IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION

Not Restricted

No. SCI 2055 of 2012

AGL HP1 PTY LTD & ORS — Plaintiffs

V

ALANVALE PTY LTD & ORS — Defendants

JUDGE:	JUDD J
WHERE HELD:	Melbourne
DATE OF HEARING:	4 May 2012
DATE OF JUDGMENT:	9 May 2012
CASE MAY BE CITED AS:	AGL HP1 Pty Ltd v Alanvale Pty Ltd
MEDIUM NEUTRAL CITATION:	[2012] VSC 192

REAL PROPERTY – Easement in gross under *Electricity Industry (Residual Provisions) Act 1993* (Vic) – Certainty of intended purpose – Application of *Land Compensation and Acquisition Act 1986* (Vic).

INJUNCTIVE RELIEF – Application by holder of easement to restrain defendants from denying access to land – Serious question to be tried – Balance of convenience – Relevance of absence of an undertaking as to damages by defendants.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr CM Scerri, one of Her Majesty's Counsel, with Ms KJD Anderson	Norton Rose Australia
For the Defendants	Mr MK Moshinsky of Senior Counsel with Dr A Hanak and Mr D Morgan	Earl & Associates

HIS HONOUR:

1 The plaintiffs are AGL HP1 Pty Ltd, AGL HP2 Pty Ltd and AGL HP3 Pty Ltd, which I will hereafter describe collectively as AGL. They are wholly owned subsidiaries of AGL Energy Ltd. On 1 December 2010, the first defendant, Alanvale Pty Ltd, granted an easement over its land to AGL, authorising entry on to its land for the purpose of erecting and laying power lines, poles and associated infrastructure required to transmit electricity from a wind farm at Macarthur to a substation at Tarrone. The transmission lines were to cross seven properties. All property owners had granted easements to AGL. Alanvale, and two other landowners now refuse entry to AGL at a time when work is well advanced on the four other properties. The other landowners in dispute with AGL are the second defendant, Brendon Leonard Blohm, and the third and fourth defendants, Andrew Kitchener North and Lynne Frances North. The Norths executed a grant in favour of AGL in about June 2011 and Mr Blohm at around the same time.

2 AGL commenced this proceeding by writ on 11 April 2012, and applied by summons of the same date for urgent interim relief to restrain the defendants from preventing access to their properties pursuant to AGL's asserted rights under each grant. Interim injunctions were granted by consent on 14 April 2012 and extended on 23 and 27 April so as to permit works to commence.

3 The proceeding has been referred to the Commercial Court and a trial is to commence on 12 June 2012, on an estimate of four days. In the meantime, AGL has sought a further extension of the injunctions until the commencement of the trial or further order. Its application is opposed by Alanvale. Mr Blohm also opposes the application unless undertakings in an acceptable form are given by AGL, including an undertaking to reinstate the land should a permanent injunction not be made, or if the court finds that AGL was not entitled to access under the easement.

4 Mr Blohm also resists the injunction unless a restriction is imposed to prevent AGL using his land as a carriageway for trucks and equipment to reach adjoining

properties, and unless other conditions are imposed concerning a restriction on the use of imported soil, the use of a suitable topping material on the access track, and a requirement the vehicles are washed as they enter his property to minimise the risk of contamination.

5 The Norths have adopted the same position as Mr Blohm, but do not seek to impose any restriction on the use of their property as a carriageway.

6 An unusual feature of this proceeding is that AGL did not simply assert its rights under the grant, requiring each landowner to bring a proceeding if they sought to restrain the exercise of those rights. Instead, AGL elected to bring the dispute to the court. As applicant for relief, it gave the usual undertakings as to damages and other undertakings involving remediation. One consequence of this course is that the defendants were not required to make application for injunctive relief to prevent what they now contend is a trespass, and so were not called upon to give any undertaking to abide by any order the court may make as to damages by reason of AGL having suffered any loss by reason of it being denied access to the properties. Nor did the defendants proffer any such undertaking in support of their contention that the application should be refused and AGL effectively denied access to their land. AGL contended, and has advanced evidence in support of a contention that, if denied access to the properties, it will sufferer financial penalties and loss of revenue that could reach millions of dollars per week.

Background

7 AGL is responsible for the management and construction of the Macarthur Wind Farm project. Leighton Contractors Pty Ltd and Vestas-Australian Wind Technology Pty Ltd, a consortium, have been engaged by Meridian Energy Ltd and its subsidiaries, including Meridian Wind Macarthur Pty Ltd, AGL Energy Ltd and Macarthur Wind Farm Pty Ltd to construct the wind farm and transmission lines linking the wind farm to the Tarrone terminal substation.

