



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: M43/2026
File Title: Les Denny Pty Ltd (ACN 652 661 955) & Ors v. Valmorbida
Registry: Melbourne
Document filed: Form 27E - Reply
Filing party: Appellants
Date filed: 15 Jul 2026

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

LES DENNY PTY LTD (ACN 652 661 955)
AND OTHERS ACCORDING TO THE SCHEDULE
Appellants

and

10

DELMA ANNE VALMORBIDA
Respondent

APPELLANTS' REPLY

PART I—CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II—REPLY

A Facts

2. The respondent states that she ‘has been denied the opportunity to lead evidence of the use made of Stevens Court prior to hers’ (RS [8]). That statement is wrong. The Court of Appeal noted that the respondent had alleged use of Stevens Court from ‘at least October 1996’, *but not earlier* (CA [52]). That is, she relied on the period of her own use (PJ [84]; CA [23]). The Court of Appeal further noted that the appellants had
10 squarely raised the changes of ownership of the putative servient land in April 2015 and October 2021 in their defence, but that the respondent had proceeded to trial without seeking to amend her claim to rely on use before October 1996 (CA [52]). The Court of Appeal rejected the respondent’s submission that it was impermissible for the appellants to raise, in that Court, the question of ‘tacking’ at general law (CA [52]). The respondent has filed no notice of contention asserting error in that conclusion, which was correct for the reasons the Court of Appeal gave. Thus, the only relevant period of use for the purposes of this appeal is from October 1996 to October 2016, during which period there was a change of ownership of the putative servient tenement.

B The first issue: General law

- 20 3. In their principal submissions, the appellants contend that the Court of Appeal’s reasons do not identify any principled justification as to why, for the purposes of establishing a prescriptive easement based on 20 years of use, the owner of a putative servient tenement should be bound by the acquiescence of their predecessor in title (AS [21]). The respondent’s submissions likewise do not provide any such justification.
4. Although the respondent contends that the appellants ‘overstate the proper role of acquiescence’ in the law of prescription’ (RS [20]), the basis for that contention is unclear. As the respondent herself observes (RS [36]), Fry J’s seminal exposition of the law of prescription in *Dalton v Henry Angus & Co* includes a statement that ‘acquiescence *and nothing else* is the principle upon which these expedients rest’.¹

¹ (1881) 6 App Cas 740 at 773 (emphasis added). See also *Hampshire Automotive Centre Pty Ltd v Centre Com (Sunshine) Pty Ltd* (2019) 60 VR 579 at 589 [52], quoted at RS [23] (‘and a corresponding acquiescence by the owner of the servient tenement in a position to prevent that user’).

Although the respondent suggests that the doctrinal basis of prescriptive easements ‘must involve something more than “acquiescence” of the landowner’ (RS [31]), she does not identify that ‘something more’. Fry J’s reference to ‘lapse of time accompanied by inaction, where action ought to be taken’² (RS [36]) is simply another way of describing acquiescence. The respondent ultimately accepts, correctly, that ‘acquiescence explains why rights of prescription are upheld’ (RS [36]).

5. The grant of an easement is ‘implied’ because the law proceeds on the basis that, if the owner of a servient tenement has acquiesced in use by the owner of the dominant tenement for 20 years, it can be explained only by the existence of a grant by the owner of the servient tenement. The basis of the implication is that a person would not acquiesce in an infringement of their rights for 20 years. The slide by the Court of Appeal was in purporting to find a basis where ‘the owners’ of the servient tenement have acquiesced for this period (CA [65]; RS [26]). If no owner has acquiesced for 20 years, there is no basis to ‘imply’ that any owner made any grant. Each of their less-than-20-year periods of acquiescence can be explained without any grant having been made by any of them.
6. The respondent states that, ‘[o]n the appellants’ argument’, a purchaser of land that is subject to a prescriptive easement formed during the predecessor’s tenure ‘should not be “bound or affected” by the easement’ if the purchaser is ignorant both of the easement and of the predecessor’s acquiescence (RS [31]). The appellants contend no such thing. In those circumstances, an easement has been formed, and the purchaser takes title subject to the easement. The question here is whether an easement may be formed where the period of 20 years of use spans multiple successive owners of the servient land. As to the respondents’ contention that the appellants ‘overlook that if the owner of the subservient [sic] tenement “knows nothing”, there will be no acquiescence’ (RS [20]), the respondent has misapprehended the appellants’ argument. The appellants contend that a reason the owner of a putative servient tenement should not be bound by their predecessor’s acquiescence is that they may know nothing of it. A landowner may have knowledge of use of their own land and acquiesce to that use, while knowing nothing of their predecessor’s acquiescence or the use to which the predecessor acquiesced. The statement that ‘the successor’s failure to stop is as much “acquiescence” as its

² *Dalton v Henry Angus & Co* (1881) 6 App Cas 740 at 773.

predecessor's' (RS [40]) does not explain why the successor should be bound by the predecessor's acquiescence.

7. The respondent concludes by asserting that '[t]here is no reason in principle why the acquiescence of the successor in title to the servient should not be "tacked" to the period necessary to create a prescriptive easement' (RS [40]). However, she does not explain that assertion, or address the appellants' contentions as to why it should not be possible to aggregate periods of acquiescence (AS [27]–[29]). For the reasons given in the appellants' principal submissions, an owner of land should not be bound or affected by the acquiescence of their predecessors, such as would enable a prescriptive easement to arise based on 20 years' use across multiple successive owners of the servient tenement.

