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Westfield 5 years on

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The 2007 High Court decision in ***Westfield Management Ltd v Perpetual Trustee Company Ltd*** *dealt with significant issues relevant to the interpretation of easements using extrinsic evidence and the integrity of the Torrens title register. The decision was not entirely clear in some aspects with some issues remaining unanswered including whether there are implications for the interpretation of other registerable interests such as restrictive convenants. Five years after this decision this article considers how subsequent cases have applied the High Court's judgement allowing conclusions to be reached about the broader impact of this authority.*

The High Court decision in *Westfield Management Ltd v Perpetual Trustee Company Ltd*[1] provided guidance in relation to the interpretation of registered easements. In the 2009 article 'The *Westfield* case: A change for the better?'[2] it was stated that:

> *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.

The 2009 article also speculated that the *Westfield* decision could impact on the interpretation of other registered interests such as leases.[3] This paper reviews the approaches taken by subsequent court decisions in applying the *Westfield* decision. The concerns expressed in the 2009 article, in relation to the potential of the *Westfield* decision to create uncertainty, have been borne out in the manner in which courts have struggled to apply the principles of the *Westfield* case. This has resulted in very different approaches to the construction of easements and its impact on the interpretation of other registered interests. Although *Westfield* has been considered and applied in a number of significant cases, there is still some doubt as to how this decision should be applied in relation to a number of key issues which this article will seek to identify, analyse and clarify.

Overview of the *Westfield* decision

It is worthwhile to provide a brief overview of the decision as a background to the discussion in this article. The decision required the High Court to construe a registered easement which permitted vehicular access from Pitt Street Mall in the Central Business District of Sydney, over a property called

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1 (2007) 233 CLR 528; 239 ALR 75; [2007] HCA 45; BC200708402 *(Westfield)*.

2 M Weir, 'The *Westfield* case: A change for the better?' (2009) 21(2) *Bond LR* 182 (the 2009 article).

3 Different issues may arise in regard to old system land. *Broadcast Australia Pty Ltd v Kim Noonan* [2011] NSWSC 1524 (12 December 2011); *Kitching v Phillips* (2011) 278 ALR 551; [2011] WASCA 19; BC201100167 (28 January 2011) at [47].

Glasshouse (servient tenement), to another property Skygarden (dominant tenement). Four buildings; Glasshouse, Skygarden, Imperial Arcade and Centrepoint, had a frontage to the pedestrian — only Pitt Street Mall that runs at right angles to King Street. Only Glasshouse fronted King Street from which vehicular access was available. When Glasshouse was developed in 1988, based on local authority planning incentives to encourage the establishment of the Pitt Street Mall (established in 1987), Glasshouse provided for a carriageway easement giving access to Skygarden. In 1988 all four lots were under separate ownership. Subsequently Westfield acquired Skygarden, Imperial Arcade and Centrepoint, and was desirous of redeveloping these sites and using the right of way giving access to Skygarden, to also provide access for the commercial purposes intended to occur on Imperial Arcade and Centrepoint; for driveways, parking spaces and loading docks. The litigation involved a discussion of whether this was possible under the terms of the registered easement.[4]

The ratio decidendi of the decision of the High Court, was based upon a standard construction of the easement, which relied upon the fact that the easement document permitted a party '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), the rights include the ability to use the easement 'across the lots burdened':

> 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]

On that basis the High Court concluded that the easement granted in favour of Skygarden did not entitle access to the neighbouring Imperial Arcade and Centrepoint. This view was consistent with a substantial jurisprudence referred to by the High Court, which suggests an easement giving access to a parcel of land, does not normally extend to a parcel of land beyond the dominant tenement.[6]

The aspect of the decision that has caused most concern were the comments made in relation to the use of extrinsic material to construe the easement.[7] 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 at the time of the grant.[8] It was argued these intentions should be applied to assist in the construction of the easement. Perpetual Trustee Company Ltd did accept some evidence of an oral agreement between the parties relevant to the easement. The High Court was concerned that this

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4 Weir, above n 2, at 183.

5 (2007) 233 CLR 528; 239 ALR 75; [2007] HCA 45; BC200708402 at [17].

