

## **REVIEW OF EASEMENTS**

By

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### **Abstract**

In this paper, I will by reference to (mostly) recent decisions , consider

- (I) the juridical nature of an easement and consider how the same practical outcome can be used by carefully drafted by laws;
- (II) relevant statutory provisions , especially in the *Conveyancing Act* going to eg the enforcement of rights of way by injunction; then canvass how there can be such an action for enforcement only if an obstruction constitutes a “substantial interference” , but not otherwise;
- (III) the interpretation/ construction of easement and how there has been a fundamental narrowing of the evidence that is admissible to construe anything other than a bare easement ; and then
- (IV) the imposition of ; and the extinguishing and modification of easements.

I have attempted to state the law as at June 2009, but experience demonstrates that such attempts incline to the optimistic. I thus welcome any positive criticism or comment to [sjacobs@wentworthchambers.com.au](mailto:sjacobs@wentworthchambers.com.au)

As will be seen below, the paper consists in large part of extracts from leading recent judgments .

### ***What is an easement ?***

1. A right of way gives the dominant owner certain rights over land belonging to the servient owner. The grant of the right of way only permits the dominant owner the reasonable use and enjoyment of the ascertained way: per Austin J in *Markos v O R Autor* [\[2007\] NSWSC 810](#)

2. Subject to the rights of the dominant owner, the servient owner has dominion over the land.

"The dominant owner has only such rights as are to be found expressly or by necessary implication in the terms of the grant. The servient owner has all the rights of an owner except those which are inconsistent with the exercise by the dominant owner of the rights expressly or by necessary implication conferred on him by the terms of the grant" : *Zenere v Leate* (1980) 1 BPR 9300 at 9304 per McLelland J; see also *Natva Developments Pty Ltd v McDonald Bros Pty Ltd* (2004) 12 BPR 22,287 at [66] per Palmer J.

Further research as to the historical background of a servitude (as it was known in Roman law); assize / incorporeal hereditaments : *Finlayson v Campbell* (1997) 8 BPR 15,703 , about pp 3 and 4

*Inter partes or runs with the land ?*

3. In the *Westfield* case (below) Hodgson JA observed at [30]-[31]:

."for a grant of an easement to bind the servient tenement rather than merely to operate as between the parties, the use authorised must be such as to benefit the dominant tenement....."

*Part 1 , Sch 8, Conveyancing Act as read with Sec 181 A*

4. "Construction of expressions used to create easements

(1) In an [instrument](#) executed or made after 1 January 1931 (the commencement of the *Conveyancing (Amendment) Act 1930* ) and purporting to create a right-of-way the expressions "right of carriage way" and "right of footway" have the same effect as if there had been inserted in lieu thereof respectively the words contained in Part 1 or Part 2 of Schedule 8.

(1A) In an [instrument](#) executed or made after 15 June 1964 (the commencement of the *Local Government and Conveyancing (Amendment) Act 1964* ) and purporting to create a drainage easement the expressions "easement to drain water" and "easement to drain sewage" have the same effect as if there had been inserted in lieu thereof respectively the words contained in Part 3 or Part 4 of Schedule 8.

(2) In an [instrument](#) which takes effect after the commencement of Schedule 1 [16] to the *Property Legislation Amendment (Easements) Act 1995* and purports to create an easement of the following kind, the following expressions have effect as if the words attributed in Schedule 8 to those expressions were inserted instead:

easement for repairs  
easement for batter

easement for drainage of sewage  
 easement for drainage of water  
 easement for electricity purposes  
 easement for overhang  
 easement for services  
 easement for water supply  
 easement to permit encroaching structure to remain  
 right of access

(2A) In an [instrument](#) that takes effect after the commencement of section 177 (as inserted by Schedule 1 [1] to the *Conveyancing Amendment (Law of Support) Act 2000* ) and purporting to create an [easement for removal of support](#), the expression "easement for removal of support" has effect as if the words attributed in Part 15 of Schedule 8 to that expression were inserted instead.

(3) The meaning given to an expression by this section and Schedule 8 may be varied (whether by way of addition, exception, qualification or omission), and is taken to have always been capable of being varied, by the [instrument](#) in which the expression is used.

(3A) In Schedule 8:

(a) a lot includes any other distinct piece or parcel of [land](#) (such as an island, a portion of a Parish or a Section), and

(b) an owner of a lot benefited includes:

- any person entitled to [possession](#) of the whole of the lot benefited or any person authorised by such a person, and
- any person entitled to [possession](#) of any part of that lot which is capable of benefiting from the easement or any person authorised by such a person.

(4) This section extends to [dealings](#) under the *Real Property Act 1900* .

*By laws of a strata scheme and easements*

5. *White v Betalli* [2007] NSWCA 243.

The owners of a waterfront property subdivided it into a 2 lot strata scheme. The rear lot, lot 2, had a right of footway over lot 1 to the water. A special by-law was created upon registration of the strata plan. This entitled the owner of lot 2 to store a small boat on lot 1 adjacent to the footway. The owner of lot 1 sought to prevent the neighbour from using the storage area. Important in the decision at [699] was the fact the owners of lot 1 and lot 2 had purchased their lots with knowledge of the respective rights and obligations under the by-law, created upon registration.

6. The by-law in *Betalli* was found not to be inconsistent with s88B of the *Conveyancing Act 1919* or the *Real Property Act*.

7. By laws can be viewed in two ways : delegated legislation or a statutory contract. See *The Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207.
8. Campbell JA in *Bettali* gave a masterly exegesis of the ancient origins of the term “by law” in English law. Here follow certain extracts germane to the topic:

“Stoljar, op cit, page 21, gives as examples:

"For example, only those might be allowed to glean who were too young or too old to reap; or neighbours might be forbidden to carry off sheaves as it was difficult to say whether they had come by them "well and truly" or had got them "without leave". Some by-laws even deal with hired labour, specify a maximum wage etc., thus anticipating ‘in a remarkable way the Statute of Labourers of 1351’ ...".

Stoljar gives other examples at p 20–21 of a medieval by-law requiring farm produce to be carted only by day and then "*openly through the midst of the town and not secretly by back ways*", and another by-law that dealt with

"a problem posed by an obdurate or unco-operative villager, one who would neither properly work his tenement nor ‘do any neighbourliness to his neighbours’."

