

THE WESTFIELD CASE: A CHANGE FOR THE BETTER?

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I Introduction

Easements are interests in land of ancient origin.¹ Any survey of authority in this area requires reference to ancient authority replete with historical evidence and precise definitions. As easements 'by their nature as a species are immutable in content but create rights of indefinite duration and are destined to endure in a changing environment'² difficult questions will arise in regard to the interpretation of easements based upon changes in technology, topography and land use that arise during the term of an easement.³

It is for this reason that the recent High Court decision in *Westfield Management Limited v Perpetual Trustee Company Limited*⁴ (Westfield) is significant in the guidance it now provides in relation to the interpretation of easements. This case has three layers involving firstly principles of interpretation of easements in relation to the ability to access land beyond the dominant tenement; secondly the application of extrinsic evidence and thirdly it might be seen as part of an attempt by the High Court over a number of authorities to protect the integrity of the torrens title register from erosion by approaches foreign to the fundamental principles of the torrens system. For this reason this judgment is significant and is already having an impact on subsequent decisions in this area. It is suggested however that in regard to the application of extrinsic evidence the case may raise a number of issues that will need to be addressed in future decisions and its possible rejection of long applied interpretation aids for easements may in fact have created uncertainty in this area of law.

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¹ Bradbrook and Neave, *Easements and Restrictive Covenants in Australia* (1981) 1.

² *Grinskis and Another v Lahood and Anor* [1971] NZLR 502, 509.

³ The law has reacted to this inflexibility and longevity of easements by providing for the extinguishment or modification of easements in some cases. Eg s 181 *Property Law Act* (Qld).

⁴ *Westfield Management Limited v Perpetual Trustee Company Limited* (2007) 239 ALR 75.

II Facts

The facts of this case are not unduly complex and relate to a right of access easement in the Central Business District of Sydney. Four buildings named for the purposes of this article (Glasshouse; Skygarden; Imperial Arcade and Centrepoint) fronted the pedestrian only Pitt Street Mall that runs at right angles to King Street. Only Glasshouse has frontage to King Street from which vehicular access is available. When Glasshouse was developed in 1988 based on local authority planning incentives to encourage the development of the Pitt Street Mall (established in 1987) Glasshouse provided a carriageway easement giving access to the adjoining Skygarden property. In 1988 all four lots were under separate ownership. In subsequent years Westfield Management Limited acquired Skygarden; Imperial Arcade and Centrepoint. Westfield Management Limited then sought to redevelop these three sites and to use the right of way giving access to Skygarden to also provide access to the commercial purposes intended to occur on Imperial Arcade and Centrepoint for driveways; parking spaces and loading docks. Westfield Management Limited sought a declaration that this access was lawful under the terms of the registered easement. The easement instrument referred to the easement as being pursuant to s 88B of the *Conveyancing Act 1919* (NSW) and provided for a subterranean passage or driveway across and beneath the Glasshouse land to the boundary of the Skygarden property. The easement contained detailed provisions in relation to the rights granted including the following:

Full and free right of carriageway for the grantee its successors in title and registered proprietors for the time being of an estate or interest in possession of the land herein indicated as the lots benefited or any part thereof with which the rights shall be capable of enjoyment and every person authorised by it, to go, pass and repass at all times and for all purposes with vehicles to and from the said lots benefited or any such part thereof across the lots burdened. (emphasis added by the High Court)

The easements also contained provisions in relation to the cost of maintenance and repairs to be borne equally by the grantor and grantee (clause 3 and 4); insurance obligations (clauses 7 and 8) and an indemnity provision (clause 9).

In the period after Westfield Management Limited was unsuccessful in this litigation it has acquired the Glasshouse property and accordingly events have overtaken the facts and principles discussed in the case.

III Decision

Westfield Management Limited was successful in the first instance but that decision was overturned by the New South Wales Court of Appeal. Westfield Management

Limited appealed to the High Court to reinstate the decision of the trial judge. The High Court dismissed the appeal.