6 Ibid, at [25]; *Harris v Flower* (1904) 74 LJ Ch 127; *White v Chandler* [2001] *NZLR* 28; *Peacock v Custins* [2002] 1 WLR 1815; Note the criticisms of *Harris v Flower* view in L Griggs, 'To and From? But Not Across: the High Court ? Easements, Torrens and Doctrinal purity' (2008) 15 *APLJ* 260.

7 (2007) 233 CLR 528; 239 ALR 75; [2007] HCA 45; BC200708402 at [35]–[37].

8 Ibid.

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

> 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.
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> 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].
>
> 39. 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* [30] and by Everett J in *Pearce v City of Hobart* [31]. The statement by McHugh J in *Gallagher v Rainbow* [32], 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.' [33]
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> 40. It is true that in *Overland v Lenehan* [34] Griffith CJ admitted extrinsic evidence to show a misdescription of the boundaries of the land comprised in a certificate of title. This is a matter now dealt with in the RP Act by the provisions in Pt 15 (ss 136–138) for the cancellation and correction of instruments. Subsequently, 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. [9]

These paragraphs require the construction of an easement registered under the Torrens system using extrinsic evidence, to consider carefully the impact this application may have on principles of indefeasibility. The statement in para [37] that the *Codelfa* case principles should not apply in this situation is significant.[10] In the *Codelfa* case the High Court confirmed that in the context of a contractual provision, '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'.[11] The High Court in *Westfield* confirmed a narrow view of what extrinsic evidence

9 Ibid, at [37]–[40] (citations omitted).
10 Ibid, at [37].
11 [1981–1982] 149 CLR 337 at 352 per Mason J.

is admissible in relation to registered easements set out in paragraphs [37]-[40] above,[12] when it later states: '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.'[13]

In addition there was the suggestion at para [40] that this conservative approach does not necessarily apply to bare easements, above which are easements that, most likely by error, do not contain covenants.

The subsequent cases that have sought to apply *Westfield* have clearly struggled to decipher the implications of the *Westfield* decision, resulting in many different approaches and views about what the High Court actually meant to state in regard to the construction of easements. The 2009 article concluded with a discussion of four categories of evidence that may or may not be applicable in construing registered easements in the light of the *Westfield* decision:

(i) The express terms of the registered easement. This is clearly the primary tool for construction of an easement accepted in *Westfield*. This is part of the ratio decidendi of the case. After 5 years there is nothing in any subsequent cases that have indicated any concerns about this self-evident principle.

(ii) Extrinsic evidence about what the parties contemplated should be applied to assist in the interpretation of the easement. This is clearly repudiated in *Westfield* and is part of the ratio decidendi of the case. Subsequent Australian cases have generally applied this view and it has been a significant feature of subsequent cases.[14]

One notable NZ Court of Appeal decision in *Big River Paradise Ltd v Congreve*[15] has raised some significant issues in regard to the principles set out in *Westfield*. That case involved the interpretation of a restrictive covenant and it was urged upon the court that based upon the *Westfield* case extrinsic evidence about the circumstances that pertained at the date of the creation of a restrictive covenant should not be applied in interpreting this document which was notified on the register. The court noted that the High Court in *Westfield* 'concluded that evidence as to the intentions and expectations of the parties, at the time, was inadmissible as to construction but was rather more equivocal as to the materiality of objective factors'[16] such as the nature of the surface of the land over which the easement was established.

The Court of Appeal suggested it is open to question if this principle should be applied in New Zealand, and noted that authority in New Zealand favoured interpreting an easement by applying principles relevant to contracts. The Court of Appeal noted that *Westfield* 'would sit rather oddly' with s 317 of the

12 (2007) 233 CLR 528; 239 ALR 75; [2007] HCA 45; BC200708402 at [37]–[40].
13 Ibid, at [44].
14 *Neighbourhood Association DP No 285220 v Moffat* (unreported, NSW SC, White J, 30 January 2008) (*Neighbourhood*); *Currumbin Investments Pty Ltd v Body Corporate Mitchell Park Parkwood CTS* [2012] QCA 9; BC201200376.
15 (2008) 6 NZ ConvC 194,610; [2008] 2 NZLR 402; [2008] NZCA 78 at [22]. An appeal to the NZ SC was dismissed SC 21/2008 [2008] 2 NZLR 589; [2008] NZSC 51.
16 SC 21/2008 [2008] NZSC 51 at [18].

