SUPREME COURT OF SOUTH AUSTRALIA

(Civil)

KI SEAPORT PTY LTD (ACN 167 774 058) v ABSTRAXION PTY LTD (ACN 125 885 109) & ANOR

[2020] SASC 113

Judgment of The Honourable Justice Stanley

23 June 2020

REAL PROPERTY - EASEMENTS - PARTICULAR EASEMENTS AND RIGHTS - OTHER EASEMENTS

REAL PROPERTY - TORRENS TITLE - EASEMENTS - CREATION - BY PLAN OF SUBDIVISION

INTERPRETATION - ADMISSIBILITY OF EXTRINSIC EVIDENCE IN RELATION TO INSTRUMENTS - WHEN EVIDENCE ADMISSIBLE - IN GENERAL

The plaintiff, KI Seaport Pty Ltd, is the registered proprietor of land (piece 51 and 52). Piece 51 is burdened by an easement, easement B, in favour of an adjoining parcel of land lot 50. Lot 50 is owned by the first defendant, Abstraxion Pty Ltd. Easement B was created by the application for deposit of a plan of subdivision, and is for defined drainage purposes.

Lot 50 is burdened by an easement, easement C, also created by the application for deposit of a plan of subdivision. It is for electricity supply purposes, specifically, three-phase power. However, it does not align with easement J on the land east of lot 50. Easement J contains on it a three-phase power source.

The plaintiff seeks relief from the burden of easement B, on the basis that it is not a valid easement. The plaintiff claims easement B amounts to an exclusive use of the land and water situated on the servient tenement (piece 51), resulting in a right to possession.

The plaintiff also seeks an order facilitating the joining of easements C and J over lot 50 so as to confer on the pieces 51 and 52 the benefit of a three-phase power supply.

Plaintiff: KI SEAPORT PTY LTD (ACN 167 774 058) Counsel: MR B HAYES QC WITH MR P QUINN - Solicitor: PIPER ALDERMAN
First Defendant: ABSTRAXION PTY LTD (ACN 125 885 109) Counsel: MR G MELICK AO SC WITH MR T DONISI - Solicitor: MELLOR OLSSON LAWYERS AS TOWN AGENTS FOR CLAYTON UTZ LAWYERS
Second Defendant: REGISTRAR-GENERAL No Attendance

Hearing Date/s: 04/11/2019 to 05/11/2019

File No/s: SCCIV-18-283

B

At trial evidence was admitted de bene esse, pending consideration of the effect of the High Court's judgment in Westfield Management Ltd v Perpetual Trustee Company Ltd and in particular whether, in construing the terms of an easement, evidence is admissible of the physical characteristics of the land.

Held:

1. Westfield v Perpetual Trustee does not expressly deal with the question of whether evidence of the physical characteristics of the land are admissible for the purpose of construing registered instruments creating easements. Intermediate Courts of Appeal elsewhere have held that that Westfield v Perpetual Trustee confirms that extrinsic material apart from the physical characteristics of the tenements is not relevant to the construction of instruments. Consequently, evidence of the physical characteristic of the tenements existing at the time the easement was granted is admissible.

2. Easement B does not amount to an exclusive use of the land and water situated on the servient tenement. It is a valid easement, and the plaintiff is not entitled to relief.

3. What appears on the register in relation to easements C and J amounts to a misdescription (as per s 69 of the Real Property Act 1886 (SA)) of what was intended in relation to the interests intended to affect the subject land. The easements should connect. The second defendant should correct the Certificate of Title to make effective the grant of substantive relief.

Real Property Act 1886 (SA) s 64, s 69, s 220(f); *Electricity Corporations (Restructuring and Disposal) Act 1999* (SA), referred to.
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; *Parramore v Duggan* (1995) 183 CLR 633; *Re Ellenborough Park* [1956] Ch 131; *Westfield Management Ltd v Perpetual Trustee Company Ltd* (2007) 233 CLR 528, applied.
Breskvar v Wall (1971) 126 CLR 376; *Clos Farming Estates v Easton & Ors* [2002] NSWCA 389; *Currumbin Investments Pty Ltd v Body Corp Mitchell Park Parkwood CTS* [2012] 2 Qd R 511; *Hare v Van Brugge* (2013) 84 NSWLR 41; *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1993] 1 All ER 307; *Moncrieff v Jamieson* [2008] 4 All ER 752; *Owners of East Fremantle Shopping Centre v Action Supermarkets Pty Ltd West Strata Plan 8618* (2008) 37 WAR 498; *Perpetual Trustee Company Ltd v Westfield Management Ltd* [2006] NSWCA 337; *Pirie v Registrar-General* (1962) 109 CLR 619; *Registrar-General of NSW v Jea Holdings (Aust) Pty Ltd* (2015) 88 NSWLR 321; *Rogers v Resi-Statewide Corporation Ltd (No 2)* (1991) 32 FCR 344; *Sertari Pty Ltd v Nirimba Development Pty Ltd* [2007] NSWCA 324; *Shelf Holdings Ltd v Husky Oil Operations Ltd* (1989) 56 DLR (4th) 193; *Towers v Stolyar* [2017] NSWSC 526; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, discussed.
Auerbach v Beck (1985) 6 NSWLR 424; *Beck v Auerbach* (1986) 6 NSWLR 454; *Bolton v Clutterbuck* [1955] SASR 253; *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (1971) 124 CLR 73; *Cannon v Villars* (1878) 8 Ch D 415; *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd* (2013) 247 CLR 149; *Chaffe v Kingsley* (1999) 79 P&CR 404; *Chiu v Healey* [2003] NSWSC 857; *Copeland v Greenhalf* [1952] 1 All ER 809; *Corporation of London v Riggs* (1880) 13 Ch D 798; *Epworth Group Holdings Pty Ltd & Anor v Permanent Custodians Ltd* [2011] SASCFC 32; *Gibson v McGeorge* (1866) 5 SCR (NSW) 44; *Hall v Lund* (1863) 158 ER 1055; *Harada v Registrar of Titles (Vic)* [1981] VR 743; *Kirkcaldie v Wellington City Corporation* [1933] NZLR 1101; *Lamos Pty Ltd v Hutchinson* (1984) 3 BPR 9350; *Lee v Coffee Republic Pty Ltd* [2006] TASSC 6; *Liddiard v Waldron* [1934] 1 KB 435; *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; *Manjang v Drammeh* (1991) 61 P&CR 194 (PC); *McLernon v Connor* (1907) 9 WALR 141; *Miller v Emcer Products Ltd* [1956] 1 All ER 237; *MRA Engineering Ltd v Trimster Co Ltd* (1988) 56 P&CR 1 (CA); *Municipality of Waterloo v Hinchcliffe* (1866) 5 SCR (NSW) 273; *Netherby Properties Pty Ltd v Tower Trust Ltd* [1999] SASC 247; *Parish v Kelly* (1980) 1 BPR 9394; *Peckham v Ellison* (1998) 79 P&CR 276; *Perebo Pty Ltd v Wayville Residential Investments Pty Ltd & Ors* [2019] SASC 35; *Powell v Langdon* (1944) 45 SR (NSW) 136; *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634; *Quach v Marrickville Municipal Council (No 1 & 2)* (1990) 22 NSWLR 55; *R J Finlayson Ltd v*

Elder Smith & Co [1936] SASR 209; *Rance v Elvin* (1985) 50 P&CR 9 (CA); *Sahab Holdings Pty Ltd v Registrar-General* [2011] NSWCA 395; *Sahade v Owners Corporation SP 62022* [2013] NSWSC 1791; *Shrewsbury v Adam* [2006] 1 P&CR 27; *Simmons v Midford* [1969] 2 All ER 1269; *State Bank of New South Wales v Berowra Waters Holdings Pty Ltd* (1986) 4 NSWLR 398; *Titchmarsh v Royston Water Co Ltd* (1899) 81 LT 673; *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557; *Wheeldon v Burrows* (1879) 12 Ch D 31, considered.

KI SEAPORT PTY LTD (ACN 167 774 058) v ABSTRAXION PTY LTD (ACN 125 885 109) & ANOR
[2020] SASC 113

Civil

STANLEY J:

Introduction

1 This is a case about easements.

2 KI Seaport Pty Ltd (KI Seaport) is the registered owner of land situated on the shores of Smith Bay, Kangaroo Island, identified as an allotment comprising pieces 51 and 52 in Certificate of Title Volume 6127 Folio 273 of Deposited Plan 92343 (KI Seaport land). Piece 52 is separated from piece 51 by a public road. Piece 52 is north-west of piece 51.

3 The KI Seaport land is being utilised for commercial purposes in conjunction with a plantation and forestry business operated by Kangaroo Island Plantation Timbers Ltd (KIPT).

4 Abstraxion Pty Ltd (Abstraxion) is the registered owner of lot 50, being land adjacent to the east of the KI Seaport land, identified as allotment 50 in Certificate of Title Volume 6127 Folio 272 of Deposited Plan 92343 (Abstraxion land) and lot 12 being land adjacent to the east of the Abstraxion land identified as allotment 12 in Certificate of Title Volume 6064 Folio 231 (Abstraxion other land). It is common ground the Abstraxion other land is currently and since 1995 has been used for the purposes of aquaculture, namely, an abalone farm.

5 KI Seaport became the registered owner of the KI Seaport land in April 2014. Abstraxion acquired the Abstraxion land in March 2018.

6 There is a long history of aquaculture operations having been conducted on the Abstraxion land and the KI Seaport land. Aquaculture operations have been conducted on the Abstraxion other land since at least July 1995. Prior to March 2018 the land which is now the Abstraxion land and the KI Seaport land was owned by Quentin Anderson and, before that, by a company KI Seafood Marketing Pty Ltd trading as Island Ocean Seafood.

