



Court of Appeal New South Wales

Medium Neutral Citation: Registrar-General of New South Wales v Cihan [2012] NSWCA 297

Hearing Dates: 31 August 2012

Decision Date: 20/09/2012

Before: Allsop P (at [1]), Barrett JA (at [2]), Tobias AJA (at [71])

Decision:

1. Grant leave to appeal.
2. Direct that a notice of appeal be filed within seven days.
3. Appeal allowed.
4. Set aside the orders made in the Equity Division on 24 November 2011.
5. Order that the questions for separate determination be answered as follows:

Question 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*, does the notification in item 2 in the second schedule of folio identifier E/23162 record such an easement?

Answer to Question 1: Yes.

Question 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 s 42(1)(a1) of the *Real Property Act 1900*?

Answer to Question 2: No.

6. Order that Mehmet Cihan pay the Registrar-General's costs of the appeal and the application for leave to appeal.

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

Catchwords: REAL PROPERTY - Torrens system - easements – easement created when both dominant and servient tenements held under Old System title - all land later converted to Torrens title and subdivided - current folio relating to servient tenement issued in 2008 - folio notes as an affecting encumbrance or interest "Easement affecting the land shown so burdened in Vol 6451 Fol 53" - that immediately preceding folio contains a short description of the easement but does not identify any dominant tenement - general description of benefited land available from an earlier folio identified in the immediately preceding folio - whether easement "recorded in" the current folio - whether easement "omitted" - WORDS AND PHRASES - "recorded in"

Legislation Cited: Conveyancing Act 1919 (NSW), s 181A(1) and Schedule 8
Conveyancing and Law of Property Act 1884 (Tas), s 34A and Schedule 8
Land Titles Act 1925 (ACT), s 81 and Schedule 1
Property Legislation Amendment (Easements) Act 1995
Real Property Act 1862, s 40
Real Property Act 1900, ss 31B(2), 32(1), 32(5), 40 (1B), 42(1), 80A, 96B, 129(1)
Real Property Act 1886 (SA), s 89 and Schedule 5
Real Property (Computer Register) Amendment Act 1979
Transfer of Land Act 1958 (Vic), s 72(3) and Twelfth Schedule
Transfer of Land Act 1893 (WA), s 65(3) and Ninth Schedule

Cases Cited: A Victor Leggo & Co Pty Ltd v Aerosols of Australia Pty Ltd (1986) NSW ConvR 55-293
Bailey v Stephens (1862) 12 CB (NS) 91; 142 ER 1077
Bursill Enterprises Pty Ltd v Berger Bros Trading Pty Ltd [1971] HCA 9; (1971) 124 CLR 73
Chambers v Taylor (1837) 2 My & Cr 376; 40 ER 683
Doe d Howell v Kennedy [1840] NSWSupC 13; (1840) NSW Sel Cas (Dowling) 979
Fejo v Northern Territory of Australia [1998] HCA 58; (1998) 195 CLR 96
Hill v Midland Railway Co (1882) 21 Ch D 143
Jones v Watts (1890) 43 Ch D 574
Sahab Holdings Pty Ltd v Registrar-General [2011] NSWCA 395

Texts Cited: J Baalman and T Le M Wells, *The Practice of the Land Titles Office (New South Wales)* (1934)
Peter Butt, *Land Law*, 6th ed (2010)
W N Harrison, "The Transformation of Torrens's System into the Torrens System" (1961-1964) 4
University of Queensland Law Journal 125
Pamela O'Connor, "Double Indemnity - Title Insurance and the Torrens System" (2003) 3 *Queensland
University of Technology Law and Justice Journal* 141
Charles Sweet, "The Land Transfer Acts" (1908) 24 *Law Quarterly Review* 26
Arthur Underhill, "Can an Easement be Granted in Perpetuity Without Words of Limitation?" (1908) 24
Law Quarterly Review 199
F Ticehurst, Baalman and Wells *Land Titles Office Practice* (fifth edition, current looseleaf)
T Cyprian Williams, "The Creation of Easements" (1908) 24 *Law Quarterly Review* 264
Bruce H Ziff, "A Matter of Overriding Interests: Unregistered Easements under Alberta's Land Titles
System" (1991) 23 *Alberta Law Review* 718

