Supreme Court
New South Wales

Case Title:	Adrienne Ryan v Margaret Mary Sutherland
Medium Neutral Citation:	[2011] NSWSC 1397
Hearing Date(s):	31 October 2011
Decision Date:	22 November 2011
Jurisdiction:	Equity Division
Before:	Black J
Decision:	Summons dismissed - held that restriction as to user is valid and enforceable against subsequent purchaser of land
Catchwords:	REAL PROPERTY - Easements - Restrictive covenants - Validity of restriction permitting use for recreational and other purposes
Legislation Cited:	- Conveyancing Act 1919 (NSW) ss 88B, 88B(2), 88B(3)(c), 89, 89(1)(c), 89(3)
Cases Cited:	- Berger Bros Trading Co Pty Ltd v Bursill Enterprises Pty Ltd (1969) 91 WN (NSW) 521 - Brunner v Greenslade [1971] Ch 993 - Brydall Pty Ltd v Owners of Strata Plan 66794 [2009] NSWSC 819 - Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd (1971) 124 CLR 73 - Copeland v Greenhalf [1952] Ch 488 - Christopoulos v Kells (1988) 13 NSWLR 541 - Clos Farming Estates Pty Ltd (recs & mgrs

apptd) v Easton [2001] NSWSC 525; (2001) 10 BPR 18,845
- Forestview Nominees Pty Ltd v Perpetual Trustees WA Ltd (1998) 193 CLR 154; [1998] HCA 15
- Grigsby v Melville [1972] 1 WLR 1355
- Harada v Registrar of Titles [1981] VR 743
- Lolakis v Konitsas [2002] NSWSC 889
- London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd [1992] 1 WLR 1278
- London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd [1994] 1 WLR 31
- Moncrieff v Jamieson [2008] 4 All ER 752; [2007] 1 WLR 2620
- Owners of East Fremantle Shopping Centre West Strata Plan 8618 v Action Supermarkets Pty Ltd [2008] WASCA 180
- Pieper v Edwards [1982] 1 NSWLR 336
- Pirie v Registrar-General (1962) 109 CLR 619
- Re Rosedale Farm (NSW) Pty Ltd [2010] NSWSC 1321
- Re Ellenborough Park [1956] Ch 131
- Reilly v Booth (1890) 44 ChD 12
- Thomas W Ward v Alexander Bruce (Grays) Ltd [1959] 2 Lloyd's Rep 472
- Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165
- Tulk v Moxhay (1848) 2 Ph 774; 41 ER 1143
- Westfield Management Ltd v Perpetual Trustee Co Ltd [2007] HCA 45; (2007) 233 CLR 528
- Weigall v Toman [2006] QSC 349; [2008] 1 Qd R 192
- Wright v Macadam [1949] 2 KB 744

Texts Cited:

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- RP Meagher, JD Heydon & MJ Leeming, Meagher, Gummow & Lehane's Equity: Doctrines and Remedies, 4th ed
- P Butt, Land Law, 4th ed

Category: Principal judgment

Parties: Adrienne Ryan (Plaintiff)

	Margaret Mary Sutherland (Defendant)
Representation	
- Counsel:	Counsel: G.A. Sirtes SC/J. Knackstredt (Plaintiff) S. Reuben (Defendant)
- Solicitors:	Solicitors: Fox & Staniland (Plaintiff) P. Dobrich & Co (Defendant)
File number(s):	10/132302
Publication Restriction:	

JUDGMENT

1 The Plaintiff ("Mrs Ryan") seeks declarations that a restriction as to user created by a registered dealing ("restriction as to user") is void; or alternatively a declaration pursuant to s 89(3) of the *Conveyancing Act* 1919 (NSW) that her land ("Lot 2") is not affected by the restriction as to user; or alternatively that the restriction as to user is an easement or a positive covenant; or alternatively that the restriction as to user is not enforceable by the Defendant ("Mrs Sutherland"). Mrs Ryan also seeks an order that the restriction as to user be removed from the title of Lot 2.