7 In April 2002, KI Seafood Marketing, then the registered proprietor of the Abstraxion other land, created easement J over the Abstraxion other land for electricity supply purposes in favour of what is now the Abstraxion land and the KI Seaport land. In November 2013, Mr Anderson, by then the registered proprietor of the Abstraxion land and the KI Seaport land, lodged an application for deposit of a plan of division for the subdivision of the land and the creation of

easement B and easement C.[1] This created lot 50 and the lot comprising pieces 51 and 52.

8 Easement B burdens piece 51 (part of the KI Seaport land) in favour of the Abstraxion land, for defined drainage purposes. Easement C burdens the Abstraxion land in favour of the KI Seaport land for the transmission of electricity by underground cable.

9 The Registrar-General issued certificates of title effecting the subdivision and the creation of easements B and C in December 2013.

Issues for determination

10 Two matters fall for the Court's determination:

(i) whether KI Seaport should be granted relief from the burden of easement B over a portion of the KI Seaport land (being piece 51); and

(ii) if orders should be made to facilitate the joining of easements C and J over the Abstraxion land so as to confer on the KI Seaport land the benefit of a three-phase power supply.

11 For this purpose, the Court needs to resolve the following questions:

Easement B

(a) Does easement B amount to an exclusive use of the land and water situated on the servient tenement (piece 51), resulting in a right to possession and not an easement?

(b) If the answer to (a) is yes, nevertheless was the registration of easement B on the Certificates of Title effective to confer an indefeasible title on the registered proprietor of the dominant tenement?

(c) If the answer to (a) is yes and the answer to (b) is no, is KI Seaport estopped from now asserting that easement B is not a valid easement?

Easements C and J

12 (d) Does what appears on the register in relation to easements C and J fail to give effect to, or amount to a misdescription of, what was intended in relation to the interests intended to affect the subject land?

13 (e) Is it "necessary" for there to be an easement which connects easement C and J?

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[1] This was effected by that section of the application for deposit of a plan of division entitled "Schedule of Easements Created by Deposit of the Accompanying Plan of Division".

14 (f) If the answer to (d) or (e) is yes, what effect, if any, does the unregistered easement have on Abstraxion (being the registered proprietor of the servient land)?

Ruling on evidence admitted *de bene esse*

15 Both parties raised objections to parts of the affidavit and documentary evidence the other relied upon. At the commencement of the trial the plaintiff disavowed reliance upon the affidavit material to which objection was taken by Abstraxion except for the affidavit of Jaroslaw Frankiw.

16 The overwhelming majority of objections turn on the effect of the High Court's judgment in *Westfield Management Ltd v Perpetual Trustee Company Ltd.*[2] At issue in this case is whether, in construing the terms of an easement, evidence is admissible of the physical characteristics of the land.

17 In their joint reasons in *Westfield v Perpetual Trustee* Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ said:[3]

> [I]in the course of oral argument in this Court it became apparent that what was engaged by the submissions respecting the use of extrinsic evidence of any of those descriptions, as an aid in construction of the terms of the grant, were more fundamental considerations. These concern the operation of the Torrens system of title by registration, with the maintenance of a publicly accessible register containing the terms of the dealings with land under that system. To put the matter shortly, rules of evidence assisting the construction of contracts inter partes, of the nature explained by authorities such as *Codelfa Construction Pty Ltd v State Rail Authority (NSW),* did not apply to the construction of the Easement.
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> Recent decisions, including *Halloran v Minister Administering National Parks and Wildlife Act 1974*, *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, and *Black v Garnock*, have stressed the importance in litigation respecting title to land under the Torrens system of the principle of indefeasibility expounded in particular by this Court in *Breskvar v Wall*.
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> The importance this has for the construction of the terms in which easements are granted has been remarked by Gillard J in *Riley v Penttila* and by Everett J in *Pearce v City of Hobart*. The statement by McHugh J in *Gallagher v Rainbow*, that: "[t]he principles of construction that have been adopted in respect of the grant of an easement at common law … are equally applicable to the grant of an easement in respect of land under the Torrens system" is too widely expressed. The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee.
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> It is true that in *Overland v Lenehan* Griffith CJ admitted extrinsic evidence to show a misdescription of the boundaries of the land comprised in a certificate of title. This is a matter now dealt with in the RP Act by the provisions in Pt 15 (ss 136-138) for the

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2 [2007] HCA 45, (2007) 233 CLR 528.

3 [2007] HCA 45 at [37]-[40], (2007) 233 CLR 528 at 539-540.

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

18 Abstraxion accepts that *Westfield v Perpetual Trustee* does not expressly deal with the question of whether evidence of the physical characteristics of land is admissible. It submits that decisions before *Westfield* indicated that evidence of the physical characteristics of land was admissible in construing an easement and that subsequent decisions since *Westfield* have confirmed that the position has not been altered by the High Court's reasons.

19 In *Perpetual Trustee Company Ltd v Westfield Management Ltd*[4] Hodgson JA, with whom Beazley and Tobias JJA agreed, said that the correct approach to the construction of the grant of an easement is to ask what does the grant authorise, and that question is to be answered by construing the grant. However, in determining this question, regard may be had to surrounding circumstances, including the physical characteristics of the dominant and servient tenements and the use actually being made of them at the time of the grant.[5] This statement of principle involves two propositions. The first is that in construing the easement regard may be had to the physical characteristics of the tenements. The second is that in construing the easement regard may be had to the use actually being made of the tenements at the time of the grant. While it is arguable that there is tacit support in the High Court's reasons on appeal for the first proposition,[6] the same cannot be said for the second proposition. The emphasis the High Court places on the importance of the principle of indefeasibility in litigation concerning title to land under the Torrens system is inconsistent with the second proposition. A third party is entitled to rely upon the register rather than being expected to look for extrinsic material which might establish facts or circumstances existing at the time of the grant.[7] As the joint reasons of the High Court make clear, what is not permissible is extrinsic evidence seeking to establish the intention or contemplation of the parties to the grant.[8] The intention of the parties to the grant is to be ascertained from the grant itself. The general rule is that extrinsic material outside the register may not be used in construing instruments that create easements. What is less clear is whether the High Court's reasons allow the intention of the parties to be ascertained also by reference to extrinsic evidence of the physical characteristics of the tenements at the time of the grant.

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4 [2006] NSWCA 337.

5 *Perpetual Trustee Company Ltd v Westfield Management Ltd* [2006] NSWCA 337 at [26].

6 *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2007] HCA 45 at [35]-[45], (2007) 233 CLR 528 at 538-541.

7 [2007] HCA 45 at [39], (2007) 233 CLR 528 at 539.

8 [2007] HCA 45 at [45], (2007) 233 CLR 528 at 541.

20 In *Sertari Pty Ltd v Nirimba Development Pty Ltd*[9] the New South Wales Court of Appeal held that *Westfield v Perpetual Trustee* confirms 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* (NSW).[10]

21 *Sertari* was followed by the New South Wales Court of Appeal in *Hare v Van Brugge.*[11] Barrett JA, with whom Macfarlan JA and Tobias AJA agreed, said:[12]

> A fundamental question concerns the extent to which it is permissible to have regard to the physical features of relevant land in construing the terms of an easement. Mr Gray submitted that, in light of the decision of the High Court in *Westfield Management Ltd v Perpetual Trustee Company Ltd*, there is very little scope to do so.
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> In that case, Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ drew attention to the restrictions inherent in the Torrens system when it comes to construing registered instruments creating easements. The general rule is that material outside the register may not be used. But, as this Court confirmed in *Sertari Pty Ltd v Nirimba Developments Pty Ltd*, the High Court recognised that that general rule does not rule out reliance on evidence of the physical characteristics of the land concerned. Handley AJA said, with the concurrence of McColl and Tobias JJA:
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> > "[T]he decision in *Westfield Management Ltd v Perpetual Trustee Co Ltd* 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*." (Emphasis added)
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> This formulation refers to both dominant and servient tenements. There was no submission on the present appeal that *Sertari Pty Ltd v Nirimba Developments Pty Ltd* should not be followed.
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> By resorting to evidence of physical characteristics of the tenements, a court does not have regard to matters which, like the intentions of the original grantor and grantee, are unavailable to third parties inspecting the register. The physical features are there for all to see, at least as they stand today. Different considerations may apply if it is suggested that some material change in physical circumstances has occurred since the creation of the easement: see the observation of Fryberg J, with whom Margaret McMurdo P and Fraser JA agreed, in *Currumbin Investments Pty Ltd v Body Corp Mitchell Park Parkwood CTS*. There is no such suggestion in this instance.
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> [Citations omitted]

22 The approach taken by the New South Wales Court of Appeal is consistent with the reasoning of the Queensland Court of Appeal in *Currumbin Investments*

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9 [2007] NSWCA 324.
10 [2007] NSWCA 324 at [15].
11 [2013] NSWCA 74, (2013) 84 NSWLR 41.
12 [2013] NSWCA 74 at [15]-[18], (2013) 84 NSWLR 41 at 45-46.

Pty Ltd v Body Corp Mitchell Park Parkwood CTS.[13] In *Currumbin* Fryberg J, with whom Margaret McMurdo P and Fraser JA agreed, said:[14]

> Acceptance of the relevance of that circumstance [the nature of the surface over which the grant applied] is not inconsistent with what the High Court wrote about the position of third parties [in *Westfield v Perpetual Trustee*]. Usually, the physical characteristics of the tenements may freely be observed by any third party interested in them. But depending on the nature of the characteristic in question or the possibility of change in the characteristic over the period since the easement was granted, cases may arise where even a physical characteristic may not be able to be taken into account consistently with the principles of the Torrens system. … If the question of construction is to be approached from the point of view of a third party inspecting the register, it may be that the scope for consideration of extrinsic evidence is reduced over time. The consequences of such an approach would need to be considered carefully. I express no opinion on the matter.