Category: Principal judgment

Parties: Registrar-General of New South Wales - Appellant
Mehmet Cihan - Respondent

Representation: Land & Property Information Legal Services - Appellant
MCK Lawyers - Respondent

H Altan - Appellant
D L Warren - Respondent

File Number(s): 2012/70604

DECISION UNDER APPEAL

Before: Windeyer AJ

Date of Decision: 24/11/2011

Medium Neutral Citation: Mehmet Cihan v City of Sydney RSL Club Co-Op Ltd [2011] NSWSC 1417

Court File Number(s): 2009/00291737

JUDGMENT

- 1 **ALLSOP P:** I agree with Barrett JA.
- 2 **BARRETT JA:** The applicant, Registrar-General of New South Wales, contends that Windeyer AJ answered incorrectly two questions that became the subject of an order for separate determination in proceedings in the Equity Division.
- 3 The Registrar-General's application for leave to appeal and the appeal itself were heard concurrently.
- 4 The questions for separate determination were framed on a stated assumption that a valid easement had been created so as to burden certain land in the City of Sydney at a time when the title to both that land and the land in favour of which the easement was created was common law or Old System title. All relevant land is now held under the provisions of the *Real Property Act 1900*.
- 5 The questions the primary judge was required to answer, on that assumption, were, first, whether the notification currently appearing in folio identifier E/23162 (the land in which includes the easement site) "records" the easement in question and, second, whether there has been an "omission" of the easement. Those questions are relevant to the operation of s 42(1) of the *Real Property Act* in ways to be mentioned presently.
- 6 His Honour answered the questions by saying that folio identifier E/23162 does not "record" the easement and that there has been "omission" of it.
- 7 Both the original dominant tenement and the parcel which included the original servient tenement were subdivided after the creation of the easement. The proceedings in the Equity Division were brought by the current registered proprietor of the subdivided lot within which the easement site now lies, that is, lot E in deposited plan 23162 which is the whole of the land now comprised in folio identifier E/23162. The defendants are the Registrar-General and the current registered proprietors of the subdivided lots that together make up the larger parcel of land that was the original dominant tenement.
- 8 On the face of the pleadings, the plaintiff seeks to establish that the landowner defendants and their successors as

registered proprietors of those subdivided lots do not enjoy the benefit of any easement burdening land of which the plaintiff is currently the registered proprietor; while the landowner defendants, by their cross claim, contend that they are entitled to the benefit of the easement.

- 9 The landowner defendants are not parties to the appeal. This, it appears, is because the plaintiff has come to accept that his land is burdened by an easement in favour of the landowner defendants. Although there may be dispute as to the precise legal basis on which the easement binds the plaintiff's land, resolution of that issue is apparently seen as going only to the question whether the plaintiff is entitled to compensation from the Torrens Assurance Fund controlled by the Registrar-General. The plaintiff seeks declaratory relief accordingly against the Registrar-General.