2 By Cross-Summons, Mrs Sutherland seeks a declaration that the restriction as to user created by the relevant instrument is valid, effectual and enforceable according to its terms to benefit her land ("Lot 1") and to burden Lot 2, or, alternatively, an order under *Conveyancing Act* 1919 (NSW) s 89 modifying the terms of the restriction as to user to give effect to the matters the Court may determine were intended by the instrument. Following an amendment of the Cross-Claim, for which I granted leave in order to permit the real issues in the case to be determined and in the

absence of any suggested prejudice to Mrs Ryan, Mrs Sutherland also claims additional orders that:

2A. An order that the said instrument be modified and/or rectified so as to express the true agreement that the Court may in the premises determine was intended by the instrument by inserting after the heading '1. Terms of restriction firstly referred to in the above mentioned plan; the following words in the body of the restriction; not to interfere with the ...

2B. Orders for the performance and carrying into effect the modification and/or rectification of the said instrument.

3 The relevant facts are straightforward. Lot 2 is burdened by a restriction as to user created under s 88B of the *Conveyancing Act* 1919 (NSW) and Lot 1 has the benefit of that restriction as to user. Section 88B(2) of the *Conveyancing Act* provides for the registration of plans which provide for the creation of easements and restrictions on use of land. Upon registration of such a plan, the easement or restriction on use is created by virtue of that registration: s 88B(3)(c) and see *Westfield Management Ltd v Perpetual Trustee Company Limited* [2007] HCA 45; (2007) 233 CLR 528 at [3].

4 The restriction is contained in an instrument headed "Instrument setting out Terms of Easements and Restrictions as to User intended to be created pursuant to section 88B, Conveyancing Act, 1919" and refers to a "Plan of Area Subject to Restriction as to User within Lot 2, DP [omitted]". The character of the restriction is described as a "restriction as to user". The lot burdened is identified as Lot 2 and the lot benefited as Lot 1. The terms of the restriction are described as follows:

> 1. Terms of Restriction firstly referred to in the abovementioned Plan.
>
> Full and free exclusive use by the registered proprietor of the dominant tenement [Lot 1] of that area noted as area subject to

> restriction as to user within the abovementioned plan with which right shall be capable of enjoyment, and every person authorised by the registered proprietor of the dominant tenement [Lot 1], to go and repass and utilise the above-described area for recreation and the maintenance and establishment of plantings and gardens and/or for the establishment of or erection of facilities to the benefit of the dominant tenement.

5 The then proprietor of Lot 2 registered the relevant Deposited Plan and associated instrument under s 88B of the *Conveyancing Act* 1919 (NSW) on 23 December 1996, after she had entered into a contract for sale of Lot 1 to its former owner in October 1996.

6 Mrs Sutherland purchased Lot 1 by contract dated 30 March 2000. Her evidence is that, when she purchased the land, she saw that part of the tennis court and concrete wall supporting that land were erected on Lot 2 in the area of the restriction as to user. Mrs Ryan purchased Lot 2 by contract dated 16 May 2005 and concedes that she did so with knowledge of the restriction as to user. It appears that a brushwood fence was subsequently erected in the same area by Mrs Sutherland and a former owner of Lot 2 and has since been reinforced by Mrs Ryan.

Whether the restriction as to user is properly characterised as an easement or a restrictive covenant

7 There is a preliminary question whether the restriction as to user is properly characterised as an easement or a restrictive covenant. Mrs Ryan contends that the restriction as to user should properly be characterised as an easement rather than a restrictive covenant, since otherwise it would not grant a positive right to Mrs Sutherland in respect of the use of the tennis court. Mrs Sutherland contends that the restriction as to user should properly be characterised as a restrictive covenant.

8 The essential features of an easement are that (1) there must be a dominant tenement and a servient tenement; (2) the easement must confer a benefit on the dominant tenement; (3) the dominant tenement and

the servient tenement must not be held and occupied by the same person and (4) the right must be capable of forming the subject matter of a grant: *Re Ellenborough Park* [1956] Ch 131 at 163; *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1994] 1 WLR 31 at 36; *Owners of East Fremantle Shopping Centre West Strata Plan 8618 v Action Supermarkets Pty Ltd* [2008] WASCA 180 at [51].