Medieval guilds, when created by royal franchise, made their own by-laws. The by-laws of mediaeval guilds covered, according to Stoljar, op cit, page 26,

"... unfair practices such as overcharging, forestalling, including unfair competition among themselves; even to prevent guildsmen from acting as agents for outsiders...".

...

When statute came to create bodies to carry out particular functions, and delegated powers to them, the pre-existing concept of the by-law was pressed into service. ....The case law provides examples of by-laws made by railway companies .....and of by-laws made under the **Public Health Act 1875 (Imp)** (*Andrews v Wirral Rural District Council* [1916] 1 KB 863).

.....

It is that ancient notion of a by-law that the New South Wales legislature chose to adopt, without definition or explanation, when first enacting legislation concerning strata titles in 1961: section 13 **Conveyancing (Strata Titles) Act 1961**. It has appeared in legislation governing strata titles ever since. Such legislation creates a statutory framework within which a type of local community can be created and administered. It is a type of community where co-ownership, and the physical proximity of the spaces that the owners are entitled to occupy,

create the opportunity for both cooperation and conflict. It is a type of community that was new in 1961, though it had some analogies with the communities that had previously existed through the creation of home unit companies under the Companies Act, or allowing for individual occupation of apartments in a building through a tenancy in common scheme.

There is nothing in the notion of a by-law that, of itself, imposes any kind of limitation on the kind of regulation that might be adopted, beyond that it is for the regulation of the particular community to which it applies. Any limitation on the type of restriction or regulation that can be a by-law must arise from the statute that enables the by-laws to be created, or from the general framework of statute law, common law and equity within which that local community is created and administered.

The particular local community that was created under the strata plan in question in the present case involves only two lots of land in separate ownership. However, they are located in a part of Sydney where access to the water is a significant benefit to a lot of land. Nothing in the notion of a by-law prevented there being a by-law entitling the owner of the lot that was located away from the water frontage to store a boat within a defined area immediately adjacent to the waterfront but within the lot located on the water frontage. And, as Santow JA has demonstrated, nothing in the particular legislative framework that governs the strata plan in question detracts from the validity of the by-law that is the subject of this litigation.”

### *Action for nuisance*

9. The dominant owner’s remedy for disturbance of his reasonable use and enjoyment of the easement is by an action for nuisance: *Paine & Co Ltd v St Neot's Gas & Coke Co* [1939] 3 All ER 812, at 823 per Luxmore LJ; · but there must first be unreasonable use of land causing unreasonable damage to other land ; and so even though use of the servient tenement may otherwise be within what was granted by the easement, if this use is carried out unreasonably so as to cause unreasonable damage to the servient tenement, it may be restrained as a nuisance : *Perpetual Trustee Company Ltd v Westfield Management Ltd* [2006] NSWCA 337 per Hodgson JA (at [30]-[31]) (appeal to the High Court dismissed [2007] HCA 45).
10. Sec 88H of the *Conveyancing Act* is headed “Injunctions” and provides, inter alia
  - (1) Where a person has engaged, is engaged or is proposing to engage in any conduct that constituted, constitutes or would constitute a contravention of a covenant imposing a restriction on the use of [land](#) or a positive covenant, the [Court](#) may, on the application of the prescribed authority or other person having the benefit of the covenant, grant an injunction restraining the firstmentioned person from engaging in that conduct and, if in the opinion of the [Court](#) it is

desirable to do so, requiring that person to do any act or thing.”

11. A mandatory injunction to restrain a nuisance would only be appropriate where it is the only way to remedy the nuisance : *Anderson v Pender* [2002] NSWSC 1005, where an order was made for the removal of a fence that encroached into an easement.

### *Obstructions*

12. Within limits, the servient owner's rights include the right to place obstructions in the way of the dominant owner. In *Finlayson v Campbell* (1997) 8 BPR 15,703 at 15,709-15,710, Young J said, citing English authority:
 

"the owner of the right of way cannot insist on having the whole parcel of land over which the way exists kept absolutely free from obstruction. The owner of the soil is entitled to maintain an obstruction, provided it does not amount to a substantial interference with the right of way."

 Similarly, in *Butler v Muddle* (1995) 6 BPR 13984 at 13986, the same judge said "it cannot be reasonable for [the dominant owner] to appropriate the [servient owner's] land and use it without the [servient owner's] consent as if it were their own."

### *Substantial interference*

13. As to the meaning of "substantial" interference with the exercise of the rights of the dominant owner, McPherson J said in *Ex parte Purcell* [\(1982\) 47 LGRA 433](#) at 439:
 

"the question in a case such as this is not simply whether the interference is 'substantial', if that expression is used simply to denote an extensive interference. It is whether it is 'material', and it is material if the consequences of the interference are likely to be extensive, even though the interference itself may be slight and the occasions of its occurrence infrequent."

Thus, although a County Council which has an easement for power lines might need access to fix the power lines only infrequently, the installation of swimming pools and other obstructions under the power lines constitutes a substantial interference: *Prospect County Council v Cross* [\(1990\) 21 NSWLR 601](#).

### *Gates across an easement*

14. As Austin J noted in *Markos*' case the general principles about obstructions (set out above) have been deployed to adjudicate whether the servient owner may install lockable gates over, and park vehicles on, the site of a right of way; and what follows is extracted from that judgment, mostly verbatim but duly renumbered and in parts, interpolated.

15. As to gates, the general principle is that "it is not unreasonable that the person entitled to use the way should be subjected to the slight inconvenience which the maintenance of protective gates imposes upon his user" : *Siple v Blow* (1904) 8 OLR 547 at 554 per Moss CJ, although each case depends on its own facts : *Flynn v Harte* [\(1913\) IR 322](#) at 327 per Dodd J; a sentiment endorsed by Young J in *Denton's* case (below) and also more recently by McLaughlin As J in *Gee v Burger* [2009] NSWSC 149 para [46].

These sentiments demonstrate that a gate or gates may well constitute a substantial interference with ordinary enjoyment, if the reasons for the gate are outweighed by the inconvenience thereby caused.