The High Court concluded that the easement giving access to Skygarden from Glasshouse should not be construed to allow the further access to Centrepont and Imperial Arcade that lay beyond Skygarden. This decision was based on the terms of the easement created and the application of well understood law in relation to access beyond a dominant tenement over a servient tenement. The decision also relies upon what might appear to be a much more restrictive approach to the construction of easements in relation to the admission of extrinsic evidence with a possible exception in the case of a bare easement. The decision is significant in that it was a unanimous joint judgment that assists greatly in the clarity of principle that can be gleaned from this decision though the way the judgment was expressed and subsequent decisions do raise some uncertainties about its implications.

IV Construction of Easement

The High Court's decision to a significant extent relied on a simple interpretation of the opening words of the easement which were interpreted to not contemplate access beyond the Skygarden site.

The High Court noted that the easement granted a right 'to go, pass and repass at all times and for all purposes ... to and from the said dominant tenement [lots benefited] or any such part thereof.' However, for activities permitted with respect to the servient tenement (Glasshouse) are 'across the lots burdened', an expression not found in the statutory formulation. This expression is apt to describe entry from King Street, and passage across the Glasshouse site of the servient tenement to reach Skygarden as the destination. What is significant for the present dispute is that the Easement does not also speak of activities 'across' rather than 'to and from' the dominant tenement (Skygarden).⁵

The High Court was content to adopt the sentiments of the leading New South Wales Court of Appeal judgment of Hodgson JA who stated when speaking of those words⁶:

the words tend to suggest that it is access to and from the dominant tenement that is the purpose of the [E]asement, and not access to further land reached only by going across the dominant tenement. Certainly, if it had been intended that the grant extend to the authorisation of others to go across the dominant

⁵ *Westfield Management Limited v Perpetual Trustee Company Limited* (2007) 239 ALR 75 [17].

⁶ (2006) 12 BPR 23,793, 23,811.

tenement to further properties, the words 'and across' could readily have been added.

This conclusion which is based on the terms of the easement document appears to be clearly correct. Unless it comes within exceptions specified below there is ample authority that the rights of access provided under an easement giving access over the servient tenement to a dominant tenement do not extend to a parcel of land beyond the dominant tenement even if that land is owned by the owner of the dominant tenement.⁷ The exceptions to that rule are when⁸:

- the terms of the easement indicate to the contrary – in the Westfield case this might have become a live issue if the terms of the easement included the significant words 'and across.'
- Where the servient tenement is in fact a footpath leading to the neighbouring property then an easement over the servient tenement might be construed as entitling access on the basis that this is the function of the servient tenement.
- If the access is for all purposes connected to the use and enjoyment of the dominant tenement and the use of the other property is ancillary to the access to the dominant tenement.

V All Purposes

One of the major arguments addressed by Westfield Management Limited was that the easement provided for access 'for all purposes' which was argued allowed access beyond the Skygarden property. This argument was dismissed on the basis of authority such as *Peacock v Custins*⁹ which did not support this argument. The High Court also took the opportunity to dismiss the argument that the rights sought in this case are ancillary to the access right to Skygarden. The High Court noted¹⁰:

the line of cases holding that, on general principles of conveyancing, the grant of an easement carries with it those ancillary rights which are necessary for the enjoyment of the rights expressly granted. For example, Warner J held in *National Trust for Places of Historic Interest or Natural Beauty v White* that use by visitors of a car park adjacent to an Iron Age hill fort in Wiltshire known as the

⁷ *Harris v Flower* (1904) 74 LJ Ch 127; *White v Chandler* [2001] NZLR 28; *Peacock v Custins* [2002] Note the criticisms of *Harris v Flower* view in Linden Griggs, 'To and from- but not access: the High Court - easements, Torrens and doctrinal purity' (2008) 15 APLJ 260.

⁸ Peter Butt, *Land Law* (5th edition 2006) 1698.

⁹ [2002] 1 WLR 1815.