9 The essential features of a restrictive covenant were described in *Pirie v Registrar-General* (1962) 109 CLR 619 at 627 where Kitto J observed that:

> "[the] subject matter [of a restrictive covenant] in each case is a restriction which subjects land to a burden. The fact that a covenant has been entered into which curtails the covenantor's rights with respect to the user of land is not enough by itself to attract the operation of [section 88(3) of the Conveyancing Act]. The restriction must be a burden upon the land; that is to say, it must be enforceable not merely as a contractual obligation, but as an interest in the land, so that even a stranger to the covenant, upon acquiring the land, will become bound by the restriction in virtue of his ownership - unless, of course (since the interest it creates is only equitable), he or a predecessor of his obtained the legal estate for value and without notice. In other words, the restriction must be one which is enforceable in equity under the doctrine of *Tulk v Moxhay* ."

Windeyer J there noted at 646-647 that a restrictive covenant:

> "... must be a restriction as to the user of land, the benefit of which was intended to be annexed to other land; and secondly, at the time the notification was entered on the register the land to which the entry related must have been in fact subject to the burden of the restriction."

10 In construing the restriction as to user, the Court is required to discover the parties' intentions as revealed by the language of the relevant document and the purpose and object of the transaction: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179-180. A restrictive covenant will not be construed by reference to material extrinsic to the register: *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2007] HCA 45; (2007) 233 CLR 528 at [39].

11 There are some textual indications which would support a characterisation of the restriction as to user as a restrictive covenant, intended to be a promise as to the use of Lot 2, which would in turn confer a right on the owner of Lot 1. The paragraph setting out its terms appears under the underlined heading "Terms of Restriction firstly referred to in the abovementioned Plan". On the other hand, the terms of the instrument then refer to a right to full and free exclusive use by the registered proprietor of Lot 2 of the specified area for the specified purposes and do not expressly refer to a limitation on actions by the registered proprietor of Lot 1. In substance, it seems to me that the restriction as to user has each of the characteristics of an easement, benefits Lot 1 in the manner of an easement, and operates similarly to the rights of occupation which have been conferred by easement in several of the cases to which I refer below. On balance, I therefore consider that the restriction as to user is properly construed as an easement rather than a restrictive covenant.

12 However, the determination of the question whether the restriction as to user should be characterised as an easement or a restrictive covenant is ultimately not essential to the resolution of this matter, since the question in issue before me is the validity of the restriction as to user and I consider that it would be valid as either an easement or a restriction as to user for the reasons set out below.

Whether the restriction as to user is valid as an easement

13 Mrs Ryan contends that, when characterised as an easement, the restriction as to user would be invalid because an easement which gives exclusive and unrestricted use of a piece of land would not satisfy the fourth requirement noted in paragraph 8 above. Mrs Ryan relies on the principle set out in *Reilly v Booth* (1890) 44 Ch D 12 at 26, where Lopes LJ observed that:

> "The exclusive or unrestricted use of a piece of land, I take it, beyond all question passes the property or ownership in that land,

> and there is no easement known to law which gives exclusive and unrestricted use of a piece of land. It is not an easement in such a case, it is property that passes."

14 Different approaches were subsequently adopted to a right to use land in *Wright v Macadam* [1949] 2 KB 744 which upheld the validity of an implied grant of a right to store coal in a shed, although that right was incompatible with the servient owner's right of possession, and *Copeland v Greenhalf* [1952] Ch 488 where an easement to store vehicles on a neighbour's land was held to be invalid as inconsistent with the servient owner's right to possession of the servient land. The decision in *Copeland v Greenhalf* was followed in *Grigsby v Melville* [1972] 1 WLR 1355 and *Harada v Registrar of Titles* [1981] VR 743.

15 In *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278, Judge Paul Baker QC reviewed the case law as to easements for storage of goods and parking. His Lordship referred to *Copeland v Greenhalf* and observed at 1286 that:

> "The matter must be one of degree. A small coal shed in a large property is one thing. The exclusive use of a large part of the alleged servient tenement is another."

