Court of Appeal
Supreme Court

New South Wales

Case Name:	Arcidiacono v The Owners – Strata Plan 61233
Medium Neutral Citation:	[2019] NSWCA 46
Hearing Date(s):	6 March 2019
Date of Orders:	6 March 2019
Decision Date:	14 March 2019
Before:	Basten JA at [61] White JA at [1]
Decision:	1. Dismiss the application for leave to appeal. 2. Applicant to pay the costs of each of the respondents.
Catchwords:	LAND LAW — Easements — Whether easements created by conveyances in 1839 bind present-day registered proprietors CIVIL PROCEDURE — Court administration — Court powers — Whether successor in title can reopen ex parte proceedings in which orders were made that affect property succeeded to
Legislation Cited:	Conveyancing Act 1919 (NSW), Pt 23, ss 88K, 184G Deeds Registration Act 1825 (6 Geo. IV No. 22) Deeds Registration Act 1843 (7 Vic. No. 16) Local Government Act 1993 (NSW), s 713 Real Property Act 1900 (NSW), s 28I Registration of Deeds Act 1897 (NSW)
Cases Cited:	BP Australia Ltd v Brown (2003) 58 NSWLR 322; [2003] NSWCA 216 Cameron v Cole (1944) 68 CLR 571; [1944] HCA 5 Chiu v Healey [2003] NSWSC 857; 12 BPR 21,241 Holroyd v Marshall (1862) 10 HLC 191; 11 ER 999

	John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd (2010) 241 CLR 1; [2010] HCA 19 Pasade Holdings v Sydney City Council [2003] NSWSC 515 Pasade Holdings v Sydney City Council [2003] NSWSC 584 Tailby v Official Receiver (1888) 13 AC 523 The Owners – Strata Plan 61233 v Arcidiacono [2018] NSWSC 1260 Wilkes v Spooner [1911] 2 KB 473
Texts Cited:	J D Heydon, M J Leeming, P G Turner, Meagher, Gummow and Lehane's Equity: Doctrines and Remedies (5th ed, 2015, LexisNexis Butterworths) R Hastings, G Weir, Hastings and Weir, Probate Law and Practice (1939, Lawbook Co) R E Megarry, H W R Wade, The Law of Real Property (3rd ed, 1966, Stevens & Sons Limited) at 543-544.
Category:	Procedural and other rulings
Parties:	John Anthony Arcidiacono (First Applicant) Anna Marie Arcidiacono (Second Applicant) The Owners – Strata Plan 61233 (First Respondent) The Owners – Strata Plan 17719 (Second Respondent) The Owners – Strata Plan 73850 (Third Respondent) Registrar General of New South Wales (Fourth Respondent)
Representation:	Counsel: T Hale SC with L E Higgins (Applicants) A Rogers (First Respondent) C A Webster SC (Second Respondent) A Leopold SC with D Elliott (Third Respondent) L Walsh (Fourth Respondent) Solicitors: Russells Law (Applicants) Peter Prior & Co Solicitors (First Respondent) Jane Crittenden, Lawyer (Second Respondent) J S Mueller & Co (Third Respondent) Fiona Harris (Fourth Respondent)
File Number(s):	2018/277503

Decision under appeal:

Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Equity Division
Citation:	[2018] NSWSC 1260
Date of Decision:	14 August 2018
Before:	Darke J
File Number(s):	2016/187360

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

JUDGMENT

1 **WHITE JA:** On 14 August 2018 Darke J refused the applicants leave to file a cross-claim in proceedings commenced by the first and second respondents: *The Owners – Strata Plan No. 61233 v Arcidiacono* [2018] NSWSC 1260. On 6 March 2019 this Court dismissed with costs an application for leave to appeal from the orders made in the Equity Division. These are my reasons for joining in those orders.