¹⁰ *Westfield Management Limited v Perpetual Trustee Company Limited* (2007) 239 ALR 75 [23].

Figsbury Ring was an “ancillary” user in the required sense. However, it is not necessary for the enjoyment of the rights granted for access to the Skygarden land that those using that access be at liberty to pass beyond Skygarden to other land.

The High Court quoted *Gale on Easements* which states¹¹:

The general rule is that a right of way may only be used for gaining access to the land identified as the dominant tenement in the grant.

The High Court then adopted a quote from *Harris v Flower* which in part states:

the user of the way for access to the buildings so far as they were situate upon land to which the right of way was not appurtenant was in excess of the rights of the defendants.

It appears the decision by the High Court is not based purely upon a construction of the easement document but also on the policy factor that a broad interpretation would place an onerous burden on the owner of the servient tenement. The High Court commented that¹² ‘the broader the right of access to the dominant tenement granted by the easement, the greater the burden upon the proprietary rights in the servient tenement.’ This theme is picked up later in the judgment when they refer to the specific provisions of the easement in relation to the cost of maintenance and repairs to be borne equally by the grantor and grantee (clause 3 and 4). The High Court comments¹³:

In the absence of further clear words it might be considered unduly burdensome upon the owner for the time being of Glasshouse that it meet one half of the costs associated with access to remoter lots. That no such further provision was made is consistent with the construction adopted in these reasons of the terms of the grant of the Easement. Further, cl (4) attributes responsibility to the respective parties for the costs of repair of damage caused to the site of the carriageway by the grantor or grantee, and otherwise provides for them to bear equally the costs of repair. No attention has been given to the costs of repairs occasioned by those utilising the Easement to pass across and beyond Skygarden.

In relation to insurance obligations (clauses 7 and 8) and an indemnity provision (clause 9) the High Court commented¹⁴:

¹¹ *Westfield Management Limited v Perpetual Trustee Company Limited* (2007) 239 ALR 75 [27].

¹² *Ibid* [29].

¹³ *Ibid* [32].

¹⁴ *Ibid* [33].

No provision is made for insurance against loss or damage arising as a result of use of Glasshouse by the owners for the time being of tenements beyond the boundary of Skygarden. Nor is the obligation to effect public risk insurance so drawn as to deal with the range of uses for which Westfield contends. The same may be said of the limited indemnity required by cl (9).

VI Extrinsic Material

One of the most significant aspects of this case is the approach taken by the High Court in relation to this matter as it involves a distinct change in approach over that previously applying. The Court was concerned with arguments addressed to them and previously to the trial judge in the form of affidavits about the subjective intention of the owner of Skygarden and attempts to determine the intention or contemplation of the parties which are outside the express terms of the grant. Perpetual Trustee Company Limited did accept some evidence of an oral agreement between the parties relevant to the easement.

The High Court was concerned that this evidence was not being used as merely an aid in construing the easement but dealt with more fundamental issues. The High Court then stated¹⁵:

37. These concern the operation of the Torrens system of title by registration, with the maintenance of a publicly accessible register containing the terms of the dealings with land under that system. To put the matter shortly, rules of evidence assisting the construction of contracts *inter partes*, of the nature explained by authorities such as *Codelfa Construction Pty Ltd v State Rail Authority of NSW*, did not apply to the construction of the Easement.

38. Recent decisions, including *Halloran v Minister Administering National Parks and Wildlife Act 1974*[26], *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[27], and *Black v Garnock* [28], have stressed the importance in litigation respecting title to land under the Torrens system of the principle of indefeasibility expounded in particular by this Court in *Breskvar v Wall*[29].

This statement requires any construction of an easement registered under the Torrens system to consider carefully the fact that the registration of the easement brings with it the necessity to incorporate principles of indefeasibility in that process. The statement that the *Codelfa* case principles should not apply in this situation is significant. In the *Codelfa* case the High Court confirmed that in the context of a contractual provision¹⁶:

¹⁵ *Ibid* [37, 38].

