SUPREME COURT OF SOUTH AUSTRALIA

(Court of Appeal: Civil)

COLOVIC v DAVEY & ANOR

[2021] SASCA 117

Judgment of the Court of Appeal
(The Honourable Justice Lovell, the Honourable Justice Doyle and the Honourable Justice Bleby)

21 October 2021

APPEAL AND NEW TRIAL - APPEAL - GENERAL PRINCIPLES

PROCEDURE - CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS - PLEADINGS - STRIKING OUT

REAL PROPERTY - TORRENS TITLE - INDEFEASIBILITY OF TITLE - CERTIFICATE OR FOLIO OF REGISTER AS CONCLUSIVE EVIDENCE

REAL PROPERTY - EASEMENTS - PARTICULAR EASEMENTS AND RIGHTS - RIGHTS OF WAY

This is an appeal from an interlocutory decision striking out paragraphs of the appellant's defence and summarily dismissing the appellant's cross claim.

The appellant is the registered proprietor of a parcel of land which lies adjacent to the respondents' land. The appellant's land is the servient tenement, and the respondents' land is the dominant tenement, in respect of an easement in the nature of a right of way marked 'A' on the Certificates of Title of both parcels of land.

The proceedings between the parties relate to an encroachment upon the appellant's land located within the area of the right of way marked A and consisting of a utilities area used by the respondents and a balcony forming part of the respondents' dwelling.

In their claim, the respondents seek to rely upon the right of way marked A. In his defence and cross claim, the appellant alleges that the right of way marked A no longer subsists, and that the respondents, by continuing to traverse the appellant's land in reliance on that right of way, are trespassing.

On Appeal from SUPREME COURT OF SOUTH AUSTRALIA (THE HONOURABLE JUSTICE PARKER) SCCIV-20-473

Appellant: DAVID COLOVIC Counsel: MR B ROBERTS QC - Solicitor: LK LAW

First Respondent: PETER JOSEPH DAVEY Counsel: MR P QUINN - Solicitor: RSA LAW

Second Respondent: JENNIFER ANNE DAVEY Counsel: MR P QUINN - Solicitor: RSA LAW

Hearing Date/s: 03/08/2021

File No/s: CIV-21-003472

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The respondents applied for orders that certain paragraphs of the appellant's defence and the entirety of the appellant's cross claim be struck out on the basis that there is no reasonable basis for the appellant's allegation that the right of way marked A no longer subsists.

The primary judge concluded that, by operation of the principle of indefeasibility, the easement continues to subsist until such time as the Registrar-General has exercised her power to vary or extinguish it under s 90B of the Real Property Act, and as such there is no reasonable basis for the appellant's case. The primary judge struck out the impugned paragraphs of the defence and summarily dismissed the cross claim.

The appellant appeals that decision on the basis that, among other grounds, the primary judge erred in concluding that the appellant's case was inconsistent with the principle of indefeasibility under the Torrens title system.

Held, per Doyle JA (Lovell and Bleby JJA agreeing), granting permission to appeal and allowing the appeal:

1. As the appellant's case turned upon a contention that the respondents' rights under the easement (and right of way marked A) had ceased to subsist by reason of a limitation in the terms of the easement that was incorporated by reference into the Register Book, it was not inconsistent with the principle of indefeasibility.

2. There is a reasonable basis for the appellant's case that the right of way marked A no longer subsists.

3. The orders made by the primary judge should be set aside and the respondents' interlocutory application dismissed.

Encroachments Act 1944 (SA) s 4; *Real Property Act 1886* (SA) s 51A, s 64, s 69, s 90B; *Transfer of Land Act 1958* (SA) s 73, referred to.
Duncan v Cliftonville Estates Pty Ltd [2001] NSWSC 968; *Davey v Colovic* [2021] SASC 7; *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528; *Deguisa v Lynn* [2020] HCA 39; *Barry v Fenton* [1952] NZLR 990; *Yip v Frolich* (2003) 86 SASR 162; *Frazer v Walker* [1967] 1 AC 569; *Breskvar v Wall* (1971) 126 CLR 376; *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (1971) 124 CLR 73; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604; *Duncan v Cliftonville Estates Pty Ltd* [2001] NSWSC 968; *Owners of Corinne Court 290 Stirling Street Perth Strata Plan 12821 v Shean Pty Ltd* (2001) 25 WAR 65; *Peacock v Custins* [2001] 2 All ER 827; *Jelbert v Davis* [1968] 1 WLR 589; *Harris v Flower* (1904) 74 LJ Ch 127; *Owners of Corinne Court 290 Stirling Street Perth Strata Plan 12821 Pty Ltd v Shean Pty Ltd* (2000) 23 WAR 1; *Brookville Pty Ltd v O'Loghlen* [2007] VSC 67; *Adelaide Brighton Cement Ltd v Hallett Concrete Pty Ltd* [2020] SASC 161, considered.

COLOVIC v DAVEY & ANOR
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Court of Appeal – Civil: Lovell, Doyle and Bleby JJA

1 **LOVELL JA:** I would allow the appeal. I agree with the orders proposed by Doyle JA and his reasons. I add the following remarks.

2 The right of way easement involved in this case is conditional. To use the shorthand expression adopted during the appeal, the right of way was operative until the area was "stopped up". The appellant contended that the area was "stopped up" and therefore the respondent was not entitled to use the easement under its own terms.

3 The expression "extinguished" was used, both before the Primary Judge and on appeal, somewhat loosely. Properly understood the appellant did not submit that if the area was "stopped up" the easement was "extinguished" in the sense that the easement was to be removed from the certificate of title. The appellant was seeking a declaration from the court that, on its own terms, the easement was no longer operative.

4 The Primary Judge found, correctly, that the existence of the easement was unequivocally recorded on both relevant certificates of title and thus contained in the Register Book. Although the Memorial noted on the respective certificates of title was not, of itself, part of the Register Book, its existence and specific location in the General Registry Office was clearly stated. It was thus incorporated onto the certificates of title by reference into the Register Book in the sense referred to by Barwick CJ in *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd*.[1] This was in contradistinction to the facts in *Deguisa v Lynn* where the High Court observed that the existence of a restrictive covenant had not been "notified on the original certificate of title" as required by s 69 of the *Real Property Act 1886* (SA).[2] In that case, the existence of the restrictive covenant and its terms were not incorporated into the certificate of title and were only ascertainable by searching for material extraneous to the Register Book.

5 Thus, in this case, the right of way and its terms were plainly recorded on the certificates of title and there was no need for a prospective purchaser to search for material extraneous to the Register Book to understand that the right of way had been granted and the conditions under which it was operative.

6 The Primary Judge found:

> It is no less inconsistent with the principle of indefeasibility that a prospective purchaser should be required to make inquiries extraneous to the Register Book to determine whether an easement had been stopped up as it is to require that a purchaser must seek

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1 (1971) 124 CLR 73 at 77–79.
2 (2020) 268 CLR 638.

> extraneous information about the terms of the restrictive covenants contained in a common building scheme.