8 Between 2005 and 2009, Macarthur Wind Farm negotiated with the owners of

properties between the wind farm and the substation for rights to install poles and wires across their land. In November 2007, Macarthur Wind Farm entered into an Option Deed with the Norths. A similar Option Deed was entered into with Alanvale on 29 April 2008. It is the owner of land to the south. Mr Blohm's land lies to the north of the Norths' land. He executed an Option Deed on 19 January 2009.

9 Under the Alanvale Option Deed, the option period expired at 5pm Eastern Standard Time on 1 December 2010. An option fee was payable. To exercise the option, Macarthur Wind Farm must deliver to the landowner during the option period a written exercise notice executed by Macarthur Wind Farm. The landowner acknowledged and agreed that during the option period the exact position and dimensions of the easement would be finalised and an easement plan prepared. The easement plan attached to the Option Deed was indicative only. The landowner agreed that it would not object to changes to the easement plan that were reasonably required because of unforseen site conditions or other circumstances beyond the reasonable control of Macarthur Wind Farm.

10 The Option Deed contemplated the registration of the Creation of Easement, and the landowner was required to use its best endeavours to assist in that registration. Macarthur Wind Farm was authorised, without the consent of the landowner, to assign the benefit of the Option Deed to a company which was a related body corporate. If Macarthur Wind Farm assigned the Option Deed, the assignment was not effective against the landowner unless it had received notice of the assignment within 28 days of the date of the assignment and the notice had been executed by Macarthur Wind Farm and by the assignee.

11 Clause 11 made provision for the giving of notices. Alanvale relied upon cl 11.3, which required that, should a notice be delivered or received other than on a business day or after 4pm, then it was regarded as received by 9am on the following business day. The notice purporting to exercise the option was received by Alanvale at 4.45pm. Clause 14 provided,

> Nothing in this agreement shall prejudice the rights of Macarthur or its employees, contractors or agents under the *Electricity Industry Act 2000* (Vic), or the *Electricity Industry (Residual Provisions) Act 1993* (Vic), the *Land Acquisition and Compensation Act 1986* (Vic), or under any under Act conferring rights and powers on Macarthur.

12 A form of Creation of Easement was attached to the Option Deed. Relevantly, it made reference to 'attached plans' in subparagraphs (a) within the definition of 'Permitted purpose' but no such plans were attached.

13 Macarthur Wind Farm assigned its rights under the Option Deeds to AGL. Each landowner was provided with a notice of the assignment on the following dates – Alanvale on 29 November 2010; Mr Blohm on 22 June 2011 and the Norths on 7 April 2011. There was an issue, at least at one point in the course of argument, as to whether consent was required. That contention evaporated. It seemed to be accepted that AGL was a 'related body corporate'.

14 AGL purported to exercise the options, and each of the landowners executed an instrument described as Creation of Easement. I say that the options were 'purportedly' exercised because Alanvale contended that the exercise was ineffective.

15 When the time to commence construction arrived, AGL required access along the easements to first construct an access track along the entire length of the proposed transmission line within the easements, construct foundations for transmission poles, install poles, string wires and later maintain the wires. The transmission lines were to be suspended on tapered concrete poles not exceeding 25 metres in height above the ground, which would be fitted with crossarms supporting insulators, with a total of six conductors and two earth wires. AGL also required a temporary fibre optic cable to be installed along the entire length of the easement to enable communications between the works and the substation. The fibre optic cable was apparently required because of the delays in construction.

16 Access along the easements is required for support vehicles to deliver and set down goods, and for the installation and maintenance of poles and wires. Several lay-

down areas are to be constructed for the preparation and delivery of goods prior to installation. The access track and lay-down areas are said to be of a temporary nature only, and may be removed at the discretion of the landowner following completion of the installation works. In that event the areas will be remediated to as near as possible the condition prior to the construction activities.

17 A gas pipeline passes beneath the earth on Mr Blohm's property, and requires protection from heavy traffic passing over it. Jeffrey George Trompf, a project manager at AGL, and for the wind farm project, estimated that the access track along the three properties would take approximately one month to complete, although protection of the Sea Gas pipeline on Mr Blohm's property would take a further month. He said that the fibre optic link would take approximately two months, and erection of the poles, following completion of the access track, would take about one month for the Blohm property, three weeks on the North property and one month for the Alanvale property. Some tasks would overlap. It was estimated that the overall construction time was three-and-a-half months, with the stringing works for the cables to take a further month.