¹⁶ [1981-1982] 149 CLR 337 at 352 (Mason J).

evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning.

The principle derived from that case is that surrounding circumstances known to the parties can be used as an aid in the construction of a contract.¹⁷

VII Use of Extraneous Evidence in Construing Easements

In the context of the interpretation of easements extrinsic evidence has often been used to interpret easements when there was some doubt as to the meaning of the express terms. There is a long line of authorities that deal with the use of extraneous evidence to construe easement documents.

Modern authorities have tended to interpret more liberally grants (such as easements) as they may endure for many years and impact differently as the environment around them changes over time.¹⁸ Authority indicates that three factors were deemed relevant in construing an easement: (a) the locus in quo (the land over which the easement is granted); (b) the nature of the terminus ad quem (the land at the end of the easement area); and (c) the purpose for which the right of way is to be used.¹⁹

In *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (no 2)*²⁰ Megarry J considered the narrow width of an easement area was a factor in interpreting an easement giving access to a church as being limited to foot traffic. In *McIlraith v Grady*,²¹ *Eliot v Renner*²² and *Bulstrode v Lambert*²³ the physical attributes of the locus in quo impacted on the interpretation of the easement document so as to permit loading and unloading on the easement area as the easement was not sensibly useable without that implication.²⁴

¹⁷ Ibid.

¹⁸ *Cavacourt Pty Ltd v Durian Holdings Pty Ltd* (1998) 9 BPR 16,836; *Lolakis v Konitas* [2002] NSWSC 889 at [42]; *Durian (Holdings) Pty Limited v Cavacourt Pty Ltd* [2000] 10 BPR 18,099 at [4].

¹⁹ Upjohn J in *Bulstrode v Lambert* [1953] 1 WLR 1064, 1067; Ambrose J in *SS and M Ceramics Pty Ltd v Kin* (1996) 2 Qd R 540 at 552; *Long v Michie* [2003] NSWSC 233 at [36].

²⁰ [1973] 1 WLR 1572; *Yip v Frolich and Frolich* [2004] SASC 287 at [22].

²¹ [1968] 1 QB 468.

²² [1923] St R Qd 172.

²³ [1953] All ER 728.

²⁴ Compare *SS and M Ceramics Pty Ltd v Kin* (1996) 2 Qd R 540 where although the decision was that the easement giving access to a rear of a grocery store did not include an entitlement to load and unload on the servient tenement that was based on the fact that at

In *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (no 2)*²⁵ the fact that the area in front of a church at the terminus of the easement would not allow vehicles to turn around assisted in the interpretation of the easement as permitting only foot traffic. The purpose of the easement was an important factor in *Elliot v Renner*²⁶ where an easement giving access to a pastry cook's premises was deemed to require the ability to stop and unload.²⁷

In *SS and M Ceramics Pty Ltd v Kin*²⁸ the changes in the buildings in place on the dominant tenement at the time of the grant of the easement (added buildings meant that the loading or unloading could no longer occur on the dominant tenement) was used to interpret an easement as not allowing loading and unloading on the servient tenement because when the easement was first created there was no need to use the servient tenement for that purpose.

Often the use of extrinsic evidence in this manner in the context of Torrens title was tempered by the need to preserve the integrity of the register.²⁹

The High Court in *Westfield* indicated that Mc Hugh J was expressing the law too broadly when he states (as a judge in the minority) in *Rainbow v Gallagher* that³⁰ '[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'. Mc Hugh J then proceeds to apply the standard common law view that easements can be construed using information such as the locus in quo; the nature of the terminus ad quem and the purpose for which the way is to be used as described above. McHugh J also comments that³¹ 'the Court will not construe the grant in a manner that goes beyond the use contemplated by the parties at the time of the grant.'

It would seem that the High Court has determined that this common law approach to the interpretation of registered Torrens title easements derived from *Codelfa* should

the time of the grant there was ample room on the dominant tenement for that purpose suggesting that the easement should be interpreted not to include the ability to load and unload on the servient tenement.