Property Law Act 2007 (NZ) which allows a court to consider modifying an easement where there was a change of use or a change of character of the neighbourhood and any other circumstance the court considers relevant.[17] The Court of Appeal noted, 'if it is legitimate to consider the circumstances at the time of the creation of an easement or covenant when deciding whether to modify or extinguish it, then it might be thought legitimate to consider the same circumstances when engaged in an interpretation exercise'.[18] Provisions that are similar to s 317 of the Property Law Act (NZ) apply in most jurisdictions in Australia.[19] It should be noted that the High Court acknowledged in *Westfield* that subsequent changes in circumstances could provide the basis for an application for a modification or extinguishment of an easement under s 89 of the Conveyancing Act 1919 (NSW).[20] This would suggest that in the circumstances considered by the High Court, their views did not deny the application of the modification or extinguishment provisions.

The Court of Appeal also asked:

> What if the easement was construed between the original parties to the easement or restrictive covenant? If not, when should the narrow approach be applied — when one party sells or both? What if the subsequent parties are well aware of the relevant extrinsic evidence such as where the relevant use was continuing when the subsequent party became affected by the easement or restrictive covenant.[21]

Based upon the application of the in personam exception, which acknowledges the enforceability of contracts or equitable interests even in the face of a registered interest in land,[22] it would not appear to impact upon the integrity of the register to allow extrinsic evidence of what was in the mind of the parties to an easement, in relation to issues within the knowledge of both parties especially if they were the original parties to an easement. The courts have consistently held that the Torrens title legislation does not destroy the ability to enforce contracts and equitable obligations entered into by the registered owner.[23] The enforcement of this exception to indefeasibility relies upon the establishment of a binding contract[24] or a trust or fiduciary relationship between the registered owner and a third party.[25] What was overlooked by the Court of Appeal was that the High Court in *Westfield* acknowledged that the conduct of the immediate parties to a dispute may provide the basis of a personal equity.[26] The High Court presumably concluded a personal equity did not arise on the facts before it.

A scenario which could raise this issue would be a sale of land after the land has been subdivided into two lots, with one lot now without a road frontage

17 Ibid, at [21].
18 Ibid.
19 See Property Law Act 1974 (Qld) s 181; Conveyancing Act 1919 (NSW) s 89.
20 [2007] 233 CLR 528; 239 ALR 75; [2007] HCA 45; BC200708402 at [43].
21 Ibid, at [22].
22 In Queensland based upon the express provisions of Land Title Act 1994 (Qld) s 185(1)(a) and in other states based upon case law.
23 C MacDonald et al, *Real Property Law in Queensland*, 3rd ed, Thomson Reuters, 2010, p 332; In Queensland this exception is expressly stated in the Land Title Act 1994 (Qld) s 185(1)(a).
24 *Valbirn v Powprop Pty Ltd* [1991] 1 Qd R 295.
25 *Bahr v Nicholay (No 2)* (1988) 164 CLR 604; 78 ALR 1; 62 ALJR 268; BC8802595.
26 [2007] 233 CLR 528; 239 ALR 75; [2007] HCA 45; BC200708402 at [43].

requiring an access easement. The landowners may enter into an easement and the dominant tenement owner might, prior to the execution of the easement, raise the need for access from the easement to a neighbouring property to allow a pool to be installed on that property. The parties may enter into an agreement that this will be allowed as a condition of the easement being signed, though this condition is not reflected in the easement document. Twelve months later, the dominant tenement owner seeks to use the easement for the purpose of accessing the neighbouring property for the installation of the pool. The principles from the *Westfield* case may allow the enforcement of that arrangement against the registered interest based upon the in personam exception.

