HIGH COURT OF AUSTRALIA

McHUGH ACJ,
KIRBY, HAYNE, CALLINAN AND HEYDON JJ

HILLPALM PTY LIMITED APPELLANT

AND

HEAVEN'S DOOR PTY LIMITED RESPONDENT

Hillpalm Pty Ltd v Heaven's Door Pty Ltd
[2004] HCA 59
1 December 2004
S530/2003

ORDER

1. *Appeal allowed with costs.*

2. *Orders of the New South Wales Court of Appeal made on 3 October 2002 set aside and in their place order:*

   (i) *Appeal allowed with costs.*

   (ii) *Paragraphs 1 to 5 of the orders of the New South Wales Land and Environment Court made on 7 June 2001 set aside and in their place order that the application is dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation:

D F Jackson QC with P R McGuire for the appellant (instructed by Bolster & Co)

T F Robertson SC with L M Byrne for the respondent (instructed by Woolf Associates)

2.

CATCHWORDS

Hillpalm Pty Ltd v Heaven's Door Pty Ltd

Real Property – Easements – Subdivision of land – Adjoining lots on a subdivision – Proposed plan of subdivision depicted "proposed right of way 10 wide" across one lot – Council approved subdivision – Whether creation of easement was a condition of the grant of approval of the subdivision – Easement not registered under the *Real Property Act* 1900 (NSW) – Whether appellant required to grant registered easement of right of way.

Real Property – Land titles under the Torrens system – Exceptions to indefeasibility of registered title – Whether Council's consent to the subdivision created a right in rem that could be relied upon by the respondent to require the appellant to grant a registered easement of way – Whether such a right consistent with s 42(1) of the *Real Property Act* 1900 (NSW).

Local Government – Town planning – Whether the creation of a right of way was a "condition" of a "development consent" under s 76A(1) of the *Environmental Planning and Assessment Act* 1979 (NSW) ("EPAA") – Whether purchase and occupation of land was to "carry out development" of the subdivision and therefore a breach of s 76A(1) of the EPAA – Whether s 123 of the EPAA empowers the making of orders to remedy or restrain a breach of the EPAA to a person who had not committed any breach of the EPAA.

Courts – Land and Environment Court – Powers of Court – Orders to remedy or restrain breaches of the EPAA.

Words and Phrases – "carry out development", "condition", "development consent".

Conveyancing Act 1919 (NSW), s 88B.
Conveyancing Act Regulations (NSW), reg 52A.
Environmental Planning and Assessment Act 1979 (NSW), ss 4, 76A(1), 123.
Local Government Act 1919 (NSW), Div 7 Pt XIIA, Div 7 Pt XII, ss 327(2), 342V(1A), 342U(2).
Miscellaneous Acts (Planning) Repeal and Amendment Act 1979 (NSW).
Real Property Act 1900 (NSW), ss 42(1), 96D.

1 McHUGH ACJ, HAYNE AND HEYDON JJ. The appellant is the registered proprietor of an estate in fee simple in the land described as Lot 529 in Deposited Plan 1003396 ("the appellant's land"). Its title is subject to some exceptions, encumbrances, interests and entries recorded in the Second Schedule to the Computer Folio Certificate issued under s 96D of the *Real Property Act* 1900 (NSW).

2 The respondent is the registered proprietor of an estate in fee simple in land ("the respondent's land") which adjoins the appellant's land. The respondent's land is described as Lot 1 in Deposited Plan 601049.

The issue

3 The respondent now has no registered easement of way over the appellant's land. None is recorded as an exception, encumbrance or interest on the title to the appellant's land. Can the respondent compel the appellant to grant it such an easement and compel the appellant to construct a track along that easement? The respondent contends that there was a condition of the grant of approval of the subdivision recorded in Deposited Plan 601049 which it can now have the appellant fulfil by granting it a registered easement of way and constructing a track. That contention should be rejected.

