

Supreme Court
New South Wales

Case Title: Mehmet Cihan v City of Sydney RSL Club
Co- Op Ltd

Medium Neutral Citation: [2011] NSWSC 1417

Hearing Date(s): 11/11/2011

Decision Date: 24 November 2011

Jurisdiction:

Equity Division

Before: Acting Justice Windeyer

Decision: Separate questions answered (a) No, (b)
Yes.

Catchwords: REAL PROPERTY - Torrens title land-
Notification on computer folio referring to
easement over land as shown on earlier
Certificate of Title- No indication of the
dominant tenement or instrument creating
the easement- Easement created when land
was under old system title- Whether
easement recorded on Certificate of Title

Legislation Cited: Land Titles Act 1980 (TAS)
Real Property Act 1900 (NSW)
Uniform Civil Procedure Rules 2005

Cases Cited: Bursill Enterprises Pty Limited v Berger
Bros. Trading Co Pty Limited (1971) 124
CLR 73
Gibbs v Messer [1891] AC 248
R v Recorder of Titles; Ex parte (1991)
TasR (NC) 4
Sieminski v Brooks Nominees [1990] Tas
R 236

Westfield Management Limited v Perpetual
Trustee Company Limited (2007) 233 CLR
528

Texts Cited:

Category: Principal judgment

Parties: Mehmet Cihan (Plaintiff)
City of Sydney RSL & Community City Club
Co-originating process Limited (Second
Defendant)
Kulin Holdings Pty Limited (Third Defendant)
Owners Corporation, Strata Plan 32388
(Fourth Defendant)
Registrar-General (Fifth Defendant)

Representation

- Counsel: Mr DL Warren (Plaintiff)
Mr T Lynch (Second, Third and Fourth
Defendants)
Mr H Agan (Fifth Defendant)

- Solicitors: MCK Lawyers (Plaintiff)
Piggott Stinson (Second, Third and Fourth
Defendants)
Kelvin O'Keefe (Solicitor for the Registrar-
General of NSW)

File number(s): 2009/00291737

Publication Restriction:

JUDGMENT

Outline

- 1 The question is whether an easement created over old system land is recorded as an interest on the current certificate of title of the servient tenement.

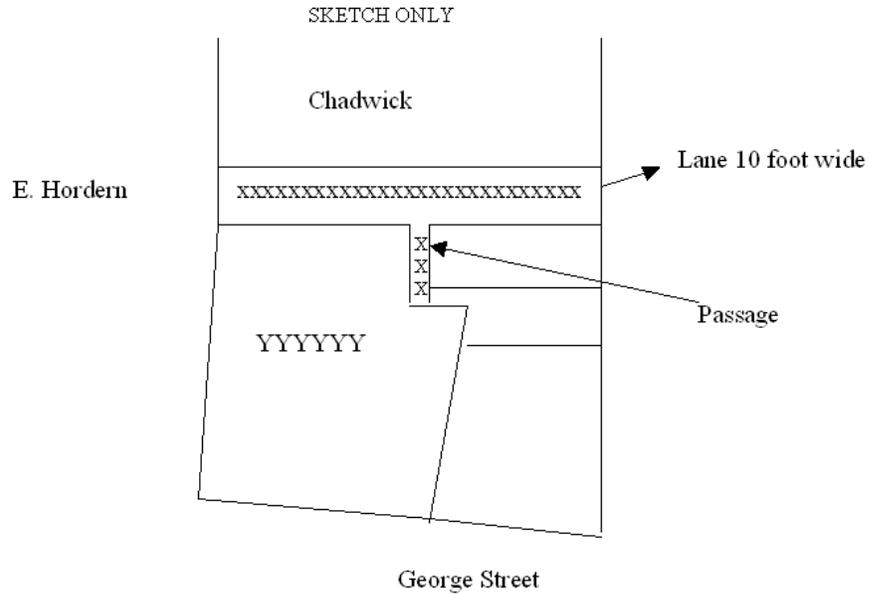
The facts

- 2 The plaintiff is the registered proprietor of the land in Certificate of Title Folio Identifier E/23162 ("the Property") which land is Lot E in Deposited Plan 23162.

- 3 By conveyance between Robert Chadwick as Vendor and John Valentine Hinton as Purchaser, dated 14 January 1882 registered Number 964 Book 237, land fronting George Street Sydney was sold to Hinton together with a right of way over part of the adjoining property retained by Chadwick. This grant of right of way was in the following words:

"with full and free liberty and free licence for the said Purchaser his appointees heirs and assigns and his and their servants and workmen and for all other persons authorised by him or them with or without labourers carts and carriages horses or other animals by night and by day to drive ride operate and labour up down to and fro and upon the lane ten feet wide running along the west boundary of the said land to Liverpool Street and delineated in the said plan and coloured yellow and the passage...feet wide running at right angles to the said lane as delineated in the said plan and therein coloured yellow."