23 In *Westfield v Perpetual Trustee* the High Court considered the admissibility of extrinsic evidence against the background of the judgments in *Powell v Langdon*[15] and *Cannon v Villars.*[16] *Cannon* held the content of a bare grant of a right of way 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. However, the idea that the High Court allowed the use of evidence of the physical characteristics of the land in construing instruments that created easements is expressed too widely. Abstraxion's submission, that *Westfield v Perpetual Trustee* does not expressly deal with the question of whether evidence of the physical characteristics of the land is admissible for that purpose, correctly states the position. Nonetheless I consider I should follow decisions of intermediate courts of appeal in other Australian jurisdictions unless I am persuaded that they are clearly wrong.[17] As *Westfield v Perpetual Trustee* is not authority for the proposition that the evidence of physical characteristics of the land is admissible in construing a registered easement, I do not consider that I am free to depart from the reasoning in *Sertari, Hare* and *Currumbin* as KI Seaport submits I should do.

24 Accordingly, I admit the evidence, to which KI Seaport objects, relevant to the physical characteristics of the tenements existing at the time easement B was granted, namely, the evidence of the aquaculture infrastructure situated on lot 50 and piece 51 at the time of the subdivision.[18] Otherwise I uphold KI Seaport's objections to the evidence relied upon by Abstraxion. However, as it is, I am

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13 [2012] QCA 9, [2012] 2 Qd R 511.
14 [2012] QCA 9 at [49], [2012] 2 Qd R 511 at 525.
15 [1944] NSWStRp 35, (1944) 45 SR (NSW) 136 at 137.
16 (1878) 8 Ch D 415 at 420.
17 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [135], (2007) 230 CLR 89 at 151-152.
18 Connell Affidavit: 50-51, 53-63, 78, 80-85, 88, 90-92, 94-97, 99, 101, 108, 117-119, 122, 124, 129-130 and 136 and Exhibits DSC-13, DSC-14, DSC-24 and DSC-25;
McLinden Affidavit: 20 and 33;
Book of Documents [Tab]: 50-51, 56, 58, 66, 69, 77 and 88-90 ('BD');
Supplementary Book of Documents [Tab]: 12-13, 31-34 ('SBD').

able to determine the validity of easement B without regard to the extrinsic evidence relied upon by Abstraxion.

25 On the other hand, KI Seaport contends that the evidence of Mr Frankiw should be admitted on the basis that *Westfield v Perpetual Trustee* permits the admission of extrinsic evidence to show a misdescription in the Certificate of Title on the register.

26 Abstraxion objects to paragraphs 10.1, 10.2, part of 10.3, paragraphs 18, 25, 34.1, 34.2, the reference to "error" in paragraph 35, and part of paragraph 36 in Mr Frankiw's affidavit. I approach his evidence on the basis he has not been qualified as an expert in accordance with the principles in *Makita (Australia) Pty Ltd v Sprowles.*[19] Accordingly, even with the latitude extended to the admission of extrinsic evidence tending to prove a misdescription on the register, permitted by *Westfield v Perpetual Trustee*, I will not admit evidence of Mr Frankiw's opinions. I would allow the objection to paragraph 10.3 as it is an expression of a speculative opinion and is argumentative. I would allow the objection to paragraph 18 on the grounds of relevance. I would allow the objection to paragraph 34.1 on the basis that it is unqualified opinion evidence and argumentative. I would allow the objection to the reference to "the error" in paragraph 35 on the basis that it is unqualified opinion and argumentative. I would allow the objection to paragraph 36 on the same basis. Otherwise, I would admit the evidence of Mr Frankiw's affidavit.

The evidence

27 The plaintiff tendered affidavits of Peter Lockett, Shauna Black, Paul Mckenzie and Jaroslaw Frankiw.

28 Mr Lockett is the approvals manager for KIPT, the ultimate holding company of the plaintiff. He described the land in question, together with its ownership. He also deposed to the location and nature of the easements the subject of the dispute.

29 Ms Black is a director of KIPT. She gave evidence of the plaintiff's potential purchase of lot 50 prior to its sale to the first defendant. She deposed to seeing the infrastructure and equipment associated with easement B on piece 51 being used in March 2018. This included water being pumped from what she understood was the first defendant's facility closest to the KI Seaport land to the dam located on easement B. This contrasted with her observation, in January 2018, of water being pumped from this facility directly into the sea.

30 Mr McKenzie is the chairman of KIPT and a director of the plaintiff. He gave evidence of the negotiations he had with Mr Anderson regarding the potential purchase of the Abstraxion land prior to its purchase by the first defendant. This included meeting with Mr Anderson and arranging for Ms Black

[19] [2001] NSWCA 305, (2001) 52 NSWLR 705.

and others to inspect the property. Mr McKenzie deposed to being surprised when he learned lot 50 had been sold, as he considered the plaintiff and Mr Anderson were on the cusp of finalising a deal. He suspected the purchaser was the first defendant.

31 In cross-examination he said that KIPT had plans to build a wharf on Kangaroo Island to allow their timber assets to be taken to the mainland, and that the wharf was fundamental to the survivability of the timber plantation.

32 When the KI Seaport land was acquired in August 2014 he was aware of easement B on the title. He realised at this stage that it could be a partial impediment to the approaches to the preferred wharf location. He said that the wharf infrastructure could go above or to the side of the easement. He described it as presenting a level of inconvenience. However, the extra expense was not material in the context of the value of the timber plantation.

33 Shortly after purchasing the KI Seaport land he made inquiries about the validity of the easement to see if there were ways any potential problems could be overcome. He also knew that the Abstraxion land was not on the market at that time.

34 He said that as there is a house and another dam on the KI Seaport land, the settlement dam did not have to be used for agricultural purposes. Absent the wharf, the drains, pipes and settlement dam do not significantly interfere with the use and enjoyment of the KI Seaport land.

35 He was aware that easements C and J do not connect. He agreed KIPT had made inquiries as to the relative costs of underground and overground connections to the preferred wharf location, and that overhead connections would be cheaper.

36 Mr Frankiw is a licensed surveyor with over 40 years' experience. He has undertaken surveying work on Kangaroo Island for the past 30 of those years.

37 Mr Frankiw's firm undertook the initial land division for KI Seafood Marketing Pty Ltd in 2000/2001. This included the creation of easement J, which was for electricity supply purposes for the benefit of what was at that time pieces 10 and 11 (KI Seaport land and Abstraxion land).

38 Mr Frankiw prepared the plan of division for the application to divide pieces 10 and 11 into lot 50 and pieces 51 and 52 in 2012. The development application was referred to the Kangaroo Island Council's Development Assessment Panel for approval. The application was approved with four conditions, including a requirement that "easements shall be granted where necessary to Piece 51 over Lot 50 for connectivity to 3 phase power supply to be obtained" and "easements shall be granted where necessary to Lot 50 over Piece 51 for the return sea water drainage infrastructure and settlement dam associated

with the aquaculture activity and relevant existing licensing". In order to comply with the conditions of the Kangaroo Island Council, Mr Frankiw created easements C and B.

39 Mr Frankiw asked Mr Anderson where easement C was to be placed and on 14 August 2013 Mr Anderson gave instructions, according to Mr Frankiw's file, that easement C was to be "10 metres wide on the northern boundary of allotment 50 and piece 51". He followed this instruction.

40 In cross-examination, Mr Frankiw said that he had the discussion with Mr Anderson as he wanted his instructions on where easement C should be located. There was a substantial amount of infrastructure and an electricity transformer at the north-east corner of lot 50. He rejected the proposition that there was no need to join easements C and J because the transformer could supply three-phase power. Mr Frankiw said that at the time there was no mention of three-phase power being accessible from the transformer. He was unsure if the transformer allowed three-phase power but he knew easement J was a three-phase source. His understanding was that easement C currently allows distribution of power from transformer to lot 50 and 51, but he was unsure as to whether it was three-phase power.

41 Mr Frankiw had no involvement with the text description of easement B on the register. In cross-examination he stated that in his mind, easement B covered the requirement that easements shall be granted where necessary to lot 50 over lot 51 for the return seawater drainage infrastructure and settlement dam. The easement in favour of lot 50 was to direct and to do whatever was necessary to get that product from lot 50 to the dam on piece 51, that included the drainage of water from the settlement dam.

42 The first defendant tendered two affidavits of Mr David Connell and an affidavit of Mr Shane Mclinden.

43 Mr Connell is an operational executive of Yumbah Aquaculture Ltd, the holding company of the first defendant. He has been involved in aquaculture for over 20 years.

44 Mr Connell gave evidence of the use of the KI Seaport land and Abstraxion land since around 2001, including the development of aquaculture facilities on the land by KI Seafood Pty Ltd. Much of his evidence related to the aquaculture infrastructure on the land.

45 In cross-examination Mr Connell said that when KI Seaport purchased the land it was not known that it was for the purposes of the timber and wharf operation. He was not made aware of this intention until Abstraxion enquired.

46 Mr Connell said there was always an interest in purchasing lot 50 from the strategic point of view of the defendants, for many reasons including biosecurity

of the aquaculture by creating a buffer around the facility operated by Abstraxion. The main biosecurity risk was another aquaculture business coming along. There also were concerns about the wharf from a shipping perspective.