2 The applicants are defendants in two proceedings. One proceeding is brought by the first respondent (The Owners – Strata Plan No. 61233). It is the registered proprietor of a property at 71 York Street, Sydney. The primary judge recorded that this proceeding concerns a passageway 12 feet wide running between buildings at 65 and 71 York Street. The applicants own the land which is the passageway and a building at 100 Clarence Street to which the passageway is appurtenant. The primary judge recorded that the first respondent seeks, amongst other things, declarations that it has the benefit of various easements over a passageway 12 feet wide and claims that such

easements were omitted from the register when the passageway was brought under the provisions of the *Real Property Act 1900* (NSW) (Judgment [3]).

3 A second proceeding has been brought by the second respondent (The Owners – Strata Plan No. 17719). It is the registered proprietor of land at 104 Clarence Street, Sydney. The primary judge recorded that those proceedings involve questions concerning the existence of easements over a passageway eight feet wide and whether easements should be imposed over it pursuant to s 88K of the *Conveyancing Act 1919* (NSW) (Judgment [3]). The applicants also own the eight feet wide passageway.

4 Both proceedings will be heard together. They are listed for hearing before Henry J for five days from 18 March 2019.

5 In their proposed cross-claim the applicants pleaded that they acquired the passageways by purchase from the Sydney City Council in February 2008. The applicants plead that the sale was made by the Council in exercise of its power under s 713 of the *Local Government Act 1993* (NSW), that is, its power of sale to recover unpaid rates. The land was then under old system title. After the applicants' purchase, the land was brought under qualified title under the *Real Property Act 1900*.

6 The passageway 12 feet wide runs in a westerly direction from York Street. It is the land in folio identifier 1/619464. At the end of that passageway the passageway of eight feet wide runs in a northerly direction towards Barrack Street. It is the land in folio identifier 1/1052948. Both folios are qualified folios. Amongst the orders sought by the applicants in the proposed cross-claim were orders pursuant to s 138(3) of the *Real Property Act* amending folio 1/619464 by removal of a record made by the Registrar-General in that folio of subsisting interests then apparent to the Registrar-General. The applicants sought the removal from folio 1/619464 of the following "BK 8 No. 383 right of way affecting the land described" and "BK 13 No. 293 right of way affecting the land described". They sought the removal from qualified folio 1/1052948 of a record of a subsisting interest being "BK 13 No. 293 right of way affecting the land described".

7 The applicants also sought declarations that a deed registered in Book 8 No. 383 created no easement enforceable against them and a declaration that the deed registered in Book 13 No. 293 created no easement enforceable against them. A right of way apparently granted over the passageway of twelve feet (folio identifier 1/619464) was granted by a deed dated 30 September 1839 (registered in Book 8 No. 383). Further deeds dated 27 and 28 November 1839 (registered in Book 13 No. 293) purported to grant rights of way over the two passageways.

8 In their written submissions before the primary judge in support of their proposed cross-claim the applicants said that they would seek additional orders, namely that the Registrar-General acted beyond power in adding the purported rights of way recorded in Book 8 No. 333 and Book 13 No. 293 to the Register, and erred in so doing.

9 The first issue sought to be raised by the cross-claim was whether easements purportedly granted over the two passageways in favour of the owners of the properties known as 71 York Street and 65-69 York Street are enforceable against the applicants, being the owners of the two passageways. The third respondent (the Owners – Strata Plan No. 73850) is the owner of 65-69 York Street. It is not a party to the two proceedings, but would have been joined to those proceedings if leave to file the cross-claim had been given.

10 The second respondent, the Owners of Strata Plan No. 17719, owns the property at 104-118 Clarence Street. It makes a claim to a right of way over the eight foot passageway, but that claim is not made on the basis of easements purportedly granted in 1839.