How the issue arises

4 In 1977, Winchcombe Carson Trustee Co (Canberra) Ltd ("Winchcombe Carson") owned the land of which both the appellant's land and the respondent's land formed part. The land owned by Winchcombe Carson was used for banana growing. Now it seems that the appellant's land, and the respondent's land, would be much more valuable if used for tourist developments.

5 In November 1977, a firm of surveyors, John P Marendy & Associates ("the surveyors"), applied to the local Shire Council (the Tweed Shire Council) for permission to subdivide the land owned by Winchcombe Carson, the purpose of the subdivision being said to be "Rural (Bananas)". It is convenient to refer to this subdivision as the "subdivision of the Winchcombe Carson land".

6 That permission was given by the Council. The resulting plan of subdivision was lodged with, and registered by, the Registrar-General in 1979. That plan (Deposited Plan 601049 – "the 1979 Plan") bore on it a diagram which showed what was described as "proposed right of way 10 wide" from the northernmost point of Lot 1 (the respondent's land) across that part of Lot 2 which includes the appellant's land to join a road called Clothiers Creek Road. (No unit of measurement was given after the figure "10".)

7 Between 1979 and the time of the litigation which gives rise to the present appeal, Lot 2 in the 1979 Plan was further subdivided. It was subdivided in 1981. Each of those plans of subdivision bore a diagram with the same notations as appeared on the 1979 Plan, namely, a diagram showing the same "proposed right of way 10 wide". In January 1998 (nearly 20 years after the Council gave its consent to the subdivision and the plan of subdivision was registered), the respondent purchased Lot 1 in the 1979 Plan. The appellant purchased its land (that part of Lot 2 which is now Lot 529 in Deposited Plan 1003396) in December 1998.

8 The respondent contended in the Land and Environment Court of New South Wales, and maintains its contention in this Court, that it is entitled to a declaration that the appellant is in breach of a condition of the development consent given to the surveyors for the subdivision of the Winchcombe Carson land, and to orders requiring the appellant not only to create a 10 metre right of carriageway on its land by registering that easement on the appellant's title, but also to construct a track within that right of carriageway at least 2.5 metres wide.

9 The Land and Environment Court made a declaration and orders substantially in the form sought by the respondent[1]. The Court of Appeal of New South Wales dismissed an appeal by Hillpalm Pty Ltd (the appellant in this Court)[2]. By special leave, that company now appeals to this Court.

10 It was common ground in this Court that the appellant's registered title to its land is not subject to any estate or interest of the respondent, whether in the "proposed easement" or otherwise. In oral argument the respondent accepted that it now has no easement over, or other interest in, the appellant's land. (In particular, it was accepted that the "exceptions, encumbrances" and so on recorded in the Second Schedule to the Computer Folio Certificate in respect of the appellant's land do not include the "proposed right of way".) The respondent contends, nonetheless, that it is entitled to compel the appellant now to perform what it says was a condition imposed, many years before, by the Shire Council, when a predecessor in title of both the appellant and the respondent subdivided the land of which their land now forms a part.

11 These reasons will seek to demonstrate that the respondent was not entitled to any of the orders it sought in the Land and Environment Court and that its application to that Court should have been dismissed.

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1 *Heavens Door Pty Ltd v Hillpalm Pty Ltd* (2001) 116 LGERA 138.

2 *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2002) 55 NSWLR 446.

12 To understand the basis of the respondent's contentions, it will be necessary to notice not only the relevant provisions of legislation dealing with subdivision of land in the Tweed Shire in 1977 to 1979, but also some provisions of subsequent legislation relied on as preserving what was said to be the effect of a condition imposed by the Shire at the time of the 1979 subdivision of the Winchcombe Carson land.

13 It is against the background of the legislation that existed at the time of the subdivision of the Winchcombe Carson land that it will be convenient to trace the particular course of events recorded in correspondence between the Council and the surveyors about the subdivision of the Winchcombe Carson land. It will then be necessary to examine the legislation in force at the time the respondent commenced its proceedings in the Land and Environment Court and some of the transitional provisions said to link the legislation with the legislation in force at the time of the subdivision of the Winchcombe Carson land.