47 Mr Connell said that Mr Anderson had explained that when he subdivided lots 50, 51, and 52 he created an easement (easement B) to maintain the infrastructure for aquaculture purposes. Mr Connell said he did not turn his mind to the exact wording of the easement, and the phrase 'excluding the discharge'.

48 From the first defendant's point of view, the purpose of easement B was to receive water from pipes laid from lot 50 into the dam. The water in those pipes was water from the sea flowing through intake pipes on lot 50. When it enters lot 50 it is used for aquaculture, which may result in contamination from organic matter, then goes to lot 51 dam where it is treated and can be discharged into the sea through an underground pipe that runs through lot 52. Mr Connell agreed the easement does not say anything about this discharge, but stated it was a natural consequence of continually feeding water into the dam. Without some sort of outlet it would be impossible. Mr Connell was not sure exactly where the outlet pipe ran. He said drainage is part of the aquaculture licence and infrastructure.

49 He later clarified that the drainage system was already in place and he was not aware it was not within the easement. He agreed the infrastructure (open concrete drain and underground pipes) could be relocated or duplicated within the easement area, or even on Crown land if such a licence was obtained. However, the dam had to be in its current location as it was the only downhill spot.

50 Mr Connell explained that the dam was part of the treatment process for water used in the aquaculture facility. It was also part of the licencing conditions of the facility to do as much as possible to prevent aquaculture escapees from entering the ocean from the facility, and the dam system is and was the most practical way of controlling larvae from the facility.

51 Mr Mclinden is an agribusiness consultant. He was a co-founder of Southseas Abalone Ltd, which is the former name of the holding company of the first defendant. He was the managing director of Southseas Abalone Ltd from April 1998 until July 2016. His evidence concerned the subdivision of the KI Seaport land and Abstraxion land and he said that on multiple occasions the Southseas Abalone board discussed the potential purchase of the KI Seaport land and Abstraxion land and the aquaculture infrastructure upon it, both prior to its purchase by Mr Anderson and subsequent to that purchase.

52 I find that these witnesses did their best to give an honest account of the matters addressed in their testimony. However, the disposition of the matters in dispute generally does not turn on the oral evidence the Court heard. The exception to this proposition is the evidence of Mr McKenzie concerning the estoppel point, which I accept.

Does easement B amount to an exclusive use of the land and water situated on the servient tenement (piece 51), resulting in a right to possession and not an easement?

53 Easement B, which was created by the application for deposit of a plan of division for the subdivision of the land, is expressed as follows:

> The right for the applicant as the registered proprietor of Allotment 50 in the plan, his agents, servants and workmen at any time to break the surface of, dig, open up and use that portion of Piece 51 marked B in the accompanying plan for the purpose of laying down, fixing, taking up, repairing, re-laying or examining pipes thereon and for the purposes of transferring water to and the storage of water in a dam thereon, affixing thereon and maintaining pumps and electrical switch gear and of using and maintaining those pipes pumps and electrical switch gear for water supply purposes and to enter the land at any time (if necessary with vehicles and equipment) for any of these purposes to be held appurtenant to Allotment 50 in the plan.

54 Accordingly, for the purposes of this easement the Abstraxion land is the dominant tenement and piece 51 is the servient tenement.

55 The four essential characteristics of easements were described by the English Court of Appeal in *Re Ellenborough Park.*[20] They are:

(i) There must be a dominant and a servient tenement;

(ii) The easement must accommodate (confer a benefit on) the dominant tenement;

(iii) The same person must not own and occupy the dominant and servient tenements. However, an exception to that common law rule is provided by s 90C of the *Real Property Act 1886* (SA) (RPA), which permits the granting of an easement to oneself; and

(iv) The right claimed as an easement must be capable of forming the subject matter of a grant.

56 In this case there is no issue that the grant of Easement B satisfies the first three characteristics. At issue is whether it satisfies the fourth.

57 KI Seaport submits that the terms of easement B create a right for "the storage of water in a dam … for water supply purposes" in favour of the proprietor of the dominant tenement, Abstraxion, on KI Seaport's land. Easement B expressly grants Abstraxion the right to store, take and use water without any limitation or qualification upon that right, including rights to install, repair and maintain pipes, pumps and other necessary equipment on piece 51. Easement B does not provide any reciprocal rights to KI Seaport as the owner of the servient tenement, which is not entitled to benefit from the water supply and,

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[20] [1956] Ch 131 at 140.

accordingly, easement B has created a right in favour of Abstraxion as the owner of the dominant tenement to take any and all water from the dam situated on piece 51, depriving KI Seaport as the owner of the servient tenement from any equivalent rights. That has resulted in an exclusive right in Abstraxion to benefit from the water supply so created, a right inconsistent with the fourth limb of the *Ellenborough Park* test for the creation and the existence of an easement, namely, a right which is capable of forming the subject matter of a grant. Accordingly, it contends that the easement is invalid.

58 Abstraxion denies this is the case. Abstraxion contends that the terms of easement B do not confer expressly on it a right to take and use water. It submits that on the face of the text of easement B, the easement simply contemplates the transfer of water from lot 50 via pipes to a dam on piece 51 and the storage of the water so transferred in that dam.

59 I accept this submission. The construction of easement B for which KI Seaport contends gives a meaning to the express words in the grant *for water supply purposes* which was not objectively intended. KI Seaport's construction is that any water stored in the dam on piece 51 will be and remain available *for water supply purposes*. In my view that involves a misreading of the grant. It fails to have regard to the placement of the words *for water supply purposes* within the terms of the grant. The grant is not a right to transfer to and store water in a dam for water supply purposes. KI Seaport's construction would have greater force if the words *for water supply purposes* had followed immediately upon the phrase *for the purposes of transferring water to and the storage of water in a dam thereon.* But they do not. The construction overlooks the intervening language of the grant, namely, *affixing thereon and maintaining pumps and electrical switch gear and of using and maintaining those pipes pumps and electrical switch gear.* To my mind that evinces an intention that the reference to *water supply purposes* in the grant merely conditions the meaning of the intervening language of the grant. The right conferred by the grant allows the dominant tenement to lay pipes across the servient tenement and to fix and maintain pumps and electrical switch gear for the purpose of transferring water to and the storage of water in a dam on the servient tenement and allows the dominant tenement to use and maintain those pipes pumps and electrical switch gear for the purposes of supplying water to the dam. The phrase "for water supply purposes" is not intended to confer a right on the dominant tenement to take water from the dam but rather to supply water to the dam. Abstraxion's characterisation of the dam as a settlement dam reflects this construction. Easement B is not the grant of a right to use the dam *for water supply purposes*. That is not to say that the right created by the grant precludes the taking of seawater from the dam either by the dominant or servient tenement. The terms of the grant do not speak of taking water from the dam, either by the dominant or the servient tenement. There is no reason to construe the grant as precluding the servient tenement from being able to take water from the dam on its land. Easement B is not concerned with the taking of water from the dam. Rather, it

confers a right to transfer and store water in the dam. There is no reason that the conferral of those rights on the dominant tenement should exclude the servient tenement from taking water stored in the dam on its land. Abstraxion makes no claim to an exclusive right to take water from the dam. In any event, the question of whether the grant confers an exclusive right on it to take water from the dam does not arise on the proper construction of the grant. Accordingly, the proper construction of the grant does not interfere with Abstraxion's plans to treat contaminated water transferred to the dam and discharge it into the sea.

60 Abstraxion's submission that easement B is limited to the transfer of water to the dam and the storage of that water must be accepted. That leaves for consideration any other basis for holding that easement B is invalid because it is incapable of forming the subject matter of a grant.

61 KI Seaport submits that the terms of easement B include rights conferred on the dominant tenement which are inconsistent and incompatible with the proprietorship and possession of the servient tenement on the whole and on that part affected by easement B, namely, a right of exclusive use in favour of the owner of the dominant tenement; a right in favour of the owner of the dominant tenement amounting to possession of that part of the servient land where the settlement dam is situated; and rights in favour of the dominant tenement which prevent the reasonable use of the servient tenement.

62 Abstraxion contends that there is no credible basis for asserting that the buried pipelines, drains and settlement dam comprising the drainage system on piece 51 confers on it the exclusive use of piece 51, let alone affects KI Seaport's reasonable use and enjoyment of piece 51. It submits that any inability of KI Seaport to make use of the area covered by the pipes, drainage channels and the settlement dam does not necessarily and inevitably prevent the reasonable use of piece 51 as a whole. It contends that the settlement dam covers only a small percentage of piece 51, being less than two per cent of the land.

63 An easement must not unduly detract from the enjoyment of the servient land. An easement must not exclude the servient owner from the land. A right that would substantially deprive the servient owner of proprietorship or possession of part of its land is not a valid easement. The right must not amount to an ouster of the owner of the servient tenement.[21] Accordingly, a right that purports to confer on the owner of the dominant tenement the exclusive right to use part of the burdened land, or a right which is so extensive[22] to practically amount to exclusive possession[23] is inconsistent with the concept of an easement and cannot constitute a valid easement.[24] The validity of an easement does not

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[21] *Copeland v Greenhalf* [1952] Ch 488 at 498, [1952] 1 All ER 809 at 812-813; *Miller v Emcer Products Ltd* [1956] Ch 304 at 240, [1956] 1 All ER 237 at 316.
[22] *Harada v Registrar of Titles (Vic)* [1981] VR 743 at 753.
[23] *Copeland v Greenhalf* [1952] Ch 488 at 498, [1952] 1 All ER 809 at 812-813.
[24] *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* [1971] HCA 9, (1971) 124 CLR 73 at 91.

depend upon whether the claimed right applies to all or a substantial proportion of the land, rather the question is whether the rights asserted by the owner of the dominant tenement impede the reasonable use of the servient tenement as a whole.[25] This is a question of fact and degree.

