



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M43/2026

BETWEEN:

**ACN 652 661 955 AND OTHERS
ACCORDING TO THE SCHEDULE**

Appellants

and

DELMA ANNE VALMORBIDA

Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

1. This outline is in a form suitable for publication on the Internet.

PART II: OUTLINE OF PROPOSITIONS

Overview

2. In Victoria, an easement can arise by prescription under the general law, that is, based on 20 years' open use of the "servient" land. Further, an unregistered easement is a paramount exception to the indefeasibility of a registered proprietor's title: *Transfer of Land Act 1958* (Vic) (TLA), s 42(2)(d). And while an easement may be recorded on the register (TLA, s 72(1)), there is no requirement it must be. In fact, the Registrar's power to record an easement is limited: s 72(2).
3. Mrs Valmorbida's use of what is now the appellants' land commenced in October 1996 and continued uninterrupted until 2018. When the appellants became registered proprietors in 2021, the 20-year period had ended. Their predecessor (a company associated with them) had become its registered proprietor in April 2015, after which the use continued unchanged "with the acquiescence of the [predecessor], who knew or ought to have known of [Mrs Valmorbida's] use": CA [24]. Only in 2018, did the predecessor protest the use.
4. Because Mrs Valmorbida's use was of a quality capable of establishing a prescriptive easement, when the 20-year period ended in October 2016, she became entitled to an easement. The appellants' two arguments to the contrary should be rejected.

Issue (1): Prescriptive easements under the general law

5. As to the first argument, neither principle nor authority requires that the same person have owned the "servient" land throughout the 20-year period necessary to establish a prescriptive easement.
6. At the level of principle, the following does not appear to be controversial:
 - (a) Under Australian common law, as in English common law, an easement over another's land can be acquired by prescription, that is, by use of the land for 20 years or more.¹
 - (b) In recognising the easement, the law presumes the use, which would otherwise be unexplained (in fact, a trespass), was pursuant to a right granted by the land's owner—the "lost modern grant".²
 - (c) The quality of the use is the basis for recognising the prescriptive right.³ The use must be "as of right" or, in the traditional phrase, "*nec vi, nec clam, nec precario*" (without force, without secrecy (i.e. open) and without permission).⁴ Put differently, the owner of the servient land must have had

¹ See e.g. *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283 (JBA 4 p 470); *Dobbie v Davidson* (1991) 23 NSWLR 625 (supp bundle); *Hampshire Automotive Centre Pty Ltd v Centre Com (Sunshine) Pty Ltd* (2019) 60 VR 579 (supp bundle); see also *R v Oxfordshire County Council; Ex p Sunningwell Parish Council* [2000] 1 AC 335 (JBA 4 p 819); *R (Lewis) v Redcar & Cleveland Borough Council (No 2)* [2010] 2 AC 70 (JBA 4 p 779).

² *Delohery*, 299, 305-6 (citing *Moore v Rawson* (1824 107 ER 756; 3 B & C 332,) and 308; *Sunningwell*, 350-351.

³ *Sunningwell*, 350G-H ("The emphasis was therefore shifted from the brute fact of the right or custom... to the quality of the 20-year user which would justify recognition of a prescriptive right"); *Redcar* [65] and [71] (Lord Hope JSC), [112] (Lord Kerr JSC).

⁴ See e.g. *Delohery*, 308; *Sunningwell*, 350G-H; *Redcar*, [20] (Lord Walker JSC), [87]-[88] (Lord Rodger JSC)

knowledge of the use and the power to stop it.⁵ Knowledge includes constructive knowledge.⁶ If the servient owner has no knowledge of the use, a prescriptive right will not arise.