7 I am unable to agree with the Primary Judge's conclusion in that regard. In *Deguisa v Lynn*, the High Court found that the certificate of title in question did not "notify" a prospective purchaser of the existence of the restrictive covenant or its terms.[3] Clearly the certificates of title in the case at bar notified a prospective purchaser both of the existence of the right of way and the conditions under which it operated.

8 The appellant here was seeking an order that the Court consider whether the easement, under its own terms (i.e. that it had been "stopped up"), was no longer operative. That is not a question of indefeasibility. The factual inquiry to be undertaken is not directed to the existence or terms of the easement but only to the question of whether the easement was "stopped up" and therefore, on its own terms, not operative. The appellant does not seek to contradict the terms of the easement. The Court can determine this factual matter without interfering with the concept of indefeasibility. No matter what facts a court finds on such an inquiry, the easement remains recorded on the certificate of title notifying prospective purchasers of its existence and its operative conditions.

9 In my view, there is a reasonable basis for the declaratory and injunctive relief sought by the appellant.

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[3] (2020) 268 CLR 638.

10 **DOYLE JA:** This appeal requires consideration of whether, and the extent to which, the Court may grant declaratory and injunctive relief in respect of limitations appearing in the terms of a registered easement.

11 The primary judge held that the nature of the Torrens title system, and the paramountcy of the indefeasibility of title within that system, do not permit the appellant to obtain the declaratory and injunctive relief he seeks in respect of the easement affecting the land of which he is the registered proprietor, being relief which is predicated upon the right of way included within the grant of the easement having ceased to subsist. As a result of this conclusion, the primary judge summarily dismissed the appellant's cross claim seeking that relief, and struck out the paragraphs of his defence which were predicated upon the asserted right of way having ceased to subsist.

12 The appellant appeals as of right against the primary judge's order summarily dismissing his cross claim. He also seeks leave to appeal against the order striking out various paragraphs of his defence. By order of this Court, the application for leave to appeal was referred for hearing and determination in conjunction with the appeal. Upon the hearing of the appeal, counsel for the respondent conceded the appropriateness of a grant of leave. This was a proper concession for him to have made given that the issues raised by the defence overlap with the issues raised by the cross claim, and involve consideration of some relatively difficult and important matters of legal principle.

13 For the reasons which follow, I am satisfied that the allegations made, and relief sought, by the appellant in his pleadings are not inconsistent with, or otherwise precluded by, the operation of the Torrens title system. At the very least that is arguably so. I would therefore allow the appeal.

Background

14 The land that is the subject of these proceedings consists of two adjoining tenements on Tynte Street, North Adelaide. The appellant, Mr Colovic, is the registered proprietor of 178 Tynte Street, being the land described in Certificate of Title Volume 5830 Folio 246. He acquired that property in December 2014. The respondents, Mr and Mrs Davey, are the registered proprietors of 180 – 182 Tynte Street, being the land described in Certificate of Title Volume 5172 Folio 957. The respondents acquired that property in November 2015. Tynte Street runs approximately east / west, and the appellant's land is to the east of the respondents' land.

15 The appellant's land is the servient tenement, and the respondents' land is the dominant tenement, in respect of an easement in the nature of a right of way marked "A" on the Certificates of Title for both parcels of land. This right of way runs from Tynte Street, up the western side of the appellant's land (and hence along its boundary with the respondents' land). It ultimately intersects with another easement in the nature of a right of way which runs parallel to Tynte

Street, along the northern boundary of the respondents' land and through to Mansfield Street. That other right of way is marked "B" on the Certificate of Title for the respondents' land.

16 The Certificate of Title for the respondents' land, under the heading "Easements", and after referring to an unrelated drainage easement, refers to the rights of way marked A and B in the following terms:

> Rights of way over the land marked A or in the event of A being discontinued stopped up and no more used as a road then over the land marked B appurtenant only to the land marked X (GRO No. 8 Book 101).

17 The Certificate of Title for the appellant's land, in addition to some unrelated easements, contains the following reference to the right of way marked A:

> Right(s) of way over the land marked A (GRO No.8 Book 101).

18 The rights of way are thus described by reference to the Memorial located in General Registry Office No. 8 Book 101. They are described in the following terms in the Memorial:

> All that piece of land part of the two several one acre sections of Town Land No. respectively 861 and 862 in the provincial survey marked with the letter A and containing in front to Tynte Street on the south side thereof 35 feet and the same in the rear abutting on a certain private road a way of the width of ten feet leading into another private road a way of the width of fifteen feet heading into Tynte Street and in depth that each side thereof eighty feet and which said piece of land contains thirty two feet and six inches of the South Western portion of the Town Acre No 862 be the said several dimensions respectively a little more or less. Together with a right of roadway along and across other portions of the said Town Acre No 862 lying on the east side of the said piece of land now used as a private road or in the event of such road being discontinued stopped up and no more used as a road then along and across the said private road of the width of 10 feet leading along the northern boundary of the said piece of land. (emphasis added)

19 When read in conjunction with the adjoining plan, it is evident that the reference to the "right of roadway along and across other portions of the said Town Acre No 862 lying on the east side of the said piece of land now used as a private road" is a reference the right of way marked A. The reference to the "private road of the width of 10 feet leading along the northern boundary of the said piece of land" is a reference to the right of way marked B. On its terms, the Memorial thus contemplates that there will be a right of way (A) over the appellant's land, or, in the event of such road being "discontinued stopped up and no more used as a road," a separate right of way (B) which runs parallel to Tynte Street through to Mansfield Street.

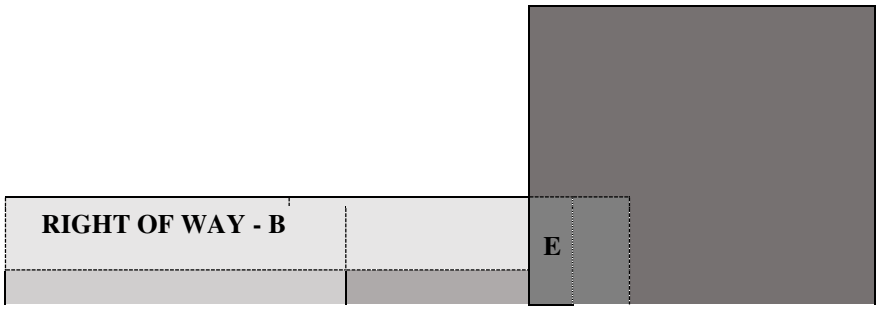
20 The appellant's position is that the right of way marked A has been "discontinued stopped up and no more used as a road" by reason of a garage having been erected towards the rear of the appellant's land, and the right of way no longer being used as a road. The appellant's primary case is that as a result of