64 In *Clos Farming Estates v Easton & Ors*[26] Santow JA, with whom Mason P and Beazley JA agreed, addressed *inter alia* the issue of whether the easement asserted in that case satisfied the fourth limb. His Honour said that in deciding whether the right purporting to be an easement is capable of forming the subject matter of a grant it is necessary to assess the degree to which the rights conferred interfere with the servient owner's exclusive possession of the land.[27] The fact that the rights claimed by the dominant tenement only touched part of the land does not necessarily preclude a finding that the rights asserted by the dominant tenement so vastly interfered with the rights of the servient tenement as to preclude them constituting an easement.[28]

65 On the other hand, in *Moncrieff v Jamieson*[29] Lord Neuberger noted that a right of aqueduct (or water rights) or a right of drainage is often granted over a specific route, so that that route may often be the full extent of the servient tenement. In such a case, the servient owner is effectively excluded from the whole of his tenement, yet such a right has always been assumed to be capable of constituting a valid easement.[30]

66 In *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd*[31] Baker J, who was upheld on appeal, said:[32]

> The essential question is one of degree. If the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of his land … it could not be an easement though it might be some larger or different grant.

67 The New South Wales Court of Appeal explored the relevant authorities concerning when rights conveyed by an easement are inconsistent and incompatible with the proprietorship and possession of the servient land in *Registrar-General of New South Wales v Jea Holdings (Aust) Pty Ltd.*[33] The test enunciated in *Jea* was explained in the following terms in *Towers v Stolyar*[34] by Darke J:[35]

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25 *Registrar-General of NSW v Jea Holdings (Aust) Pty Ltd* [2015] NSWCA 74, (2015) 88 NSWLR 321.
26 [2002] NSWCA 389.
27 [2002] NSWCA 389 at [45].
28 [2002] NSWCA 389 at [46].
29 [2007] UKHL 42, [2008] 4 All ER 752.
30 [2007] UKHL 42 at [142], [2008] 4 All ER 752 at 795.
31 [1993] 1 All ER 307.
32 [1993] 1 All ER 307 at 317.
33 [2015] NSWCA 74 at [39]-[45] and [61]-[62], (2015) NSWLR 321 at 331-332 and 334-335.
34 [2017] NSWSC 526.
35 [2017] NSWSC 526 at [49].

> In determining the question of validity of the Easement it is necessary to consider the matters identified as relevant by the Court of Appeal in *Jea Holdings* at [64]. It is thus necessary to consider the extent of interference with the servient owner's rights of ownership on that part of the servient tenement actually affected by the Easement, and on the servient tenement as a whole (see also *Clos Farming Estates Pty Ltd v Easton* at [35]-[36]). Included in that analysis is a consideration of whether the servient owner retains reasonable use of the servient tenement in its entirety, and an assessment of the degree to which the rights conferred by the Easement interfere with the servient owner's exclusive possession of the land (see *Clos Farming Estates Pty Ltd v Easton* at [45]-[46]). Questions of degree and evaluation are involved (see *Jea Holdings* at [150]).

68 In *Shelf Holdings Ltd v Husky Oil Operations Ltd*[36] the issue was whether pipelines interfered with the ownership of the land to such an extent that the land over which the pipeline was constructed was not capable of being a valid easement as it was not capable of forming the subject matter of a grant. The Alberta Court of Appeal allowed an appeal from the trial judge's decision that the grant did not confer an easement but an interest in land. Haddad JA adopted this statement of principle:[37]

> [i]t follows from the general nature of the recognized interests in property that an easement cannot amount to a claim quite at variance with the proprietary rights of the servient owner. On the other hand, it is also quite obvious that an easement does to some extent detract from those rights. A right of way cuts down the servient owner's right to exclude people from his property or to develop it as he pleases; and a negative easement such as light, also hinders development. The issue in fact is the perennial one of the drawing the line, of deciding when the point has been reached that the right in question detracts so substantially from the rights of the servient owner that it must be something other than an easement.

69 The Court held that the grant did not detract so substantially from the rights of the servient owner as not to be a valid easement.[38]

70 The grant of other rights which have been recognised as valid easements include: an easement to pollute water and cast noxious matter onto adjoining land;[39] a right to discharge surplus water from the dominant tenement when reasonably necessary;[40] a right to the exclusive use of a drain;[41] and a right to the uninterrupted passage and running of water through water pipes.[42]

71 The question being one of degree and evaluation, I do not consider that the buried pipelines and settlement dam on piece 51 can properly be characterised as conferring upon Abstraxion the exclusive use of piece 51 let alone depriving KI Seaport of its reasonable use and enjoyment of its land. All easements interfere with the servient tenement to some extent. It is almost invariably the

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36 (1989) 56 DLR (4th) 193.
37 *Shelf Holdings Ltd v Husky Oil Operations Ltd* (1989) 56 DLR (4th) 193 at 202.
38 (1989) 56 DLR (4th) 193 at 204.
39 *Kirkcaldie v Wellington City Corporation* [1933] NZLR 1101.
40 *Municipality of Waterloo v Hinchcliffe* (1866) 5 SCR (NSW) 273.
41 *Simmons v Midford* [1969] 2 Ch 415, [1969] 2 All ER 1269.
42 *Rance v Elvin* (1985) 50 P&CR 9 (CA).

case that the proprietor of a servient tenement is very nearly deprived of possession of the space occupied by pipes and so much of the soil on each side as is necessary for access for maintenance and repair. Yet there is no doubt as to the validity of an easement of this kind.[43] The same may be said of the space occupied by the dam notwithstanding its greater area. In this case the pipes have been laid underground. The evidence suggests that the pipes and dam occupy no more than five per cent of the servient tenement and the dam only two per cent of that land. The easement does not occupy a substantial area of the land or significantly impair the servient owner's use and enjoyment of the land. The only witness to give evidence on this topic, Mr McKenzie, gave evidence to the contrary.

72 For these reasons I reject KI Seaport's submission that easement B is invalid at common law. It is not entitled to the declaration it seeks.

Does registration preclude KI Seaport from impugning easement B?

73 In any event, had I concluded that easement B was invalid at common law, I would nonetheless have rejected KI Seaport's contention that proof of invalidity entitles it to obtain removal of easement B from the title to lot 50 and piece 51.

74 Abstraxion submits that as a result of registration, its title to lot 50, including the rights and liberties enjoyed pursuant to easement B, is absolute and indefeasible and, as a result, the easement is incapable of being impugned as creating rights that are too broad to constitute a valid easement based on common law principles.

75 KI Seaport seeks a declaration that easement B is not a valid easement and an order directing the Registrar-General to cancel the easement and correct the relevant Certificates of Title pursuant to s 64 of the RPA. Section 64 provides:

> In any proceeding in the Court respecting any land, or any transaction, contract, or application relating thereto, or any instrument or record affecting any such land, it shall be lawful for the Court to direct the Registrar-General to cancel, correct, record, substitute, issue, or make any certificate of title, or any memorial or entry in the Register Book, or otherwise to do such acts and make such entries as may be necessary to give effect to any judgment, decree, or order of such Court given or made in such proceeding, and the Registrar-General shall obey every such direction.

76 KI Seaport also contends that the RPA confers upon the Registrar-General broad powers to correct errors, make any other alteration and issue a new certificate so corrected, including any such correction or alteration in place of the existing certificate, pursuant to s 78A, s 220(f) and Part 19A. That power extends to the variation and extinguishment of easements, including a power to extinguish easements without the consent of persons affected pursuant to s 90B.

77 Section 220(f) of the RPA provides:

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[43] *Gale on Easements* 20th ed. 2017 at [1-58].

> The Registrar-General may exercise the following powers:
>
> …
>
> (f) **To correct errors**
>
> the Registrar-General may, upon such evidence as the Registrar-General considers sufficient—
>
> (i) correct errors, or update information recorded, in—
>
> (A) the Register Book;
>
> (B) a certificate;
>
> (C) any entry in the Register Book or a certificate;
>
> (D) any plan of division or other plan in the Lands Titles Registration Office; or
>
> (ii) make any entry or notation in or upon the Register Book, a certificate, plan of division or other plan that has been erroneously omitted;
>
> Every certificate or entry so corrected or supplied shall have the like validity and effect as if such error had not been made or such entry omitted. In exercising his or her powers under this paragraph the Registrar-General may disregard any difference between the dimensions of boundaries as stated in any certificate or in the Register Book or in entries made therein respectively and the actual dimensions of such boundaries as found by admeasurement on the ground;

78 KI Seaport relies upon a line of High Court authority commencing with *Pirie v Registrar-General*[44] through to *Parramore v Duggan*[45] and subsequent superior court judgments in *Rogers v Resi-Statewide Corporation Ltd (No 2),*[46] *Owners of East Fremantle Shopping Centre West Strata Plan 8618 v Action Supermarkets Pty Ltd*[47] and *Netherby Properties Pty Ltd v Tower Trust Ltd.*[48] It submits that these cases are authority contrary to the proposition that the registration of an invalid interest on the title makes enforceable that interest by reason of the doctrine of indefeasibility. It submits that if the registered interest, such as an easement, is invalid then its registration cannot cure the defect and it is and remains unenforceable. KI Seaport contends that based on the provisions of the RPA and the authorities it relies upon, the result does not depend on bringing the registered interests within the express qualifications to indefeasibility provided by s 69 of the RPA.