In *Denton v Phillpot* (1990) NSW Conv R para 55-543 Young J said (at 59,030): "... the cases show that ordinarily if there is a good reason for having a gate, such as the reasonable interests of security, and the dominant owner is given a key to the gate, then courts have not been over-anxious to find that there has been a substantial interference."

16. In *Denton's* case Young J concluded that the installation of gates was not a substantial interference with a right of way appurtenant to residential property, on the ground that it was reasonable to install gates to provide security and they had not been installed out of cussedness or spite, and the evidence did not establish that the location of the gates caused any substantial inconvenience to the dominant owner.

#### *Fencing off an easement*

17. In *Trewin v Felton* [\[2007\] NSWSC 851](#), Brereton J, by reference to an exegesis of many cases, including *Pettey v Parsons* [\[1914\] 2 Ch 653](#), summarized the prima facie position as follows:

"In the case of such an easement running alongside a boundary of the dominant land, so that the length of it contiguous to the dominant land is greater than necessary for a single point of access, questions may arise as to the number and extent of access points to which the dominant owner is entitled on the one hand, and the entitlement of the servient owner to fence the easement on the other. In my view, the *prima facie* position is that (1) the servient owner is entitled to fence the right of way in order to secure its property along the whole boundary, but not so as to interfere with reasonable user of the right of way by the dominant owner through gates at such points as meet the dominant owner's reasonable requirements; and (2) the dominant owner may have access through gates at a number of places, and may determine from time to time the points of access, which may vary over the years; but (3) the dominant owner is not entitled to have the easement remain unfenced."

***Construction of an easement : what is the correct approach ? What materials are admissible ?***

18. An easement must be construed at the time of the grant : *Finlayson v Campbell* Unrept NSW SC 4/9/97 Young J.

19. The approach to the construction of an instrument creating an easement was articulated by Hodgson JA (with whom Beazley and Tobias JJA agreed) in *Perpetual Trustee Company Ltd v Westfield Management Ltd* [2006] NSWCA 337 (appeal to the High Court dismissed [2007] HCA 45).

The case concerned what evidence is relevant to and admissible in respect of the true construction of an instrument of grant.

20. Some earlier authorities, discussed and supported by McHugh J in his dissenting judgment in *Gallagher v Rainbow* [1994] HCA 24; (1994) 179 CLR 624, adopted the proposition (to use McHugh J's words at 640) that "the Court will not construe the grant in a way that would enable an easement to be used in a manner that goes beyond the use contemplated by the parties at the time of the grant".

21. Hodgson JA in *Westfield* commented on that proposition as follows (at [25]):

"I believe this proposition needs to be applied with care, because it could be taken as suggesting two related propositions that are, in my opinion, incorrect. First, it could be taken as suggesting that consideration of what is 'contemplated by the parties' is a separate exercise from construing the grant, whereas in my opinion it is not; and secondly, it could be taken as suggesting that the investigation of what is contemplated by the parties can be pursued in some way beyond the appropriate method for determining what is the intention of the parties as manifested by the grant itself, considered having regard to the circumstances in which the grant was made."

22. His Honour continued (at [26]):

"In my opinion, there is just one question, what does the grant authorise; and that question is to be determined by construing the grant. One way of posing the question is to ask, what use was intended to be authorised by the grant; but no separate investigation into the use contemplated by the parties is either necessary or permissible; however, in determining this question, regard may be had to the surrounding circumstances, including the physical circumstances of the dominant and servient tenements and the use actually being made of them at the time of the grant."

23. As Austin J commented in *Markos's* case para [42] ff

“42 In my opinion, a practical lesson to be drawn from these observations is that it is apt to create confusion for a court or counsel to analyse the meaning of a grant of easement by reference to the use "contemplated by the parties", unless they are very careful to explain what they mean by those words. That is an important lesson because many of the reported cases, and most of the textbooks, use this language.

*Implied right to park on / offload vehicles where easement to pass and repass*

24. See the discussion in *Trewin v Felton* [\[2007\] NSWSC 851](#) paras [47] ff, where Brereton J concluded at para [52] that

“52 Accordingly, in the absence of an implied term, a right of carriageway which authorises passing and repassing to and from the dominant property, does not authorise parking on the site of the easement, except to the extent that it is necessarily part of passing and repassing to and from the dominant property – for example, as was conceded in *Bulstrode v Lambert* (at 1070), to halt for a brief moment to put down or pick up a passenger, as that was *de minimis*, but no more .....

*Where use of dominant tenement changes after the grant*

(Note : the case summaries and commentaries in the two groups identified below have been extracted *mostly verbatim* from *Markos's* case and *Moffat's* case )

25. There are two broad categories of cases where judges have spoken about the use contemplated by the parties .

In one group of cases, the use of the dominant tenement changed after the time of the grant. *Jelbert v Davis* [\[1968\] 1 WLR 589](#) and *White v Grand Hotel Eastbourne Ltd* [\[1913\] 1 Ch 113](#) are the most commonly cited examples .

26. In *Jelbert* the defendant converted the dominant tenement of a right of way into a caravan park with more than 200 camping sites. The English Court of Appeal held that the use of the right of way for such a large number of camping sites was impermissible, partly because such use was not authorised as a matter of construction of the grant, and partly because the use was excessive and therefore an actionable nuisance even if literally within the terms of the grant. On the question of construction, Lord Denning MR said (at 595) that the right of way could not be used to an extent that was "beyond anything which was contemplated at the time of the grant". But as Hodgson JA pointed out in *Perpetual Trustee* (at

[43]), his Lordship's subsequent discussion was directed to the interpretation of the grant in the light of the objective circumstances.