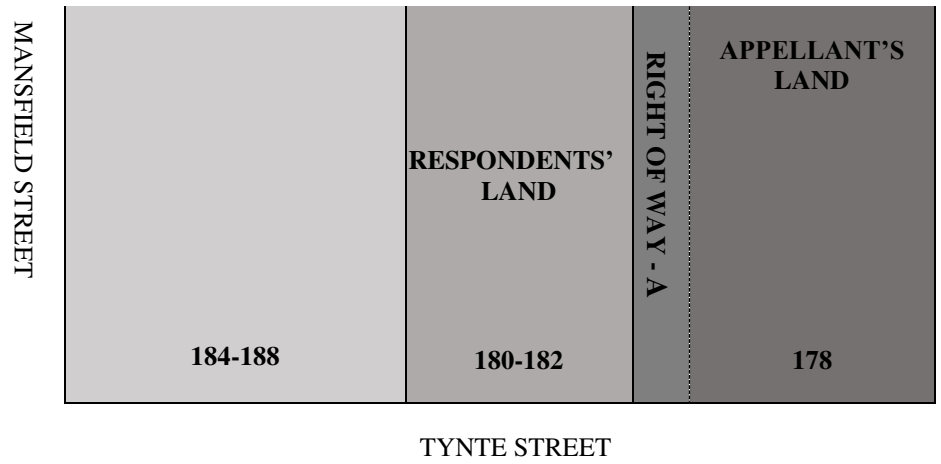
this, that right of way has, on its own terms, ceased or expired, and is forever at an end. On occasions, the appellant has expressed this position in terms that the right of way marked A has ceased to subsist.

21 The appellant's primary case is predicated upon an interpretation of the Memorial to the effect that the stopping up is a once and for all event, such that once it has occurred, the right of way marked B comes into effect, and the right of way marked A is forever at an end. Before the primary judge the appellant also articulated an alternative case to the effect that even if the stopping up is not a once and for all event, nevertheless, that event having occurred, the right of way marked A remains suppressed for such time, and for so long as, it is stopped up.

22 The issues between the parties concerning the right of way marked A arose in the context of a dispute between them in relation to an encroachment upon the appellant's land ('the Encroachment'). An identification survey report prepared for the respondents by a licensed surveyor indicates that the Encroachment occupies a rectangular area of 3.5 metres by 0.76 metres, located within the area of the right of way marked A. More particularly, the Encroachment is in the north western corner of that right of way, where the boundary between the parties' properties is displaced to the west by 0.76 metres for a distance of 3.5 metres from the northern boundary of the respondents' land. The respondents have a two storey dwelling on their land, which had been built prior to their acquisition of that land. At ground level, the Encroachment consists of a utilities area which had been installed by a previous owner, and which includes an air conditioning plant, sewage and storm water outlets, and electricity and gas connections. At the first floor level, the Encroachment consists of a balcony forming part of the respondents' dwelling.

23 The parties' land, the rights of way marked A and B, and the area the subject of the Encroachment (marked "E"), are depicted in the following stylised diagram:





24 In the course of applying for development plan consent from the City of Adelaide for work to be performed on the balcony area of the first floor of their home, the respondents were informed of the Encroachment.

25 In July 2019, the appellant wrote to the City of Adelaide opposing the application for development plan consent. He maintained his objection at a meeting of the Council Assessment Panel in August 2019. The basis for the objection was the Encroachment.

26 The respondents attempted to resolve the issue that had arisen in relation to the Encroachment. In October 2019 they obtained a valuation report which valued the land the subject of the Encroachment at $2,000. In December 2019, the respondents sought a resolution on the basis that they would pay the appellant $3,000 in return for the appellant consenting to a transfer of the land the subject of the Encroachment from the appellant to the respondents, with a consequential realignment of the boundary between their properties.

27 The appellant did not accept this proposal, and the respondents issued proceedings in this Court seeking relief in respect of the Encroachment. The respondents' statement of claim recites various matters of detail in relation to the parties' respective properties (including reference to the right of way marked A) and the existence of the Encroachment. It then alleges that at the date of acquisition of their property, the respondents were not aware of the Encroachment upon the appellant's land. It also alleges that the respondents utilise the right of way for the purposes of accessing the utilities area, as well as for the purposes of waste removal and other such necessary home living requirements.

28 After setting out their attempts to resolve the issue in relation to the Encroachment, the respondents seek relief, pursuant to s 4 of the *Encroachments Act 1944* (SA), requiring the transfer of the land the subject of the Encroachment to the respondents and a determination of the sum of any compensation payable to the appellant for this transfer.

29 The appellant filed a defence to this claim in which he opposed the relief sought by the respondents under the *Encroachments Act* on grounds which included allegations (in paragraphs 3.3, 4.3, 10 and 22 of the defence) to the effect that there is no subsisting right of way that would permit the respondents to access the utilities area that is the subject of the Encroachment, and that any access by the respondents to this area via the alleged right of way would constitute a trespass.

30 The appellant also filed a cross claim (being a counter claim against the respondents). The introductory paragraphs of the cross claim allege that the respondents have been traversing the appellant's land in purported reliance upon the right of way marked A; that this right of way has, on its terms, expired; and that the respondents are thereby trespassing on the appellant's land.

31 The cross claim then pleads in some more detail the basis for these allegations. In particular, after setting out some formal matters in relation to the parties' land and the right of way marked A, the appellant pleads that the right of way has been discontinued, stopped up and is no longer used as a road. In support of this allegation, the appellant pleads that the right of way marked A was formerly a private road that was used to provide access (in combination with the area comprising the right of way marked B) between Tynte Street and Mansfield Street; that the construction of the respondents' dwelling over a portion of the private road precluded it now being used in that way; and that the area comprising the right of way marked A is no longer used as a road or thoroughfare, and constitutes a private driveway providing access from Tynte Street to the appellant's garage.

32 The appellant pleads that, in the circumstances, the right of way marked A has, pursuant to its terms, "come to an end".

33 The appellant further pleads that despite this "cessation and consequential termination" of the right of way, the respondents have continued to pass over the appellant's land in purported reliance upon the right of way; that they have done so in order to access the utilities area; and that they have constructed a step on the appellant's land in order to facilitate that access. The appellant alleges that this conduct constitutes a trespass which the respondents will continue to perpetuate unless restrained.

34 In his prayer for relief, the appellant seeks orders to the following effect:

1. A declaration that the right of way marked A has been discontinued stopped up and is no more used as a road.

2. A declaration that the right of way marked A has ceased and is forever at an end.

3. An injunction restraining the respondents from passing onto the area marked A other than at the appellant's invitation.

4. A mandatory injunction requiring removal of the step which has been constructed upon the appellant's land.

5. A mandatory injunction requiring the removal of the utilities area insofar as it constitutes an encroachment on the appellant's land.

35 By application dated 2 September 2000, the respondents sought orders under the *Uniform Civil Rules 2020* (SA) striking out the paragraphs of the appellant's defence to which I have referred, and summarily dismissing or striking out his cross claim.