(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. This aspect of the type of evidence it seems has not been subsequently applied in this manner. Subsequent cases that have involved a consideration of bare easements are suggestive of not accepting that an exception applies in the case of bare easements as was argued in the 2009 article, but these comments by the High Court have been used to justify consideration of the nature of the surface over which the easement is granted.[27]

One of the features of the *Westfield* case was the arguable differentiation made in relation to bare easements, which are easements that are created, but do not contain substantial covenants. It seems it is not an entirely unusual occurrence.[28] In *Sertari Pty Ltd v Nirimba Developments Pty Ltd* the NSW Court of Appeal when considering *Westfield*, referred to the words used by the High Court at the end of para [40] to justify a conclusion that evidence of the physical characteristics of the dominant and servient tenement are relevant to an interpretation of an easement, but without reference to other extrinsic circumstances surrounding the execution of the instrument.[29] In this way the NSW Court of Appeal in *Sertari* did not consider para [40] related only to the circumstance of a bare easement but was applicable in a broader sense to standard easements. The Court of Appeal did not consider the reference in para [40] to 'circumstances surrounding the execution of the instrument including the nature of the surface over which the grant applied' should only be applied in regard to bare easements. Subsequently in *Neighbourhood Association DP No 285220 v Moffat*,[30] which did involve a bare easement, Justice White considered himself bound by the Court of Appeal decision in *Sertari*. The *Sertari* decision did not deal with a bare easement and did not refer to the considerations in para [40] in relation to bare easements but applied a narrow interpretation of *Westfield* and accordingly excluded any reference to the extrinsic circumstances to assist in the interpretation of what was intended in relation to the easement other than the physical characteristics

27 Ibid, at [40].
28 *Neighbourhood* (unreported, NSW SC, White J, 30 January 2008); *Currumbin Investments Pty Ltd v Body Corporate Mitchell Park Parkwood CTS* [2012] QCA 9; BC201200376.
29 *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324 at [15].
30 *Neighbourhood* (unreported, NSW SC, White J, 30 January 2008).

of the dominant and servient tenement.

Justice White was clearly of a mind to refer to the extrinsic evidence to interpret the easement broadly based upon the expectations and intentions of the parties to the easement. 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 that: 'I would not myself have regarded the High Court's decision as precluding recourse to all of the objective matrix of facts bearing on the construction of the instrument.'[31] In the 2009 article it was suggested that this was a missed opportunity to take a broader view of the *Westfield* principles in the context of bare easements.

This issue once again arose in the recent Queensland Court of Appeal case of *Currumbin Investments Pty Ltd v Body Corporate Mitchell Park Parkwood CTS*[32] which involved the construction of a bare easement. It was argued in this case that as the easement was a bare easement, it was legitimate to refer to extrinsic evidence, being the files of town planners who acted for the developer at the time of the creation of the easement, to establish the intention of the grantor and grantee. Reference in this case was made to the *Neighbourhood* case which had raised the possibility of extrinsic evidence being applicable in the case of bare easements. The Court of Appeal in *Currumbin Investments* however, rejected any liberal interpretation of the *Westfield* doctrine on the basis of the High Court's discussion in para [40] of the judgement, and applied the view of the NSW Court of Appeal in *Sertari*. Accordingly, it would seem that based upon the views of two senior courts, it is not correct to interpret bare easements using extrinsic evidence as was arguably raised in the *Westfield* case, other than in referring to the physical characteristics of the dominant and servient tenement. It would seem that the reference to this issue in para [40] should not be interpreted as providing an exception to the general principles in the case.

If one reads para [40] carefully as the High Court refers to the relevance of extrinsic evidence in relation to the special circumstance of a bare easement where covenants have been omitted (which would be contrary to the thrust of the rest of the judgement), it is arguable that the High Court was indeed suggesting an exception did apply in relation to bare easements. The contrary argument is that the reliance upon the statements in *Cannon v Villars* discussed in para [40], which suggests an ability to consider the circumstances surrounding the execution of an instrument was unsafe as that English case involved a vague agreement providing access to a leasehold property and related to non Torrens title land.

(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. On one view of *Westfield* this is only relevant in the case of bare easements though this was not a view preferred in *Sertari* and *Currumbin Investments*. On the basis of these two cases this is probably admissible evidence though it is

31 Ibid, at [35].

32 *Currumbin Investments Pty Ltd v Body Corporate Mitchell Park Parkwood CTS* [2012] QCA 9; BC201200376.

suggested this is not particularly clear from *Westfield* based upon para [40]. As it was not necessary to the decision in *Westfield* this must be considered to be persuasive obiter. It would seem that the *Sertari* and *Currumbin Investments* cases preferred to reject the existence of a bare easement exception to allow the application of evidence of the physical make-up of the dominant and servient tenement in interpreting easements which were not bare easements. Without that approach the *Westfield* case may have been viewed as unduly restrictive in its application as the physical make-up of the dominant and servient tenement is normally something that any person could inspect.