27. In *White*, a private residence on the dominant tenement was converted into a lodging house for the drivers of cars whose owners stayed at a nearby hotel. At the time of the grant, the dominant tenement had a single resident with two vehicles, but after the conversion there were "many residents of a shifting character with vehicles that [did] not belong to them". The English Court of Appeal held that the different use was within the terms of the grant, as the dwelling house could be converted from a private dwelling house to a house used for the purposes of trade with the consent of a third person.
28. McHugh J in *Gallagher* (at 642) said it was not easy to reconcile *White* with the principle that an easement cannot be used for a purpose that was not contemplated by the parties to the grant, suggesting that on the facts the parties may have contemplated the altered use. But in *Perpetual Trustee* Hodgson JA said that *White* was consistent with other cases and he added (at [42]):  
 "in my opinion the other cases referred to by McHugh J support a proposition somewhat narrower than the proposition asserted by him, limiting the use of an easement to that contemplated by the parties at the time of the grant."
29. In *Markos*, Austin J commented on the above authorities as follows

"46 In the present case counsel for both parties treated the quoted statement as indicating that according to Hodgson JA, an easement is limited to the use contemplated by the parties at the time of the grant. As I read the judgment in *Perpetual Trustee*, that is decidedly not Hodgson JA's view. That is the view he attributed to McHugh J. Hodgson JA criticised the misleading associations of that view and insisted that the court's task is to construe the easement to determine the intention of the parties as manifested by the grant, having regard to admissible surrounding circumstances."

*Contemplation of parties : whether owner of dominant tenement can use the right of way to gain access to other land owned or acquired by him or her*

30. The second group of cases in which judges have spoken about the contemplation or intention of the parties is a group of cases dealing with whether the owner of the dominant tenement can use the right of way to gain access to other land owned or acquired by him or her.

In the *Perpetual Trustee* , a right of way had been granted across Glasshouse for the benefit of Skygarden, which adjoined Centrepoint and Imperial Arcade. Subsequently Perpetual Trustee acquired Glasshouse and Westfield acquired

Skygarden, Centrepoint and Imperial Arcade. Westfield wished to use the right of way over Glasshouse for access through Skygarden to Centrepoint and Imperial Arcade. The Court of Appeal, overturning the trial judge, found that the grant on its true construction did not permit the owner of the dominant tenement, Skygarden, to authorise the use of the right of way for access to Centrepoint and Imperial Arcade.

[The key dicta are at (2006) 12 BPR 23,793 at 23,811]

31. Prior to *Westfield* it was the common practice to construe easements, even those under the Torrens system, having regard to all material objective facts at the time of the grant eg Butt P, *Land Law*, 5th ed at [1,696]. As White J observed in *Neighbourhood Association DP No 285220 v Moffat* [2008] NSWSC 54, these authorities have been overruled by the *Westfield* case in respect of an easement whose terms *are fully described*.

“But where there is a bare grant of a right such as in *Powell v Langdon*, and such as there is in this case, 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.” : Para [35]

32. In *Harris v Flower* (1904) 74 LJ Ch 127 at 132, Romer LJ appeared to state an absolute rule to the effect that if a right of way is granted for the enjoyment of Lot A and the grantee owns or acquires Lot B, the grantee cannot use the right of way for passing over Lot A to Lot B. An exception to that "rule" has been recognised where Lot A is a means of access to Lot B at the time of the grant. Hodgson JA treated *Harris v Flower* as an example of the correct approach to construction of the grant (influenced also by the principle that the user authorised by an easement must be for the benefit of the dominant tenement), rather than as a statement of an inflexible rule (at [45]).
33. Another exception was given by Megarry V-C in *Nickerson v Barraclough* [1980] Ch 325 at 336. Suppose that Lot A is a narrow footpath running from Lot X (the other side of which is a public road) to Lot B. The owner of Lot X grants a right of way over Lot X to the owner of Lot A (who also owns or later acquires Lot B) for the benefit of Lot A. According to Megarry V-C, the grant would be construed as authorising the dominant owner to use the right of way as a means of access to Lot B, since Lot A is a footpath which constitutes a means of access to Lot B. His Lordship said the same result would flow if Lot A were not used as an actual means of access to Lot B but as between the parties to the transaction it was intended to be used in that way. In *Perpetual Trustee*, the trial judge treated Megarry V-C's example as depending upon a finding that the contemplated use of the right of way was to permit access to Lot B, but Hodgson JA said that was wrong, if it meant that the contemplated use could be proved by evidence other than the evidence available for construction of the grant itself (at [46]).

34. Hodgson JA's judgment in *Westfield* also sheds light on the relevance, to the question of construction, of the "purpose" for which the easement is to be used. According to his Honour's reasoning (at [36]), it is appropriate for the court to consider the purpose of the grant, by making inferences from the words of the grant and the circumstances to which regard may be had in construing the grant, but not by receiving evidence concerning the parties' purpose. It is not correct to say, as a universal rule, that the grantee has no right to use the easement for any new or additional purpose of the dominant tenement; that proposition is correct only to the extent that the new use is unauthorised as a matter of construction of the grant (at [37]-[39], citing *United Land Company v Great Eastern Railway Company* (1875) 10 Ch App 586 at 590 per Mellish LJ). It may be that the instrument, expressly or by implication, grants a general right of way for all purposes, and if that is so, the instrument authorises use beyond that which prevailed at the time of the grant (at [40]).

35. Austin J in *Markos* continued after reviewing the above authorities:

“51 In the present case it is necessary to construe the right of way having regard to the language of the instrument and by reference to the surrounding circumstances at the time of the grant. There has been no attempt to tender evidence of what the grantor and grantee contemplated or of their purpose in making the grant, but in any case the subjective purpose or contemplation of the parties are not matters to be addressed, except to the extent that they are reflected in the terms of the grant and the admissible surrounding circumstances.

52 One of the issues that has been raised for consideration is whether the right of way authorises use of the passageway for access between Coles Parade and property belonging to Autor other than the dominant tenement. That raises for consideration such cases as *Harris v Flower* and *Nickerson v Barraclough*, as interpreted by Hodgson JA in *Perpetual Trustee*. Transposing the examples given by Romer LJ and Megarry V-C, Lots 76 and 77 (the dominant tenement) correspond with Lot A, the other land owned by Autor (Lots 29, 30 and 75) correspond with Lot B, and Lot 78 (the servient tenement) corresponds with Lot X. Those cases point to the conclusion that use of Lot X to pass to or from Lot B over Lot A is a nuisance actionable by the servient owner, unless Lot A is a means of access to Lot B at the time of the grant or it appears from the terms of the grant and the admissible surrounding circumstances that such access was or would be available.