²⁵ [1973] 1 WLR 1572.

²⁶ [1923] St R Qd 172.

²⁷ Refer also to *Long v Michie* [2003] NSWSC 233 at [36].

²⁸ (1996) Qd R 540.

²⁹ McPherson J in *SS and M Ceramics Pty Ltd v Kin* above n 24 at 539 and *Hoy v Allerton* (2002) Q Conv R 54-559.

³⁰ *Rainbow v Gallagher* (1994) 179 CLR 624, 639,640.

³¹ *Ibid* 640.

no longer apply. The basis of this view draws upon fundamental torrens title principles that a party relying upon the terms of a document should not have their interest impacted upon by unknown and virtually unknowable information not reflected on the register. The High Court expresses it as follows³²:

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.

Is there any aspect of extrinsic evidence that can be applied in the interpretation of easements? The High Court acknowledges that Griffith CJ admitted extrinsic evidence to show a misdescription of the boundaries of land in *Overland v Lenehan*.³³ But indefeasibility does not attach to the boundaries under the Torrens system and the resort to extrinsic evidence of what are the dimensions on the ground of a parcel of land is not surprising and is standard in the case of uncertain boundaries.

The High Court also acknowledged and in this way confirms its narrow view of what extrinsic evidence is admissible when it later states³⁴:

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

This would include the types of issues traditionally used to interpret easements based on the details specified on the register. But does it suggest that this is the limit of the evidence admissible in the interpretation of easements. Can other factors be applied such as the physical nature of the easement and the land on which the easement is found?

VIII Bare Easements

Sophisticated easements will normally include detailed descriptions of the nature of the use permitted under the easement; maintenance; insurance and other relevant entitlements. As the easement under consideration in *Westfield* was a sophisticated easement there was some ease in applying a strict view on the applicability of extrinsic evidence on the basis that the parties should have included any important

³² *Westfield Management Limited v Perpetual Trustee Company Limited* (2007) 239 ALR 75 [39].

³³ *Ibid* [40].

³⁴ *Ibid* [44].

considerations into such a document especially in the context of a registered easement. Does that view apply necessarily in the case of a bare easement?

In an easily overlooked passage the High Court stated³⁵:

in *Powell v Langdon*[35] Roper J accepted as applicable to the construction of a particular grant of a right of way (apparently over land under the RP Act) a statement by Sir George Jessel MR in *Cannon v Villars*[36]. This was that the content of the bare grant of a right of way *per se* was to be ascertained by looking to the circumstances surrounding the execution of the instrument, including the nature of the surface over which the grant applied.

This provides some basis for arguing that the strictness of the *Westfield* test may not be applied in all cases. This is starkly shown in the reaction of the New South Wales Court of Appeal in *Sertari Pty Ltd v Nirimba Developments Pty Ltd* ³⁶ (*Sertari*) and a single judge decision of White J in *Neighbourhood Association DP no 285220 v Moffat (Neighbourhood)*.³⁷

Sertari was the first opportunity to apply *Westfield* as it was a judgment delivered only five weeks after *Westfield*. In *Sertari* the Court of Appeal was asked to consider whether a servient tenement owner was obliged to consent to a development application by the dominant tenement owner for a right of carriageway which would result in the development on the dominant tenement of 236 units. In construing the easement to determine if the easement contemplated that type of development the servient tenement owner sought to rely upon evidence of extrinsic circumstances including the physical characteristics of the servient and dominant tenements and the activities conducted on the dominant tenement at the time of the original grant of the easement to suggest a narrower interpretation of the easement.

The Court of Appeal noted in the decision of the trial judge³⁸:

Windeyer J rejected the town planner's report and the terms of the development consent as irrelevant to the construction of the grant. He also held that the physical characteristics of the tenements and the activities being conducted on the dominant tenement at the time of the grant could not cut down its plain words. The appellant again sought to rely on this extrinsic

³⁵ *Ibid* [40].