Below is a copy of the plan endorsed on the conveyance, but indicating the land sold bounded red on the plan as Y and the lane and passage coloured yellow as X .



xxx – yellow fill

Y – red boundary

- 4 The land conveyed is shown on the plan endorsed as bounded by George Street on the East. The land retained by Chadwick is on the West. The right of way land was adjacent to the western boundary of the land sold and gave access to Liverpool Street, Sydney. In 1891 the Property retained by Chadwick was converted to Torrens Title and Certificate of Title Volume 1022 Folio 161 was issued pursuant to Primary Application No. 8361 in the name of Robert Chadwick as registered proprietor. The Certificate of Title described the land by metes and bounds and expressed the title to be subject to the encumbrances, liens and interests "notified herein". The notifications include the following words:

"Subject to full and free liberty and license for William Henry Hinton and Fredrick William Mackey their heirs and assigns and their servants and workman and for all other persons authorised by them with or without labourers, carts and carriages, horses or other animals at all times by night and by day to drive ride operate and labour up and down to and fro over the lane ten feet wide and the passage five feet wide coloured brown on plan hereon".

The wording was thus almost the same as is the conveyance, except that the persons having the right were different, and may have been the

executors of the will of the earlier owner. The plan referred to clearly showed the lands the subject of the right of way.

- 5 The land in Certificate of Title Volume 1022 Folio 161 was subsequently subdivided into five parcels of land, being lots A, B, C, D and E in DP23162 and as lots were sold, new certificates of title issued for the separate lots.
- 6 Certificate of Title Volume 6451 Folio 53 was issued for lot E in DP 23162 on 22 February 1952. This Certificate of Title bore a notification in identical terms to that in Volume 1022 Folio 161. On the third page of the Certificate of Title Volume 6451 Folio 53 was a plan on which the lane ten feet wide and the passage five feet wide were shown coloured brown.
- 7 The current Certificate of Title for Lot E is Folio Identifier E/23162. As the title is in a computer folio the Certificate of Title certifies that the person described in the First Schedule is the registered proprietor of an Estate in fee simple (or otherwise) of the land described subject to such exceptions, encumbrances, interests and entries as appear in the Second Schedule. The plaintiff is named in the First schedule. The Second Schedule records in item 2 the following:

"2 Easement affecting the land shown so burdened in Vol 6451 Fol 53".
- 8 Under the further amended statement of claim the plaintiff being the registered proprietor of Lot E seeks a declaration that the defendants, who in sum own the land originally sold to Hinton, are not entitled to the benefit of a right of carriageway and an injunction restraining any such use. In the alternative, if there is such an entitlement, compensation is sought from the Torrens Assurance Fund controlled by the Registrar General. The land sold to Hinton has been converted to strata title. According to the pleadings, the second defendant is the owner of Lots 3 to 9 in Strata plan

2388. The third defendant is the owner of Lots 1 and 2 and the fourth defendant holds the common property. There is no first defendant.

9 On 16 June 2011, I made an order under Part 28.2 of the *Uniform Civil Procedure Rules (2005)* that the following questions be determined separately and prior to any other issues:

(1) On the assumption that a valid easement existed over a lane ten feet wide and a passageway five feet wide burdening the plaintiff's land and benefiting the second, third and fourth defendants' land at the time the plaintiff's land was brought under the provisions of the *Real Property Act 1900* (NSW), does the notification in Item 2 in the Second Schedule of Folio Identifier E/23162 record such an easement?

(2) Has the easement in favour of the second third and fourth defendants' land been omitted from Folio Identifier E/23162 within the meaning of S42(1)(a1) *Real Property Act 1900* .

I made that order because if the easement is recorded no claim for compensation will arise and the expense of obtaining evidence for that claim will be avoided.

10 It is I think accepted, that if the easement is not recorded on the Register then this an omission which can be corrected under Section 13 (1)(d) of the *Real Property Act 1900* [the Act], in which case a claim for compensation under Section 129 will arise. However the questions were based on the assumed fact.

The relevant statutory provisions

11 Relevant sections of the Act are as follows:

31 B The Register

(1) The Registrar-General shall cause a Register to be maintained for the purposes of this Act.

(2) The Register shall be comprised of:

- (a) folios,
- (b) dealings registered therein under this or any other Act,
- (c) the record required to be kept pursuant to section 32 (7),
- (d) instruments of a prescribed class, and
- (e) records required by the regulations to be kept as part of the Register.

(3) The Register may be maintained in or upon any medium or combination of mediums capable of having information recorded in or upon it or them.