53 In the present case there are some indications that the passageway was already being used for some purposes prior to the grant of the right of way, and it would hardly be surprisingly if the passageway were being used at that time for access to and from the beach. But there is just not enough evidence before me in the present

proceeding to justify a finding there was access to and from Barrenjoey Rd and the beach between the passageway and points behind Lots 76 and 77. There is also the complicating factor produced by the consolidation of Lots 30, 76 and 77 (but not Lots 29 and 75). I think the appropriate finding in the present case is that there is a substantial degree of probability that the plaintiffs would be entitled, in appropriately constituted proceedings, to prevent Autor from allowing the passageway to be used for access between Coles Parade and properties other than Lots 76 and 77.

54 Since I shall use the expression "a substantial degree of probability" again in these reasons for judgment, I should explain that by "substantial" I mean "not insignificant or insubstantial", and I use the word "probability" in the mathematical sense, rather than to indicate "more likely than not".

*Where the right of way is "bare" : Westfield / Perpetual distinguishable*

36. What follows under this heading is extracted , mostly verbatim, from the judgment of White J in *Neighbourhood Association DP No 285220 v Moffat* [\[2008\] NSWSC 54](#), duly renumbered.
37. In *Westfield Management Ltd v Perpetual Trustee Co Ltd*, the High Court had to construe a right of way the terms which were fully described (at [15]). It was in that context that the High Court emphasised that in construing an easement registered under the [Real Property Act 1900](#) (NSW) (at [36]-[45]), indefeasibility requires that regard be had only to the register, and that the rules as to the admissibility of extrinsic evidence to construe contracts have no place in construing registered dealings (at [37]-[39]).
38. However, the High Court cited *Powell v Langdon* [\(1944\) 45 SR \(NSW\) 136](#) at 137 without disapproval. There, Roper J (as his Honour then was) was faced with the construction of a bare right of way and observed 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." , comments the High Court seemed to endorse .
39. 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.

40. In *Sertari Pty Limited v Nirimba Developments Pty Limited*, Handley AJA, with whom Tobias and McColl JA agreed, said (at 130 [13]-[16]):

*“[13] Windeyer J held that the words of the grant were clear and since it was a right for all purposes and at all times all persons connected with the proposed residential development were entitled to use the right of carriageway. In these circumstances the question of excessive user, which was essentially one of construction, could not arise.*

*[14] The appellant relied on evidence of extrinsic circumstances, including the physical characteristics of the servient and dominant tenements, and the activities being conducted on the dominant tenement at the time of the grant, to support a narrower construction. In particular it relied on the genesis and purpose of the grant evidenced in the report to the Council of its chief town planner of 4 July 1989 which it acted upon when granting the development consent of 18 August that year.*

*[15] 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 material but the decision in *Westfield Management Ltd v Perpetual Trustee Co 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*: paras [5], [37]–[41].*

*[16] 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.” (My emphasis.)*

41. This was said in the context of the construction of a right of carriageway whose terms were fully described (at [11]). The Court of Appeal did not hold that the extrinsic circumstances in that case could not be considered because, even in the case of construing a contract, extrinsic circumstances cannot be relied on to render ambiguous what is otherwise clear (*Optus Vision Pty Limited v Australian Rugby Football League Ltd* [2004] NSWCA 61 at [25]- [32] and [33]).
42. White J said in *Neighbourhood Association DP No 285220 v Moffat* [2008] NSWSC 54 that

*“...It is.....doubtful whether *Westfield Management Ltd v Perpetual Trustee Co**

*Ltd* justifies the statement in the terms described in paras [15] and [16]; *a fortiori* if applied to the construction of the type of grant considered in *Powell v Langdon* and in this case. However, the statement of law is unequivocal and formed the ratio of the Court's decision. The statement of law was not confined to the construction of instruments which set out in detail the terms of rights granted.

41 I conclude that the statement of principle is binding on me, and accordingly, that *the only matters to which it is legitimate to have regard in construing the instrument are the folio identifiers, the registered instrument, the deposited plans and the physical characteristics of the tenements*. As I have said, in this case there was no evidence as to the physical characteristics of the tenements at the time of the grant of easement which assists in that process.

42 Although the issue of the licence by the Environment Protection Authority is as much a matter of objective fact as the physical characteristics of the land, and would be as readily ascertainable by a purchaser of the land as the physical characteristics of the land at the time of the grant (or more so), I do not consider that I am entitled to have regard to the licence in construing the instrument.”

### **Sec 88 K Conveyancing Act : Imposition of easements**

43. [Section 88K](#) of the [Conveyancing Act](#) provides that the court “may make an order” (that is, whether the order is made or not is in the court’s discretion), imposing an easement over land if: (i) the easement is reasonably necessary for the effective use or development of other land; (ii) that use will not be inconsistent with the public interest; (iii) adequate compensation is given for any loss to the owner of the land being burdened; and (iv) all reasonable attempts have been made to obtain the easement.
44. “reasonably necessary” does not mean absolutely essential and that whilst mere desirability is insufficient, it must at least be shown that the use of the claimant’s land with the easement is substantially preferable to its use without the easement; see eg *117 York Street Pty Ltd v PSP 16123* (1998) 43 NSWLR 504 at 509; 8 BPR 15,917 at 15,920 and see *Katakouzinou v Roufir* (2000) 9 BPR 17,303 at 17,307, which confirms that it is at the date of the hearing that one must consider reasonable necessity and see also *Durack v de Winton* supra at 16,449.
45. [s 88K](#) is confiscatory in nature and that as has been observed more than once in the authorities; see eg *Re Seaforth Land Sales Pty Ltd’s Land* [\[1976\] Qd R 190](#) at 193, the court should not lightly interfere with the proprietary rights of the owner of land over which someone else seeks to exercise a statutory right.