His Lordship also observed at 1288 that:

> "The essential question is one of degree. If the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of his land, whether for parking or anything else, it could not be an easement though it might be some larger or different grant. The rights sought in the present case do not appear to approach anywhere near that degree of invasion of the servient land. If that is so ... I would regard the right claimed as a valid easement."

His Lordship's decision was upheld by the Court of Appeal on different grounds in *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1994] 1 WLR 31.

16 In *Queanbeyan Leagues Club Ltd v Poldune Pty Ltd* (1996) 7 BPR 15,078 at 15,080, McLelland CJ in Eq held that the right to use land for the purpose of parking motor vehicles was a permissible easement and observed that:

> "Even if everything said in *Copeland* could be considered to be good law, which is doubtful (see *Wright v Macadam* [1949] 2 KB 744) it is clear in my opinion that that case is distinguishable on the facts (see also *Hedley v Roberts* [1977] VR 282 and *Evanel Pty Ltd v Nelson* (1995) 39 NSWLR 209; 7 BPR 14,388). In my view a right to use land for the purpose of parking cars cannot be excluded by any principle of the kind expressed in *Copeland* from the category of permissible easements, which it has been said 'must alter and expand with the changes that take place in the circumstances of mankind' (see *Commonwealth v Registrar of Titles* (1918) 24 CLR 348 at 353, quoting *Dyce v Hay* (1852) 1 Macq HL 305 at 312)."

17 In *Clos Farming Estates Pty Ltd (recs & mgrs apptd) v Easton* [2001] NSWSC 525; (2001) 10 BPR 18,845, the plaintiff sought to rely on an easement entitling it to plant and cultivate grape vines on the servient land, to harvest the grapes, to sell or otherwise dispose of them and to retain any profits from the enterprise. Bryson J held that that interest was not a valid easement where the owner of the servient tenement retained no more than nominal ownership of the land. That case is distinguishable from the present facts in that the easement affected the entirety of the defendant's land.

18 In *Weigall v Toman* [2006] QSC 349; [2008] 1 Qd R 192 at [13]-[14], Wilson J upheld the validity of an easement granting exclusive use of a garage standing on a section of the easement and noted that the validity of an easement purporting to confer on the owner of the dominant tenement a right of an exclusive character to use the servient tenement is a matter of degree; that such a right is invalid if it robs the servient owner of the reasonable use of his land; and that relevant factors include proportionality between the servient tenement as a whole and that part of it over which the exclusive right is given; the extent of the exclusivity claimed; whether the easement arose by prescription or by express grant; and practicalities.

19 In *Moncrieff v Jamieson* [2008] 4 All ER 752; [2007] 1 WLR 2620, the House of Lords adopted a somewhat different approach to that adopted in *London & Blenheim Estates* . Lord Hope of Craighead observed that "the fact that the servient proprietor is excluded from part of his property is not necessarily inimical to the existence of a servitude" (at [24]). Lord Scott of Foscote expressed the view that an easement could validly give the dominant owner "sole use for a limited purpose" since that is not inconsistent with the "servient owner's retention of possession or control" (at [55]). His Lordship doubted the correctness of the approach adopted in *London & Blenheim Estates* and observed that the question whether an easement deprived the owner of reasonable use of the land had to be determined by reference to the land over which the easement is enjoyed, rather than the whole of the servient owner's land. However, his Lordship also observed at [59] that he did not see why a land owner should not grant rights of a servitudal character over his land to any extent that he wishes, and that:

> "I would, for my part, reject the test that asks whether the servient owner is left with any reasonable use of his land, and substitute for it a test which asks whether the servient owner retains possession, and subject to the reasonable exercise of the right in question, control of the servient land."

Lord Neuberger of Abbotsbury observed that he was not satisfied that a right was not an easement "simply because the right granted would involve the servient owner being effectively excluded from the property" (at [140]) and that a right could be an easement although the dominant owner effectively enjoyed exclusive occupation, on the basis that the essential requirement was that the servient owner retained possession and control (at [143]).