The easement and the entries concerning it

- 10 Two adjoining areas make up the land burdened by the easement as originally created. One is a strip of land ten feet wide and about 111 feet long running parallel to (and to the west of) the western side of George Street, Sydney (adjacent to its intersection with Liverpool Street) and opening on to Liverpool Street. The other is a strip of land five feet wide and about 16 feet long running into the first strip at right angles from the west. These areas are referred to as the sites of a lane and a passage respectively.
- 11 The easement was created by grant in conveyance registered number 964 book 237 dated 14 January 1882 by which land having the western side of George Street as its eastern boundary was conveyed by Robert Chadwick to John Valentine Hinton. Adjoining land to the west also owned by Chadwick was retained by him. The easement site lay within that retained land. The part of the easement site consisting of the lane was contiguous with the conveyed land for part of its length. For a distance of about 56 feet from its southern end at Liverpool Street, the eastern boundary of that part of the easement site corresponded with the western boundary of the conveyed land.
- 12 The operative part of the conveyance was:
- "Doth grant bargain sell alien enfeoff release and confirm unto the said purchaser and his heirs All that piece or parcel of land situate and lying and being in the Parish of St Andrew in the County of Cumberland Colony of New South Wales [described by metes and bounds] as the land is delineated in the plan hereon endorsed and therein edged red 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 five feet wide running at right angles to the said lane as delineated in the said plan and therein coloured yellow. . . To have and to hold the said land messuages hereditaments and all and singular the premises hereinbefore described and intended to be hereby assured with appurtenances unto the said Purchaser and his heirs . . ."
- 13 The easement provided for the land fronting George Street acquired by Hinton from Chadwick a means of rear access from and egress to Liverpool Street over the relevant part of Chadwick's retained land lying to the west.
- 14 The separate questions that the primary judge was required to answer were posed on the express assumption that the easement was validly created. Implicit in that assumption is the proposition that the relevant part of Chadwick's retained land was burdened by the easement, that the benefit of the easement was appurtenant to the land conveyed by Chadwick to Hinton and that that position pertained when all relevant land was later converted to Torrens title. I proceed accordingly.
- 15 The land retained by Chadwick (of which the easement site formed part) was converted to Torrens title in 1891. Certificate of title volume 1022 folio 161 declared Chadwick to be the registered proprietor "subject to such encumbrances, liens and interests as are notified herein". Under a heading "Notification referred to" there appeared the following:
- "Subject to full and free liberty and licence for William Henry Hinton and Frederick William Mackey the owners of the land adjoining the south eastern side of the land above described their heirs and assigns and their servants and workmen 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."
- 16 The primary judge surmised that William Henry Hinton and Mackey may have been executors of the will of John Valentine Hinton and noted that the plan on the certificate of title clearly showed the land the subject of the easement.
- 17 The land in this volume 1022 folio 161 was later subdivided by deposited plan 23162 into five lots, A, B, C, D and E. The easement site was wholly within lot E. Volume 6451 folio 53 was issued in respect of lot E in 1952. It carried the following notification:
- "Subject to full and free liberty and licence for William Henry Hinton and Francis William Mackey their heirs and assigns and their servants and workmen 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 labor up and down to and fro over the land ten feet wide and the passage five feet wide coloured brown on the plan hereon."
- 18 Again, the site of the easement was clearly depicted in a plan on the certificate of title.

- 19 The current folio of the register relating to lot E is folio identifier E/23162. It was issued in 2008. Recorded on it as an encumbrance or interest is the following:

"Easement affecting the land shown so burdened in Vol 6451 Fol 53".

- 20 A person searching the title of lot E today, therefore, is put on notice by the content of the current folio of the register relating to the lot that it is burdened by an easement and that further information about the easement may be obtained by inspecting volume 6451 folio 53.

The separate questions in context

- 21 The significance of the questions for separate determination, as between the plaintiff and the landowner defendants, is made clear by s 42(1) of the *Real Property Act*, the provision central to the Act's system of indefeasibility of registered title. The part of s 42(1) relevant to this case is:

"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:

...

(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,

..."

- 22 Thus, if an easement burdening land existed immediately before conversion of the land to Torrens title, the registered proprietor holds subject to the easement if either of two conditions is satisfied: if the estate or interest constituted by or arising from the easement is "recorded" in the folio of the register relating to the land; or if there is "omission" of the easement from the folio of the register relating to the land.
- 23 Paragraph (a1) was added to s 42(1) of the *Real Property Act* by the *Property Legislation Amendment (Easements) Act 1995*. Professor Butt, at [20 85] of Peter Butt, *Land Law*, 6th ed (2010), says that, as regards easements predating the bringing of the burdened land under the provisions of the *Real Property Act*, s 42(1)(a1) "merely codifies the law that had developed under the former s 42(1)(b)" - a provision, it may be noted, that had a counterpart in the original Torrens legislation of New South Wales. Section 40 of the *Real Property Act 1862* caused a registered proprietor to hold:

"subject to such encumbrances liens estates or interests as may be notified on the folium of the Register Book constituted by the grant or certificate of title of such land but absolutely free from all other encumbrances liens estates or interests whatsoever . . . except as regards the omission or misdescription of any right of way or other easement created in or existing upon any land . . ." (emphasis added)