³⁶ *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324 (Unreported, Tobias, McColl and Handley, 15 November 2007).

³⁷ *Neighbourhood Association DP no 285220 v Moffat* [2008] NSWCA 54 (Unreported White J, 30 January 2008).

³⁸ *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324 (Unreported, New South Wales Court of Appeal, Tobias, McColl and Handley, 15 November 2007) [15].

material but the decision in *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2007] HCA 45 has since confirmed that extrinsic material apart from the physical characteristics of the tenements, is not relevant to the construction of instruments registered under the *Real Property Act 1900*. This Court is therefore limited to the material in the folio identifiers, the registered instrument, the deposited plans, and the physical characteristics of the tenements. These provide no basis for reading down the clear and unqualified words of the grant. The grant was for all purposes, for use at all times, and extended to every person with an estate or interest in any part of the dominant tenement with which the right was capable of enjoyment, and persons authorised by them.

In this way the Court of Appeal included the possibility that evidence of the physical characteristics of the servient and dominant tenement could be applied to a construction of the easement. This might be open based on the last sentence of paragraph [40] from *Westfield* which refers to ‘the nature of the surface over which the grant applied’. It should be noted that this was quoted by the High Court in relation to a bare grant of a right of way per se and was included in a sentence that referred to the use of evidence of circumstances surrounding the execution of the instrument (which is generally not permitted but perhaps permitted in bare grants). It is suggested on balance this reference to physical characteristics by the High Court was not intended to exclude this consideration in easements that are not bare rights of way. The words used by the High Court do create some uncertainty on this point.

The confusion that *Westfield* may have created is confirmed in the *Neighbourhood* case where Justice White dealt with the construction of an easement for a pipeline and irrigation where by an oversight a registered easement for that purpose did not include the content of the rights granted by that easement. The circumstances suggested it was contemplated these rights did include a right to spread effluent over the servient tenement as confirmed by a contemporaneous EPA pollution control licence. Accordingly, in this case a bare easement was being considered. Justice White was clearly of a mind to refer to the extrinsic evidence to interpret the easement broadly. He referred to the last sentence of para 40 from the *Westfield* case discussed above and noted the High Court did not disapprove of the approach taken in *Powell v Langdon* which involved a bare grant of an easement. Justice White commented that³⁹: ‘I would not myself have regarded the High Court’s decision as precluding recourse

³⁹ *Neighbourhood Association DP no 285220 v Moffat* [2008] NSWCA 54 (Unreported Supreme Court of New South Wales, White J, 30 January 2008) [35].

to all of the objective matrix of facts bearing on the construction of the instrument.’ Justice White noted in *Westfield* that⁴⁰:

The High Court did not say why different principles might apply to the construction of a bare grant. The reason may be one of necessity. In the case of a bare grant, if ambiguities cannot be resolved by recourse only to the text of the registered instrument and plan, the person proposing to buy, or to deal with, registered land is necessarily thrown back to an examination of the extrinsic circumstances to see the extent of the rights which have been conferred on the owner of the dominant tenement.

Although Justice White did not think *Westfield* justified the approach taken in *Sertari* and especially in the context of a bare grant Justice White felt bound by the statement of principle as the Court of Appeal judgment did not appear to be limited to easements where the terms were fully set out. Accordingly, the extrinsic evidence was not applied in that case.

It might be commented in that case that Justice White could have sought to distinguish *Sertari* and to directly apply *Westfield* on the basis there was no intention to deal with bare grants of easement in *Sertari*.

This confusion is accentuated by the subsequent case of *Richard Frank Horton Berryman v Robert Sonnenschein*⁴¹(*Horton*) where Einstein J in para 29 applied White’s J judgment to deem inadmissible evidence of extrinsic evidence in considering ancillary rights under an easement. Einstein J took the view that White J considered himself bound by the *Westfield* decision on the basis of its unequivocal finding in relation to extrinsic evidence. But White J was referring to the unequivocal Court of Appeal decision which he clearly thought was unduly limited in not acknowledging the High Court equivocation on the availability of extrinsic evidence for bare easements. The *Horton* case will tend to obscure what is suggested is a valid point being made by White J in the *Neighbourhood Association case*.