(4) The Registrar-General may, from time to time, vary the manner or form in which the whole or any part of the Register is maintained.

32 Folios of the Register

(1) The Registrar-General creates a folio of the Register for land by making a record of:

- (a) a description of the land and of the estate or interest therein for which it is created,
- (b) a description of the proprietor for the time being of the estate or interest and the fact that any such proprietor is a minor if the Registrar-General knows that to be the case, and
- (c) such particulars, as the Registrar-General thinks fit, of:
 - (i) other estates or interests, if any, affecting the land, and
 - (ii) other information, if any, that relates to the land or any estate or interest therein and is included in that record pursuant to this or any other Act (including an Act of the Parliament of the Commonwealth) or an instrument made under any such Act,

and by allocating a distinctive reference to the record so made.

40 Manual folio to be considered evidence of title and that the land has been duly brought under the Act

(1B) Where, in a manual folio or computer folio certificate, the estate or interest of a registered proprietor is expressed to be subject to:

- (a) (a) an estate or interest evidenced by an instrument,
- (b) (b) a provision of an instrument, or
- (c) (c) an enumerated provision of an Act or of an Act of the Parliament of the Commonwealth,

the whole of the contents of the instrument, provision or enumerated provision, as the case may be, shall be deemed to be set forth at length in the folio or certificate.

42 Estate of registered proprietor paramount

(1) Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded except:

- (a) the estate or interest recorded in a prior folio of the Register by reason of which another proprietor claims the same land,

(a1) in the case of the omission or misdescription of an easement subsisting immediately before the land was brought under the provisions of this Act or validly created at or after that time under this or any other Act or a Commonwealth Act,

The Law

12 It is trite that one of the key purposes of the Torrens System is to prevent the need for parties to go beyond the register in investigating their title, *Gibbs v Messer* [1891] AC 248. See also *Westfield Management Limited v Perpetual Trustee Company Limited* (2007) 233 CLR 528 [39]. This policy is however subject to Section 40 (1B) of the Act, so that in the case of an

easement created when the land was under Old System Title, it is sufficient if particulars of the Old System deed or instrument creating the easement are set out. If that is done search of that document outside the Register will be necessary.

- 13 For there to be an easement there must be a dominant and servient tenement. The right must benefit the dominant tenement making it a better property cf *Westfield* at [21]. Item 2 of Schedule 2 does not indicate the instrument by which the easement there referred to was created. The certificate of title there referred to, namely Volume 6451 Folio 53, does show on its plan the land burdened, but that is not sufficient for section 40(1B). In addition, it does set out the terms of the "easement" which I have set out, but there is nothing to indicate the dominant land. The wording could be just a personal right not attaching to land.
- 14 Despite Volume 6451 Folio 53 not specifying the dominant tenement and not identifying the instrument creating the easement, the defendants submitted that a reader of the folio would be put on sufficient notice of the Easement and it would then be incumbent on the reader to conduct the necessary inquiries to determine the exact nature of the interest.
- 15 For this proposition, the Defendants relied on statements of the High Court in *Bursill Enterprises Pty Limited v Berger Bros. Trading Co Pty Limited* (1971) 124 CLR 73. That case considered whether a notification on a certificate of title:

"subject also to an extension of the right of way above noted granted to William Long of Sydney wine merchant his heirs and assigns by memorandum of transfer No. 7922 dated 15 May 1872.".....

which mistakenly referred to a transfer granting a right of way, when in fact it granted a right of way and in addition was a transfer of a parcel of the land, put a purchaser on sufficient notice of that transfer.

16 Addressing this question, Windeyer J stated at 92-93:

"The argument that the interest in the buildings is not notified on the certificate of title proceeded on the assumption that Bursill, when purchasing the land, could safely neglect to search transfer no 7922, which was expressly referred to on the certificate of title. ... Doubtless this description would have been better if it had read "extension of right of way and rights in buildings above the way". But it seems to me that what is "notified" to a prospective purchaser by his vendor's certificate of title is everything that would have come to this knowledge if he had made such searches as ought reasonably to have been made by him as a result of what there appears"

17 His Honour continued stating:

"It seems to me that, at any time from 1872 till today, a prudent conveyancer acting for a purchaser of the land that is now Bursill's would have ascertained what it was that transfer 7922 referred to on the vendor's certificate of title in law effected. True he might have been surprised to discover all that his search revealed. But surely no prudent person, seeing the reference to a right of way, would neglect to ascertain what exactly was the nature of the right of way, the land subject to it, the persons who could avail themselves of it, for what purposes in what manner and at what times..."