- 24 The exception causing omitted or misdescribed easements to affect land despite their not being notified on the register was, by the time of the enactment of the *Real Property Act 1862*, an established feature of Torrens system legislation. Professor Harrison noted in W N Harrison, "The Transformation of Torrens's System into the Torrens System" (1961-1964) 4 *University of Queensland Law Journal* 125 that the exception was introduced in South Australia in December 1858 as one of many amendments to the first *Real Property Act* which had been assented to in January of that year. Harrison says of the particular amendment (at 130):

"It was not necessary to make the protection of a registered proprietor so absolute that a neighbour should be deprived of an easement merely because it had been omitted from the certificate."

- 25 Section 42(1)(a1) makes a particular kind of interest in Torrens system land valid and effective despite lack of recording and registration. It creates, in the form of an exception to indefeasibility, what is sometimes called an "overriding interest", that is, a valid and effective property right that does not derive from any recording on the title: see the discussion by Pamela O'Connor, "Double Indemnity - Title Insurance and the Torrens System" (2003) 3 *Queensland University of Technology Law and Justice Journal* 141 at 152 and Bruce H Ziff, "A Matter of Overriding Interests: Unregistered Easements under Alberta's Land Titles System" (1991) 23 *Alberta Law Review* 718.
- 26 The present appeal was approached on both sides on the footing that one of two findings must eventuate: either that the interest referable to the 1882 easement is "recorded in" folio identifier E/23162 or that the easement is "omitted from" that folio. The relevant concept of omission was recently explored by this Court in *Sahab Holdings Pty Ltd v Registrar-General* [2011] NSWCA 395 at [251] and following.
- 27 The possibility that it might be established in the Equity Division proceedings that, because the case is one of omission, the plaintiff's land is burdened by an "overriding interest" of each of the landowner defendants pursuant to s 42(1)(a1) provides the basis for the plaintiff's alternative claim against the Registrar-General in those proceedings. That claim is based on s 129(1) of the *Real Property Act*:

"Any person who suffers loss or damage as a result of the operation of this Act in respect of any land, where the loss or damage arises from:

- (a) any act or omission of the Registrar-General in the execution or performance of his or her functions or duties under this Act in relation to the land, or
 - (b) the registration (otherwise than under section 45E) of some other person as proprietor of the land, or of any estate or interest in the land, or
 - (c) any error, misdescription or omission in the Register in relation to the land, or
 - (d) the land having been brought under the provisions of this Act, or
 - (e) the person having been deprived of the land, or of any estate or interest in the land, as a consequence of fraud, or
 - (f) an error or omission in an official search in relation to the land, or
 - (g) any error of the Registrar-General in recording details supplied in the notice referred to in section 39 (1B),
- is entitled to payment of compensation from the Torrens Assurance Fund."

- 28 If, in accordance with the decision of the primary judge, the separate questions are answered in the way stated at [6] above, there may be grounds for a finding that the plaintiff has suffered loss or damage arising from one of these s 129(1) matters. That, of course, is not a matter that is before this Court. It is relevant only as context.

The decision at first instance

- 29 The primary judge referred to s 40(1B) of the Act. That section was introduced by the *Real Property (Computer Register) Amendment Act 1979*. It is in the following terms:

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

- (a) an estate or interest evidenced by an instrument,
 - (b) a provision of an instrument, or
 - (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."