20 In *Owners of East Fremantle Shopping Centre West Strata Plan 8618 v Action Supermarkets Pty Ltd* [2008] WASCA 180, Buss JA (with whom McLure JA and Murray AJA agreed) held that an easement for parking

was a valid easement where it satisfied both the tests in *London & Blenheim Estates* and *Moncrieff v Jamieson.*

21 In *Brydall Pty Ltd v Owners of Strata Plan 66794* [2009] NSWSC 819 at [15], McDougall J noted that the question whether an exclusive easement would deprive the owner of the servient land of the whole of the beneficial use of the parcel of land subject to the rights may not be a relevant consideration, for two reasons which his Honour identified as follows:

> "One is that the test (referred in *Copeland v Greenhalf* [1952] Ch 488) may overstate even the position in England. The second is that, as I have indicated, the trend of authority in this country is to look at whether the rights asserted impede the reasonable use of the servient tenement as a whole. As to the first proposition: to the extent that *Copeland* is authority for the proposition that I have stated, the decision of the House of Lords in *Moncrieff v Jamieson* [2007] 1 WLR 2620 appears to cast doubt on it. See in particular the speech of Lord Scott of Foscote at 2642 [59]. As I understand it, the other members of the House shared his Lordship's views. I do not think that it is relevant, at the level of principle, that this was an appeal from the Scottish courts and not from the Court of Appeal of England and Wales."

22 In my view, the restriction as to user, if construed as an easement, would satisfy the test set out in *London & Blenheim Estates* , as applied to the whole of Lot 2 in accordance with the trend of the Australian cases to which McDougall J referred in *Brydall Pty Ltd v Owners of Strata Plan 66794* . It appears from inspection of the plans in evidence before me that the restriction as to user affects a relatively small part of Lot 2 and it does not (by contrast with the easement in *Clos Farming Estates Pty Ltd (recs & mgrs apptd) v Easton*) confer exclusive or unrestricted use of the whole of Lot 2 on Mrs Sutherland. I do not think it could be said that the restriction as to user has the result that Mrs Ryan retains no more than nominal ownership of Lot 2 (in the language of *Clos Farming Estates Pty Ltd (recs & mgrs apptd) v Easton*), so far as she continues to have possession and control of the house which occupies the larger part of that lot.

23 On balance, I also consider that the restriction as to user would also satisfy the alternative test set out in *Moncrieff v Jamieson* , referring to the part of

the land which is the subject of the easement rather than the whole of Lot 2. The use permitted by the restriction as to user is limited to the specified purposes of (1) recreation, (2) the maintenance and establishment of plantings and gardens and/or (3) the establishment of or erection of facilities to the benefit of the dominant tenement. I would read the third of those purposes as taking its character from the first and second so that it does not permit Mrs Sutherland to use the relevant area for any purpose. While it is not necessary for me to determine the precise limits of that third purpose, it would not, in my view, permit the erection of, for example, an industrial facility on that area of the land. In my view, the owner of Lot 2 retains possession and control of the relevant part of the land, including the ability to restrain the use of the land other than for the specified purposes, although the owner of Lot 1 is permitted the use of it for the specified purposes. Mrs Ryan also retains some use of the land itself, which she has in fact exercised by reinforcing the brushwood fence on it as noted in paragraph [6] above.

Whether the restriction as to user is valid as a restrictive covenant

24 Mrs Ryan contends that, even if the restriction as to user is a covenant rather than an easement, it should be construed as a positive covenant and a positive covenant is not enforceable against Mrs Ryan as a non-party successor in title. In my view, the restriction as to user is negative in character rather than positive in character.