Uncertainties created by *Westfield*?

One of the features of decisions that have discussed *Westfield* is that there is a perceived uncertainty about what it is the High Court was attempting to state in its decision. The quotes above in paras [37]–[40] did not seemingly deny access to extrinsic evidence in all cases, and did not reject entirely Justice McHugh's statement in *Gallagher v Rainbow*; rather indicating it was too broad. A significant recent decision of the Queensland Court of Appeal in the *Currumbin Investments* case sought to provide some clarity to its interpretation. After rejecting the submission that the principles are different in regard to bare easements, Justice Fryberg considered the meaning of what the High Court stated in *Westfield*. In particular Justice Fryberg referred to the High Court's statement:

> 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.*[33]

Justice Fryberg considered this quote:

> The words emphasised are important. The High Court was not saying that a third party who inspects the register never needs to look further. It was not saying that extrinsic evidence of facts and circumstances existing at the time of the creation of the easement must always be disregarded. On the contrary, it referred to situations where extrinsic evidence might be taken into account. What the court held was to be disregarded was evidence which not only established facts and circumstances at the time of the creation of the registered dealing but which also placed the third party in the situation of the grantee (or for that matter, the grantor — the reasoning would be the same). That was the reason for the court's emphasis on disregarding 'evidence to establish the intention or contemplation of the parties to the grant of the Easement'.
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> That is consistent with the High Court's approval of the closing remarks in the judgment of Hodgson JA in the Court of Appeal to which reference has already been

33 Ibid, at [39].

> made. His Honour referred to 'the error resulting from a preparedness to look for the intention or contemplation of the parties outside what was manifested by the grant itself, *construed in the circumstances'*.[34]

In this way, Justice Fryberg was applying what is a fairly liberal interpretation of the *Westfield* principles, but with an emphasis on limiting the extrinsic evidence to where it required a third party or court to place themselves in the position of the grantee or grantor. Justice Fryberg confirmed the *Sertari* view that the physical characteristics of an easement may be admissible as this may be freely observed by any third party interested in them, but he noted that the possibility of change in those characteristics over time may mean it is not appropriate to apply that evidence, and in this issue the time that has elapsed since the creation of the easement is relevant. If an easement has been recently created it may not offend Torrens principles to admit that evidence but it may be a concern if this process is completed years after the creation of the easement. He states: 'it may be that the scope for consideration of extrinsic evidence is reduced over time'.[35] This approach does echo the issue raised in the Court of Appeal in *Big River Paradise Ltd v Congreve* where they questioned the application of the *Westfield* approach when the original parties to the easement were still owners of the dominant and servient tenement. In that case there is no third party who is placed in the position of the grantee or grantor and the test applied by Justice Fryberg could be satisfied. It also allows room for the application of the in personal exception in some cases as discussed above.

The issue of how to interpret *Westfield* was also discussed in the judgement of Slattery J in *Brugge v Hare*[36] where the primary discussion focused on the issue of the extent to which the physical characteristics of the tenements can be taken into account when interpreting easements. Relying upon the view taken in *Sertari* that extrinsic material apart from physical characteristics of the tenements, is not relevant to the construction of instruments registered under the Real Property Act, the court noted:

> It is difficult to give content to the rights under an easement unless some account is taken of the physical characteristics of the tenements. Otherwise the parties are engaged in an empty debate about the meaning of words in an instrument without reference to what is happening on the ground. The limitations of such a narrow view was emphasised by Campbell JA in *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64; BC201001880 at [158].
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> Thus, the approach taken in these reasons is to take into account information appearing in the Register and the physical characteristics of the tenements in order to determine the nature of the rights conferred under Easement B.[37]

The application of the *Westfield* case was also considered in *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council*[38] which involved the interpretation of a registered lease. In interpreting the principles that emerged from *Westfield*, the court noted:

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34 Ibid, at [46]–[47].
35 Ibid, at [49].
36 (2011) 16 BPR 30,217; [2011] NSWSC 1364; BC201110153.
37 Ibid, at [36]–[37].
38 [2010] NSWCA 64; BC201001880 (1 April 2010).