- 30 The judge proceeded on the basis that, because folio identifier E/23162 expresses the registered proprietor's interest to be subject to the interest described in it as "Easement affecting the land shown so burdened in Vol 6451 Fol 53", s 40(1B) causes the content of volume 6451 folio 53 to be "set forth at length in" folio identifier E/23162.
- 31 The primary judge was of the view that volume 6451 folio 53 contains an incomplete or insufficient description of the easement. The wording of that description is set out at [17] above. The problem identified by the judge is that, while that wording refers to "full and free liberty and licence for William Henry Hinton and Francis William Mackey their heirs and assigns and their servants and workmen and for all other persons authorised by them" to pass and repass over the lane and the passage shown in brown on the endorsed plan, it does not identify any land as enjoying the benefit of the right or, for that matter, suggest that the right is appurtenant to land as distinct from being merely a personal right of the named persons.
- 32 The judge proceeded on the footing that the same deficiency affected the description in the original volume 1022 folio 161 (that is, the certificate issued upon conversion to Torrens title and, as to the land concerned, superseded by volume 6451 folio 53 in 1952). That, however, was a misapprehension on the judge's part. The description in volume 1022 folio 161 (set out at [15] above) referred to "full and free liberty and licence for William Henry Hinton and Frederick William Mackey *the owners of the land adjoining the south eastern side of the land above described* their heirs and assigns . . ." (emphasis added). There was thus a description of a dominant tenement by reference to not only named owners but also location vis-a-vis the land in the certificate of title.
- 33 The position is accordingly that the description the judge regarded as incomplete or deficient appears in the prior volume 6451 folio 53 to which attention is now expressly directed by the notation on folio identifier E/23162, but that the same element of incompleteness or insufficiency did not affect the originally issued folio (volume 1022 folio 161 issued in 1891 and superseded in 1952) to which, of course, attention is not directed by the current folio identifier E/23162.
- 34 The judge regarded the element of incompleteness or deficiency in volume 6451 folio 53 as fatal to any conclusion that the interest constituted by the benefit of the easement was "recorded in" the current folio identifier E/23162. He noted that inspection of volume 6451 folio 53, to which attention was specifically directed, would not have identified any land as land to which the benefit of the easement was appurtenant. He also noted that further searches may have allowed such identification to be made. The conclusion was then stated:

"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."

- 35 The finding of omission followed as a corollary.

The recording and the construction of it

- 36 The question posed by s 42(1) (and the first of the questions for separate determination) is whether the interest in the plaintiff's lot E subsisting in the landowner defendants by reason of the 1882 easement is "recorded in the folio of the Register" relating to the plaintiff's lot E.
- 37 The folio created in 2008 is one of the many folios that, along with certain other instruments and records make up "the Register" as referred to in s 31B(2). Creation of the folio in 2008 must be taken to have occurred pursuant to s 32(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."
- 38 The creation of the new folio in 2008 gave rise to an obligation of the Registrar-General under s 32(5):
- "Where, under this Act, the Registrar-General creates a new folio of the Register for land contained in a previously created folio of the Register, the Registrar-General shall appropriately cancel the previously created folio and may, for the purposes of this subsection, require the production to the Registrar-General of any certificate of title."
- 39 Before the advent of computerised folios, each folio generally consisted of an original certificate of title which was bound into and formed part of the register book. A "duplicate" certificate of title was issued to the registered proprietor. References in these reasons to a particular certificate of title are references to the folio of the register constituted by the original of that certificate forming part of the register book.
- 40 The presence on the current folio of the notation set out at [19] above implies that the Registrar-General was satisfied that an interest arising from an easement as described in that notation affected lot E. I say this because, under s 32(1)(c)(i), a "record" of "such particulars, as the Registrar-General thinks fit" of "other estates and interests ... affecting the land" to which the folio relates is part of the statutorily required content of a folio at the time of its creation.
- 41 It can thus be seen that the Registrar-General, when determining the content to be included in the new folio upon its creation in 2008, not only thought it fit to include a reference to refer to something "affecting" land in the folio but also described the affecting item as "Easement".
- 42 The plaintiff does not argue that the relevant part of lot E is not burdened by an interest of the persons enjoying the benefit of the easement created by the conveyance of 1882. The plaintiff says, rather, that the interest in the burdened lot E flowing from the continuing existence of the easement is not "recorded in" the folio for lot E, so that that the easement is not an interest "subject to" which the plaintiff holds his estate in fee simple. A corollary is that, if the fact that the interest is not "recorded in" the folio means that there is, as referred to in s 42(1)(a1), "omission" of the easement, the effectiveness of the interest comes only from its being an "overriding interest" of the kind referred to at [25] above.
- 43 Given the form of the notation on the current folio for lot E, s 40(1B) causes the content of volume 6451 folio 53 to be available for the purpose of construing that notation. When the content of volume 6451 folio 53 is taken into account, the plaintiff points out, no reference to any easement is found. Rather there is reference to "full and free liberty and licence" for two named persons "their heirs and assigns" and the "servants and workmen" of those two persons (and of their heirs and assigns) and "for all other persons authorised by" those two persons (and by their heirs and assigns) to use the lane and the passage; and those words do not indicate that any easement as such has been granted. The "liberty and licence" might well entail, it is said, a mere personal right.
- 44 Four particular indicators point strongly against this construction of the message conveyed by a combination of the recording on folio identifier E/23162 and the content of volume 6451 folio 53 to which s 40(1B) causes to be available for the purpose of construing that recording. I shall consider them in turn.