18 Mr Trompf said that to erect the poles, holes would need to be bored into the ground at each proposed location, although the dimensions and configuration may change from pole to pole depending on specific ground conditions. The poles, when erected, would be secured into the ground by one of the following methods – concreting the base of the pole into the ground; inserting a sleeve into a hole in the ground, concreting the sleeve and then inserting the pole into the sleeve; or by the construction of a mass concrete foundation below ground level with a concrete spigot which will rise above the ground to which the pole base will be attached. In some cases guy wires might be required to support the poles. When required, the guy wires would remain within the easement, and would require concrete foundations at the point of entry into the ground.

19 Mr Trompf said that where there was livestock on the property, temporary protection would be put in place, especially where there were holes. He said that

gates would be fitted and fences modified to support gates where necessary.

20 Mr Trompf said that should the injunction *not* be made permanent at trial, the access track and lay-down areas could be removed. The poles and their fittings could also be removed to ground level and the conductors and earth wires all removed. He said that below ground work, in particular concrete mass footings that might have been installed, would be more difficult to remove, although their removal was possible.

21 The financial terms upon which each easement was granted are all different. They are regarded by the plaintiffs and defendants as confidential. Suffice to say, in relation to each agreement there were substantial payments made or to be made in consideration of the grants. While there were some differences in the terms of each easement to be granted under the Option Deeds, particularly in relation to remediation works, the nature of each proposed easement, and its stated purpose, were in all material respects the same.

22 The easement over the property owned by Mr Blohm extends in a southerly direction along the boundary of one of his properties and through the middle of the other property to the south, where it shares a boundary with the North's property. The length of the transmission line proposed to be constructed through Mr Blohm's properties is approximately 2.4 kilometres. The transmission line proposed to be constructed through the North's property will be approximately 1.3 kilometres. The easement, through the North's property, passes close to the eastern boundary for about half that distance and then along the eastern boundary until it reaches the Alanvale property further south. The length of the proposed transmission line through the Alanvale property is approximately 2.1 kilometres. The easement passes close to the eastern boundary, if not adjacent, for around one kilometre and then divides the property as it reaches the Woolsthorpe-Heywood Road.

23 AGL contends that each of the Option Deeds executed by the defendants are valid and enforceable, and were validly assigned by Macarthur Wind Farm to it. The

validity of the assignments was initially challenged by the defendants, but that challenge is no longer advanced, at least for the purpose of this application. AGL further contends that the options were validly exercised. Each landowner executed an instrument creating the easement pursuant to s 45(1) of the *Transfer of Land Act 1958*. Each grant identified the servient land by reference to an area marked on an attached Plan for Creation of Easement. The dominant land was described in the following terms:

> In *Gross* – section 43(3) of the *Electricity Industry (Residual Provisions) Act 1993*.

24 The grantor and grantees were identified. The grantees are the plaintiffs. Importantly, the 'Permitted purpose' was set out in the following terms in the Alanvale easement,

> Permitted purpose
>
> 1. The full and free right and liberty to and for the Grantee and its successors, assigns, employees, agents, contractors, subcontractors and invitees at all times to enter in and upon the Servient Land for the purposes of:
>
> (a) erecting or laying power lines, poles and associated infrastructure laid out generally as per the attached plans;
>
> (b) erecting or laying communications lines or equipment, if in conjunction with the power lines, poles and associated infrastructure;
>
> (c) maintaining the power lines, poles and associated infrastructure, and communications lines or equipment; and
>
> (d) transmitting electricity through power lines,
>
> Reserving to the Grantor at all times the right of access and egress across and through the Servient Land by foot and with or without plant, equipment, materials and vehicles of all descriptions.

The easements granted by Mr Blohm and the Norths do not contain the words 'laid out generally as per the attached plans' in paragraph 1(a).

25 The covenants given by the grantor and grantee in the case of Alanvale were as follows:

> 2. Grantee's covenants

The Grantee must:

(a) when exercising the rights conferred by this easement:

(i) do as little damage to the Servient Land and all improvements or fixtures located on the Servient Land as is reasonably practicable and make good at his sole expense any damage caused to the Grantor's reasonable satisfaction as soon as practicable after any damage is caused; and

(ii) cause as little harm, inconvenience and interference to the operations of the Grantor and the occupiers on the Servient Land as is reasonably practicable; and

(b) where the surface of the Servient Land is broken, fully reinstate and leave the Servient Land as nearly as possible in the condition in which it was immediately prior the surface being broken as soon as reasonably practicable after completion of those works.