79 I do not accept this submission.

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44 [1962] HCA 58, (1962) 109 CLR 619.
45 [1995] HCA 21, (1995) 183 CLR 633.
46 [1991] FCA 535, (1991) 32 FCR 344.
47 [2008] WASCA 180, (2008) 37 WAR 498.
48 [1999] SASC 247.

80 The fundamental principle of the Torrens system is that the title created by registration is indefeasible. Indefeasibility is subject to limited exceptions including fraud, forgery, short-term leases and specific overriding statutes.[49]

81 The rights and liberties enjoyed by Abstraxion as the registered proprietor of lot 50 were not created under, or conferred by, an instrument registered on the title to the lot comprising pieces 51 and 52. Rather, easement B was noted in the plan of division and that section of the application for deposit of a plan of division entitled "Schedule of Easements Created by Deposit of the Accompanying Plan of Division", under which lot 50 and the lot comprising pieces 51 and 52 were created.[50]

82 Pursuant to s 223LE of the RPA, deposit of the plan of division in the Lands Titles Office had the automatic effect of vesting in Mr Anderson, as the registered proprietor of lot 50, the rights and liberties over that portion of piece 51 marked B on the plan.[51] The Registrar-General subsequently issued Certificates of Title recording easement B on the title to the lot comprising pieces 51 and 52, *qua* the servient tenement, and the title to lot 50, *qua* the dominant tenement.

83 Easements may be expressly granted or reserved in respect of Torrens title land and may be entered on the Certificate of Title of the dominant and servient tenements pursuant to s 81 and s 96 of the RPA. Where easements are so entered, the easement is binding on all future purchasers of the servient tenement.[52]

84 Central to consideration of this issue is the judgment of the High Court in *Parramore v Duggan*.[53]

85 *Parramore v Duggan* stands as authority for the proposition that where an easement in favour of the dominant tenement is registered on the Certificate of Title of the servient tenement, the easement is indefeasible. Once registered on the title of the servient tenement the easement is enforceable over that tenement.[54] Pursuant to s 69 of the RPA, Abstraxion's title to lot 50 is absolute and indefeasible, subject only to the limited and specific qualifications in s 69, e.g., fraud.

86 Section 69 in its terms exhaustively provides the limited qualifications to the principle of indefeasibility of title subject to the registration of other interests.

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[49] *Epworth Group Holdings Pty Ltd v Permanent Custodians Ltd* [2011] SASCFC 32 at [39]-[41]; *Perebo Pty Ltd v Wayville Residential Investments Pty Ltd & Ors* [2019] SASC 35 at [34].

[50] See BD 29 and BD 62.

[51] The same outcome may also have been achieved under s 67 of the RPA when the deposited plan was noted in the register book.

[52] *Parramore v Duggan* [1995] HCA 21, (1995) 183 CLR 633; *Chiu v Healey* [2003] NSWSC 857 at [24].

[53] [1995] HCA 21, (1995) 183 CLR 633.

[54] *Chiu v Healey* [2003] NSWSC 857 at [24].

87 It is the content of the register itself which vests title and not the documents or historical facts which led to the registration which determines the nature and extent of the title.[55] Further, pursuant to s 51A and s 51D of the RPA, the Certificates of Title constitute conclusive proof that the easement exists and that Abstraxion enjoys the rights and liberties conferred under the easement as registered proprietor of lot 50. Toohey J in *Parramore* said that a similar provision to s 51A and s 51D of the RPA in the *Land Titles Act 1980* (Tas), namely s 106(1), prevents a collateral attack upon the existence of an easement to which the title refers.[56]

88 In *Breskvar v Wall*[57] Barwick CJ said:[58]

> The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause of reason for which the instrument is void.

89 In *Westfield v Perpetual Trustee* the High Court underlined the importance in litigation respecting title to land under the Torrens system of the principle of indefeasibility[59] expounded in particular in *Breskvar v Wall.*

90 As Brennan J (as he then was) points out in *Parramore v Duggan* the essential characteristic of the Torrens system of registered title is not a system of registration of title but a system of title by registration.[60] The register is both conclusive and exhaustive. As the High Court makes clear in *Westfield Management Ltd v Perpetual Trustee Co*, searches and investigations beyond the register should be unnecessary.[61]

91 KI Seaport seeks to rely upon *obiter* remarks of McHugh J in *Parramore v Duggan,* where he said:[62]

> The respondent also contended that the indefeasibility of the appellant's title is subject to the right of the Recorder to call in the appellant's title and record the easement to which the appellant's land was subject before its conversion to Torrens title. Section 139 of the Act provides that the Recorder may, upon such evidence as appears to him sufficient, correct errors or supply omissions in the Register and may "call in" a certificate of title for that purpose. Section 163 of that Act empowers the Recorder to "call in" the

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55 *Lee v Coffee Republic Pty Ltd* [2006] TASSC 6 at [9].
56 [1995] HCA 21, (1995) 183 CLR 633 at 643.
57 [1971] HCA 70, (1971) 126 CLR 376.
58 [1971] HCA 70, (1971) 126 CLR 376 at 385-386.
59 [2007] HCA 45 at [38], (2007) 233 CLR 528 at 539.
60 [1995] HCA 21, (1995) 183 CLR 633 at 635.
61 [2007] HCA 45 at [38]-[39], (2007) 233 CLR 528 at 539.
62 [1995] HCA 21, (1995) 183 CLR 633 at 652-653.

> certificate of title' 'for the purpose of registration or of being, cancelled, corrected or otherwise dealt with" in a number of specified circumstances. One circumstance is that:
>
> > "(e) it is necessary for him to have the certificate of title ... for the purpose of registering a dealing, or of cancelling, correcting, or otherwise dealing with the certificate."
>
> No doubt it is arguable that an error that is correctable by the Recorder is an exception to indefeasibility and that it may be proper, depending upon all the circumstances of a particular case, to call in a certificate and correct an error even when it means subjecting the title, evidenced by the certificate, to a hitherto unrecorded interest on the folio. But even if the major premise of the argument is correct, the minor premise depends upon the particular facts and circumstances of the case, and they are not found or recorded in the special case. More than that, the Recorder is not a party to this appeal. To seek to determine the rights of these parties in proceedings to which the Recorder is not a party would be highly inappropriate and probably an exercise in futility.

92 Not only are the remarks *obiter* and not adopted by any other member of the Court, but they go no further than the expression of McHugh J's opinion that s 163 of the *Land Titles Act 1980* (Tas), a provision in similar terms to s 220 of the RPA, gives rise to an argument that an error that is correctable by the Registrar is an exception to indefeasibility. However, McHugh J does not decide the point.

93 *Pirie v Registrar-General*[63] stands for the proposition that the Registrar-General is under a duty to keep the register book clear of any notification not authorised by law. The Registrar-General not only has a power but also a duty to correct errors in the register, since a system that depends so completely on the register cannot function properly unless the register is accurate.[64] However, this is subject to the limits on the power of the Registrar-General conferred by s 220(f) of the RPA. The Registrar-General exercises the power to correct errors only to correct obvious clerical and administrative errors.[65] This accords with a long-settled judicial view on the limits of the power: it is not the Registrar-General's role, under the guise of correcting the register, to adjudicate conflicting claims to land.[66] Section 220(f) is in the nature of a "slip" provision. Nor can the power to correct be interpreted to impinge on indefeasibility.[67]

94 KI Seaport's reliance upon the judgment of von Doussa J in *Rogers v Resi-Statewide Corporation Ltd (No 2)*[68] is misplaced. In that case the Court

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63 [1962] HCA 58, (1962) 109 CLR 619.

64 *Pirie v Registrar-General* [1962] HCA 58, (1962) 109 CLR 619 at 623, 644; *Sahade v Owners Corporation SP 62022* [2013] NSWSC 1791 at [45].

65 *Butt's Land Law* 7th ed. (2017) 12.1350.

66 *State Bank of New South Wales v Berowra Waters Holdings Pty Ltd* (1986) 4 NSWLR 398 at 403; *Quach v Marrickville Municipal Council (No 1 & 2)* (1990) 22 NSWLR 55 at 60.

67 *Sahab Holdings Pty Ltd v Registrar-General* [2011] NSWCA 395 at [185] and [193] overturned on appeal but not on this point in *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd* [2013] HCA 11, (2013) 247 CLR 149.

68 [1991] FCA 535, (1991) 32 FCR 344.

exercised the power conferred by s 64 of the RPA to direct the Registrar-General to cancel the registered mortgage because the registration had been obtained by forgery, thereby enlivening one of the exceptions in s 69 of the RPA. However, von Doussa J held that the power conferred by s 64 is circumscribed. It is not a power exercisable at large but one limited to cases where such a proceeding is not expressly barred by s 69.[69] Section 64 confers an ancillary power on the Court to make effective its grant of substantive relief. As KI Seaport has failed in its application for a declaration that easement B is invalid, s 64 does not confer a stand-alone source of power to impugn the validity of the easement. This is not a case that falls within one of the exceptions to indefeasibility in s 69. This distinguishes this case from *Rogers v Resi-Statewide.*

95 In *Owners of East Fremantle Shopping Centre West Strata Plan 8618 v Action Supermarkets Pty Ltd*[70] Buss JA, with whom McLure JA and Murray AJA agreed, held that it was reasonably arguable that a registered lease or licence if illegal, void or unenforceable, did not immunise the registered interest from the consequences of a breach of s 20(1)(a) of the *Town Planning and Development Act 1928* (WA) (the Town Planning Act).[71] This *obiter* observation appears to be founded on the proposition that the Town Planning Act may qualify or override rights which a registered proprietor would otherwise enjoy under the Western Australian equivalent to the RPA. However, in South Australia s 6 of the RPA provides that subsequent legislation can only override the RPA where the legislation expressly provides that it applies "notwithstanding the provisions of the *Real Property Act 1886".* In any event, the case appears to have been decided *per incuriam* as there is no reference to the High Court's judgment in *Parramore v Duggan*.