The *Westfield* case has not gone unnoticed in New Zealand but there appears to be some resistance to its application. In *Big River Paradise Ltd v Congreve*⁴² the Court of Appeal did not endorse the approach in *Westfield* and noted some concerns about how the *Westfield* test should be applied as discussed below.

⁴⁰ Ibid [37].

⁴¹ *Richard Frank Horton Berryman v Robert Sonnenschein* (Unreported, Supreme Court of New South Wales , Einstein J, 14 March 2008).

⁴² [2008] 2 NZLR 78.

IX What Does Westfield Stand as Authority For?

The decision in *Westfield* does create some uncertainties:

- Are physical characteristics of the tenements something that can be considered? This is not as clearly dealt with in *Westfield*. In no part of *Westfield* were the physical characteristics of the tenements used to interpret the easement document. The only reference to the physical characteristics was in the quote relating to a bare grant of a right of way which seems to have been created as a separate category but as outlined above this may not have been intended to exclude considerations relevant to the surface over which the easement is granted. It seems the Court of Appeal in *Sertari* were content to consider physical characteristics of the tenements. Does this still allow the consideration available under the common law to consider the size of the locus in quo or the terminus ad quem? This is unfortunately not clear as one would like though as these types of matters are found on the relevant plans associated with the subdivision and the registered easement found on the register it may not be contrary to torrens principles to consider these issues.
- It seems that the only clear statement in *Westfield* is that evidence is admissible required to make sense of what the Registrar identifies as relevant to the easements such as surveying terms and abbreviations which appear on the plan.
- What about bare easements? It is suggested the point made by Justice White in *Neighbourhood* is well made though it would apply to a minority of cases. In New South Wales the *Sertari* case will need to be distinguished and it may be considered persuasive in other jurisdictions.
- As to the concern expressed by the High Court about subsequent owners not knowing about evidence not found on the register – this may not apply when the original parties are seeking to interpret an easement. Does the narrow approach apply to the initial parties to the easement, if not, when does that view begin to apply?⁴³ It would seem that the High Court would apply their test from registration.

The concern is the extent to which the High Court has limited this type of extrinsic evidence. It is unfortunately unclear from the judgment for an informed reader who is not attempting to read the judgment as one would a statute. It seems the High Court could be viewed as indicating a particularly hard line on the use of extrinsic evidence as applied in *Sertari*. The limit of extrinsic evidence supported in this case

⁴³ *Big River Paradise Ltd v Congreve* [2008] 2 NZLR 78 [22].

was in relation to the use of the physical characteristics of the tenements including matters such as folio identifiers etc outlined above.

An argument that supports a broader interpretation is provided in the discussion of *Cannon v Villars* where the High Court acknowledged the use of circumstances surrounding the execution of the instrument including the nature of the surface over which the grant is applied – but that was in relation to a bare grant? Their position on this point is further blurred by their statement made after referring to bare grants that⁴⁴:

The situation with which the Australian courts were concerned in the above cases bore little resemblance to that in the present case, where the evidence goes to the intentions and expectations of the parties to the Instrument respecting the development of an area in the central business district of Sydney.

This seems to refer in an oblique manner to the high value and complexity of decisions made in this exclusive part of Australia's largest and most significant city. Does this mean that extrinsic evidence is admissible in less complex situations? I think not.

There might be considered to be four categories of evidence in construing easements:

- (i) The express terms of the registered easement. This is clearly the primary tool for construction of the easement and accepted by *Westfield*. This is part of the ratio decidendi of the case.
- (ii) Extrinsic evidence about what the parties contemplated would be acknowledged as being included as part of the easement covenants in standard easement. This is clearly repudiated in *Westfield* and is part of the ratio decidendi of the case.
- (iii) Extrinsic evidence about the circumstances surrounding the execution of the instrument and the nature of the surface over which the easement is granted is admissible for bare easements only but is obiter in this case.
- (iv) Evidence about the physical make up of the dominant and servient tenement at the time of the creation of the easement and the dimensions of the easement area. This is probably admissible evidence though it is suggested this is not particularly clear from *Westfield* based upon their very narrow test expressed in paragraph [40]. As it was not necessary to the decision in this case this must be considered to be persuasive obiter.