The first indicator

- 45 The first indicator is the word "Easement" in folio identifier E/23162 itself. Because of s 32(1)(c)(i), this shows, as I have said, that the Registrar-General has formed an opinion that there is an affecting interest and that it is an easement.
- 46 The plaintiff says that the Registrar-General's opinion is not binding or conclusive. That must be so. But the description

"Easement" is of particular significance in determining the message conveyed by the notation.

The second indicator

- 47 The second indicator is use of the words "full and free liberty and licence" in the relevant part of volume 6451 folio 53. Those or like words, while capable of denoting a licence or personal right, have long been employed in the drafting of easements. Statutes enabling the creation of easements of various kinds by means of short forms of words commonly import a long form that includes "full and free right and liberty": see, for example, *Transfer of Land Act 1958* (Vic), s 72(3) and Twelfth Schedule; *Real Property Act 1886* (SA), s 89 and Schedule 5; *Transfer of Land Act 1893* (WA), s 65(3) and Ninth Schedule; *Land Titles Act 1925* (ACT), s 81 and Schedule 1. In each of these cases, the short form "right of carriageway" imports a long form that includes "full and free right and liberty". In New South Wales and Tasmania, the equivalent long form is "full and free right": *Conveyancing Act 1919* (NSW), s 181A(1) and Schedule 8; *Conveyancing and Law of Property Act 1884* (Tas), s 34A and Schedule 8.
- 48 The practice of conveyancers in and about the creation of easements may be taken to be reflected by words appearing in the suggested form of grant by transfer under the *Real Property Act* set out in J Baalman and T Le M Wells, *The Practice of the Land Titles Office (New South Wales)* (1934) at 109:

"... do hereby transfer and grant to the said transferee out of all such my estate and interest in the land mentioned in the schedule following ... full and free right as appurtenant to the land comprised in certificate of title ..."