3. Grantor's covenants

The Grantor will not obstruct the Servient Land in any way, and in particular will not excavate, construct any building or structure, plant any trees or allow any trees or vegetation other than pasture grasses or natural groundcover to grow or remain on the Servient Land, or allow any other event, activity or thing to obstruct the Servient Land (existing fences and fence lines excluded).

26 While the covenants in the other instruments were different in some respects, they required AGL to do as little damage to the servient land as reasonably practicable, and to reinstate broken land as nearly as possible. AGL was also obliged to cause as little harm, inconvenience and interference to the operations of the grantor and the occupiers on the servient land as is reasonably practicable. The grantee covenants in the Blohm easement are much more extensive. These differences may be explained in part by the fact that Mr Blohm and the Norths had engaged solicitors to act for them in relation to the Option Deed and grant of the easement, while Mr Morrison, a director of Alanvale, did not.

27 As AGL's plans progressed for the construction of the power lines there were communications passing between representatives of AGL and the landowners, concerning the scope of the proposed works. These discussions and communications, which seemed to commence in around July 2011, also involved

contractors engaged by AGL to undertake the work. For example, Mr Blohm said that at a meeting on 31 August 2011, at the Macarthur Wind Farm site office, attended by representatives of Leightons and an engineering firm, there was discussion about access to his property and works that might be undertaken by him. He said he was provided with a Scope of Works which described works that were much more substantial than he had previously understood would be undertaken on his property.

28 The evidence filed on behalf of the defendants consistently made reference to their surprise and concern at what they regard as a substantial departure from the scope of the works they had understood at the time of entering into the Option Deeds. Their evidence suggested that AGL representatives acknowledged that there had been a change in the scope of the works. The contractors certainly acknowledged that a change in scope had occurred.

29 In substance, the defendants' complaints are that, when first presented to them, the works to be carried out by Macarthur Wind Farm involved the relatively straightforward erection of poles to a height of between 20 and 25 metres, planted into the ground after a hole had been prepared using an auger fixed to a truck. Taking Mr Morrison's account as an example, he said that he was told during the negotiation stage in about 2006 that AGL proposed to erect concrete poles to a height of 20 metres, and that there would be only six poles on his land. He said he was told that a truck would come onto his land, drill a hole with an auger and then drop in a pole.

30 In late August 2011, Mr Morrison received an email from Leightons setting out the nature and likely extent of the works. He was informed that nine poles would be installed, with substantial concrete foundations buried under ground, although with only limited visibility above ground. It was estimated that construction of the foundations on his land would take around eight days and require access for 12 concrete trucks to pour each foundation. The height of the poles had increased to around 30 metres. One of the key points noted in the document was that the

proposed design of transmission poles, as originally advised to landowners, had been changed. The document explained,

> During the planning stage of the Macarthur Wind Farm Project it was envisaged that 20m timber poles installed into holes bored directly into the ground would be sufficient. These poles have been used on a number of similar transmission lines and represent standard practice for the industry. This preliminary design was used when initially determining the size of the easement and assessing the number of poles required in each property. Installation of these poles can be performed relatively quickly as a single hole needs to be bored for each pole and the pole can then be erected and concreted into place. A single crew would be able to stand up approximately four poles a day.

31 The discussion paper given to Mr Morrison by Leightons also mentioned the need for an access track to be constructed to facilitate the movement of heavy plant and equipment over the land. The access track was to be 4 metres wide with passing bays every 250 metres to ensure the plant did not drive off the access track. It was proposed that the access track would remain for maintenance vehicles once construction was completed.

32 Having regard to a Gantt chart produced by the plaintiffs as at 26 April 2012, the construction work was scheduled to commence in late April with the construction of temporary access tracks, protection of a gas line passing through Mr Blohm's property and installation of a temporary fibre link between the wind farm and the substation. Other works in anticipation of the commencement of foundation would commence in early May. The construction of foundations and erection of the poles was scheduled for June, occupying most of the month, while stringing works would extend until the end of July. These estimates would, of course, depend upon the weather and other exigencies.