The legislative scheme in 1977-1979

14 Between 1977 and 1979, two separate parts of the *Local Government Act* 1919 (NSW) regulated the subdivision of land. Division 7 of Pt XIIA of that Act (ss 342S-342Z) permitted[3] the making of an interim development order forbidding the interim development of land (an expression which included, but was not limited to, subdivision of land[4]) except as permitted by or under the authority of the interim development order and "subject to such conditions and restrictions as may be imposed by or under the interim development order and to such provisions as may apply by virtue of the interim development order"[5]. Division 2 of Pt XII of the *Local Government Act* (ss 323-340F) provided[6], among other things, that land should not be subdivided except in accordance with the provisions of the *Local Government Act*. In particular, s 327(2) provided that, "[i]n a case where a subdivision does not provide for the opening of a public road", land was not to be subdivided until certain conditions were met. The subdivision of the Winchcombe Carson land was a subdivision which did not provide for the opening of a public road. The conditions applicable to such a

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3 *Local Government Act* 1919 (NSW), s 342U.

4 s 342T(1).

5 s 342U(4).

6 s 323(1).

subdivision included[7] that "the town or shire clerk has certified to the applicant that the requirements of this Act other than the requirement for the registration of plans have been complied with". Section 327(2)(c) further provided that, where a subdivision did not provide for the opening of a public road, a plan of the subdivision was to be registered in the office of the Registrar-General.

15 In 1966, the Minister for Local Government rescinded the then Interim Development Order No 1 – Shire of Tweed and made a new interim development order – the Interim Development Order No 2 – Shire of Tweed. That order was amended from time to time. By 1977, it forbade subdivision of the land the subject of the Winchcombe Carson subdivision unless some conditions (about the size of allotments, the ratios of depth to frontage of allotments, and the size of the frontage of each allotment) were satisfied. The Council could dispense with these conditions in certain circumstances. In addition, however, s 342V(1A) of the *Local Government Act* permitted the Council to grant an application for subdivision (or other development) of land which was subject to an interim development order "unconditionally or subject to such conditions as it may think proper to impose". The respondent submitted that this power to impose conditions was exercised when the Shire Council gave permission for the subdivision of the Winchcombe Carson land. It is convenient to deal at this point with that subdivision. For that purpose, it will be necessary to examine the course of correspondence between the surveyor and the Council.

Conditions of permission to subdivide?

16 Not all of the documents submitted to the Shire Council in connection with the proposal to subdivide the Winchcombe Carson land were in evidence at the trial of proceedings in the Land and Environment Court. Some documents, notably the proposed plan of subdivision lodged with the Council, could not be found. In the end, however, nothing turns on that fact. The dispute between the parties to this appeal must be decided according to what is revealed by the evidence about the course of events concerning the subdivision of the Winchcombe Carson land.

17 When the application for that subdivision was first submitted to the Council, in November 1977, the surveyor, in an accompanying letter, spoke of physical access from Clothiers Creek Road to what was then described as Lot 2 (but appears to be a reference to what became Lot 1 – the respondent's land[8]) as

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7 s 327(2)(b).

8 (2001) 116 LGERA 138 at 144 [25].

being "given by an easement over the proposed new road in stage 3 of the overall development". Because the plan accompanying this letter was not in evidence there might be some debate about what was meant by "the proposed new road in stage 3 of the overall development". Again, however, nothing turns on that.

18 On 22 December 1977, the Shire Clerk wrote to the surveyor saying that the application to subdivide the Winchcombe Carson land "to create a 45 hectare rural lot *with right of way access to Clothiers Creek Road*" had been approved by Council (emphasis added). The "45 hectare rural lot" that was to be created was the land that became the respondent's land. The letter said that the Council's approval was:

> "subject to compliance with the following conditions:-
>
> (a) Provision of a constructed right of carriageway from Clothiers Creek Road. The track shall be at least 2.5 metres wide and constructed with 150mm consolidated thickness of gravel.
>
> (b) Submission of final plans and payment of fees."