- (d) If a qualifying use continues for 20 years without the servient owner acting to prevent or resist it, the owner is taken to have acquiesced or consented to the use, with effect from its commencement.⁷
 - (e) Once the claimant proves the use for the 20-year period, the servient owner has an “evidentiary onus” of proving lack of knowledge⁸
 - (f) Successive owners of the dominant land can “tack” their use to run up the 20-years.⁹
7. The law’s focus is on the quality of the use.¹⁰ Because failure to prevent the use will constitute acquiescence or consent (thereby justifying the presumption of the grant), the owner of the servient land must have known or had the means of knowing of the use. So, “[w]hen it is said that ‘acquiescence’ lies at the root of prescription, what is meant is that the servient owners — whoever they are — have the means of knowing of the use being exercised but do not interrupt it.”¹¹
8. While the appellants do not cite any on-point authority to support their argument, there is considerable authority directly against it—cases where courts have recognised a prescriptive easement despite a change in the servient land’s ownership during the 20-year period.¹² The appellants do not explain why those authorities are wrong.¹³
9. The relevant question is not whether a single owner acquiesced throughout the period but whether the servient land was subject, for 20 years, to an open use that its owners knew about. That is the reasoning set out in CA [65]. It is consistent with both principle and authority. The appellants’ attack on it (AS [23]–[30]; AR [5]) cannot be sustained.

Issue (2): Operation of the *Transfer of Land Act 1958*

10. As to the second argument, s 42(1) of the TLA operates on an “encumbrance”. When the appellant’s predecessor became the registered proprietor of the land in 2015, Mrs Valmorbida had not yet used the land for 20 years. Accordingly (and as the Court of Appeal concluded: CA [88], [91] and [102]), she had no rights—including any “claim” or “demand”—in respect of the land and there was no “encumbrance” for 42(1) to extinguish.

⁵ *Hampshire Automotive*, [57].

⁶ See *Arcidiacono v The Owners – Strata Plan No 17719* (2020) 104 NSWLR 199, [42] (JBA 4 p 544) and [111] (JBA 4 p 557). The test for constructive knowledge is objective: “was the use of a kind that an owner, reasonably diligent in the protection of his or her interests, would or should have discovered?”: *ibid*; see also *Wayella Nominees Pty Ltd v Cowden Ltd* [2003] WASC 210, [224] (JBA 4 p 950).

⁷ *Delohery*, 308 (“since an easement over the land of another could only be lawfully created by his consent, the law... implied that that consent had been given. **This was the substance of the law. The mode of giving the consent was an accident**” (emphasis added); *Sunningwell*, 352-353 (citing *Dalton v Henry Angus & Co* (1881) 6 App Cas 740, 773 (Fry J)); *Redcar*, [67] (Lord Hope).

⁸ *Arcidiacono v The Owners – Strata Plan No 17719* (2020) 104 NSWLR 199, [47] (JBA 4 p 545), Butt’s Land Law (7th ed, 2017, Lawbook Co) at par 16.430; *Wayella Nominees Pty Ltd v Cowden Ltd* [2003] WASC 210, [223] (JBA 4 p 950)

⁹ AS [28], citing *Sunshine Retail Investments Pty Ltd v Wulff* [1999] VSC 415, [145]; see also *Pekel v Humich* (1999) 21 WAR 24, [135] (JBA 4 p 773) and *Auckran v Pakuranga Hunt Club* (1904) 24 NZLR 235, 240-1 (JBA 4 pp 572-3).

¹⁰ *Sunningwell*, 350G-H. “The true approach is to determine the character of the acts of user or enjoyment relied on.” *Mills v Silver* [1991] Ch 271, 290 (Parker J), extracted in *Arcidiacono*, [13].

¹¹ P. Butt, “Use ‘as of Right’” (2004) 78 ALJ 162, 166 (JBA 5 p 978), cited in *Arcidiacono*, [56]–[57] (Macfarlan JA, McCallum JA agreeing) and [143] (White JA). White JA went further, explaining ([83]–) the function of acquiescence and concluding “[I]n truth acquiescence does not, in all cases, lie at the root of easements by prescription, but rather emphasises that it is the open and uninterrupted use that gives rise to the easement by prescription” ([144]). A prescriptive easement can arise even where the servient land’s owners during the 20-year period are not known: *Fernance v Simpson* (2003) 11 BPR 20,955 (JBA 4 p 578).

¹² CA [63]–[64], and cases there cited; see also *Dobbie v Davidson*, 629A: “The indicia of a claim of right will be found in the circumstances. Relevant... will be... the persistence of the conduct, despite supervening sale and the acquisition of new owners by the dominant and servient tenements...” (emphasis added).