33 The defendants now raise a wide range of objections, some of a more technical nature than others. Their objections going to the scale and impact of the proposed works may be simply stated as a complaint that the construction work now proposed to be undertaken is of such a magnitude, character and duration that had they known these facts at the time of the negotiations they would never have entered

into the Option Deeds. What was initially proposed was that contractors would enter the property with a truck and auger, drill holes, drop in posts and be off the property within a matter of days, without any substantial disruption to an owner's ability to carry on their farming business. Stringing works might take a few more days. What is now proposed is the construction across each easement of a substantial road capable of carrying very heavy equipment.

34 Photographs were produced of the road under construction on an adjoining property, whose owners do not complain in this proceeding. That construction work requires the excavation of soil, the carrying in of substantial amounts of rock as a base, with crushed rock or similar material laid over the top to produce a smooth surface. As a consequence, parts of a property may be effectively divided during an extended period of time when the access road is under construction, with the attendant risk to cattle, and no guarantee that once completed cattle would be able to pass from one side to the other.

35 In addition, the construction of the concrete foundations for the larger poles will occupy a substantial period of time and involve a large number of trucks delivering concrete for each foundation. Furthermore, AGL proposes to use the easements on the Alanvale and Blohm properties as access to the other properties. Mr Morrison calculated there would be hundreds of concrete trucks passing up and down the easements during the concreting process extending over many weeks.

36 There is also the loss of amenity. The defendants claim that the substantially different works create a much greater adverse impact on their land, diminishing its value because of the increased size and number of poles. In order to assuage some of the defendants' concerns, AGL has agreed that it will remove the temporary access roads following the erection of the poles as part of its remediation work. Such remediation would, of course, involve a further serious intrusion into the defendants' land along the easement.

Serious question to be tried

37 The principles to be applied when considering an application for interlocutory injunctive relief are not in dispute. In *Australian Broadcasting Corporation v O'Neill*[1] Gleeson CJ and Crennan J said,

> The principles were discussed, for example, in *Chappell v TCN Channel Nine Pty Ltd* (a decision referred to by Crawford J in a passage quoted above), *National Mutual Life Assn of Australasia Ltd v GTV Corporation Pty Ltd*, and *Jakudo Pty Ltd v South Australian Telecasters Ltd*. As Doyle CJ said in the last-mentioned case, in all applications for an interlocutory injunction, a court will ask whether the plaintiff has shown that there is a serious question to be tried as to the plaintiff's entitlement to relief, has shown that the plaintiff is likely to suffer injury for which damages will not be an adequate remedy, and has shown that the balance of convenience favours the granting of an injunction. These are the organising principles, to be applied having regard to the nature and circumstances of the case, under which issues of justice and convenience are addressed. We agree with the explanation of these organising principles in the reasons of Gummow and Hayne JJ, and their reiteration that the doctrine of the Court established in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* should be folIowed.

38 In their joint judgment, Gummow and Hayne JJ identified a material difference between the High Court in *Beecham Group Ltd v Bristol Laboratories Pty Ltd*[2] and the House of Lords in *American Cyanamid Co v Ethicon Ltd*[3] concerning the applicant's prospects of success. They were concerned to identify and reject a proposition in *American Cyanamid* that appeared to reverse the onus by having the court move to the balance of convenience unless the material available to it failed to disclose that the plaintiff had any real prospect of succeeding in its claim for a permanent injunction at trial. They said,[4]

> Those statements do not accord with the doctrine in this Court as established by *Beecham* and should not be followed. They obscure the governing consideration that the requisite strength of the probability of ultimate success depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought.

39 That proposition is now reflected in *Bradto Pty Ltd v State of Victoria*[5] where the Court of Appeal held,

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1 (2006) 227 CLR 57, [2006] HCA 46, [19] (citations removed).
2 (1968) 118 CLR 618.
3 [1975] AC 396.
4 *Australian Broadcasting Corporation v O'Neill* [2006] 227 CLR 57, [206] HCA 46, [71].
5 [2006] 15 VR 65; [2006] VSCA 89, [35].

> In our view, the flexibility and adaptability of the remedy of injunction as an instrument of justice will be best served by the adoption of the Hoffman approach. That is, whether the relief sought is prohibitory or mandatory, the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong', in the sense of granting an injunction to a party who fails to establish his right at the trial, or in failing to grant an injunction to a party who succeeds at trial.

40 In *Nicholas John Holdings Pty Ltd v Australian and New Zealand Banking Group Ltd*[6] Hedigan J said,

> The issue of whether or not there is a serious question to be tried is not always susceptible of confident solution. It may be, in some cases, that the evidence raises a serious question but the case is not strong. Care must be taken not to confuse a question serious to the parties with the criteria here envisaged. If the matter raised is arguable but dubious, then it may be that a marked balance of convenience in favour of the applicant must exist before granting the relief sought… Moreover, it is open to a court to decide short points of construction, even though the proceedings are interlocutory.