11 On 12 June and 27 June 2003 Bryson J made orders under s 88K of the *Conveyancing Act 1919* (NSW) imposing easements for light and air for the benefit of 65-69 York Street. The orders were sought by the then owner of that property, Pasade Holdings Pty Ltd, in order to satisfy conditions of a development consent imposed by the Sydney City Council on a proposed redevelopment of the building on 65 York Street (*Pasade Holdings v Sydney City Council* [2003] NSWSC 515 and *Pasade Holdings v Sydney City Council*

[2003] NSWSC 584). In the first of the judgments dealing with the imposition of easements over the eight foot passageway, Bryson J recorded (at [4]):

> "... no person can be identified by searches in the general register of deeds or elsewhere who appears to have a documentary title to the passageway, and there is no person who in the present age is behaving as its owner by exercising or purporting to exercise acts of ownership. So far as evidence shows the last purported act of ownership was a grant of a right of way in 1839."

12 In his judgment of 27 June 2003 dealing with the imposition of similar easements over the 12 foot passageway, Bryson J recorded that so far as any registered document showed the title to the 12 foot passageway was in the same position as title to the 8 foot strip.

13 The applicants plead that in 2003 Pasade Holdings commenced further proceedings against the Council's imposition of additional easements over the passage pursuant to s 88K of the *Conveyancing Act*. On 19 December 2003 Hamilton J made orders imposing easements over Lot 1 in DP 619464 (the 12 foot passageway). The easements were for use of part of the lane for the purpose of keeping in place sprinkler heads for the benefit of the building erected upon the lot benefited (viz. 65-69 York Street), an easement for keeping in place a ventilation pipe in favour of that lot and an easement for an overhang of window ledges.

14 In its proposed cross-claim the applicants seek an order setting aside the orders made on 13 June, 27 June and 19 December 2003 on the ground that its predecessor in title, whoever that might be, was not joined as a party to the proceedings.

15 The applicants also alleged that the cross-defendants had abandoned any rights which they might otherwise have had to use the two passageways. The primary judge found that that claim was not properly pleaded and had a tendency to cause prejudice, embarrassment or delay, and would be liable to be struck out (Judgment [54] and [55]). That conclusion was not challenged on the application for leave to appeal (Applicants' submissions para [13(d)] and [16]).

16 The primary judge otherwise refused the applicants leave to file the cross-claim, principally on the ground that the claims were "untenable and bound to

fail" (Judgment [32], [35], [40], [52]). The primary judge also said that case-management issues, and in particular the delay in raising the cross-claim and the additional delay and extra costs that would be occasioned if leave were granted, were further reasons to decline leave for the filing of the cross-claim, although not "by themselves decisive" (Judgment [60]). His Honour concluded (at [61]):

> "I have concluded that with one exception the claims sought to be raised by the proposed cross claim are untenable and bound to fail. The exceptional claim is itself not properly pleaded. In my opinion it would be futile to grant leave to file the proposed cross claim because it would be liable to summary dismissal and striking out. It seems to me that when regard is had also to the case-management matters referred to above, it would not be appropriate to grant leave for the filing of the proposed cross claim."

The 1839 easements

17 It was common ground that prior to his death, one Hugh Macdonald was the legal owner of the lands over which rights of way were said to have been granted. He died on 9 September 1819 leaving a wife and four children. He left his estate to executors on trust to be converted into money and then to be divided equally between his wife and children. The executors renounced probate on 23 August 1820. In 1819 title to real estate did not vest in executors or administrators but in the devisee under the will or, on intestacy, in the heir at law. Land could be devised to the executors, or to other trustees, to be held or applied by them on the trusts of the will (R Hastings, G Weir, *Hastings and Weir, Probate Law and Practice* (1939, Lawbook Co) at 152; R E Megarry, H W R Wade, *The Law of Real Property* (3rd ed, 1966, Stevens & Sons Limited) at 543-544). The persons named as executors took legal title to Hugh Macdonald's land in their capacity as trustees, not executors, and held it on the trusts of the will.