36 In the affidavit filed in support of this application, the respondents' solicitor explained that the basis for the application was a contention that there is no reasonable basis for the appellant's allegation in the defence and cross claim to the effect that the right of way marked A (referred to as the "right of way easement") no longer subsists, such that the respondents are liable in trespass. In support of their contention, the respondents' solicitor relied upon three propositions:

1. The right of way, or easement, referred to on the Certificates of Title for the parties' land provides an indefeasible interest in favour of the respondents by reason of s 69 of the *Real Property Act 1886* (SA).

2. The appellant has not sought to vary or extinguish the easement through the mechanism provided in s 90B of the *Real Property Act*.

3. For so long as the easement remains recorded on the Certificates of Title for the parties' land, the respondents are entitled to the use and benefit of the appellant's land so recorded.

37 The appellant opposed the application on the basis that his defence and cross claim did no more than seek to give effect to a limitation in the terms of the easement itself, and that giving effect to these limits (even to the point of granting relief predicated upon the easement having come to an end) was not inconsistent with the indefeasibility of interests under the Torrens title system. The appellant contended it was no barrier to the Court granting declaratory and injunctive relief giving effect to these limits that he had not sought to invoke the power of the Registrar-General under s 90B to vary or extinguish the easement. The appellant contended that the Registrar-General's power under this section is very narrow, and does not preclude the Court either giving effect to limitations in the terms of the easement itself, or indeed ordering that the Registrar-General do so under s 64 of the *Real Property Act* (albeit that the appellant does not, on the current version of his pleadings seek any relief under that section).

The primary judge's reasons

38 After setting out the principles governing the respondents' application to strike out, or summarily dismiss, the impugned paragraphs of the defence and the entirety of the cross claim, the primary judge addressed the merits of the respondents' substantive challenge to the appellant's case.

39 His Honour summarised the parties' submissions in relation to the merits, and explained that there were ultimately two issues to be determined. First, whether the Court can determine whether the easement has been extinguished, or whether that is a matter that only the Registrar-General can determine under s 90B of the *Real Property Act*. Secondly, if the Court can determine the extinguishment issue, whether that should be decided upon the respondents' interlocutory application or deferred until trial.

40 As will become clear, the primary judge framed the first of these issues in terms that does not quite correspond with what I consider to be the issues between the parties. In my view, the issue is better framed in terms of whether, and the extent to which, the Court may grant declaratory and injunctive relief in respect of limitations appearing in the terms of a registered easement; and, in particular, whether the Court may do so in circumstances where it is said that the easement has, on its own terms, come to an end,[4] but nevertheless remains on the title.

41 In any event, the primary judge commenced his analysis of the merits by considering whether, as the parties had accepted before him, a right of way by easement may contain a term that limits the duration of the easement. After referring to various authorities, including the reasons of Young CJ in Eq in *Duncan v Cliftonville Estates Pty Ltd*,[5] his Honour concluded that not only may the nature and extent of the rights conferred by an easement be limited, but also that there is no reason why the duration of an easement cannot also be limited.[6] There is no challenge to this conclusion on the appeal.

42 Next, the primary judge turned to the nature of the Torrens title system, as reflected in the *Real Property Act*. After referring to the essentiality of the principle of indefeasibility (as expressed in s 69 of the *Real Property Act*) to that system, his Honour referred to the recent decisions of the High Court in *Westfield Management Ltd v Perpetual Trustee Co Ltd*[7] and *Deguisa v Lynn*,[8] which his Honour described as reiterating that the Torrens title system was one of title by registration rather than the registration of title, and as reaffirming that it is an essential element of the system of indefeasibility that the Register Book must

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4 Or, on the appellant's alternative case, has been suppressed for so long as the right of way marked A remains stopped up.

5 *Duncan v Cliftonville Estates Pty Ltd* [2001] NSWSC 968.

6 *Davey v Colovic* [2021] SASC 7 at [53].

7 *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528.

8 *Deguisa v Lynn* [2020] HCA 39.

contain a complete record of all matters affecting title to land registered under the *Real Property Act*.

43 The primary judge distinguished the present case from the situation in *Deguisa v Lynn*, where the existence of the restrictive covenant sought to be relied upon had not been notified on the certificate of title, but was only ascertainable by searching for material extraneous to the Register Book. By contrast, in the present case, his Honour accepted that the existence and dimensions of the easement were recorded on the relevant certificates of title, with the terms of that easement (as recorded in the Memorial) incorporated by reference into the Register Book in the sense contemplated by the High Court.[9] His Honour concluded that the principle of indefeasibility thus applied to the easement as it has been expressed in the Memorial.[10] There is again no challenge to this conclusion on the appeal.

44 However, it was at this point in his analysis that the primary judge's reasons began to diverge from the appellant's submissions. In support of his contention that the Court can give effect to limitations appearing in the terms of an easement, and that this is not inconsistent with indefeasibility, the appellant relied upon the decision of the High Court of New Zealand in *Barry v Fenton*.[11] In that case, the Court gave effect to a limitation appearing in the terms of an easement that confined the right of way to vehicular traffic (as opposed to foot traffic). The primary judge distinguished *Barry v Fenton*:[12]

> It was not suggested in *Barry v Fenton* that the easement had come to an end. For that reason, it was not necessary for the Court to consider the principle of indefeasibility and the concomitant requirement that all matters affecting title to land be ascertainable from the Register Book.
>
> I consider that *Barry v Fenton* is distinguishable. The only issue in that case was whether, on its true construction, the easement permitted passage by foot or was restricted to vehicular movement. The question of extinguishment did not arise.

45 The primary judge then proceeded to invoke the reasoning of Besanko J in *Yip v Frolich*[13] in support of his conclusion that it would be inconsistent with the notion of indefeasibility under the Torrens title system for the Court to give effect to a contention that an easement had expired on its own terms in circumstances where it remained on the title. In that case, Besanko J held that the relevant easement had been abandoned at common law. However, after considering the operation of s 90B of the *Real Property Act* (which empowers the Registrar-General to extinguish an easement in certain circumstances), his Honour concluded that a registered easement remains enforceable for so long as

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9 *Deguisa v Lynn* [2020] HCA 39 at [56], [69], [70], referring to *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (1971) 124 CLR 73 at 77-79.

10 *Davey v Colovic* [2021] SASC 7 at [58].

11 *Barry v Fenton* [1952] NZLR 990.

12 *Davey v Colovic* [2021] SASC 7 at [61]-[62].