The third indicator

- 49 The third indicator comes from the use of the words "and their heirs and assigns" in the description in volume 6451 folio 53. As was pointed out in *Fejo v Northern Territory of Australia* [1998] HCA 58; (1998) 195 CLR 96 at [11], "[w]ords of limitation in the form 'to A his heirs and assigns for ever' have long been recognised as conveying an estate in fee simple". The common law was very particular about the use of the words "and his heirs". A grant to A and his "heir" in the singular (*Chambers v Taylor* (1837) 2 My & Cr 376; 40 ER 683) and a testamentary gift of land to A without words of limitation (*Doe d Howell v Kennedy* [1840] NSWSupC 13; (1840) NSW Sel Cas (Dowling) 979) created a life estate only.
- 50 In the Law Quarterly Review of January 1908, the editor of *Challis's Law of Real Property* referred to a "delusion" of conveyancers "that proper words of limitation are necessary to create an easement in fee": Charles Sweet, "The Land Transfer Acts" (1908) 24 *Law Quarterly Review* 26 at 28n. The author of *Underhill's Law Relating to Trusts and Trustees* responded with an observation that "the practice of conveyancers in using words of limitation in the creation of easements *de novo* has been merely *ex abundanti cautela*". He said that there is "not a scrap of authority" that such words are necessary in that context: Arthur Underhill, "Can an Easement be Granted in Perpetuity Without Words of Limitation?" (1908) 24 *Law Quarterly Review* 199.
- 51 This brought a spirited riposte from the author of *A Treatise on the Law of Vendor and Purchaser*, T Cyprian Williams, who, in "The Creation of Easements" (1908) 24 *Law Quarterly Review* 264, said:
- "The case therefore seems to stand thus: Words of inheritance are necessary for the grant of an estate in fee simple in things which lie in grant. Easements are things which lie in grant. The conclusion to be drawn seems obvious."
- 52 The controversy about the need for words of limitation for the creation of easements came in the wake of the recognition of easements as incorporeal hereditaments in the later part of the nineteenth century: see, for example, *Hill v Midland Railway Co* (1882) 21 Ch D 143; *Jones v Watts* (1890) 43 Ch D 574. Easements lay in grant, not in livery and the argument in favour of words of limitation was compelling.
- 53 It is not necessary to resolve the argument here. For present purposes, the important point is that, in the late nineteenth century, it had long been the practice of conveyancers to use the traditional words of limitation (to A "and his heirs and assigns") when drawing conveyances by which an easement was created by grant. This was recognised by Bryson J in *A Victor Leggo & Co Pty Ltd v Aerosols of Australia Pty Ltd* (1986) NSW ConvR 55-293 at 56,712:
- "[I]t appears to have been common, in the nineteenth century and since, to go to some lengths, in a transfer which was intended to create an easement, to establish the estate for which the easement was to be held, either by stating in terms that it was to be held in fee simple or by stating at length the words of limitation which would have been required for a conveyance of a general law title."
- 54 The words of limitation were quite inapt where a mere licence or personal right was to be created.

The fourth indicator

- 55 The fourth indicator comes from the plan endorsed on volume 6451 folio 53. The lane and the passage run through lot

E from Liverpool Street. Land other than land forming part of lot E itself adjoins the easement site at three places: first, at the Liverpool Street frontage, second, at the end of the lane distant from Liverpool Street and, third, at the end of the passage distant from Liverpool Street.

- 56 The physical layout is such that the only conceivable purpose of the lane and the passage is to allow access from Liverpool Street to the land at the ends of the lane and the passage distant from that street and corresponding egress from that land to the street. The narrow strips of land cannot otherwise be useful.
- 57 The plan itself thus justifies an inference that each of the lane and the passage serves a purpose of accommodating the adjoining land lying at the end of it. It is of the essence of an easement that it is "beneficial to the land and beneficial in respect of the ownership of the land, and not beneficial to any other person": *Bailey v Stephens* (1862) 12 CB (NS) 91; 142 ER 1077 per Willes J at 1085. The physical circumstances here indicate that the lane and the passage are beneficial only to the adjoining land to and from which they run.

Discussion

- 58 The matters just canvassed indicate that, according to the endorsement on folio identifier E/23162, construed with the aid of s 40(1B), lot E is affected or encumbered by something that the Registrar-General has assessed to be an easement, that the description that s 40(1B) causes to be incorporated uses forms of words traditionally employed in the creation of easements as distinct from mere licences and that the physical layout shown by the plan that s 40(1B) causes to be incorporated is such as to imply quite clearly that the right in respect of the affected part of lot E serves a purpose of accommodating or benefiting land adjoining lot E at the ends of the lane and the passage distant from Liverpool Street.
- 59 This, to my mind, is sufficient to warrant a conclusion that the easement created in 1882 is "recorded in" folio identifier E/23162.
- 60 I acknowledge, of course, that the recording, thus understood, does not include any explicit description of the benefited land. As the primary judge correctly observed, the identification of a dominant tenement is an essential element of the valid creation of an easement. But the question now under consideration is not as to the valid creation of the easement. It is accepted that there was valid creation in 1882, with the parcel then conveyed to Hinton (and now subdivided into the several lots of which the landowner defendants are the registered proprietors) as the dominant tenement. The question of present relevance goes to the description of the easement.
- 61 The apparent deficiency in the explicit description is, in my opinion, not fatal to the conclusion that the easement is "recorded", particularly when it is recognised that the missing information is readily obtainable by means that the available material provide.
- 62 Both parties referred in submissions to *Bursill Enterprises Pty Ltd v Berger Bros Trading Pty Ltd* [1971] HCA 9; (1971) 124 CLR 73, a case examined by the primary judge. The question there was whether an interest in a stratum of land occupied by an adjoining building was "notified upon the folium of the Register Book" relating to the land concerned. There was in fact a notation that referred to a right of way created by a particularly identified instrument. There was no reference to the additional interest relating to the stratum that had been created by the same instrument. The High Court held, by majority, that the affecting interest in the stratum was notified on the relevant folio. Barwick CJ said (at 77):
- "It seems to me that it was not intended that the certificate of title alone should provide a purchaser dealing with the registered proprietor with all the information necessary to be known to comprehend the extent or state of that proprietor's title to the land. The dealings once registered became themselves part of the Register Book. It was therefore sufficient that their registration should be by statement of their nature recorded on the certificate of title."
- 63 Windeyer J said (at 93):
- "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."
- 64 The concept here is that "notification" (or, as it is today, "recording") is sufficiently made if particulars explicitly stated are such as to engender in the mind of a reasonable reader generally familiar with property and land titles a need for further inquiry by resort to readily available records. In the present case, the four indicators to which I have referred would show very clearly to such a reader the existence of an easement affecting the parts of lot E consisting of the lane and the passage; and there would also be a very strong suspicion that the benefited land (not explicitly identified) was that at the ends of the lane and the passage distant from Liverpool Street.