> They do not deny the applicability of the principle whereby a document will be construed as having the meaning that a reasonable reader, with such knowledge of the surrounding circumstances as is available to him or her, would attribute to it. If surrounding circumstances cannot be established by evidence to construe an easement, that does not mean that one is thrown back onto the discredited exercise of seeking to construe a document simply by reference to a supposed *'natural and ordinary meaning'* of the words. Rather, it means that the sort of surrounding circumstances to which one can look are limited to those that one can know without evidence from outside the terms of the document itself.[39]

This view fits quite neatly with the principle discussed by Justice Fryberg in the *Currumbin Investments* case, with the focus being upon the extent to which the reference to extrinsic evidence might be applied inappropriately, in regard to a registered interest where a third party does not nor cannot know factors at play in the creation of that registered interest.

There have been other cases where the basis for the *Westfield* decision has been suggestive of the need to apply a narrow interpretation on what the High Court said in *Westfield.* In *Fermora Pty Ltd v Kelvedon Pty Ltd*[40] in regard to the interpretation of an easement and the status of an associated unregistered deed, Justice Edelman in interpreting this easement considered the decision in *Westfield* and noted the basis of the decision was the need to protect the integrity of the register and the concept of indefeasibility. Justice Edelman then states that:

> Viewed in light of this rationale, the exception which the High Court tentatively applied in *Westfield*, without the benefit of argument on the point, must be of narrow compass. The broader the exception, the greater the difficulty for third parties inspecting the register to determine the nature of the rights and liberties to which they are subject.[41]

Some cases have also taken a very narrow view of the ability of the capacity to use extrinsic evidence in regard to interpreting easements. In *Chick v Dockray*,[42] the Full Court of the Tasmanian Supreme Court held that in interpreting an easement, 'the only extrinsic evidence that may be used is that necessary to make sense of terms or expressions identified in the property register, such as surveying terms, or abbreviations, which appear on a plan'.[43]

The general impression of the decisions since the *Westfield* case has confirmed that in regard to bare easements, this should not be seen as a separate category which is suggestive of a broader application of extrinsic circumstances. Although to the writer this was a defendable interpretation of the decision, subsequent case law led by the decision in *Sertari* has led other courts to deny any special category of case for bare easements. In regard to the relevance of the physical characteristics of the dominant and servient tenements, *Sertari* suggested this was permissible based on *Westfield*, though this was derived from the discussion of bare grants by the High Court in

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39 Ibid, at [158].

40 [2011] WASC 281; BC201107897.

41 Ibid, at [39].

42 [2011] TASFC 1; BC201101768; refer also to a similarly narrow approach in *Davidson v Elkington* [2011] WASC 29; BC201100406 (11 February 2011) at [29]; *Staley v Pivot Group Pty Ltd (No 6)* [2010] WASC 228; BC201006248 (30 August 2010) at [93].

43 [2011] TASFC 1; BC201101768 at [20].

Westfield. Subsequent cases have supported this view, though *Currumbin Investments* has placed a gloss on this view by requiring caution in the use of even this information, if there is length of time since the creation of the easement.[44]

Are the principles of the *Westfield* case applicable to interests other than easements?

One issue which was speculated about in the 2009 article was whether *Westfield* could be applicable to other registered interests. As the High Court's views had as their bedrock the need to respect the integrity of the register, it was arguable that this principle could be applied more broadly than just easements. It seems, based upon subsequent case law, that this speculation has proven to be correct, and it would seem the principles expressed in *Westfield* may apply to the covenants of any registered instrument.