18 On 9 September 1820, Mary Ann Macdonald, the deceased's widow, obtained an order appointing her as administrator of Hugh Macdonald's personal property. In 1830, the Supreme Court appointed a James Scott and Stephen Macdonald, the eldest son of Hugh Macdonald, as trustees of Hugh MacDonald's estate. In 1830 the surviving named executor (Hugh Macdonald's real estate still being vested in him) conveyed the deceased's land to the newly appointed trustees. Following the death of James Scott the property became

vested in Stephen Macdonald as the surviving trustee. He became the legal owner of the land, as trustee for the beneficiaries under the will. Findings to this effect were made by the primary judge (at [17]-[20]). Those findings are not challenged.

19 The primary judge recorded that in September 1835 Stephen Macdonald together with the widow of Hugh Macdonald (now called Mary Ann Rochfort) and her then husband, Bernard Rochfort, Elizabeth Coulson (a daughter of Hugh Macdonald) and her husband, Thomas Coulson, granted a mortgage over the land to William Kerr to be redeemed within three years (Judgment [21]).

20 The indenture of 30 September 1839 registered in Book 8 No. 383 that purportedly granted a right of way for the benefit of land that is now 71 York Street was made between the widow of Hugh Macdonald, Stephen Macdonald and his wife, Thomas and Elizabeth Coulson, another two sons of Hugh Macdonald who were beneficiaries under the will on the one part, and a Henry MacDermott on the other part. Bernard Rochfort had died prior to 30 September 1839.

21 The indenture of 28 November 1839 registered in Book 13 No. 293 that purportedly granted rights of way for the benefit of land that is now 65-69 York Street, was made between Hugh Macdonald's widow, Stephen Macdonald, Thomas and Elizabeth Coulson and the two other sons of Hugh Macdonald on the one part, and a Hugh Nolan on the other part.

22 The case advanced by the applicants before the primary judge was that the parties to the deeds granting the rights of way did not hold the legal estate. The applicants submitted before the primary judge that Hugh Macdonald's widow did not enter into the deeds as administrator, but rather she and her children entered into the deeds in their capacities as beneficiaries of the estate. They submitted that the land remained in the estate with the widow as administrator. As the primary judge held, that was plainly incorrect. All that had ever vested in the widow as administrator was Hugh Macdonald's personal estate.

23 The primary judge held that following the death of James Scott, which had occurred by 1835, the land was vested in Stephen Macdonald as the surviving

trustee, and he became the legal owner of the land entitled to possession of it (Judgment [26]).

24 Each of the indentures recited that the parties of the first part (that included Stephen Macdonald) were seised in fee simple in possession. The primary judge held that:

> "29 The terms of the deeds reveal an intention that there would be a conveyance of the totality of the interests in the land held by the conveying parties, both legal and equitable. For example, the deeds refer to "all the estate right title interest use trust property possibility claim and demand whatsoever both at law and in equity".
>
> 30 I do not think there is any reason to doubt that when the deeds were made the entirety of the legal interest in the subject lands resided amongst those of the first part. The deeds recite that they were seised in fee simple in possession. There is no evidence that Stephen McDonald had disposed of his legal title by the time the deeds were made. It is conceivable that there had been by that time a conveyance of the trust property in specie to the beneficiaries, but on either view the legal title was dealt with under the terms of the deeds, including by the creation of the rights of way over the passageways."

25 The last finding is challenged on the ground that a mortgage of the lands had been granted in 1835. The mortgagee became the legal owner of the land, subject to the mortgagors' equity of redemption. Grounds 1 and 2 of the proposed notice of appeal are as follows:

> "1 The trial judge erred in failing to consider the effect of a conveyance by mortgage of the land the subject of the proceedings dated 11 and 12 September 1835 by Bernard Rochfort and his wife Mary Ann, Stephen Macdonald and Thomas Coulson to William Kerr (the **'Mortgage'**).
>
> 2 The trial judge erred in finding that at the time both the Deed of Indenture dated 30 September 1839 and the Deed of Indenture dated 28 November 1839 (the **'Deeds'**) were entered into, the legal interest in the subject land resided in all or some of Mary Ann Rochfort, Stephen Macdonald and his wife (also Mary Ann), Thomas and Elizabeth Coulson, Macquarie Macdonald and Campbell Leverston Macdonald in circumstances where prior to entry into the Deeds, title to the subject land had been conveyed under the Mortgage to William Kerr and there was no evidence that title had been conveyed by William Kerr to all or any of those named in the Deeds."