*Defence of abandonment*

46. It is difficult to establish that an easement that is a right of property has been abandoned. The plaintiff must show not only that there has been non-user for a considerable period of time, but that the conduct of the dominant owner is such as to demonstrate a fixed intention never at any time thereafter to assert the easement or attempt to transmit it to anybody else. *Treweeke v 36 Wolseley Road Pty Ltd* [1973] HCA 27; (1973) 128 CLR 274 and *Proprietors of Strata Plan 9968 v Proprietors of Strata Plan 11173* [1979] 2 NSWLR 598; ; *Ward v Ward* [1852] EngR 654; (1852) 7 Ex 838, 839[1852] EngR 654; ; 155 ER 1189, 1190 and *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, 553.
47. As Young J observed in *Finlayson v Campbell* (ibid)  
 “It is clear that in considering the question of abandonment, one looks not only at the acts, deeds and inactions of the present proprietor of the dominant tenement, but also those of his or her predecessors in title.....

However, as Needham, J points out in the *PSP 9968 case* at 613, there is a real distinction between not using a single right to the full extent permitted and the omission to use one of a parcel of rights. In the latter case, there can be an abandonment of part of an easement. Thus, in *Webster v Strong* [1926] VLR 509, when a fence had been erected in 1885 on a right of carriageway reducing it to a right of footway without protest for about 30 years, there would have been abandonment at common law of the right of carriageway but not the right of footway.

Although it would seem to me that the present case is merely one of non-user of part of a right rather than an abandonment of part of a right, there are some dicta in the cases such as that by Farwell, J in *Young v Star Omnibus Co Ltd* (1902) 86 LT 41, 43, that one could have an abandonment of part of such a right.

The difficulty in applying the doctrine of abandonment of part is really a result of the fact that the doctrine first grew up in connection with partial abandonment of a right of ancient lights. With such a right, the dominant owner's alteration of a building to block up some windows and to reposition others can well be an abandonment of part as was said by Pollock, CB in *Jones v Tapling* (1862) 12 CB (NS) 825, 866[1862] EngR 911; ; 142 ER 1367, 1382, a dominant owner may abandon any portion of what he has been granted or used. It is, however, very difficult to apply that principle to a right of carriageway.”

See further *Ashoil Holdings Pty Ltd v Fassoulas* [2005] NSWCA 80.

### **Sec 89 Conveyancing Act : modification of easements**

48. Sec s 89(1) provides:

“Where land is subject to an easement ... the Court may from time to time, on the application of any person interested in the land, by order modify or wholly or partially extinguish the easement ... upon being satisfied ... “.

There then follow a series of what are usually called gateways, and if a person can pass through one of those gateways factually, then the court may make the order extinguishing or modifying the easement.

### *Onus*

49. The plaintiff bears the onus of satisfying the Court that the proposed modification or extinguishment will not substantially injure the persons entitled to the easement: *Tujilo v Watts* [2005] NSWSC 209 para [36].

That case contains one of the best analyses of what constitutes “substantial interference “ and the relevant extracts follow, edited to eg remove citations .

50. “37 In *Re Mason and the Conveyancing Act* (1960) 78 WN (NSW) 925 Jacobs J said, at 928:

“It has been submitted to me that the word “substantial” is a word which introduces a comparison between the disadvantage to the subject land and the disadvantage by modification of the covenant to the land having the benefit of the covenant. I do not take this view of the meaning of the word “substantial”. I consider in its context it does not mean large or considerable but it means an injury which has present substance; that is to say, not a theoretical injury but something which is real and which has a present substance.”

Though those words were uttered in a case which concerned the application of section 89(1)(c) to a restrictive covenant, they also apply when section 89(1)(c) is invoked in relation to an easement.

### Construction of Section 89(1)(c) – “Injury”

38 In *Mogensen v Portuland Developments Pty Ltd* .....at 56,856 McLelland J (as he then was) said:

“The kind of injury contemplated in the section is injury to the relevant person in relation to his ownership of (or interest in) the land benefited. The injury may be of an economic kind, eg reduction in the value of the land benefited, or of a physical kind, eg subjection to noise or traffic, or of an intangible kind, eg impairment of views, intrusion upon privacy, unsightliness, or alteration to the character or ambience of the neighbourhood. These arbitrary categories, while serving to illustrate the ambit of the concept of injury for the purposes of the section, are neither mutually exclusive nor necessarily exhaustive, and what I have described as injuries of a physical or intangible kind could well also affect

the value of the land in question. However it is clear that a person may be “substantially injured” within the meaning of sec 89(1)(c) notwithstanding that the value of his land would be unaffected or even increased by the proposed modification .....

It is also clear, particularly in the case of injuries of what I have called an intangible kind, that the subjective tastes, preferences or beliefs of particular individuals may, within limits of reasonableness, give rise to injury in the relevant sense to those individuals .....

If, however, particular persons do not after due notice assert any claim to injury to them on purely subjective grounds of this kind then it may be open to the Court to infer that there is no injury of that kind to those persons .....although the absence of objection does not remove from applicants for relief under the section the onus of establishing their case .....

.....

39 Both *Mogensen* and *Webster* were cases where the application of section 89 to a restrictive covenant was in issue. There are differences between a restrictive covenant and an easement that might possibly bear upon what can count as an “injury” in relation to an easement. Restrictive covenants are commonly entered for the explicit purpose of preventing or limiting development of a particular type on land. They are entered in a context where it is recognised that development on land can have effects, of all the various types referred to by McLelland J in *Mogensen*, on nearby landowners. When that is the purpose and context in which the restrictive covenant is entered, it is understandable that all the types of effect that McLelland J listed are ones which are counted as an “injury”.

40 With an easement, at least one of the purposes for which it is entered is so that the people in whose favour it is granted can carry out a particular type of activity on the land of the servient tenement, or (as in the case of easements for water, electricity, drainage, support, and so on) receive the benefit of a particular type of activity being carried out or of a particular type of event happening on the servient tenement. It is quite clear that interference with the very type of benefit which the grant of the easement explicitly confers on the owners of the dominant tenement is at least one of the types of thing which can be an “injury”, within section 89(1)(c). However the grant of an easement over land has certain incidental effects, of preventing development of the land which is inconsistent with the occurrence of the types of activities or events which the easement expressly allows to happen on the servient tenement. There is question of whether this incidental effect of the grant of an easement, of inhibiting the development of the servient tenement, is something which can appropriately be taken into consideration in deciding whether there is an “injury”, in a way which is separate

from whether a proposed modification or extinguishment of an easement will interfere with the carrying out of the very type of occurrences which the easement explicitly allows to happen on the servient tenement. I give some further consideration to how that question applies on the facts of this case at paras [86] – [87] below.”