⁴⁴ *Westfield Management Limited v Perpetual Trustee Company Limited* (2007) 239 ALR 75 [41].

X Broader Implications

The reference by the High Court to the need to protect the integrity of the Torrens Title register was outlined in para 38 when it is stated:

Recent decisions, including *Halloran v Minister Administering National Parks and Wildlife Act 1974*[26], *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[27], and *Black v Garnock*[28], have stressed the importance in litigation respecting title to land under the Torrens system of the principle of indefeasibility expounded in particular by this Court in *Breskvar v Wall*[29]. These cases deal with differing subjects and involve the High Court quoting primarily from *Breskvar v Wall*.

It may be seen as an attempt by the High Court to communicate a fundamental approach to the consideration of registered interests under the Torrens title in relation to the use of extrinsic evidence. The authorities quoted involve a consideration of a variety of issues. In *Farah Constructions* the applicability of the equitable doctrines of *Barnes v Addy* to the fraud and notice provisions of the Torrens system; in the case of *Black v Garnock* relating to the system of registration of writs of execution and in *Halloran* dealing with acquisition of land. Except perhaps to some extent in *Farah Constructions* the principles of the Torrens system were more a background to the decision rather than its driving force. This may indicate that the High Court will continue to keep the issue of extrinsic evidence and the policy imperative of the protection of the torrens register in mind in determining issues relevant to torrens title land without it being a central determinative issue.

Of interest is the extent to which this case, dealing with the limits on use of extrinsic evidence to interpret registered interests will impact on the interpretation of other registered interests. The High Court focused on the role of extrinsic evidence in easements. It would seem that based on the wording used by the High Court that these principles could be applied to a registered mortgage; lease; covenant or profit a prendre so that the interpretation of the terms of that interest should not be assisted by extrinsic evidence particularly in relation to what was intended by the parties in the lead up to the execution of the instrument.

The principles in the *Codelfa* case have been applied in the interpretation of leases regularly without reference to the issue of its impact on indefeasibility.⁴⁵ It may be the case that the difference between leases with a limited term as against easements that continue often for many years would permit the distinguishing of *Westfield* though it may provide a chilling effect on the use of *Codelfa* to imply covenants into

⁴⁵ *Harrem Pty Ltd v Toyo Tyres Rubber Australia Limited* [2008] NSWSC 776 [483]; *R and J Lyons Family Settlement Pty Ltd v 155 Macquarie St Pty Ltd* [2008] NSWSC 310 [60]; *Bowen Investments Pty Ltd v Tabcorp Investments Pty Ltd* [2008] FCAFC 38[51].

registered leases or the use of extrinsic evidence in interpretation of any registered instrument.

XI Conclusion

Westfield provides interesting guidance in relation to the interpretation of registered easements and provides a reaffirmation of fundamental torrens title principles. What the case also does is create further uncertainty in relation to what if any extrinsic evidence may be available to assist in construction of easements. Firstly, in a point raised in the *Neighbourhood* case it is arguable that a much more liberal viewpoint might be appropriate in the case of bare easements and this is probably reflected (though in a somewhat muffled manner) by the High Court in *Westfield*.

Also unclear is whether the physical make up of the tenements is still a relevant consideration or is it also considered extrinsic evidence? This confusion is caused by the lack of clarity in how the High Court has discussed this issue. It is suggested that whenever a court is asked to construe a registered interest, whether it is an easement; mortgage, lease or restrictive covenant that the principles in *Westfield* will need to be considered. As a torrens title conservative that may not be a bad thing.