26 The applicants submitted that there was no evidence that moneys owed to the mortgagee had been paid, nor that the land had been reconveyed by Mr Kerr to Stephen Macdonald or any other of the parties named in the 1839 deeds. They submitted that on the face of the documentary evidence the land remained the property of Mr Kerr. Without a reconveyance none of the parties

named in the 1839 deeds could be said to have held the legal title with power to create an easement.

27 This argument was not advanced before the primary judge. The grant of the 1835 mortgage and the absence of a reconveyance prior to September 1839 are not facts that have been pleaded, as they should have been if reliance were to be placed on this ground. However, the facts appear to be uncontroversial and the contention can be addressed on its merits.

28 On the application for leave to appeal the third respondent tendered a deed made on 27 and 28 February 1840, whereby the mortgagee reconveyed the mortgaged land to the mortgagors. This instrument was not in evidence before the primary judge. It was tendered and admitted on the application for leave to appeal because the applicants now rely on a ground not advanced before the primary judge. The third respondent invokes the principle in *Holroyd v Marshall* (1862) 11 ER 999 at 1007 that:

> "[I]f a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained."

29 Notwithstanding the recitals in the conveyances of 1839 the grantors of easements over the lands now held by the applicants did not have a legal estate at the time the easements were granted.

30 The applicants asserted that Stephen Macdonald acquired the legal estate to the servient tenements in 1840. The grants of easements were for valuable consideration that was paid. This at least conferred on the transferees of the lands transferred and their successors in title an equitable right to enforce the rights of way against the owner of the servient tenement unless the owner of the servient tenement was a bona fide purchaser of the legal estate for value

without notice (*Holroyd v Marshall* (1862) 10 HLC 191; 11 ER 999 at 1007; *Chiu v Healey* [2003] NSWSC 857; 12 BPR 21,241 at [27]-[29]).

31 The applicants submitted that this could not be determined on an interlocutory application for leave to file the cross-claim, where, so it was submitted, it was necessary to show that there was no real issue of fact or law to be determined. But the applicants could not advance any arguable basis for the relief sought. Mr Hale SC who appeared with Mr Higgins for the applicants submitted that it was arguable that the only right that might be enforceable by the first and third respondents against the applicants was a right to seek specific performance by their seeking to get in the legal title to the easements.

32 I understood Mr Hale to submit that there might be grounds to oppose the grant of such relief and perhaps to suggest that prior to such relief being obtained, the first and third respondents would not have a right enforceable in equity to use the rights of way.

33 Lord Westbury's statement in *Holroyd v Marshall* that the principle to which he referred applies only to a contract of a class of which a court of Equity would decree specific performance caused confusion until the House of Lords' decision in *Tailby v Official Receiver* (1888) 13 App Cas 523 at 535 and 547. As the learned authors of J D Heydon, M J Leeming, P G Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed, 2015, LexisNexis Butterworths) say at [6-270]:

> "... factors going to the court's discretion to decree specific performance can hardly be relevant to a principle which operates without a decree of the court or further act of the parties to vest property in an assignee on the happening of certain events."

34 The easements were vested, at least in equity, in the owners of the dominant tenements and their successors in title and enforceable as such, irrespective of considerations of specific performance.

35 Further, the owners of the dominant tenements would have obtained full title to the easements by estoppel once Stephen Macdonald obtained a reconveyance of the lands from the mortgagee in 1840 (*Chiu v Healey* at [30], [32]). The first contention raised by the applicants was untenable.

36 The applicants further pleaded that at the time of their purchase of the passageways they had no notice of any equitable interest in favour of Strata Plan No. 61233 or Strata Plan No. 73850, and pleaded that the two easements, if valid, were not enforceable against it.