*Land refers to servient tenement*

51. In the *Markos* case at [115], Austin J said that:

“[T]he introductory language of s 89(1) ... empowers the court to modify or extinguish an easement ‘on the application of any person interested in the land’. The ‘land’ there referred to is ‘land [that] is subject to an easement’, in other words the servient tenement. Therefore an application under s 89(1) for modification or extinguishment can be made only by the servient owner or someone else who is interested in the servient owner’s land. The section does not authorise an application to be made by the dominant owner.”

*Meaning of “modify” : does relocation constitute modification?*

52. The word “modify” is quite a wide word though it usually means “to alter without radical transformation”; see the Shorter Oxford English Dictionary definition which was picked up by the Court of Appeal in *Sydney City Council v Ilenace Pty Ltd* [1984] 3 NSWLR 414 at 421. However, the word usually does not comprehend an extinction of rights and replacement by substitute rights; see in the company context *Re Mercantile Trust International Co* [1893] 1 Ch 484n at 491.

53. In the context of the present section, Holland J said in *Manly Properties Pty Ltd v Castrisos* [1973] 2 NSWLR 420 at 424, that a relocation of an easement was not a modification of an easement, but rather was the destruction of an existing easement and the grant of a new easement. Einstein J took the same view in *Durack v de Winton* (1998) 9 BPR 16,403 at 16,434.

54. In *Tanlane Pty Ltd v Moorebank Recyclers Pty Ltd* [2008] NSWSC 1341, Young CJ in Eq held

“78 However, the position is not as black and white as it first appears. First, there is a decision in New Zealand *Re Lewis* [1959] NZLR 1040 which goes the other way. However, it would seem to me that in the light of the local cases one should not follow it. Secondly, the court has power to order that an existing easement be extinguished subject to a new easement being created; see *Castrisos* and *Durack*.

79 Further, there are examples, unreported, where orders have been made which have the effect of substituting or relocating an easement. However, I am not aware of any case where there has been an actual order relocating the easement.

The nearest one gets to is the decision of C McLelland CJ in Eq in *Kilmister and the Conveyancing Act* (No 246 of 1967).

80 The *Kilmister* case concerned land in Hudson Parade, Avalon, where there was a right of way on the plan and there was a paved road which followed the contours of the cliff type terrain and it was assumed by everybody until a survey was made for an intending mortgagee, that the bitumen road was actually on the same site as the right of way on the plan. However, surveys showed that actually the easement on the map passed right through the living room of the plaintiff's house.

81 The Chief Judge extinguished the easement so far as it affected the plaintiff's land. However, he did not go further and relocate the "paper easement" to the site of the bitumen road. No reasons were given. It would appear that the judge considered that for all intents and purposes there was an easement over the site of the bitumen road."

55. In *Markos v O R Autor Pty Ltd* [\[2007\] NSWSC 810](#). [Austin J](#) said at [117] that he should follow *Castrisos* and noted:

"His Honour's reasoning on that point has been followed in subsequent cases, and the law now seems to be that a relocation of the site of an easement so that it traverses a completely different track is outside the power conferred by s 89(1)(c).

56. Gzell J in *Loclot Pty Ltd v Pullen* [\(2003\) 56 NSWLR 592](#) at [6] was of the same general view. However, he did go further and query whether the power to wholly or partially extinguish an easement extended to allow an extinguishment subject to conditions, see at 596 [18].

57. Young CJ in Eq said in *Tanlane*,

"84 Accordingly, although there is validity in the point that one cannot relocate an easement as a modification under s 89, in practical terms this difficulty would not assist the defendant."

58. Austin J in *Markos* case summarised *Loclot* as follows:

119 In *Loclot Pty Ltd v Pullen* [\(2003\) 56 NSWLR 592](#) Gzell J had to consider whether the court could alter the boundaries of a right of way on the application of the servient owner, on condition (opposed by the servient owner) that a clearance of a specified height be maintained above the site of the right of way. He referred to the *Manly Properties* case and pointed out that Holland J was dealing with an extinguishment order to take effect on the happening of a future event, the future event being one desired by the parties (the consensual grant of a substitute easement). He referred to later cases that had followed *Manly Properties* and distinguished them on the same basis. He compared the New

South Wales' provision, which is silent on the question of imposing conditions, with s 84(1C) of the Law of Property Act 1925 (UK), which (by amendment in 1969) specifically declares that the power conferred by the section to modify a restriction includes power to add such further provisions restricting the user of, or the building on, the affected land as appear to the Lands Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant. He concluded (at 596) that it would be an "over-generous interpretation of the power in s 89 of the Act to 'modify or wholly or partly extinguish' an easement ... to conclude that the power extends to the imposition of conditions upon a modification or extinguishment".

120 *Loctot* did not address the question whether an easement can be modified under s 89(1)(c) by expanding it or altering its character for the benefit of the dominant owner against the opposition of the servient; but if, as that case held, there is no power to impose conditions for the benefit of the dominant owner when modifying an easement by limiting it, it would be odd if there were a power of modification for the benefit of the dominant owner enabling the court to achieve the same outcome. Just as the legislature could amend s 89 so as to permit the imposition of conditions, it could amend so as to permit modifications for the benefit of the dominant owner, but it has not done so."

### *Conveyancing Act, Sch 8*

#### 59. SCHEDULE 8 – Construction of certain expressions (Section 181A)

##### **Part 1 - Right of carriage way**

Full and free right for every person who is at any time entitled to an estate or interest in [possession](#) in the [land](#) herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment, and every person authorised by that person, to go, pass and repass at all times and for all purposes with or without animals or vehicles or both to and from the said dominant tenement or any such part thereof.

##### **Part 2 - Right of foot way**

Full and free right for every person who is at any time entitled to an estate or interest in [possession](#) in the [land](#) herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment, and every person authorised by that person, to go, pass and repass on foot at all times and for all purposes, without animals or vehicles to and from the said dominant tenement or any such part thereof.