65 The reader in question, being expressly directed to volume 6451 folio 53 (the content of which was deemed by s 40(1B) to be included in folio identifier E/23162), would there find, in addition to the four indicators already mentioned (and the lack of explicit identification of the dominant tenement), the following:

"Last Certificate Vol 1022 Fol 161".

66 That, combined with the fact that the relevant endorsement on volume 6451 folio 53 was obviously placed there upon first creation of that folio in 1952, would indicate volume 1022 folio 161 as a source of additional information about the content of the endorsement. And, of course, resort to volume 1022 folio 161 would bring to light the reference to a dominant tenement described as "the land adjoining the south eastern side of the land above described", that adjoining land being (or having once been) owned by William Henry Hinton and Frederick William Mackey.

67 The primary judge took the view (at [22]) that there was nothing in volume 6451 folio 53 which would enable a purchaser to ascertain the land, if any, to which the easement was attached. Having regard to the fact that the relevant notation was obviously carried over from the previous folio and that that folio was expressly identified in volume 6451 folio 53, it seems to me that, as was submitted on behalf of the Registrar-General, the means of remedying the apparent deficiency were available from the current folio, construed in the light of s 40(1B).

68 It is relevant to note that, even apart from s 40(1B), the Act itself shows that resort may be had to material outside the register in construing the content of the register. Thus, for example, s 80A allows incorporation by reference in a dealing of the content of a document that is "filed" but does not form part of the register except for the limited purposes of s 96B: see s 80A(3). Also, it is the practice of the Land Titles Office not to object to incorporation by reference in instruments lodged for registration of unregistered documents such as covenants to observe the conditions in a common law mortgage: F Ticehurst, *Baalman and Wells Land Titles Office Practice* (fifth edition, current looseleaf) at [240.400].

69 The principle that "the register is everything", to the extent that it may perhaps be a rough summation of the broad effect of the statutory provisions, is not offended by the conclusion that the 1882 easement is, for the reasons I have stated, "recorded in" folio identifier E/23162.

Conclusion

70 I propose orders as follows:

1. Grant leave to appeal.
2. Direct that a notice of appeal be filed within seven days.
3. Appeal allowed.
4. Set aside the orders made in the Equity Division on 24 November 2011.
5. Order that the questions for separate determination be answered as follows:

Question 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*, does the notification in item 2 in the second schedule of folio identifier E/23162 record such an easement?

Answer to Question 1: Yes.

Question 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 s 42(1)(a1) of the *Real Property Act 1900*?

Answer to Question 2: No.

6. Order that Mehmet Cihan pay the Registrar-General's costs of the appeal and the application for leave to appeal.

71 **TOBIAS AJA:** I agree with the orders proposed by Barrett JA for the reasons he has expressed.