13 *Yip v Frolich* (2003) 86 SASR 162.

it appears on the title; that the Court cannot order its removal on the ground that it had been abandoned; and that under the *Real Property Act*, only the Registrar-General may extinguish an easement.[14]

46 The primary judge then summarised his reasons for concluding that there was no reasonable basis for the appellant's case as articulated in the appellant's defence and cross claim:[15]

> The effect of the submissions advanced by the [appellant] is that the easement has clearly come to an end on its own terms. That is because there is no factual dispute that it has been stopped up. Thus, the Court should give effect to the terms of the Memorial and find that the easement has been extinguished due to the occurrence of the defined event. … However, for the reasons that follow, I reject that analysis.
>
> The scheme of the RPA is that the Registrar-General has been given an express power in s 90B to vary or to extinguish easements in the circumstances referred to therein. The detailed and elaborate provisions included in the RPA for the extinguishment and variation of easements reflect the paramountcy of the principle of indefeasibility. Given that principle, I consider that I must adopt the same approach as that taken by Besanko J in *Yip v Frolich*. As his Honour said in that case, "the position under the RPA is that a registered easement remains enforceable for so long as it appears on the title. The court cannot order its removal …".[16]
>
> While Besanko J was dealing with a contention that an easement had been abandoned, rather than being extinguished on its own terms, his Honour's analysis was clearly founded upon the principle of indefeasibility of the registered title. That principle applies regardless of the cause of the alleged extinguishment. It would not be consistent with the indefeasibility principle, as affirmed by the High Court in *Deguisa v Lynn,* if a person searching the Register Book were required to make extraneous enquiries to determine whether a particular event had occurred so as to extinguish an easement.
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> The fundamental object of the RPA is to provide certainty of title. Thus, the Register Book, and it alone, will provide a purchaser "with the information necessary to comprehend the extent or state of the registered title of the land in question".[17] It is no less inconsistent with the principle of indefeasibility that a prospective purchaser should be required to make inquiries extraneous to the Register Book to determine whether an easement had been stopped up as it is to require that a purchaser must seek extraneous information about the terms of the restrictive covenants contained in a common building scheme.[18] Accordingly, I find that the easement continues until such time as it is removed from the respective certificates of title under s 90B of the RPA upon the Registrar-General being satisfied that the requirement of that section have been met.

47 Having concluded that the easement continues to subsist until such time as the Registrar-General exercises her power under s 90B of the *Real Property Act* to remove the easement, his Honour concluded that there was no reasonable basis for the appellant's case as articulated in the impugned paragraphs of his defence

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14 *Yip v Frolich* (2003) 86 SASR 162 at [49].
15 *Davey v Colovic* [2021] SASC 7 at [71]-[74].
16 *Yip v Frolich* (2003) 86 SASR 162 at [49].
17 *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528 at [5], *Deguisa v Lynn* [2020] HCA 39 at [4].
18 As was the situation in *Deguisa v Lynn* [2020] HCA 39.

and in his cross claim. His Honour thus struck out those paragraphs, and summarily dismissed the cross claim.

The appeal

48 On appeal, the appellant challenges several aspects of the trial judge's reasoning, as set out in the paragraphs extracted above. In particular, the appellant contends that the primary judge erred not only in distinguishing *Barry v Fenton*, but also in failing to distinguish *Yip v Frolich*. The appellant also contends that the primary judge erred in his approach to s 90B of the *Real Property Act*, both in failing to appreciate its narrow scope and in overlooking the Court's power under s 64 to direct the Registrar-General to remove an easement so as to give effect to an order of the Court.

49 Further, and in any event, the appellant contends that, properly understood, the principle of indefeasibility does not operate in the manner reflected in the primary judge's reasons. While accepting that it would be inconsistent with the indefeasibility of a registered easement to give effect to an earlier infirmity in that easement that was not reflected on the register (such as by reason of abandonment, in accordance the reasoning of Besanko J in *Yip v Frolich*), the appellant contends that an order giving effect to limitations that appear in the terms of the easement as notified on the Register would not in any way undermine the indefeasibility of the registered easement. And that would be true even if, as here, it would be necessary to have regard to extraneous information in order to determine whether that limitation has been transgressed.

50 In addressing the appellant's contentions, I intend to commence by making some general observations as to the operation of the principle of indefeasibility within the Torrens title system of land, before then addressing the permissibility of limitations in the terms of an easement and the Court's ability to give effect to them. I will then address the reasons of Besanko J in *Yip v Frolich*, and the appellant's submissions to the effect that it can be distinguished on the basis that it involved a contention that the Court should give effect to an earlier common law abandonment that was not reflected on the title, whereas the appellant here seeks merely to give effect to a limitation that appears in the terms of the easement (as recorded on the title).

51 Before addressing these matters, I mention in passing that the primary judge referred in his reasons to there being no factual dispute that the right of way marked A has been stopped up. The primary judge was mistaken about this. The respondents have not made any such concession. That said, the primary judge's slip in this respect is of no consequence because it is accepted that, for the purposes of the strike out and summary dismissal application, it was appropriate to assume in the appellant's favour that this could be established. In order to succeed in their application, the respondents were required to establish that, even assuming the right of way marked A has been stopped up, there was nevertheless no reasonable basis for the appellant's case that the Court could give effect to

this by making orders predicated upon the right of way no longer subsisting in circumstances where it still appeared on the certificates of title.

The Torrens title system and indefeasibility

52 An essential element of the Torrens title system, as enshrined in the *Real Property Act,* is the principle of indefeasibility of title expressed in s 69 of that Act. Under that section, the title of every registered proprietor of land is absolute and indefeasible, subject only to interests notified on the certificate of title and the limited qualifications set out in ss 69(a)-(i).

53 As the High Court reiterated in *Deguisa v Lynn*,[19] the Torrens title system is one of title *by* registration rather than registration *of* title. Further, it operates on the basis that the dealings recorded on the relevant certificate of title, together with the information appearing in the relevant folio of the Register Book, provide third parties (including a purchaser taking his or her title to the land from the registered proprietor) with "the information necessary to comprehend the extent or state of the registered title to the land in question."[20]

54 As the High Court summarised in *Deguisa v Lynn*:[21]

> The text of s 69 of the Act, the statutory context in which it is to be construed, and the authoritative judicial exposition of the purpose of the Act, combine to support the conclusion that a person dealing with a registered proprietor of land is not to be regarded as having been notified of an encumbrance or qualification upon the title of the registered proprietor that cannot be ascertained from a search of the certificate of title or from a registered instrument referred to in a memorial entered in the Register Book by the Registrar-General.

55 The essence of the principle of indefeasibility under the Torrens title system is thus that it prevents a registered interest being impugned by reference to (inconsistent) rights or interests that do not appear on the Register, or by reference to defects or infirmities in that title that do not appear on the Register. This is subject only to the exceptions identified in the *Real Property Act* (such as those listed in s 69), and any *in personam* claims that might bind the registered proprietor.[22] However, for the reasons developed later, it is important to appreciate that the principle of indefeasibility does not prevent the courts giving effect to limitations in the terms of a registered interest that appear on the Register.

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19 *Deguisa v Lynn* [2020] HCA 39 at [4]; citing *Frazer v Walker* [1967] 1 AC 569 at 581, 584-585 and *Breskvar v Wall* (1971) 126 CLR 376 at 385-387, 391, 397, 399-400, 413.

20 *Deguisa v Lynn* [2020] HCA 39 at [2], [4], [71]-[72], [88]-[89]; *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528 at [5]; *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (1971) 124 CLR 73 at 77-79.

21 *Deguisa v Lynn* [2020] HCA 39 at [9].