##### **Part 3 - Easement to drain water**

Full and free right for every person who is at any time entitled to an estate or interest in [possession](#) in the [land](#) herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment, and every person authorised by that person, from time to time and at all times to drain water (whether rain, storm, spring, soakage, or seepage water) in any quantities across and through the [land](#) herein indicated as the servient tenement, together with the right to use, for the purposes of the easement, any line of pipes already laid within the servient tenement for the purpose of draining water.....

#### **Part 4 - Easement to drain sewage**

Full and free right for every person who is at any time entitled to an estate or interest in [possession](#) in the [land](#) herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment, and every person authorised by that person, from time to time and at all times by means of pipes to drain sewage and other waste material and fluid in any quantities across and through the [land](#) herein indicated as the servient tenement, together with the right to use, for the purposes of the easement, any line of pipes already laid within the servient tenement for the purpose of draining sewage .....

#### **Part 5 - Easement for repairs**

1. The owner of the lot benefited may:

(a) at the expiration of at least one week's notice served on the owner or occupier of a lot burdened, use the lot burdened for the purpose of carrying out necessary work on, or on any structure on, the lot benefited which cannot otherwise reasonably be carried out, and

(b) do anything reasonably necessary for that purpose, including:

- entering the lot burdened, and
- taking anything on to the lot burdened.

2 In exercising those powers, the owner of the lot benefited must:

(a) ensure all work on the lot benefited is done properly and carried out as quickly as is practicable, and

(b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and

(c) cause as little [damage](#) as is practicable to the lot burdened and any improvement on it, and

(d) restore the lot burdened as nearly as is practicable to its former condition, and

(e) make good any collateral [damage](#).

**Part 6 - Easement for batter**

.....

**Part 7 - Easement for drainage of sewage**

1 The owner of the lot benefited may:

(a) drain sewage, sullage and other fluid wastes in pipes through each lot burdened, but only within the site of this easement, and

(b) do anything reasonably necessary for that purpose, including:

- entering the lot burdened, and
- taking anything on to the lot burdened, and
- using any existing line of pipes, and
- carrying out works, such as constructing, placing, repairing or maintaining pipes and equipment.

2

In exercising those powers, the owner of the lot benefited must

.....

**Part 8 - Easement for drainage of water**

1 The owner of the lot benefited may:

(a) drain water from any natural source through each lot burdened, but only within the site of this easement, and

(b) do anything reasonably necessary for that purpose, including:

- entering the lot burdened, and
- taking anything on to the lot burdened, and
- using any existing line of pipes, and
- carrying out work, such as constructing, placing, repairing or maintaining pipes, channels, ditches and equipment.

2 In exercising those powers, the owner of the lot benefited must:

.....

**Part 9 - Easement for electricity purposes**

1. The owner of the lot benefited may:

(a) transmit electricity through each lot burdened, but only within the site of this easement, and

(b) do anything reasonably necessary for that purpose, including:

- entering the lot burdened, and
- taking anything on to the lot burdened, and

- carrying out work, such as constructing, placing, repairing or maintaining poles, wires, conduits and equipment.

2 In exercising those powers, the owner of the lot benefited must:

.....

**Part 10 - Easement for overhang**

1 The owner of the lot benefited:

(a) may insist that the parts of the structure ( "the overhanging structure") on the lot benefited which, when this easement was created, overhung the lot burdened remain, but only to the extent they are within the site of this easement, and

(b) must keep the overhanging structure in good repair and safe condition,

.....*etc*

3 The owner of the lot burdened may insist that this easement be extinguished when the structure on the lot benefited is removed.

4 The owner of the lot burdened must not do or allow anything to be done to damage or interfere with the overhanging structure.

**Part 11 - Easement for services**

1 The owner of the lot benefited may:

(a) use each lot burdened, but only within the site of this easement, to provide domestic services to or from each lot benefited, and

(b) do anything reasonably necessary for that purpose, including: .....*etc*

**Part 12 - Easement for water supply**

1 The owner of the lot benefited may:

(a) run water in pipes through each lot burdened, but only within the site of this easement, and

(b) do anything reasonably necessary for that purpose including:.....*etc*

**Part 13 - Easement to permit encroaching structure to remain**

1 The owner of the lot benefited:

(a) may insist that the parts of the structure ( "the encroaching structure") on the lot benefited which, when this easement was created, encroached on the lot burdened remain, but only to the extent they are within the site of this easement, and

(b) must keep the encroaching structure in good repair and safe condition, and

(c) may do anything reasonably necessary for those purposes, including:

- entering the lot burdened, and
- taking anything on to the lot burdened, and
- carrying out work.

2. In exercising those powers, the owner of the lot benefited must:

- (a) ensure all work is done properly, and
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) restore the lot burdened as nearly as is practicable to its former condition, and
- (d) make good any collateral [damage](#).

**3** The owner of the lot burdened may insist that this easement be extinguished when the structure on the lot benefited is removed.

**4** The owner of the lot burdened must not do or allow anything to be done to [damage](#) or interfere with the encroaching structure.

#### Part 14 - Right of access

1 The owner of the lot benefited may:

- (a) by any reasonable means pass across each lot burdened, but only within the site of this easement, to get to or from the lot benefited, and .....etc

2 In exercising those powers, the owner of the lot benefited must:

- (a) ensure all work is done properly, and .....
- (e) make good any collateral [damage](#).

#### Part 15 - Easement for removal of support

**1.** The owner of [supporting land](#) may:

- (a) remove the support provided by the [supporting land](#) to the [supported land](#), and
- (b) do anything reasonably necessary for that purpose.

2 An expression used in this easement that is defined for the purposes of section 177 of the [Conveyancing Act 1919](#) has the same meaning given to it in that section.

**60. RESOURCES**

Bradbrook A & Neave M, *Easements and Restrictive Covenants in Australia*, Butterworths, 2nd ed, 2000

Butt P, *Land Law*, 5th ed, Lawbook Co

Jackson, *The Law of Easements and Profits*, Butterworths, London 1978