In *Alliance Engineering Pty Ltd v Yarraburn Nominees Pty Ltd*,[45] one issue in the case involved the lease of a hotel and whether the permitted use provision for a 'Hotel only' allowed the operation of poker machines on the premises. Submissions were made to the court that the construction of that term had to have regard to the operation of the hotel at the time the lease commenced, based upon the authority of *Boreland v Docker*.[46] The judgement of Justice Sackville stated:

> *Westfield* involved the construction of a registered easement. The principle stated by the High Court does not necessarily apply to all provisions in registered instruments such as leases or mortgages. The reason is that '*indefeasibility*' attaches only to those covenants or provisions that are so intimately connected with the estate or interest created by the registered instrument that they are to be regarded as part of that estate or interest: *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976) 136 CLR 326 at 343; 9 ALR 39; 50 ALJR 487; BC7600036 per Gibbs J; *Pt Ltd v Maradona Pty Ltd* (1992) 25 NSWLR 643 at 679; [1992] ANZ ConvR 513; (1992) NSW ConvR 55-620 per Giles J; *Perpetual Trustees Victoria Ltd v English* (2010) 14 BPR 27,339; [2010] NSWCA 32; BC201001246 at [68], [92]–[98] per Sackville AJA (with whom Allsop P and Campbell JA agreed). Extrinsic circumstances might therefore play a part in the construction of provisions in a registered instrument that cannot be regarded as part of the estate or interest in land created by the instrument.[47]

As the issue of whether *Westfield* applied to the construction of the permitted use clause in this case was not argued before the court, it did not reach a conclusion on the question of whether *Westfield* could apply to the construction of a registered lease, but it was certainly suggested as a possibility. The judge did suggest in this quote that the principles of *Westfield* may not apply to those covenants that are not part of the estate or interest created by the instrument. This has the potential if applied elsewhere to limit the application of the *Westfield* doctrine by not impacting on covenants that do not have the protection of indefeasibility. The clause considered in the

44 *Dillon v Gosford City Council* [2008] NSWLEC 186; BC200804226 (6 June 2008) at [23]–[29].
45 [2011] NSWCA 301; BC201107311 (21 September 2011).
46 (2007) NSWCA 94.
47 Ibid, at [53].

Westfield case, in relation to the nature of the rights over the servient tenement and beyond, would deal with a matter about which indefeasibility would attach as it would be considered as part of the registered easement estate.

There is considerable jurisprudence that indefeasibility does not apply to all covenants in registered interests but only those that can be regarded as part of the estate or interest in land created by the instrument in the case law specified above in the quote from Justice Sackville's judgment. This area of law, in recent years, has drawn greater focus in relation to the issues surrounding the enforcement of personal covenants against mortgagors in the case of fraudulent but ultimately indefeasible registered mortgages where the mortgagor has had a mortgage registered against their property through the actions of a fraudulent third person by a bona fide mortgagee.[48] There are two differing points on that issue but it is suggested the better view is that a bona fide mortgagor is not liable under the personal covenant to pay.[49]

Westfield was also mentioned as part of the views of the NSW Court of Appeal in *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council*,[50] where Campbell JA noted that because some covenants in leases do not 'touch and concern' the land they are not impacted by the concerns about indefeasibility applied by the High Court in *Westfield*. Campbell JA nevertheless noted the final sentence in para [39] of *Westfield* is not dependent upon any considerations of the extent of indefeasibility, but rather on the inherent probabilities concerning the inquiries that a purchaser of Torrens title land will make. This view resulted in the court not applying extrinsic evidence beyond the terms of the lease document. The view of the Court of Appeal in this case appears to differ from *Alliance Engineering*, in regard to the limit on *Westfield* in relation to covenants that are not within the indefeasibility concept but nevertheless *Westfield* was influential in supporting a narrow use of extrinsic evidence to interpret a lease document.

In this decision it was acknowledged that different considerations may apply in regard to this issue as between a lease and an easement.[51] Although an easement is the creation of a legal property right when created by registration of a section 88B instrument, it can be a unilateral act by the grantor, rather than a consensual one (indeed, frequently the creation of an easement is a unilateral act, occurring when a subdivider of land registers a plan of subdivision and an 88B instrument in anticipation of eventual sale of lots in the subdivision). A lease, by contrast, is a consensual document, and creates both contractual rights and property rights. Even recognising these differences, the reasons provided by the High Court in *Westfield* were

48 S Grattan, 'Recent Developments Regarding Forged Mortgages: The Interrelationship Between Indefeasibility and the Personal Covenant to Pay' (2009) 21(2) *Bond LR* 43; MacDonald, above n 23, p 307.

