) hereditament (from hereditare, to inherit) is any physical thing which can be inherited. Strictly, 'corporeal heriditament' is a tautology since it is incorporeal *rights* to land which are inherited rather than the physical land itself. But the expression 'corporeal hereditament' focuses attention upon physical things rather than intangible things which cannot be touched.

97 Quoting Sir Edward Coke, Blackstone described hereditaments as 'the largest and most comprehensive expression; for it includes not only lands and tenements, but whatsoever may be inherited': W Blackstone, *Commentaries on the Laws of England*, Book 2, ch 2. But, in the context of the *Limitation Act 1935*, the expression 'corporeal hereditament' is used to describe tangible things *other than* land. The focus is on those corporeal things which are affixed to the land. The word 'includes' in the definition is important. Land *includes* those tangible things and any interest in them. Therefore, when s 5 speaks of possession of 'land' it can sensibly be read as speaking of possession of tangible things not intangible things like easements which cannot be possessed.

98 For these two reasons, s 4 of the *Limitation Act 1935* has no application to Fermora's action to discharge the Easement. If the Easement were abandoned, or subject to an agreement for surrender, or a condition subsequent for surrender, then an action under s 129C would not be time-barred.

If this court has the power to extinguish the Easement under s 129C, does it have a discretion to refuse to do so and, if so, should that discretion be exercised?

99 The final issue raised in this application is one which, again, would only arise in the event of a conclusion that the Easement had been abandoned, or subject to an agreement for surrender, or a condition subsequent for surrender which had been satisfied. It is clear that this

court has a discretion to refuse to extinguish an easement even if s 129C is enlivened: ***Pieper v Edwards*** [1982] 1 NSWLR 336.

100 Any exercise of discretion to refuse to extinguish the Easement may depend upon the ground by which the Easement could have been extinguished: abandonment, agreement, or satisfaction of a condition subsequent. Each different ground might involve different considerations and would depend upon the reason why the Easement is extinguished. It is not appropriate to speculate upon how this discretion might have been exercised if I had concluded that s 129C had been enlivened.

Conclusion

101 For the reasons I have explained, there was no agreement to discharge the Easement, nor abandonment, nor has the condition subsequent in the Deed of Easement been satisfied. The Easement is not discharged.

102 This conclusion may not spell the end of Fermora's proposed lifestyle village. There are suggestions in documents exhibited to the affidavits in this application that the nearby golf course is short of water and might even take all of any treated water from Kelvedon's proposed abattoir operations via another easement: Pavlinovich 1, annexure MMP 9, page 58. However, since it is not necessary to consider whether discretion should be exercised to discharge the easement, this matter is not germane to the legal issues in this application.