41 The unusual juxtaposition of the parties, where AGL is the applicant for relief, has meant that it is the defendants who, in effect, assumed carriage of challenging the validity of AGL's claimed right under each easement. That did not mean that AGL was relieved of the ordinary burden to establish the grounds for injunctive relief.

42 The defendants contended that they are entitled to remedies at trial on the basis that they were mislead at the time they executed the Option Deeds by reason of the modest scope of the works then explained to them. Their case in that regard has not been pleaded, but it seems probable that they will raise counterclaims. Presumably, such a case, if reflecting their evidence on this application, would rely on representations as to the future matters, calling upon AGL to establish reasonable grounds for describing the works as it did. That of course assumes the correctness of the representations advanced on behalf of the defendants.

43 For the purpose of this application, I do not regard the strength of this unpleaded complaint of misleading or deceptive conduct to be such that there is no serious question to be tried concerning AGL's asserted right, or that AGL should have imposed upon it a burden to establish a more marked balance of convenience in its

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6 [1972] 2 VR 715.

favour. But, the complaints by the defendants about the change in the scope of works, and the impact upon their livelihood and amenity, is not confined to their proposed claim for relief on the basis that they were mislead when entering into the Option Deeds. I will return to its further significance in due course.

44 The defendants advanced a further challenge to the grant of the easements based upon an allegation of misleading or deceptive conduct. They contended that they were mislead into making the grants by an implied representation that they were legally bound to do so. Alanvale contended that the option was invalidly exercised because notice of the assignment was required, but not given. Having abandoned its contention that the assignment itself was invalid, it seemed to follow that the alleged failure to give notice must also be taken as abandoned. Alanvale's final point, concerning the exercise of the option, was that it was to be exercised by 5pm on 1 December 2010. Alanvale relied upon cl 11.3 of the Option Deed, which provided that where a notice was received after 4pm it was regarded to have been received at 9am on the following business day. The notice exercising the option was not received by Mr Morrison until 4.45pm. Thus, Alanvale contended, the notice was too late.

45 AGL argued that the specific provisions prescribing the time within which the option was to be exercised took precedence. That period ended at 5pm eastern standard time on 1 December 2010. Once again, I am not persuaded that the contention of Alanvale is of such force and merit that it can be said that there is no serious question to be tried as to the validity of AGL's claimed right, or that it should have imposed some additional burden to persuade the court of a marked balance of convenience in its favour.

46 There are, however, two more substantial grounds advanced by the defendants, that raise serious doubts about the basis of AGL's asserted rights to enter the properties. The first matter concerned the certainty of the intended purpose of the easement; and the second, the validity of the easements under the *Land Compensation and Acquisition Act 1986* (LAC).

47 The defendants argued that each easement is void for uncertainty. The definition of 'Permitted purpose' in the Alanvale easement made reference to 'the attached plans' which in context were to depict the layout of the works to be undertaken. There was some suggestion by AGL that extrinsic evidence might identify the plans, although it was later accepted that there may be nothing that had been prepared at the time that would fit the description. In *Westfield Management Ltd v Perpetual Trustee Co Ltd*[7] the High Court differentiated between the construction of contracts and instruments registered on title. It held,

> The importance this has for the construction of the terms in which easements are granted has been remarked by Gillard J in *Riley v Penttila* and by Everett J in *Pearce v City of Hobart*. The statement by McHugh J in *Gallagher v Rainbow*, 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 …
>
> is too widely expressed. The third party who inspects the register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee.

48 Clause 5.3 of the Alanvale Option Deed contemplated that the easement would be registered, and required the landowner to use its best endeavours to assist in that registration. The defendants contended that the purpose of registration was frustrated or diminished by the absence of the contemplated plans. If, as seems to be the case, there may be no plans, an inquiry to ascertain what they were and to incorporate them in the easement would seem fruitless. Accordingly, one construction of paragraph 1(a) may be to read down the purpose by deleting all reference to the 'attached plans'. The Blohm and North easements did not make reference to 'attached plans'. The defendants contended that, whether or not there was a clerical error, the absence of specification of the kind contemplated by the 'attached plans' so undermined the certainty required of registrable instruments as to invalidate the grant.