It is the first of these conditions ("the December 1977 conditions") which the respondent contended in the courts below, and in this Court, was a condition which bound the appellant.

19 In April 1978, the surveyor wrote again to the Council about the proposed subdivision and in particular "[w]ith respect to the provision of a constructed right of carriageway from Clothiers Creek Road to the proposed 45 hectare rural allotment". The surveyor said:

> "It was originally envisaged that the right of carriageway was to follow the proposed route of a new road of which part is to be constructed in Stage 1 and part in Stage 3 of the overall development. Physical access to the proposed new Lot can at present be gained by an existing track which follows the intended route of the road in Stage 3 but traverses the proposed allotments in Stage 1 as shown on the accompanying plan.
>
> It would be logical if the right of carriageway was to follow the existing track, however not wishing to involve ourselves in any possible legal entanglements at the time of development of Stage 1 the right of carriageway should follow the route of the proposed new road. This further poses the problem of the difficulty in construction of the carriageway over the section of road in Stage 1 because of the nature of the terrain.

> Would Council advise if consideration would be given to physical access being attained over the existing track but the actual right of carriageway being granted over the route of the intended new road. I am advised that the road in Stage 1 of the project will begin as of the 1st July 1978."

Two aspects of that letter should be noted. First, the letter sought to vary the December 1977 conditions. Secondly, the variation sought was not limited to doing away with the requirement to provide a constructed right of carriageway. What was suggested was that physical access to what was to become the respondent's land should be "attained over the existing track" but that "the actual right of carriageway [be] granted over the route of the intended new road" (presumably before the subdivision was approved and effected). What was described as "the intended new road" appears to have followed the route subsequently depicted on Deposited Plan 601049 as the "proposed right of way 10 wide".

20 Council replied to this proposal on 22 May 1978. The Shire Clerk confirmed "that the arrangement for right of carriageway provisions as access to the proposed lot as described in [the surveyor's April letter] are acceptable to Council". The letter went on to say:

> "This acceptance is conditional upon the rural/residential estate development proceeding. Consequently your client company shall be required to declare by statutory document as a condition of subdivision that a right of carriageway over the existing track shall be created in favour of the proposed rural lot if the new roads are not dedicated within two years of the date of this letter."

Again, two features of this letter are to be noted. First, Council accepted the surveyor's proposal made in the April 1978 letter. But, secondly, that acceptance was conditional. The exact content of the condition is obscure. In particular, it is not clear what was meant by saying that Winchcombe Carson "shall be required to declare by statutory document as a condition of subdivision that a right of carriageway over the existing track shall be created". What is clear, however, is that this obligation ("to declare by statutory document") was to operate "if the new roads are not dedicated within two years" of the date of Council's letter, 22 May 1978.

21 In September 1978, the surveyor sent the plan of subdivision to Council for sealing. On 6 November 1978, the Shire Clerk wrote to the surveyor saying that:

> "Council is prepared to grant final approval to the above subdivision even though all the conditions of Council's letters dated 22 December, 1977, and 22 May, 1978, have not been complied with. However, you are hereby advised that Council will not take any responsibility for the fact that the existing track is outside the right of carriageway; nor will Council be involved in any dispute that may arise because the existing track is outside the right of carriageway."

22 The plan certified by the Shire Clerk bore on it the diagram showing "proposed right of way 10 wide". The Shire Clerk certified that the requirements of the *Local Government Act* (other than the requirements for the registration of plans) had been complied with by the applicant in relation to the proposed subdivision. The plan was registered in the Office of the Registrar-General and became Deposited Plan 601049.