22 *Frazer v Walker* [1967] 1 AC 569 at 580, 585; *Breskvar v Wall* (1971) 126 CLR 376 at 384-385; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 637-638, 653; *Westfield Management Ltd v Perpetual Trustee Company Ltd* (2007) 233 CLR 528 at [43].

56 In order to attract the protection of indefeasibility, the terms of an easement must be recorded on the relevant certificate of title, or at least be incorporated by reference into the Register Book in the sense contemplated by the High Court in *Deguisa v Lynn*.[23] As mentioned earlier, there is no dispute in the present case that the terms of the easement appearing in the Memorial were incorporated into the Register Book.

Limitations in the grant of an easement

57 The primary judge held, and I agree, that the nature and extent of the rights conferred by an easement may be limited. In particular, an easement may be limited in its duration.[24] It may be limited as to its duration by the reference in its terms to a particular period of time. Alternatively, it may be limited as to its duration by the reference in its terms to the occurrence or existence of some event, state of affairs or use. The only requirement is that the limitation be drafted with sufficient clarity that the duration of the easement can be ascertained from the terms in which it was granted.

58 Authority for the above may be found in the reasons of Young CJ in Eq in *Duncan v Cliftonville Estates Pty Ltd.*[25] The issue in that case concerned the effect of an easement granted in the following terms:[26]

> A right of carriageway over the part of the servient tenement for the benefit of the dominant tenement but only whilst the size and height of the current structures erected on the dominant tenement remain unaltered and comprise only two residences.

59 Young CJ in Eq said:[27]

> The law is not yet fully developed as to how one can limit the duration of an easement. This appears from discussions in books such as Hinde McMorland & Sim, *Land Law in New Zealand* (Butterworths, Wellington, 1997) para 6.018. Various points are clear. One is that an easement must be the subject matter of a grant; the interest that is granted must be precise; and one must be able to know at any period of time whether the legal right exists or not. With a Torrens System easement, this is reinforced by the fact that the whole philosophy of the Real Property Act 1900 is that one must be able to see from the title deeds at any time just what are the rights and interests in the land. Just as there are difficulties with caveats etc that affect part of the land where there is no proper plan so there are also difficulties if a document presented to the Registrar General for registration as an easement does not properly define the length of time for which the easement endures so things are clear.
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> Apart from this it seems to be the law as is said in Tiffany, *Real Property* Volume 2, 2nd ed (Callaghan and Company, Chicago, 1920) p 1333:

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[23] *Deguisa v Lynn* [2020] HCA 39 at [56], [69], [70], referring to *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (1971) 124 CLR 73 at 77-79, and *Westfield Management Ltd v Perpetual Trustee Company Ltd* (2007) 233 CLR 528 at [38]-[39].

[24] *Davey v Colovic* [2021] SASC 7 at [43]-[53].

[25] *Duncan v Cliftonville Estates Pty Ltd* [2001] NSWSC 968. Referred to in *Bradbrook and Neave's Easements and Restrictive Covenants* (3rd ed, 2011) at [1.3].

[26] *Duncan v Cliftonville Estates Pty Ltd* [2001] NSWSC 968 at [10].

[27] *Duncan v Cliftonville Estates Pty Ltd* [2001] NSWSC 968 at [28]-[32].

> "*A right of way may, by the terms of the grant, be limited to certain seasons or persons, or even to a particular time of day. It may also be subject to interruption by reason of a particular use that may be made by the owner of the servient tenement*".

The main authorities for this decision are *Hollins v Verney* (1884) 13 QBD 304 and *Collins v Slade* (1874) 23 WR 199. It is thus possible to create an easement in a limited form, but the grant must clearly delineate it.

There are also situations involving grants which are obviously created to endure only so long as a particular purpose is subserved by their exercise and that come to an end automatically when they can no longer subserve such purpose. I am quoting from Tiffany (p 1363). The authorities for the proposition are mainly American such as *Cotting v Boston* 87 NE 205 (1905) (Mass), but the principle would seem to apply in this country. Tiffany takes the view it is far better to deal with these matters as rights of way that only endure for a particular time rather than rights of way that exist for all time and are then abandoned.

I do not think it is useful to look at this rather esoteric subject any further. Whichever way one looks at it, the present grant is too uncertain. The size and height of the current structure have to be recognised. Then there are the weasel words, "remain unaltered". Does this mean completely unaltered such as not even to change by a few millimetres? And then one also gets words "comprise only two residences". Whatever the extent of the rules as to the expression of easements, this grant falls outside it.

Giving effect to limitations in the grant of an easement

60 Where there exist limitations in the grant of an easement, the courts will construe the rights strictly in accordance with their terms so as not to burden the servient land nor benefit the dominant land beyond the terms expressed, and so as to ensure that the easement is not used beyond the terms of the grant.[28] Where a purported use exceeds the grant, declaratory or injunctive relief may be available to give effect to the limitations in the terms of the grant.[29]

61 The decision in *Barry v Fenton*[30] is a convenient illustration of the courts' role in construing the grant of an easement, and in giving effect to the limitations in that grant. The defendant in that case purchased a property, the access to which was difficult. There was an easement in the nature of a right of way over the adjoining property of the plaintiff. It was noted on the titles of each of the properties. The defendant commenced using the right of way to access his property, including by foot. The terms of the grant of easement described the right of way by reference to vehicular traffic, and the plaintiff brought proceedings seeking a perpetual injunction to restrain the defendant from using the right of way otherwise than for the passage of vehicular traffic. North J construed the terms of the grant, and held that the right of way was confined to

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[28] *Westfield Management Ltd v Perpetual Trustee Company Ltd* (2007) 233 CLR 528 at [25]-[26].

[29] *Barry v Fenton* [1952] NZLR 990; *Owners of Corinne Court 290 Stirling Street Perth Strata Plan 12821 v Shean Pty Ltd* (2001) 25 WAR 65; *Peacock v Custins* [2001] 2 All ER 827; *Jelbert v Davis* [1968] 1 WLR 589; *Harris v Flower* (1904) 74 LJ Ch 127; *Gale on Easements* (21st ed, 2020) at [9-122].

[30] *Barry v Fenton* [1952] NZLR 990.

vehicular traffic and hence did not extend to the use of the right of way as a footway. While his Honour did not ultimately grant an injunction to give effect to this limitation in the terms of the easement, the only reason that relief was withheld was an expectation that, the parties' legal rights having been determined, there was unlikely to be any cause for further complaint.

62 Similarly, in *Owners of Corinne Court 290 Stirling Street Perth Strata Plan 12821 Pty Ltd*,[31] Hasluck J construed the terms of an easement as containing a right of way that did not extend to the use sought to be made of that right of way by the defendants, and made a declaration to this effect.

63 The primary judge in the present case accepted that the courts may have a role in construing the grant of an easement, and in granting relief giving effect to limitations in that grant. But his Honour considered that *Barry v Fenton* was distinguishable from the present case because the issue of construction in that case did not involve any suggestion that the easement had been extinguished or had otherwise come to an end. As such, the primary judge took the view that giving effect to the construction reached in that case did not give rise to any need to consider the principle of indefeasibility and the concomitant requirement that all matters affecting title to land be ascertainable from Register Book.[32] Relying upon the decision of Besanko J in *Yip v Frolich*, his Honour considered that different considerations arose in circumstances where the effect of the limitation in the grant of the easement sought to be enforced was to bring the easement to an end.