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7 [2007] 233 CLR 528, 539 [39] (citations removed).

49 Thus, a question for trial is whether the absence of the information contemplated by the 'attached plans', so as to depict the layout of the poles and associated works, invalidates the grants. AGL contended that there was no requirement that an effective grant designated by the easement boundary required a precise description, beyond that already given, of the installations to be placed on that land. As against that, the defendants point to the significant difference they have identified in the magnitude of that which was proposed at the time of executing the Option Deed, compared with that which is now proposed to be undertaken, to highlight the materiality of such a plan. They argued that some definition was required that limited the scope of the works to be undertaken in order to give meaning to the grant, and to protect any subsequent landowner who may look at the grant to ascertain the nature and scope of the encumbrance. Suffice to say there is a serious question to be tried as to whether the easement is void for uncertainty.

50 The second and perhaps more fundamental challenge by the defendants is that the easements granted are voidable under s 13 of the LAC. Alanvale has purported to avoid the grant. Section 13 of the LAC provides,

> **13 Sale of interest in land voidable if notice not given**
>
> If an Authority enters into an agreement to acquire an interest in land in contravention of section 6, the acquisition is voidable at the option of the person whose interest in land is or is being acquired and the exercise of that option is effected by the service on the Authority of a notice in writing signed by that person.

51 The defendants contended that AGL is an Authority for the purpose of the LAC, and is empowered under s 86 of the *Electricity Industry Act 2000* to compulsorily acquire an easement for the purpose of erecting power lines. That being so, they argue, AGL must comply with the requirements of the LAC even when negotiating a private agreement such as the Option Deed and Grant of Easement.[8] The defendants contended that they were entitled to a notice of intention to acquire, even by private

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8 See LAC s 4 and the definition of 'acquire' in s 3 which includes an acquisition by agreement if the person acquiring that interest is empowered to acquire it by compulsory process.

agreement,[9] and that a failure to provide the required notice makes the acquisition voidable at the option of the person whose interest in land is affected.

52 AGL contended that because they had not sought the approval of the Governor-in-Council to acquire compulsorily the easements, they were not 'empowered' to do so, and therefore the provisions of the LAC had no application. They argued that there was, at the very least, a serious question to be tried in that regard. The defendants countered by arguing that an Authority may be 'empowered' notwithstanding the absence of approval; and that the history and stated purpose of the LAC was to ensure that, even in the case of a private negotiation, the fact that the Authority (AGL) could, with the approval of the Governor-in-Council, compulsorily acquire the right, created an imbalance in negotiating positions that was adjusted by the regime introduced under the Act.

53 This matter has not been fully argued. I am not in a position to make any final determination as to the merits of this part of the defendants' case. It has, however, been sufficiently argued to make it clear that the point has real substance, and, if correct, enables each defendant to avoid the grant, leaving AGL in the position of a mere trespasser.

54 The key to this argument is whether it can be said that at the relevant time AGL was 'empowered'. That question is not without some difficulty, as the decision in *Candibon Pty Ltd v Minister for Planning*[10] illustrates. That case may, of course, be distinguished on the basis that the powers contained in the 'Special Act' under consideration were quite different. Nevertheless, there is in my view a serious question to be tried in relation to this issue.

55 Thus it is that I turn to the balance of convenience, having regard to the probabilities of success of the parties on their respective contentions, and the practical consequence that might flow from the outcome should the order of the court on this

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9 The defendants contended that this was not a case where, under s 7 of the LAC, a notice of intention was not required.

10 [2011] VSC 415.

application be found to have been incorrect at trial.

Balance of convenience

56 AGL is already well advanced with works on the other properties along the negotiated corridor of the easements. It has already made a substantial investment on the basis of the grants, not just in the consideration paid or payable under each grant, but the works already undertaken on other properties. AGL also claimed that it would suffer significant loss occasioned by any delay in its access to the three properties, through the imposition of penalties charged by its contractors; and that it would lose substantial revenue because of a delay in the connection between the wind farm and the substation.

57 AGL also contended that it was placed in a position of unusual and substantial prejudice by reason of the fact that the defendant landowners, who sought to prevent AGL's access over the easements, had not made application for injunctive relief and thus were not exposed to any undertaking as to damages. AGL argued that if it was refused injunctions, the defendants would have effectively obtained relief to protect their positions until the trial of the proceeding without the usual exposure to an undertaking as to damages.

58 Although a trial has been fixed to commence on 12 June 2012, the delay from now until the final resolution of this proceeding is uncertain. It is estimated to take four days. There may of course be an appeal.