¹³ AS [19], RS [26] (noting AS [19] addresses only *Pekel v Humich*).

11. The appellants accept that, when their predecessor became registered, Mrs Valmorbida had no estate or interest in nor a right in respect of the land (AS [41]; AR [10]). Yet they contend she had a “claim or demand” capable of constituting an “encumbrance”.
12. The “claim” they identify appears to have shifted.¹⁴ Their latest position is Mrs Valmorbida had a claim “to a period of use that may count towards [the] 20 year period”: AR [11] (responding to RS [53] and [57]). But, as the Court of Appeal concluded (and the appellants apparently accept), until the end of the 20-year period, she had “no rights at all”: CA [88]. Without a right, there cannot have been a claim.
13. The Court of Appeal also relied on authorities that rejected notions that, during the 20-year period, there is an “accruing right” or that the “potentiality of the acquisition of an easement” is generative of rights before the end of the period: CA [85]–[87]).¹⁵ Those authorities directly contradict the appellants’ argument. But the appellants do not challenge them. Nor do they identify any contrary authority, despite the long history of the terms “claim” and “demand” in conveyancing law.¹⁶
14. The other factors that the appellants call in aid do not support the argument either:
 - (a) Accepting the breadth of the “encumbrance”, it does not apply unless Mrs Valmorbida had a “claim”: AS [53], [55] and [57]. She did not.
 - (b) The legislative history demonstrates that, ever since 1866,¹⁷ Torrens legislation in Victoria has provided that unregistered easements are a paramount exception to indefeasibility: RS [56] and [68]. Recommendations for amendment have not been adopted: RS [68].
 - (c) Given the express provision in s 42(2)(d), the statutory context—even if extended to s 32C(a) of the *Sale of Land Act 1962* (Vic)—does not support the argument. If anything, the existence of latter provision contradicts it: RS [64]–[66].
 - (d) Arguments about the “policy” or the “scheme” of the Torrens system depend on the specific provisions of the Torrens statute under consideration: RS [69].¹⁸ The Court of Appeal took that approach—carefully and thoroughly considering the text, context, policy, legislative history, the authorities and fairness: CA [99], [104], [109], [112], [126] and [129] (RA [69], [74] and [75]).

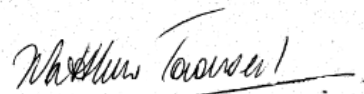
Conclusion

15. The appeal should be dismissed.

DATED 15 October 2026



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¹⁴ Compare AS [52] with AR [11].

¹⁵ *Bonner v Great Western Railway Co* (1883) 24 Ch D 1 (plaintiff not entitled to an injunction after 16 years use because he had “no rights at all”); *Greenhalgh v Brindley* [1901] 2 Ch 324, 328 (“the so-called potentiality of the acquisition of an easement within less than twenty years is not an interest in land or an easement known to the law”... “There is either an easement... or there is not. If there is not, there is no intermediate stage which has any legal existence”)

¹⁶ e.g. in “all estate” clauses and *Conveyancing Act 1881* (UK), s 63, *Property Law Act 1958* (Vic), s 63, and cognate legislation. See also *Land Registry Act 1862* (25 & 26 Vict. c. 53) (UK), s 20 and *The Record of Title Act (Ireland) 1865* (28 & 29 Vict. c. 88), s 12 (recorded owner to hold “free from all Rights, Interests, Claims, and Demands whatsoever”).

¹⁷ *Transfer of Land Statute 1866* (Vic) (JBA 1 pp 279–284), s 49 “Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to... any easement acquired by enjoyment or user or subsisting over or upon or affecting such land”

¹⁸ See also *Dobbie v Davisdon*, 630F (Kirby P) and cases there cited. “All depends on the particular legislative provisions in play and the policy choices made”: *Chitolie v Saint Lucia National Housing Corporation* [2023] UKPC 43, [36].

SCHEDULE**A.C.N. 652 661 679 PTY LTD**

Second Appellant

A.C.N. 652 661 651 PTY LTD

Third Appellant

A.C.N. 652 661 795 PTY LTD

Fourth Appellant