64 For reasons which I shall develop I consider that the primary judge erred in his reliance upon *Yip v Frolich* given that it involved a common law abandonment of the easement (which was a limitation, or defect, in the easement that did not appear in the Register Book) rather than a limitation in the terms of the grant of an easement (which does appear in the Register Book). However, before explaining my reasoning in this respect, it is convenient to commence by summarising Besanko J's reasoning in *Yip v Frolich*.

The decision in *Yip v Frolich*

65 The plaintiff in *Yip v Frolich*[33] sought injunctive relief in relation to an easement appearing on the certificate of title for the defendants' land, which adjoined his own. The plaintiff argued that the easement conferred on him both rights of way and certain drainage rights. The defendants disputed that the easement conferred rights of way, and also argued that all rights under the easement had, in any event, been abandoned. The defendants also submitted that the injunctive relief sought by the plaintiff should be refused on discretionary

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31 *Owners of Corinne Court 290 Stirling Street Perth Strata Plan 12821 Pty Ltd v Shean Pty Ltd* (2000) 23 WAR 1 at [78]-[86], [123]-[127]. Reversed on appeal (2001) 25 WAR 65)) but on grounds not presently relevant.

32 *Davey v Colovic* [2021] SASC 7 at [61]-[62].

33 *Yip v Frolich* (2003) 86 SASR 162.

grounds (including acquiescence, hardship and the plaintiff's unreasonable conduct).

66 Besanko J construed the terms of the easement as confined to drainage rights,[34] and then turned to consider whether those rights had been abandoned. As his Honour explained, there were two issues. First, whether there was any scope for the application of the common law doctrine of abandonment under the provisions of the *Real Property Act*. Secondly, if the doctrine of abandonment is available under the provisions of the *Real Property Act*, whether abandonment had been made out on the facts.[35]

67 Besanko J began his consideration of the first of these issues by observing that the easement in question was registered on the respective titles of the dominant and servient parcels of land; and that the *Real Property Act* contained an indefeasibility provision (s 69) and a provision making the original certificate of title conclusive evidence of title to land and to any other estate or interest in land (s 51A).[36]

68 Besanko J reasoned that there was no section in the *Real Property Act* which gave the Court the power to order the Registrar-General to remove a registered easement from the title.[37] His Honour contrasted this position with the position in New South Wales,[38] and suggested that the position in this State was closer to the position in Victoria.[39] Besanko J concluded:[40]

> I think the position under the RPA is that a registered easement remains enforceable for so long as it appears on the title. The court cannot order its removal on the ground that at common law it has been abandoned. Under the RPA only the Registrar-General may extinguish an easement.

69 Having concluded that only the Registrar-General may extinguish an easement, Besanko J suggested that a court might decline to order equitable relief (predicated upon the enforceability of the easement) for a certain period of time if it appeared that the owner of the servient land was pursuing an application to the Registrar-General for the removal of the easement on the ground of abandonment, and that such an application had some prospect of success. The defendants in that case had foreshadowed an application to the Registrar-General, and so his Honour considered that it was necessary for him to consider whether there was power in the Registrar-General under the *Real Property Act* to

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34 *Yip v Frolich* (2003) 86 SASR 162 at [43].
35 *Yip v Frolich* (2003) 86 SASR 162 at [9].
36 *Yip v Frolich* (2003) 86 SASR 162 at [45].
37 *Yip v Frolich* (2003) 86 SASR 162 at [46].
38 *Yip v Frolich* (2003) 86 SASR 162 at [46], referring to s 89 of the *Conveyancing Act 1919* (NSW) and the decision of the High Court in *Treweeke v 36 Wolseley Road Pty Ltd* (1973) 128 CLR 274.
39 *Yip v Frolich* (2003) 86 SASR 162 at [47]-[48], referring to s 73 of the *Transfer of Land Act 1958* (Vic) and the decisions in *Riley v Penttila* [1974] VR 547 at 574 and *Wolfe v Freijahs' Holdings Pty Ltd* [1988] VR 1017 at 1026.
40 *Yip v Frolich* (2003) 86 SASR 162 at [49].

extinguish an easement on the ground of abandonment in the face of opposition from the owner of the dominant land.[41]

70 Besanko J then embarked upon a consideration of Part 8 of the *Real Property Act*, and in particular s 90B, concluding that it did not give the Registrar-General power to extinguish an easement over the opposition of the proprietor of the dominant land.[42] His Honour summarised his reasons for concluding that, even if the easement had been abandoned at common law, he would be bound to give effect to the conclusive nature of the title:[43]

> Subject to any Act relating to the variation or extinguishment of easements of a particular class, I think the position under the RPA may be summarised as follows. First, the Act does not give power to the court to make orders extinguishing a registered easement. The Registrar-General is given a power to extinguish an easement. Secondly, the circumstances in which the Registrar-General may extinguish a registered easement are very limited. Generally, the consent of the proprietor of the dominant land is required. If he or she cannot be located, or the Registrar-General is satisfied that the proprietor's estate or interest in the dominant land will not be detrimentally affected by the extinguishment of the easement, the consent of the proprietor of the dominant land may be dispensed with.
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> In my opinion, even if I was to find that the easement (or some of the rights under the easement) have been abandoned at common law, I would be bound to recognise and give effect to the conclusive nature of the title, and therefore the registered easement, unless and until it is removed from the title. In fact, I think it is the case that, under the RPA, the Registrar-General has no power to extinguish an easement if the proprietor of the dominant land objects (unless the Registrar-General is satisfied that the proprietor's estate or interest in the dominant land will not be detrimentally affected by the extinguishment of the easement). It follows therefore that even if there was an outstanding application to the Registrar-General in this case I would not decline to grant equitable relief to the owner of the dominant land.
>
> The defendants' submission that the rights under the easement have been abandoned must fail.

71 In case he was wrong in the above conclusion, Besanko J went on to consider whether at common law the drainage rights had been abandoned, and (in case he was also wrong in his conclusion on the construction issue) whether the rights of way had also been abandoned. His Honour concluded that the defendants failed to establish abandonment in relation to the drainage rights under the easement,[44] but did not ultimately resolve the position in relation to the rights of way.[45]

72 Besanko J ultimately concluded that the plaintiff was entitled to equitable relief giving effect to the drainage rights under the easement, there being no

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41 *Yip v Frolich* (2003) 86 SASR 162 at [49].
42 *Yip v Frolich* (2003) 86 SASR 162 at [52].
43 *Yip v Frolich* (2003) 86 SASR 162 at [53]-[55].
44 *Yip v Frolich* (2003) 86 SASR 162 at [65], [67].
45 *Yip v Frolich* (2003) 86 SASR 162 at [66]-[67].

discretionary reason (on account of acquiescence, hardship or unreasonable conduct) to withhold that relief.[46]

73 An appeal to the Full Court against the orders made by Besanko J was dismissed.[47] However, the appeal focused upon the construction of the easement, and did not involve any consideration of Besanko J's reasoning to the effect that under the *Real Property Act* only the Registrar-General may extinguish an easement.