37 The primary judge held that it was not arguable that when the applicants acquired the passageways in 2008 that they were bona fide purchasers of the legal estate without notice of the easements (Judgment [33]). His Honour referred to various documents sent to the applicants' solicitors that expressly referred to the existence of the easements. The applicants were also parties to proceedings in 2003 before Bryson J (*Pasade Holdings v Sydney City Council* [2003] NSWSC 515 and *Pasade Holdings v Sydney City Council* [2003] NSWSC 584) in which reference was made to the conveyance of 30 September 1839 in Book 8 No. 303 in which a right of way over the passageway 12 feet wide was granted (Judgment [5]).

38 The applicants did not dispute this finding.

39 In any event, the easements were available on search and the applicants must have had at least constructive notice of them. The applicants do not seek leave to appeal from the primary judge's finding that they had notice of the easements.

40 Mr Hale submitted that even though there was no challenge to the primary judge's finding that the applicants had notice of the rights of way, it might be the case that earlier owners of the servient tenements who acquired legal title to those tenements did not have notice. I understood him to submit that in those circumstances the applicants would have acquired legal title unburdened by the rights of way. That would be in accord with *Wilkes v Spooner* [1911] 2 KB 473.

41 The cross-claim does not plead the facts that would need to be established for that contention to be upheld. Nor is it conceivable that such facts existed. The deeds creating the rights of way were registered in the General Register of Deeds so that any purchaser would have had at least constructive notice of the rights of way, which would be sufficient to preclude a purchaser from relying

upon the principle that a bona fide purchaser of the legal estate for value without notice would take title free from any earlier equitable interest.

42 At the time the deeds were registered the legislation providing for the registration of deeds and conveyances was the *Deeds Registration Act 1825* (6 Geo. IV No. 22). That Act provided that all deeds, conveyances and other instruments in writing (except leases for less than three years) affecting lands, tenements or other hereditaments in New South Wales could be entered and registered in the office of the Supreme Court of New South Wales and where made *bona fide* and for valuable consideration would have priority according to the date of registration.

43 That Act was repealed by the *Deeds Registration Act 1843* (7 Vic. No. 16) (except insofar as it related to the District of Port Phillip), subject to the proviso that "... nothing herein contained shall affect the operation of any matter or thing already done or commenced under the said recited Act." The 1843 Act provided for the creation of the Office of the Registrar-General and for the registration of Crown grants, deeds, conveyances and other instruments in writing affecting lands in New South Wales by the Registrar-General, rather than their being registered in the Supreme Court. Section 11 of the 1843 Act contained a similar provision to s 1 of the 1825 Act, namely that deeds executed or made "bona fide or [sic] for valuable consideration" and which were duly registered should have priority according to the priority of registration.

44 The 1843 Act was in due course repealed by the *Registration of Deeds Act 1897*. Section 12 of that Act made like provision for registered deeds made bona fide and for valuable consideration to take priority according to the dates of registration.

45 The effect of these provisions was to preserve earlier registered equitable interests both by ensuring that a subsequent holder of a legal estate had constructive notice of the earlier equitable interest and also by ensuring that even if failure to search the register did not give constructive notice, priority would be given according to the date of registration.

46 Section 184G(1) of the *Conveyancing Act* (that is within Div 1, Pt 23 of that Act) provides:

> "**184G Instruments affecting land to take effect according to priority of registration**
>
> (1) All instruments (wills excepted) affecting, or intended to affect, any lands in New South Wales which are executed or made bona fide, and for valuable consideration, and are duly registered under the provisions of this Division, the *Registration of Deeds Act 1897*, or any Act repealed by the *Registration of Deeds Act 1897*, shall have and take priority not according to their respective dates but according to the priority of the registration thereof only."

47 The applicants then submitted that if the easements were enforceable only in equity they were not "subsisting interests" that the Registrar-General could record on the qualified folio pursuant to s 28I of the *Real Property Act*.