"Proposed right of way"

23 The expression "proposed right of way" when used on the plan of subdivision that became Deposited Plan 601049 was (and is) a term of art. Since 1964, s 88B of the *Conveyancing Act* 1919 (NSW) has provided for the creation (and later the release) of easements, and restrictions on use of land by the lodging of plans showing the creation or release of those interests. In particular, it has provided, and now provides, that[9] a plan shall not be lodged in the Office of the Registrar-General for registration unless it indicates in the manner prescribed in respect of the plan by regulations made under the *Conveyancing Act* (or now under that Act or the *Real Property Act*) what easements, if any, are intended to be created appurtenant to or burdening land comprised in the plan. It further provided[10] that on registration of a plan upon which an easement is indicated, then, subject to some qualifications which need not be noticed, easements indicated as intended to be created shall be created[11], whether or not the land benefited and the land burdened are in the same ownership at the time when the plan is registered.

24 Regulations were made under the *Conveyancing Act* prescribing the manner in which easements intended to be created by registration of a plan are to be indicated. At the times relevant to this matter, the Conveyancing Act

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9 s 88B.

10 s 88B(3).

11 s 88B(3)(c)(i).

Regulations (NSW) provided[12] that, in any deposited plan lodged for registration in the Office of the Registrar-General, no notation was to be entered referring to an intention to create an easement which was not intended to be created pursuant to s 88B of the *Conveyancing Act*. An exception was made, however, to allow illustration of the site of an easement which it was intended should *later* be created by an instrument of a grant or reservation rather than by the plan itself. Thus, reg 52A provided that:

> "(2) Notwithstanding the provisions of clause (1) of this Regulation, the diagram in such a plan may illustrate the site of an easement intended to be created by an instrument of grant or reservation, provided the designation of such site includes the word 'proposed' or an abbreviation thereof and provided no written statement of such intention is entered elsewhere on the plan.
>
> (3) The illustration and designation of the site of an easement in accordance with clause (2) of this Regulation shall not be taken for the purposes of the said section 88B to indicate in the prescribed manner an intention to create an easement."

It follows that registration of the plan of subdivision of the Winchcombe Carson land as Deposited Plan 601049 did not create an easement over the "proposed right of way 10 wide". That plan, by describing the right of way as a "proposed right of way 10 wide", did no more than "illustrate the site of an easement *intended* to be created by an instrument of grant or reservation".

25 In these circumstances, what was the effect of the correspondence which passed between the surveyor and Council? In particular, was there any condition of the Council's approval of the subdivision which was a condition relating to the "proposed right of way 10 wide"?

Was there a condition of the subdivision?

26 The appellant submitted that, even if there was a condition attached to the Council's approval of the subdivision, the Shire Clerk had certified on the plan that was lodged with the Registrar-General that it had been met.

27 The plan lodged with the Registrar-General bore the Shire Clerk's certificate that the requirements of the *Local Government Act* had been met. That certificate was given under s 327(2)(b) of that Act. As noted earlier, that

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12 reg 52A.

provision was found in Pt XII of the Act. The better view may well be that, as the appellant submitted, s 327(2)(b) required the Shire Clerk to consider not only whether requirements which flowed from or were imposed pursuant to Pt XII of the Act had been satisfied but also to consider whether any other requirements of the Act, including any requirements imposed under Pt XIIA and, in particular, s 342U(4) had been satisfied. But even if the Shire Clerk's certificate is to be read in this way, it could certify only that those conditions which had to be met before the subdivision was certified had been satisfied. The certificate did not, and could not, say anything about whether conditions to be fulfilled at some time after the subdivision had been certified, let alone after it had been effected, were conditions that had been satisfied.

28 Because the respondent's argument assumes that the relevant condition of approval of the subdivision was not one that had to be satisfied *before* certification by the Shire Clerk or the effecting of the subdivision, the certificate of the Shire Clerk may be put aside from further consideration.