C The second issue: The *Transfer of Land Act*

8. The respondent accepts that the effect of s 42(1) of the *Transfer of Land Act* is to extinguish any 'encumbrances' that are not recorded on the relevant folio of the Register unless they fall within one of the exceptions to indefeasibility (RS [50]). Given that 'inchoate' prescriptive easements do not fall within any of those exceptions, the respondent must also accept that, if an inchoate prescriptive easement constitutes an 'encumbrance' within the meaning of the Act, it is extinguished upon the registration of a registered proprietor's estate or interest.
9. The respondent states that she 'accepts that whether s 42(1) extinguishes "something" (to use a neutral term) depends on *whether it is an "encumbrance" capable of being recorded on the folio*' (RS [51]). Although she cites the appellants' principal submissions in reference to that statement, the appellants do not contend that an 'encumbrance', within the meaning of the Act, must be capable of registration. To the contrary, the respondent's contention that an 'encumbrance' must be capable of being registered is wrong. The respondent puts the contention as follows: 'A necessary concomitant of [the appellants'] argument is that whatever s 42 extinguishes must be capable of registration because, *were it otherwise, the Act would effect extinguishment without affording protection by registration*' (RS [61]). The respondent then says that, '[i]f an inchoate prescriptive easement cannot be registered, it follows that it cannot be an "encumbrance" and so cannot be extinguished' (RS [61]). However, there is no requirement that, to be an 'encumbrance', a right or interest must be capable of registration. By way of clear example, a constructive trust over land brought under the Act plainly constitutes an 'encumbrance' within the meaning of the Act. However, by

operation of s 37 of the Act, the Registrar cannot record notice of a constructive trust in the Register. Further, only a lease of more than three years can be registered (s 66(1)). Prescriptive easements themselves are only registrable if they are recognised by an order of a court or an award of an arbitrator (s 72(2)).

10. As to the proper construction of the term ‘encumbrance’, the respondent describes as ‘unremarkable’, and thus accepts, that ‘the words “claim or demand” must be given effect and there may be a “claim or demand”, even where there is no estate or interest’ (RS [57]). If an inchoate prescriptive easement constitutes a ‘claim or demand which is or may be had made or set up in to upon or in respect of the land’, then it falls within the definition of ‘encumbrance’, notwithstanding that it does not constitute, or derive from, an estate or interest in land or a right in respect of land.
11. The respondent incorrectly states that the appellants ‘do not descend to identify the “claim or demand” that, on their case, made the definition operative’ (RS [57]). In their principal submissions, the appellants squarely address why an inchoate prescriptive easement falls within the definition of ‘encumbrance’, including why it constitutes a ‘claim or demand’ (AS [52]). Simply put, an inchoate prescriptive easement is a claim to a period of use that may count towards a 20 year period of use sufficient to found a prescriptive easement. An inchoate prescriptive easement thus falls within the Act’s extremely broad, ‘extended’³ and inclusive definition of ‘encumbrance’. And, in any event, it falls within the ordinary meaning of that term (AS [53]). Given the definition is inclusive, attention to the ordinary meaning of ‘encumbrance’ is not ‘difficult to understand’ (RS [59]) but required. Recognition of its broad ordinary meaning is not inconsistent with the fact that a broad inclusive definition has been provided: that was evidently done to ensure that any burden whatsoever would be captured.
12. The respondent seeks to avoid the underlying purpose of the Torrens system by referring to ‘the limitations of “statutory purpose” as an aid in interpreting legislation’ in certain contexts (RS [68]). However, the fundamental purpose of the Act, including the first principle of the Torrens system that retrospective investigations are ‘effectually and in perpetuity got rid of’,⁴ is centrally relevant to the proper construction of the statutory provisions under consideration. For the reasons referred to in the appellants’ principal

³ Dr Stanley Robinson, *Transfer of Land in Victoria* (1979) p 190.

⁴ Robert Torrens, *The South Australian System of Conveyancing by Registration of Title* (1858) p 34.

submissions (AS [63]–[67]), the construction contended for by the appellants gives effect to that purpose; the construction for which the respondent contends frustrates it.

13. According to the respondent, the Court of Appeal did not overlook the effect of registration (RS [75]). However, it is apparent that the Court of Appeal misunderstood the operation of s 42 by holding that the primary judge ‘was correct to characterise s 42 ... as an ambulatory provision’ in so far as it ‘describes the estate of the registered proprietor of land *from time to time, not only at the point of registration*’ (CA [132]). Whilst s 42 may be ‘ambulatory’ in the sense that it always applies, the effect of s 42 is felt at the point of registration. So much is clear from the exceptions that appear in s 42(2). The effect of s 42(1) is that, *at the point of registration*, a registered proprietor comes to hold the land free from all encumbrances not recorded on the folio, subject to exceptions including those listed in s 42(2). However, those exceptions are not the only encumbrances subject to which a registered proprietor holds the land after registration. As Brennan J observed in *Bahr v Nicolay (No 2)*, the indefeasibility provisions of Torrens legislation ‘are designed to protect a transferee from defects in the title of the transferor, not to free him from interests with which he has burdened his own title’.⁵ Where an easement is granted or otherwise arises during the period of ownership of a registered proprietor, the easement does not subsist during that period by operation of the exception in s 42(2)(d). Rather, it subsists by operation of the general law and is enforceable against the registered proprietor *in personam*.⁶ Section 42(2)(d) preserves — at the point of registration — any easements that have been acquired by that time but not prescriptive easements yet to be acquired because an insufficient time has elapsed.

Dated: 15 July 2026



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⁵ (1988) 164 CLR 604 at 653.

⁶ Cf *Golding v Tanner* (1991) 56 SASR 482 at 485–486, 495–496.

SCHEDULE**EVIE PITARD PTY LTD (ACN 652 661 679)**

Second Appellant

CHLOE PITARD PTY LTD (ACN 652 661 651)

Third Appellant

HUNTER PITARD PTY LTD (ACN 652 661 795)

Fourth Appellant