48 Section 28I provides:

> "**28I Subsisting interests to be entered on qualified folio**
>
> (1) When creating a qualified folio of the Register for any land, the Registrar-General shall record in that folio any subsisting interest then apparent to the Registrar-General, but shall not be concerned to make searches or inquiries as to the existence of any such interest.
>
> (2) The Registrar-General may, at any time after the creation of a qualified folio of the Register, record in that folio any additional subsisting interest in the land comprised therein."

49 "Subsisting interest" is defined in s 28A as follows:

> "***Subsisting interest***, in relation to land for which a qualified folio of the Register has been created, means:
>
> (a) any contingent or vested estate or interest in that land that was in existence at the date on which the qualified folio of the Register was created and would have been enforceable against the person for the time being registered in that qualified folio as the proprietor had that qualified folio not been created and had any dealing registered therein been effected by a corresponding instrument duly registered under Division 1 of Part 23 of the *Conveyancing Act 1919* at the same time as the dealing became registered in the Register, and
>
> (b) any estate or interest in that land, arising by prescription or under any statute of limitations, that was in existence or in the course of being acquired at the date on which the qualified folio of the Register was created."

50 The applicants cited no authority for their contention that only legal and not equitable estates or interests could be recorded in the qualified folio under s 28I. That contention is contrary to the definition of a "subsisting interest" which includes any existing estate or interest that would have been enforceable

against the person registered as proprietor of the qualified folio had the person who became registered taken under an instrument that was registered under Div 1 of Pt 23 of the *Conveyancing Act 1919*.

51 The easements recorded in the 1839 deeds were subsisting interests and had priority over the transfer to the applicants because, had the applicants taken an old system conveyance and registered that conveyance in the General Register of Deeds, they would have taken subject to the rights of way granted by the 1839 deeds.

52 This is at least because the applicants had notice of the grant of the easements.

53 It is unnecessary to decide whether the result would also follow because in any event the effect of s 184G of the *Conveyancing Act* would be to preserve their priorities according to the dates of registration. No submissions were made in relation to that question. The deeds were registered pursuant to the *Deeds Registration Act 1825*. The effect of the first clause of the 1843 Act and clause 7 of that Act is that records that were required to be delivered by the registrar of the Supreme Court to the Registrar-General were to "continue to have the same force and effect ... as they respectively would have had if they had remained in the Registrar's office of the Supreme Court and this Act had not been passed." The 1843 Act did not expressly provide that deeds registered before that Act should be taken to have been registered under that Act, although that Act did provide that it did not affect the operation of any matter or thing already done under the 1825 Act. It is unnecessary to decide whether s 184G does not preserve the priority of pre-1843 instruments as efficaciously as it preserves the priority of post-1843 instruments. That conclusion would be apparently unintended. The question need not be resolved, not having been the subject of submissions. The 1839 easements had priority because it is accepted that the applicants had notice of them.

54 For these reasons the alternative argument advanced on the application for leave to appeal is also untenable.

Reopening 2003 proceedings

55 A third ground of the proposed appeal sought to challenge the refusal of the primary judge to reopen the 2003 proceedings imposing easements in the absence of the owner of the servient tenement. The primary judge summarised the applicants' endeavour to challenge the orders made in proceedings in 2003 as follows:

> "The orders sought to be set aside by the defendants are various orders made in earlier proceedings in this Court under s 88K of the *Conveyancing Act* imposing easements over the passageways. The defendants wish to invoke the inherent power of the Court to set aside orders made in the absence of an affected party. It was submitted that the then owner of the passageways was not a party and there was no contradictor or someone present to 'speak for that land'. The defendants submitted as they now owned the passageways they could seek to set the ex parte orders aside." (Judgment [42])

56 His Honour concluded that:

> "... it is not open to the defendants to seek to set aside the orders made in the earlier proceedings. The defendants have since become the owners of the passageways. However, they do not thereby succeed to the right of the former owner to have the ex parte orders set aside. In my opinion, the right is a personal right that is based upon the principles of natural justice." (Judgment [44])