25 In dealing with restrictive covenants, equity readily gives effect to the common intention of the parties: *Brunner v Greenslade* [1971] Ch 993 at 1006, quoted with approval by a unanimous High Court in *Forestview Nominees Pty Ltd v Perpetual Trustees WA Ltd* [1998] HCA 15 at 164; (1998) 193 CLR 154. A covenant may be negative in substance although its language is expressed in positive form - indeed, the decision in *Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143 concerned such a case. Professor Butt suggests the applicable test is whether the covenant requires the expenditure of money (positive) or whether it can be complied with by

doing nothing (negative): P Butt, *Land Law,* 4 th ed at [1728] - [1729]. The distinction between a positive and negative covenant is similarly expressed in RP Meagher, JD Heydon & MJ Leeming *, Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* where it is observed that:

> "in considering whether a covenant be positive or negative in character, the Court will, of course, have regard to the substance and not the form of the covenant. Thus the covenant in Tulk v Moxhay itself (to keep a square open as a pleasure ground) was positive in form, although negative in character ... It should also be remembered that a negative covenant is sometimes to be implied as the corollary of an express positive covenant. The test of whether a covenant is truly negative is whether it can be complied with by complete inaction."

26 In my view, the restriction is negative in character, since it may be complied with by the registered proprietor of Lot 2 doing nothing, which will not involve any such interference with the use of the relevant part of the land by the proprietor of Lot 1 in the manner contemplated by the restriction as to user. In these circumstances, the principle that a positive covenant will not run with the land would have no application. In my view, the restriction as to user can also validly take effect on that basis.

Claim for modification or rectification

27 In the alternative, Mrs Sutherland sought to modify or rectify the restriction as to user under equitable principles of rectification or under s 89 of the *Conveyancing Act* 1919 (NSW). On the findings which I have reached, no occasion for rectification or modification of the instrument under s 89 of the *Conveyancing Act* arises. The factual basis for rectification or modification was also not established, since there was no admissible evidence before me which would support a contention that the intent of the parties was other than as determined by the objective construction of the restriction as to user . No occasion arises to determine whether any such evidence could have been admitted having regard to the comments made by the High Court in *Westfield Management Ltd v Perpetual Trustee Co Ltd* to which I have referred above.

28 For completeness, I should note that there was a real question, which it is also not necessary for me to determine in the absence of any evidentiary basis for modification or rectification, whether s 89 of the *Conveyancing Act* could have supported an order in the nature of rectification which, in effect, validated an otherwise invalid restriction as to user to the benefit of the owner of Mrs Sutherland's land. That section relevantly provides that:

> 89(1) Where land is subject to an easement or a profit a prendre or to a restriction or an obligation arising under covenant or otherwise as to the user thereof, the Court may from time to time, on the application of any person interested in the land, by order modify or wholly or partly extinguish the easement, profit a prendre, restriction or obligation upon being satisfied
>
> ...

(c) that the proposed modification or extinguishment will not substantially injure the persons entitled to the easement or profit a prendre, or to the benefit of the restriction or obligation.

29 The grant of relief under s 89 is discretionary and the facts relevant to the exercise of the discretion include matters such as the history of the property, the conduct of the owners of dominant and servient tenements, the acts of a prior registered proprietor and the state of the register, and no one factor is decisive: *Pieper v Edwards* (1982) 1 NSWLR 336 at 340; *Re Rosedale Farm (NSW) Pty Ltd* [2010] NSWSC 1321. The power under s 89(1)(c) of the *Conveyancing Act* is commonly exercised to extinguish an easement or covenant, which is consistent with the specific reference to injury to the rights of the persons entitled to it, and Counsel have not identified any case where that power has been exercised to modify the right so as to protect it from invalidity. There is real force in Mrs Ryan's contention that, if the covenant were in fact invalid, there would be nothing to be modified under *Conveyancing Act* s 89 and the section would have no application; and, if the restriction as to user is valid in its current terms (as I have found) then there is no occasion for recourse to the section. I

should, however, record my view that, if the power were otherwise available, its exercise would not have caused any injury to Mrs Ryan, because she has fairly conceded that she was aware of the restriction on the land when she purchased the land.

Costs

30 Mrs Ryan has been unsuccessful in the proceedings and there is no reason that costs should not follow the event.

Orders

31 Accordingly, I order that:

1. The Summons be dismissed.

2. Mrs Ryan pay the costs of the proceedings.

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