96 Likewise, *Netherby Properties Pty Ltd v Tower Trust Ltd*[72] was decided without reference to *Parramore v Duggan.*

97 For these reasons, had I found easement to be invalid at common law, I would have found that nonetheless, as a result of its registration, absolute and indefeasible title to it has been conferred upon Abstraxion.

Estoppel

98 Abstraxion also contends that KI Seaport is estopped from now asserting that easement B is not a valid easement. In the circumstances it is unnecessary to decide this question. I should indicate however that had it been necessary to determine the question, I would not have found that KI Seaport was estopped in all the circumstances of the case.

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69 *Rogers v Resi-Statewide Corporation Ltd (No 2)* [1991] FCA 535, (1991) 32 FCR 344 at 351.
70 [2008] WASCA 180, (2008) 37 WAR 498.
71 [2008] WASCA 180 at [33], (2008) 37 WAR 498 at 509.
72 [1999] SASC 247.

99 Abstraxion contends that KI Seaport is estopped from asserting that easement B is not a valid easement by reason of its conduct in remaining silent about the invalidity for some four years and, in particular, prior to Abstraxion acquiring lot 50. It relies upon the doctrine of equitable estoppel by silence.

100 In *Waltons Stores (Interstate) Ltd v Maher*,[73] Brennan J (as he then was) said:[74]

> Silence will support an equitable estoppel only if it would be inequitable thereafter to assert a legal relationship different from the one which, to the knowledge of the silent party, the other party assumed or expected… What would make it inequitable to depart from such an assumption or expectation? Knowledge that the assumption or expectation could be fulfilled only by a transfer of the property of the person who stays silent, or by a diminution of his rights or an increase in his obligations. A person who knows or intends that the other should conduct his affairs on such an assumption or expectation has two options: to warn the other that he denies the correctness of the assumption or expectation when he knows that the other may suffer detriment by so conducting his affairs should the assumption or expectation go unfulfilled, or to act so as to avoid any detriment which the other may suffer in reliance on the assumption or expectation. It is unconscionable to refrain from making the denial and then to leave the other to bear whatever detriment is occasioned by non-fulfilment of the assumption or expectation.
>
> [Citations omitted]

101 In order to make good the estoppel Abstraxion must prove first that KI Seaport had knowledge that Abstraxion was negotiating to purchase lot 50 from Mr Anderson and second that, if Abstraxion acquired the land, it intended to use easement B for its benefit, and in those circumstances remained silent allowing Abstraxion to conduct itself on the assumption or expectation that easement B was a valid easement.

102 In my view Abstraxion's claim fails at this point.

103 Abstraxion executed a contract to purchase lot 50 from Mr Anderson in mid-February 2018. The evidence rises no higher than that at the time of the sale of lot 50 by Mr Anderson to Abstraxion, KI Seaport suspected that Abstraxion was the purchaser. There was no evidence that prior to disclosure to KI Seaport of the fact of the sale of lot 50 to Abstraxion, KI Seaport knew Abstraxion was in negotiations with Mr Anderson to acquire that land. On the contrary, the evidence is that KI Seaport was in negotiations with Mr Anderson to purchase lot 50. In the circumstances equity did not oblige KI Seaport to warn Abstraxion that if it proceeded with the purchase of lot 50 KI Seaport asserted that easement B was invalid. The evidence does not permit a finding to be made that KI Seaport assumed or expected Abstraxion to proceed to purchase the land on the basis that easement B was invalid. There is simply no evidence that supports a finding that prior to Abstraxion entering into a contract with Mr Anderson to

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73 [1988] HCA 7, (1988) 164 CLR 387.
74 [1988] HCA 7, (1988) 164 CLR 387 at 428.

purchase lot 50, KI Seaport knew Abstraxion was to purchase the land. In those circumstances, equity would not oblige KI Seaport to warn Abstraxion, a prospective purchaser of which it had no knowledge, that it asserted easement B was not valid.

Does easement C not give effect to the intention of that easement such that what is recorded on the register involves an error or misdescription of the interests intended to be created on the subject land?

104 Easement C is described on the title to lot 50 as an easement in favour of pieces 51 and 52 for the transmission of electricity by underground cable. On the drawing, easement C runs along the northern boundary of piece 51 and lot 50 and terminates at the boundary of the Abstraxion other land. On the face of the register easements C and J do not connect.[75] KI Seaport contends this is a misdescription within the meaning of s 69(d) of the RPA. It submits it should be corrected by way of a declaration and an order pursuant to s 64 directing the Registrar-General to correct the register.

105 Easements C and J arise from two separate subdivisions of the land. The first occurred in 2001 when a single allotment was subdivided into two allotments consisting of the Abstraxion other land and an allotment comprising pieces 10 and 11 which are now the Abstraxion land and the KI Seaport land. This subdivision created easement J for electricity supply purposes for the benefit of the allotment that comprised pieces 10 and 11. The second subdivision occurred in 2013 and created, *inter alia,* easement C.

106 At that time there existed an electricity transformer in the north-eastern corner of lot 50.

107 The law may imply the grant or reservation of an easement when none was expressly granted or reserved. This usually occurs in accordance with the rule in *Wheeldon v Burrows.*[76] However, an implied grant may arise pursuant to the doctrine of common intention[77] or as a matter of necessity.[78]

108 KI Seaport contends that easement C does not, on its face, give effect to the intention of that easement being an easement for electricity supply purposes. It submits this is an unintended misdescription on the title and should be corrected. It submits that the objective circumstances evince Mr Anderson's intention, at the time of subdivision, to create an easement on lot 50 for the benefit of pieces 51 and 52 which would make continuous and effective easement J. In the alternative, KI Seaport contends that, by necessity, an easement should be recognised and created connecting easement C with easement J on the Abstraxion other land by relocating easement C on the Abstraxion land. In

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[75] See Appendix A to these reasons for a schematic diagram showing the two relevant easements.
[76] (1879) 12 Ch D 31.
[77] *Hall v Lund* (1863) 158 ER 1055; *Beck v Auerbach* (1986) 6 NSWLR 454 at 461.
[78] *Gibson v McGeorge* (1866) 5 SCR (NSW) 44; *Corporation of London v Riggs* (1880) 13 Ch D 798.

addition, KI Seaport contends that a statutory easement existed over the Abstraxion land connecting easement J with easement C at the time the application for the second subdivision was lodged. KI Seaport contends that by necessity an easement is created connecting the easements, with easement C running along and adjacent to the eastern boundary of the Abstraxion land with the Abstraxion other land thereby making easement C continuous and effective and consistent with the statutory easement that relates to the lot 50 electricity infrastructure.

109 KI Seaport contends that at the time of the second subdivision it was intended that three-phase power would be available to it via easement J on the Abstraxion other land to support aquaculture and other potential uses of the subdivided land being the Abstraxion land and the KI Seaport land. Upon the subdivision an easement would be created over the Abstraxion land, namely, easement C, that would connect the KI Seaport land via the Abstraxion land to the three-phase power supply available via easement J.

110 It contends that the purpose of easement C is to connect the KI Seaport land to the electricity supply on easement J. In order to give effect to this purpose it is necessary for there to be an easement which connects easement C and J. The absence of that connection means that KI Seaport is unable to enjoy the benefit of easement C as originally intended.

111 Abstraxion contends that there is no proper basis to find that there was an intention to connect easements C and J and no proper basis to find the existence of an easement by necessity.

112 First, Abstraxion submits that there is no evidence that Mr Anderson had an intention to put piece 51 to some definite and particular use for which it was necessary to grant an easement connecting easement J at the time he applied to subdivide what is now lot 50 and pieces 51 and 52, nor at the time that he created easement C.

113 I do not accept this submission.

114 The grant of an easement may be implied where the implication is needed to give effect to the common intention of grantor and grantee as to the use that the grantee will make of the land.[79] The implication depends not merely on the construction of the terms of the grant but on the circumstances under which the grant was made.[80] The implication must be inherent in the very nature of the transaction itself.[81] The parties must have intended the land granted to be used in some particular manner.[82] Their intention must have been unqualified.[83]

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79 *Hall v Lund* (1863) 158 ER 1055; *Beck v Auerbach* (1986) 6 NSWLR 454 at 461.
80 *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634 at 646.
81 *R J Finlayson Ltd v Elder Smith & Co* [1936] SASR 209 at 234.
82 *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634 at 647.

115 The reservation of an easement may also be implied where the implication is needed to give effect to the parties' common intention as to the use that the grantor will make of the retained land.[84] However, the law does not lightly imply the reservation of such an easement. This is because a vendor who wishes to reserve an easement could do so expressly. The implied reservation involves the *ex post facto* imposition of a burden that the vendor could have imposed expressly,[85] presumably at the cost of a reduced sale price. The circumstances must give rise to a necessary inference of an intention common to both parties that the grantor should have an easement reserved in his or her favour. "Necessary" is to be understood in the sense that the facts are not reasonably consistent with any other explanation, as distinct from merely being consistent with such an explanation. This is a substantially stricter test than the test adopted from implying terms into contracts.[86] The common intention must have been to reserve a right of a particular kind. No easement can arise where the nature and extent of the right is left unspecified.[87]

116 It is clear on the evidence that in 2013 when easement C was created it was intended to burden lot 50 in favour of pieces 51 and 52 for the transmission of electricity by underground cable.[88] This is reflected in the conditions of subdivision approval which refers to the granting of an easement "where necessary" to piece 51 over lot 50 to obtain connectivity to three-phase power supply.[89] It was noted by Council that at that time the land obtained three-phase power from easement J.[90] In those circumstances Council conditioned the application for subdivision upon piece 51 obtaining access to three-phase power from the Abstraxion other land.[91] Abstraxion puts two submissions in response. First, that Mr Anderson had not at that time formed an intention to use piece 51 for a purpose that required three-phase power and second, that the conditions of subdivision approval merely reflect the possibility that in future an easement would be granted where the supply of three-phase power to the KI Seaport land became necessary and piece 51 could not obtain three-phase power by any other means. I do not accept these submissions.