49 *Hilton v Gray* (2008) ASC 155-094; (2008) Q ConvR 54-686; [2007] QSC 401; BC200711894 (13 December 2007); *Pt Ltd v Maradona Pty Ltd* (1992) 25 NSWLR 643; [1992] ANZ ConvR 513; (1992) NSW ConvR 55-620; *Duncan v McDonald* (1997) 3 NZLR 669; *Grgic v ANZ Banking Group Ltd* (1994) 33 NSWLR 202; [1994] ANZ ConvR 334; (1994) NSW ConvR 55-699; BC9405152.

50 [2010] NSWCA 64; BC201001880 (1 April 2010).

51 Ibid, at [159].

acknowledged as capable of applying to a registered lease.[52] There are a number of authorities which involved restrictive covenants where courts have now applied *Westfield* to the interpretation of these interests. In *Prowse v Johnston*[53] it was necessary on an application for a declaration to determine whether a restrictive covenant which burdened Torrens title land, which limited the number of houses on a property, would prohibit a proposed development. It was argued in this case that the interpretation of restrictive covenants was the same as the interpretation of any contract which could include consideration of the intention of the parties which was to provide a high quality residential development when the restrictive covenant was first created in 1912. Justice Cavanough noted that based upon *Westfield*, the ability to apply standard contractual principles to the interpretation of registered covenants may be more limited. Justice Cavanough noted that *Westfield* related to an easement rather than a restrictive covenant; that the High Court did not expressly refer to restrictive covenants; there are considerable differences between the two; and that there are differences between the relevant Torrens system provisions of New South Wales and of Victoria.[54]

Justice Cavanough noted the High Court's reasoning was not expressly confined to the case of easements under the Torrens legislation of New South Wales and referred to 'fundamental considerations' concerning the operation of the Torrens system of title by registration, being considerations which involved 'the maintenance of a publicly accessible register containing the terms of the dealings with land under that system'.[55] The court also referred with apparent approval to the Victorian case of *Riley v Pentilla*, as being a case in which the importance of the principle of indefeasibility for the construction of easements was duly recognised. Justice Cavanough noted the full implications of *Westfield* are still being worked out and in *Ryan v Sutherland*, Black J of the NSW Supreme Court treated it as applicable to restrictive covenants. In this case the court made reference to the registered plan of subdivision and other corresponding covenants in the development which could be searched to assist in the construction of the restrictive covenant.[56] In this way the *Westfield* principles were applied in this case.

Conclusion

The case law since *Westfield* has confirmed that there are somewhat differing views about how the principles in this case are to be appropriately applied. This has resulted from the somewhat delphic manner of expression by the High Court in the *Westfield* case. In addition it is difficult to apply the principles in this case with the varied circumstances that arise in relation to registered easements and other registered interests, bearing in mind that the task of construing these documents may either occur shortly after their

52 Refer also to *Boss v Hamilton Island Enterprises Ltd* [2010] 2 Qd R 115; [2009] QCA 229; BC200907223 (11 August 2010) at [67]–[70].
53 [2012] VSC 4; BC201200050 (11 January 2012).
54 Ibid, at [57].
55 Ibid.
56 Ibid, at [58].

creation or many years later. It seems that based upon the views of a number of decisions that *Westfield* has been interpreted to allow 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 to be used in construing easements. The issues raised in the NZ case *Big River Paradise Ltd v Congreve* do raise some significant questions about the boundaries of the principles of the *Westfield* case. The observance of the need for protection of the integrity of the register is well-founded. It is suggested that the principles discussed by Justice Fryberg in the *Currumbin Investments* case provides the most perceptive method to apply *Westfield*, his judgment acknowledges the need to respect the integrity of the register, while respecting the fact that where the use of extrinsic evidence requires a third party to be aware of information outside of the terms of an easement, and which is not readily available to that person, then that extrinsic evidence should not be applied to the interpretation of the easement. This does provide some room to refer to extrinsic evidence known to the parties to the easement, if the original parties are still owners of the dominant and servient tenement, drawing upon the principles at the basis of the in personam exception. It is clear that the principles in *Westfield* can be applied to other registered interests, such as leases. Despite the indications by the High Court provided in para [40], there is from the perspective of a number of decisions no exception for bare easements that allows a broadening of the reference to extrinsic circumstances.