74 The reasoning of Besanko J in *Yip v Frolich* was applied by Kaye J in *Brookville Pty Ltd v O'Loghlen*[48] in the context of s 73 of the *Transfer of Land Act 1958* (Vic).

Analysis

75 As explained by Besanko J in *Yip v Frolich*, and the primary judge in the present matter, the Registrar-General has an express power under s 90B of the *Real Property Act* to vary or extinguish easements in the circumstances described in that section. It is also true, as Besanko J explained, that the circumstances in which the Registrar-General may vary or extinguish a registered easement under that section are limited. In the absence of the consent of the proprietor of the dominant land, the Registrar-General may only do so in the circumstances provided for in s 90B(3) (that is, where notice has been given, 28 days have passed, and the Registrar-General is satisfied that the interest of the proprietor of the dominant or servient land will not be detrimentally affected) or in s 90B(4) (that is, where the Registrar-General is of the opinion that it is not reasonably practicable to ascertain the identity or whereabouts of the proprietor of the dominant land, and the other requirements in that subsection have been complied with).

76 However, as the parties on this appeal both accepted, s 90B is not the only mechanism for varying or removing an easement. The Court may also direct that the Registrar-General do so under s 64 of the *Real Property Act.*

77 The respondents accept that, on the assumption the right of way marked A has been stopped up, it would have been open to the appellant to seek the removal or extinguishment of the easement containing the right of way marked A under either s 64 or s 90B of the *Real Property Act*. However, relying upon the reasoning of Besanko J in *Yip v Frolich,* they contend that in the absence of any attempt by the appellant to invoke either of these mechanisms, the Register is conclusive and the easement remains enforceable; and that the easement thus presents an obstacle to the appellant's case that the right of way inherent in that easement no longer subsists.

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46 *Yip v Frolich* (2003) 86 SASR 162 at [68]-[79].
47 *Yip v Frolich* (2004) 89 SASR 467.
48 *Brookville Pty Ltd v O'Loghlen* [2007] VSC 67.

78 In my view, this contention overlooks a fundamental distinction between the situation in *Yip v Frolich* and the situation in the present case.

79 In *Yip v Frolich*, the defendants were seeking to rely upon a common law abandonment of the easement, and hence a defect in the easement that did not appear on the Register. To have given effect to this defect would have directly undermined the principle of indefeasibility that is essential to the operation of the Torrens title system. It was this inconsistency between the operation of common law abandonment and the principle of indefeasibility under the *Real Property Act* that led Besanko J to reject the defendants' reliance upon abandonment.

80 In the present case, however, the appellant does not seek to contradict the terms of the easement as it appears on the Register. To the contrary, the appellant accepts that, for so long as it remains on the Register, the easement is enforceable. But it is only enforceable in accordance with its terms, and the appellant seeks merely to give effect to a limitation that appears in those terms.

81 Understood in this way, the present case is analogous to the situation in *Barry v Fenton*, and distinguishable from the situation in *Yip v Frolich*. It does not involve any challenge to, or clash with, the indefeasibility of title that is essential to the operation of the Torrens title system. It involves an assertion of rights that is consistent with what appears on the Register, rather than an assertion of rights that do not appear on the Register. Indeed, it is the respondents who assert rights that are inconsistent with what appears on the Register, by relying upon a right of way that has, on the terms of the easement appearing on the Register, ceased to subsist. They seek to impose a burden upon the proprietor of the servient tenement beyond what was agreed, and beyond what the terms of the easement appearing in the Register contemplate.

82 It is true that the limitation in the terms of the grant of easement is a fundamental one that goes to the very subsistence of the right of way marked A. In that sense the limitation is one that operates with a similar practical effect to a common law abandonment of that right of way. But I do not think that similarity is of any significance to the operation of the principle of indefeasibility. What is significant for that purpose is whether the relevant limitation is one that appears in the terms of the registered interest on the Register. While a common law abandonment does not appear on the Register, and hence may be said to be inconsistent with the principle of indefeasibility,[49] the limitation in the terms of the grant of the easement relied upon by the appellant in the present case does appear on the Register.

83 The limitation relied upon the appellant is that the right of way marked A ceases to exist once it has been "discontinued stopped up and no more used as a road". I acknowledge that a factual inquiry may be required in order to

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[49] Unless, for example, it attracts some recognised qualification to indefeasibility, such as a claim that binds the relevant party *in personam.*

determine whether this condition of cessation has been satisfied. In that sense, a third party may not know the status of the right of way from the Register. But I do not think that this matters, or is contrary to the approach to the Torrens title system, and the principle of indefeasibility of title, as described by the High Court in *Westfield Management Ltd v Perpetual Trustee Co Ltd*[50] and *Deguisa v Lynn.*[51] The need for a factual inquiry to determine whether a party's rights (the terms and content of which are described in, and hence ascertainable from, the Register) have been exceeded or infringed in a particular case is entirely conventional and consistent with the indefeasibility of that party's title and rights. Such factual inquiry was inherent, for example, in the courts' consideration of whether to grant relief in those cases I have mentioned earlier under the heading 'Giving effect to limitations in the grant of an easement'.

84 For these reasons, I have reached a different conclusion from that reached by the primary judge. In my view, on the facts as alleged by the appellant in his defence and cross claim, there is a reasonable basis for his case that the right of way marked A has ceased to subsist, in accordance with the principles governing summary dismissal and strike out applications as set out in *Adelaide Brighton Cement Ltd v Hallett Concrete Pty Ltd*.[52] It also follows that there is a reasonable basis for the declaratory and injunctive relief sought by the appellant. In my view, that is so despite the appellant not having (i) pleaded any entitlement to a direction to the Registrar-General under s 64 of the *Real Property Act* to remove the easement (or to vary it to remove reference to the right of way marked A), or (ii) made an application to the Registrar-General under s 90B of the *Real Property Act* to remove or vary the easement.

85 In these circumstances, the respondents' application to summarily dismiss or strike out the impugned paragraphs of the appellant's defence, and the entirety of his cross claim, ought to have been dismissed.

Conclusion

86 For the reasons set out, I would grant permission to appeal to the extent necessary, allow the appeal, set aside the orders made by the primary judge on 22 March 2021, and in lieu thereof order that the application (FDN 10) of the respondents (being the applicants at first instance) be dismissed.

87 **BLEBY JA:** I agree that the appeal should be allowed for the reasons given by Doyle JA.

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50 *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528.
51 *Deguisa v Lynn* [2020] HCA 39.
52 *Adelaide Brighton Cement Ltd v Hallett Concrete Pty Ltd* [2020] SASC 161 at [53]-[70].