117 The evidence makes it sufficiently clear that easement C was granted for the purpose of transmission of electricity by underground cable to pieces 51 and 52. That was in a context where the existing easement J was granted in favour not only of lot 50 but pieces 51 and 52 as well.[92] Further, the Abstraxion submission imposes upon the phrase "where necessary" a meaning that is not

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83 See, e.g., *Shrewsbury v Adam* [2005] EWCA Civ 1006 at [33], [2006] 1 P&CR 27 at 481-482.
84 *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634 at 646-647.
85 *Wheeldon v Burrows* (1879) 12 Ch D 31 at 49, 59; *Liddiard v Waldron* [1934] 1 KB 435.
86 *Peckham v Ellison* (1998) 79 P&CR 276 at 291.
87 *Chaffe v Kingsley* (1999) 79 P&CR 404 at 417.
88 BD 30 p 671.
89 BD 26 p 660.
90 BD 26 p 646.
91 BD 26 p 646, 648, 649 and 651.
92 BD 30 p 671.

intended. The use of the phrase in the conditions of subdivision approval means no more than that the grant of the easement should be over that part of the land necessary to obtain three-phase power supply to piece 51. It does not make the grant conditional upon three-phase power only being capable of being supplied by the easement, such that the grant is not made if three-phase power can be supplied to piece 51 by some other means. Finally, I am satisfied that at the time of the subdivision Mr Anderson intended to create an easement which would provide three-phase power from easement J over lot 50 to piece 51. I am satisfied that Mr Anderson intended to comply with the conditions of the subdivision approval. That is a natural inference to draw from the evidence that he wished to undertake the subdivision.

118 I do not accept the submission that there is no misdescription and easement C accurately reflects the intentions of Mr Anderson because of the location of an electricity transformer in the north-eastern corner of lot 50. The evidence does not permit a finding that the existence of the transformer permitted the supply of three-phase power from lot 50 to piece 51. The evidence that Mr Anderson gave instructions to Mr Frankiw, the licenced surveyor he used for the purposes of preparation of the application for the deposit of a plan of division, is intractably neutral. Mr Anderson's instruction to Mr Frankiw that easement C was to be "10 metres wide on the northern boundary of allotment 50 and piece 51" is not inconsistent with an intention that easement C should connect to easement J. At the end of the day, the evidence is that the only source of three-phase power from lot 50 was easement J. The facts are not reasonably consistent with any explanation other than that it was intended at the time of subdivision that easement C connect with easement J.

119 On the other hand, the existence of a statutory easement seems to me to be irrelevant. A statutory easement in favour of SA Power Networks existed over the Abstraxion land at the time Mr Anderson lodged the application for deposit of a plan of division (DP 92343). It was created pursuant to clause 2 of schedule 1 to the *Electricity Corporations (Restructuring and Disposal) Act 1999* (SA). An existing easement benefiting SA Power Networks cannot be said to benefit anybody else, including KI Seaport as the registered proprietor of piece 51.

120 Second, Abstraxion submits that the doctrine of common intention cannot apply to this case because Mr Anderson was the common owner of all the relevant land at the time of subdivision. The 2013 subdivision which created easement C did not involve the sale by Mr Anderson of any of the KI Seaport land, the Abstraxion land or other land. Abstraxion contends that this precludes the operation of the common intention doctrine first, because there are no parties who can have a common intention and second, because there was no severance of land between grantor and grantee at the time of subdivision.

121 I do not accept this submission.

122 In undertaking the subdivision, Mr Anderson granted an easement over lot 50. He intended to create an easement benefiting piece 51 by providing three-phase electrical power to that land from the supply available on easement J. This easement was intended not only to benefit piece 51 but to burden lot 50. But this easement was misdescribed. The doctrine of common intention is predicated upon the existence of a common intention at the time of severance. However, the doctrine of common intention is to be understood in the context of the *Re Ellenborough Park* requirement that one of the essential characteristics of an easement is that the owners of the dominant and servient tenements must be different persons. But that requirement has been modified by statute. Section 90C(1) of the RPA provides that a person may be the proprietor of an easement and the servient land that is subject to the easement. It follows that for the purposes of coherence in the law where the circumstances prescribed by s 90C exist the doctrine of common intention can apply where the same person owns the dominant and servient tenements. What is critical is the existence of the intention which gives rise to the implication of an easement. Easements may impliedly be created by the circumstances under which the grant was made.[93] Here it was intended that upon the subdivision an easement should be created to benefit piece 51 and burden lot 50 by permitting the supply of three-phase power to piece 51 from easement J across lot 50. The easement that was created and entered on the register does not reflect that intention. I am satisfied that for the purpose of s 69(d) of the RPA the easement has been misdescribed. This is significant because KI Seaport is invoking a statutory remedy. It applies to the Court for a direction to be given to the Registrar-General pursuant to s 64 of the RPA to correct the misdescription of easement C on the certificate of title. Even if the doctrine of common intention could not strictly apply to the circumstances of this case, I am satisfied that easement C has been misdescribed for the purpose of s 69(d) of the RPA on the basis that it had been intended that easement C would connect with easement J when the easement was created. In those circumstances, it is proper that the jurisdiction of the Court be invoked to correct the register.

123 Abstraxion seeks to characterise the misdescription of easement C as an unregistered easement. Easement C and easement J are both recorded on the title for pieces 51 and 52 and on the title for lot 50. In these circumstances the submission of Abstraxion that there is no registered easement must be rejected. Easement C is a registered easement, it is merely misdescribed. Easement C was recorded on the title of lot 50 and easement J was recorded of lot 12 prior to Abstraxion becoming the registered proprietor of these lands. KI Seaport does not seek the creation of a new easement but merely seeks the correction of what is misdescribed on the relevant certificates of title. It seeks to have the drawing corrected in such a way as to connect easement C with easement J to give effect to the intention that lot 50 be supplied with three-phase power from easement J. The misdescription should be corrected.

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93 *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634 at 646.

124 This case falls within the exception to the principle of indefeasibility enshrined in s 69(d). KI Seaport is entitled to the declaration it seeks because easement C has been misdescribed on the title. Accordingly, the Court should direct the Registrar-General to correct the Certificate of Title to make effective its grant of substantive relief.[94]

125 In the circumstances, I need not decide whether by necessity an easement should be recognised and created connecting easement C and J. I indicate however in my view an easement by necessity does not exist in this case.

126 An easement of necessity cannot be implied unless the easement is absolutely necessary,[95] that is to say the land cannot be used without the easement.[96] While there are some New South Wales authorities which have suggested something less than absolute necessity may suffice,[97] I agree with the learned authors of *Butt's Land Law* that the better view is that it is not sufficient for an easement to be reasonably necessary or necessary for the reasonable enjoyment of the land.[98] The requirement for absolute necessity distinguishes easements of necessity from easements of common intention implied to give effect to an intention as to the use to be made of land granted or retained. In the latter category of implied easement, the easement need only be reasonably necessary for the enjoyment of the land in the way contemplated.[99] The requirement for absolute necessity means that the right claimed is essential for the use of the alleged dominant tenement and is not merely a matter of convenience.[100]

127 In this case the evidence does not support a finding that connecting easements C and J is necessary for KI Seaport to enjoy the supply of three-phase power. The evidence obtained from SA Power Networks demonstrates that in the future three-phase power could be obtained from other sources.[101]

Conclusion

128 On a proper construction of the grant, easement B does not amount to an exclusive use of the land and water situated on the servient tenement. It is a valid easement.

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94 *Rogers v Resi-Statewide Corporation Ltd (No 2)* [1991] FCA 535, (1991) 32 FCR 344.
95 *McLernon v Connor* (1907) 9 WALR 141 at 143 and 146-147.
96 *Titchmarsh v Royston Water Co Ltd* (1899) 81 LT 673 at 675; *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557 at 573; *Bolton v Clutterbuck* [1955] SASR 253 at 269; *MRA Engineering Ltd v Trimster Co Ltd* (1988) 56 P&CR 1 at 6 (CA); *Manjang v Drammeh* (1991) 61 P&CR 194 at 197 (PC).
97 *Parish v Kelly* (1980) 1 BPR 9394 at 9399-9401; *Lamos Pty Ltd v Hutchinson* (1984) 3 BPR 9350 at 9354-9355.
98 *Butt's Land Law* 7th ed. (2017) 9.410.
99 *Auerbach v Beck* (1985) 6 NSWLR 424 at 444; *Beck v Auerbach* (1986) 6 NSWLR 454 at 461 (CA).
100 *McLernon v Connor* (1907) 9 WALR 141 at 146-147.
101 See SBD 17.

129 However, I am satisfied that easement C has been misdescribed for the purpose of s 69(d) of the RPA. I direct the Registrar-General to correct the Certificate of Title to make effective the grant of substantive relief.

130 I otherwise dismiss the plaintiff's claims. I direct the parties to confer and provide minutes of order that reflect these reasons. I would hear the parties as to costs.

APPENDIX A