59 The basis upon which AGL claims to be entitled to enter upon the land and carry out the works – the rights granted under each easement – is under serious challenge. There is a real prospect that the defendants will succeed at trial, although their success is by no means certain. There remain serious questions to be tried.

60 The defendants contended that if AGL failed to establish the validity of the easements it would be a trespasser upon the land, but no ordinary trespasser. Had the works been confined to that which the defendants were initially informed would

be their scope, it might be argued that the impact on the land, in the event that AGL did not succeed to establish its case, would have been plainly contemplated by the defendants and relatively inconsequential. But the scope has changed in material respects. The defendants point out that the work will take months, not days. Heavy excavation equipment will be required, numerous concrete trucks will pass along a newly created heavy duty road, and the infrastructure to be created is more substantial and dominant on the landscape. There will also be a serious interruption to the ability of each owner to use the adjacent land for farming purposes.

61 If, on the other hand, AGL had done as the defendants say they should have, it may have acquired the very same rights by agreement or by compulsory acquisition and be able to carry out the proposed works. It may still be able to do so if the defendants are correct in their contentions, although it might experience delay.

62 I have had regard to the increased risks identified by the defendants, involving contamination by imported soil, escaping livestock, injury to livestock and loss of access to a house and to some parts of the property by reason of construction of the substantial access road. I am less persuaded by those matters as factors that weigh in favour of refusing the injunction sought. Some such risk would always have been contemplated, and most of the risks are manageable. Under the terms of each grant, AGL is required to minimise such risks.

63 Thus, there is on the one hand a significant intrusion by AGL into the defendants' land for a period of time which may be for more than a month and perhaps much longer. As against that, AGL claims a right of entry under the easements and points to very substantial financial loss as a consequence of delays. AGL has also proffered the usual undertaking as to damages and a further undertaking to remove the temporary access track, lay down areas and hard stand. It declines to give a full reinstatement of the undertaking previously given.

64 Putting to one side the absence of any undertaking as to damages by the landowners, I am of the opinion that the balance of convenience favours the grant of the

injunction sought by AGL. I have reached that conclusion by adopting the approach enunciated in *Bradto,* to ask where lies the lowest risk of injustice if the decision of this court were to turn out to be wrong at trial.

65 While the respective risks of injustice may be finely balanced, I am persuaded that the least injustice flowing from the order of this court, if proved wrong at trial, is that to be suffered by the defendants. There is one further factor however, which in my view tips the balance further in favour of an injunction.

66 Had the defendants brought an application to restrain AGL from entering upon their land, on the same grounds on which they now contend the grants are invalid or may be voided, an injunction, if granted, would ordinarily be accompanied by the usual undertaking as to damages. If AGL is refused an injunction, the defendants will, in effect, have obtained that relief at AGL's risk of substantial loss but in the absence of any undertaking as to damages.

67 The defendants contend that the circumstances in which they may obtain effective relief without any obligation to give an undertaking as to damages is not a matter which may be taken into account when assessing the balance of convenience. I disagree. It is a factor that informs the test in *Bradto* – what course will carry the lower risk of injustice if the court turns out to be wrong. There is, in my view, something manifestly unfair about the burden of the undertakings, accompanied by a litigation risk, falling only upon AGL, when it is the defendants who seek to deny to AGL its right under easements granted by each defendant for which significant sums have been paid. Had AGL asserted its right to enter on each property under the rights granted, instead of bringing the dispute to the courts, the landowners would have faced with a clear choice, give way or seek a remedy in court. AGL should not be prejudiced by making the choice to commence this proceeding rather than to bring the dispute to a head by acts of self-help which may have provoked a different course.

68 Thus, by reason of this factor, I am more firmly persuaded that the balance of

convenience lies in favour of the grant of injunctive relief to AGL until 4.15pm on 12 June 2012 or further order, upon the usual undertaking as to damages, and the additional undertaking proffered by AGL. I am not persuaded that any further restriction on the right of entry ought to be imposed. While the defendants contend that the easements do not extend to a right of carriageway over their land, the claim by AGL that it is entitled to have access from one property to another is a question for trial. Nor do I propose to add any further conditions of the kind sought by Mr Blohm, to protect him from the risk of imported soil, proper cleaning of heavy equipment and a proper surface on the access track. These matters have either been addressed by AGL in its material, by a satisfactory proposal, or are required of it in compliance with its legal obligations, including its obligations under each grant.