57 After referring to the decisions of the High Court in *Cameron v Cole* (1944) 68 CLR 571 at 589; [1944] HCA 5 and *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1; [2010] HCA 19 and to the decision of this Court in *BP Australia Ltd v Brown* (2003) 58 NSWLR 322; [2003] NSWCA 216 at [132]-[134] the primary judge held:

> "47 The entitlement resides only in the person affected by the denial of natural justice; that is to say, the person who should have been given the opportunity to be heard. The entitlement thus bears a personal, not proprietary, character. That is so even if the relevant orders affect the proprietary interests of the person. In such a case the entitlement to set the orders aside does not attach in some fashion to the property involved.
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> 48 In the present case, the defendants' acquisition of ownership of the passageways (by conveyance from the Council of the City of Sydney exercising powers under the *Local Government Act 1993 (*NSW)) did not involve any transfer to them of the personal right of the former owner to set aside the orders made in the earlier proceedings.
>
> 49 I do not think that the absence of a contradictor itself gives rise to any rights to set aside the orders. It is true that if a necessary party is not heard, arguments that may have been made in that person's interests might not be put. However, it is not that circumstance that underpins the entitlement to set aside the orders; it is the infringement of the rules of procedural fairness which

provide that a person affected should be afforded the opportunity to be heard, whatever use the person might make of the opportunity.

50 No party was able to cite any authority that was directly on point on this issue. I am nonetheless satisfied that, as a matter of principle, it is plainly not open to the defendants to seek to set the orders aside on the basis that the orders were made in the absence of the then owner of the passageways.

51 Additional reasons were advanced by the proposed cross-defendants as to why the defendants could not succeed in having the orders set aside. These reasons include:

(a) that the defendants were themselves parties to the earlier proceedings;

(b) that in one of the proceedings the defendants sought and obtained easements over the passageways for the benefit of 100 Clarence Street; and

(c) that the defendants, who have owned the passageways since 2008, have been guilty of delay.

52 As pointed out by the defendants, these matters do not go to the question of the power of the Court to set aside the orders. In any event, having concluded that it is not open to the defendants to invoke the power to set aside the orders made in the absence of the former owner, it is not necessary to consider these additional reasons. In my opinion, this part of the proposed cross-claim is also untenable and bound to fail."

58 In my view this reasoning is correct. But even if it may be arguable that in some cases it might be open to a successor in title to property affected by orders affecting the property made in the absence of the then-owner of the property to reopen the proceedings in which such orders were made, this is clearly a case in which no such remedy would be granted. The applicants acquired the property from the council with knowledge of the easements which would have affected the price paid. It is inconceivable that a court would allow the proceedings to be reopened when the easements were imposed to satisfy the requirements of a development consent and when to do so would be to give the applicants a windfall. Equally it is inconceivable that the orders could be set aside so that the easements could be reimposed under s 88K with compensation being payable to the applicants.

Case management issues

59 The above reasons were sufficient grounds for dismissing the application for leave to appeal. Case management issues also supported the making of that order. The two proceedings in the Equity Division are awaiting trial later this month. If the cross-claim were allowed to be filed new parties would be added

to the proceedings. The applicants did not dispute that the trial would have to be adjourned.

60 The applicants' defence was filed on 12 August 2016. It was not until 1 September 2017 that a draft cross-claim was served. A motion for leave to file the cross-claim was filed on 4 October 2017 but it was not heard until 25 July 2018. Judgment on that application was given promptly on 14 August 2018. The summons seeking leave to appeal was not filed until 30 November 2018. The ground upon which the applicants rely to assert the unenforceability of the 1839 rights of way was raised for the first time on appeal. The unsatisfactory progress in formulating and pursuing the claims was an additional reason for refusing leave.

61 **BASTEN JA:** I agree with the reasons of White JA.

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