18 I have to say I think the reference to prudent conveyancer might be misplaced and the reference should be to a prudent person or purchaser. However, the case stands for the principle that reliance cannot be placed on the description of the instrument by the Registrar General if a prudent person would in any event have inspected the instrument and seen the description of the instrument by the Registrar General was not complete.

19 In applying the *Bursill* principle to the present case, it is important to distinguish the facts of *Bursill* in one important respect. In the present case, the current Certificate of Title does not record the instrument that established the easement. The Certificate of Title refers to a separate document, namely the Certificate of Title Volume 6451 Folio 53. Conversely, in *Bursill*, the instrument creating the easement was recorded, albeit being wrongly described. There is nothing to indicate the way by which a prudent purchaser could check the notification or ascertain

the appurtenant land. I should add that the certificate of title for the land sold under the original conveyance on conversion to Torrens Title notified the appurtenant easement with reference to its creation by conveyance Book 237 Number 964 although the evidence is that this notification was placed on the title sometime after the Certificate of Title issued.

- 20 I was referred to a Tasmanian case *Sieminski v Brooks Nominees* [1990] Tas R 236. There Zeeman J addressed Section 102 of the *Land Titles Act 1980* (TAS) which in S102(2)(iii) provided that for the burden of a covenant to run with the land, notice of the covenant must be recorded on the folio of the Register constituting the title to the land intended to be burdened. His Honour said at [24]:

"I hold that for there to be "notice of the covenant recorded on the folio of the Register" within the meaning of s102 (2)(a)(iii), as a minimum, what needs to be recorded on such folio is either the substantial effect of the covenant or a reference to the instrument creating the covenant where its terms may be found."

In *R v Recorder of Titles; Ex parte* (1991) TasR (NC) 4 Cox J at [97] agreed with this statement as do I.

- 21 Unless the creating instrument, or the substantial effect of the easement, is recorded on the Register, a person would be required to conduct further searches to trace the title. Such searches are contrary to the principles of the Torrens System and should not be required of a prudent purchaser dealing with Torrens Title. The substantial effect of the easement could not be recorded unless the dominant tenement was made clear on the record or the deed creating the easement identified.
- 22 It was argued that counsel for the plaintiff in his written submissions had accepted that the easement was properly recorded on Certificate of Title Volume 6451 Folio 53. Mr Warren in his oral submissions in relying on lack of identification of the dominant tenement withdrew from that and in any event I said the case could not be decided on that concession. I accept the

reference to the Certificate of Title on the current folio is a reference to an instrument under S40(1B) of the Act but as I have explained there is nothing on that Certificate of Title which would enable a purchaser to ascertain the land, if any, to which the right of way was attached.

- 23 It was also argued by counsel for the Register General that there was no evidence on the question of whether the notification was sufficient to give notice of the easement to a reasonably sophisticated conveyancer conducting a search of the title and it was for the plaintiff to adduce such evidence. I do not think that correct. It is a question of fact whether the interest is recorded. Expert evidence would not assist.

Decision

- 24 A prudent purchaser, in making all the reasonable searches required of him, would be expected to examine Volume 6451 Folio 53. Upon examining Volume 6451 Folio 53 (including the accompanying drawing) the dominant tenement to which the right of way was appurtenant would not have been apparent.
- 25 It is true that it would have been possible to conduct further searches to determine if there were a dominant tenement and if so, its identification. Search of the purchasers index under Hinton and Mackay might have located the instrument but a prudent purchaser would not know that.
- 26 By failing to indicate on Volume 6451 Folio 53 the dominant tenement or in the alternative the instrument creating the easement, that interest was not recorded on the Register.
- 27 For the sake of completeness as some reference was made to it, I add that a copy of the Memorandum of Transfer F503845 was put into evidence. That transfer granted an easement appurtenant to Lot E over parts of Lots B, C, and D in DP 23162 and reserved to the owners for the time being of

the land in Lots A, B, C and D a right of way over Lot E to be held so far as part of it was concerned "in common with William Henry Hinton and Frederick William Mackay (the owners of the land adjoining the south eastern side of the land shown on the said deposit plan)". Hinton and Mackay were not then the owners of the adjoining land. They had sold it in 1926.

- 28 The transfer noted under encumbrances "subject to the right of way on the Certificate of Title in favour of William Henry Hinton and Frederick William Mackay on the land coloured brown on the said Certificate of Title". The Certificate of Title referred to was Volume 1022 Folio 161. These entries could not amount to a recording of the easement in question. It was not argued that they did.
- 29 The Second Schedule to the current Folio E/23162 identifies these appurtenant and affecting easements created by transfer F503845. That enabled it to be searched. That is in stark contrast to Item 2 in Schedule 2.

Result

- 30 I answer the separate question (a) No, (b) Yes. I direct the answers be recorded.