29 The December 1977 conditions had required provision of a constructed right of carriageway before the plan of subdivision would be sealed. Because this presented "the problem of the difficulty in construction of the carriageway" over part of that road, a difficulty to which the surveyor referred in his April 1978 letter, the surveyor sought and obtained a variation of that condition. The variation first proposed by Council (in its May 1978 letter) was the requirement "to declare by statutory document as a condition of subdivision that a right of carriageway over the existing track" should be created "if the new roads are not dedicated" before 22 May 1980. In November 1978, there was no "statutory document" created or "declare[d]" by Winchcombe Carson or its surveyor and none was thereafter sought by the Council. Its letter of November 1978 recognised that the condition had not been met and that letter did not seek to pursue its enforcement. Instead, the Council sealed the plan and its Shire Clerk gave his certificate with no condition other than any that could be identified from the plan itself. In particular, contrary to the respondent's submission, in November 1978, the Council did not impose as a condition of its sealing the plan, and thus approving the subdivision, any condition in the form or to the effect of the first of the December 1977 conditions, namely, that a constructed right of carriageway from Clothiers Creek Road be provided, on which the track should be at least 2.5 metres wide and constructed with 150 mm consolidated thickness of gravel.

30 What significance, then, is to be attached to the depiction, on the plan that was sealed and registered, of the "proposed right of way 10 wide"?

The effect of the plan

31 On its face, the depiction on the plan of the "proposed right of way 10 wide" did no more than indicate that those who had prepared the plan intended, at some unspecified time in the future, to create an easement of way by an instrument of grant or reservation. All the land in the plan then being owned by Winchcombe Carson, the plan may be taken as indicating that company's intention. That statement of intention was not devoid of significance. Indeed, it may well have taken on some real commercial significance in dealings between Winchcombe Carson and any person who bought only one of the lots in the subdivision. The statement of intention having been made, it would have been open to a would be purchaser of the proposed dominant tenement to press for the creation of the relevant easement (and to a would be purchaser of the proposed servient tenement to press for a reduction in the price otherwise payable).

32 Whatever may have been the *commercial* significance of the statement of Winchcombe Carson's intention on the plan, nothing in the *Local Government Act* obliged Winchcombe Carson to give effect to its stated intention. If the depiction of the "proposed right of way 10 wide" on the plan can be understood as a condition of the grant of Council's approval to the subdivision (and we doubt that it can), that condition was not one requiring the creation of a right of carriageway; it was, at most, a condition that the intention to do so be stated. And that was done. But the intention was not bounded by any time for its being put into effect.

33 In this Court, the respondent suggested that the statement of an intention to create a right of way constituted a condition of the subdivision that was to be carried into effect within a reasonable time. So far as the reasons of the Land and Environment Court and the Court of Appeal reveal, this contention was not one made in the courts below. But whether or not advanced for the first time in this Court, the contention is not made good.

34 Once it is recognised, as in our view it must, that the Council, by its November 1978 letter, abandoned any insistence on any of the earlier formulations of conditions for the subdivision, it follows that, if there was any relevant condition for the subdivision, it could be found only in what appears on the plan. The evidence led in the Land and Environment Court provides no basis for deciding what time would be a reasonable time within which effect should be given to the stated intention. That is reason enough to reject the respondent's contention. But even if that difficulty could be surmounted, there is a more fundamental difficulty. These reasons later demonstrate that there is no basis for concluding that the obligation to give effect to the statement of intention was an obligation binding the appellant – a person other than the party whose intention was stated (Winchcombe Carson).

35 Legislation in force at the time of the subdivision of the Winchcombe Carson land which was relevant to that subdivision underwent considerable alteration before the appellant or the respondent bought their land. It is necessary to identify the statutory provisions upon which the respondent relied in support of the claim it made in the Land and Environment Court.

The basis of the claims in the Land and Environment Court

36 As noted earlier, the respondent sought, in the Land and Environment Court, a declaration that the present appellant was in breach of condition (a) of the December 1977 conditions. This was said to constitute a breach of a condition of a development consent. The reference to a "condition" of a "development consent" was to be understood by reference to the *Environmental Planning and Assessment Act* 1979 (NSW) ("the EPAA"). Section 4 of the EPAA defined "development consent", so far as now relevant, as a "consent under Part 4 to carry out development". The word "development" was in turn defined by s 4 of that Act as meaning:

> "(a) the use of land, and
>
> (b) the subdivision of land, and
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> (c) the erection of a building, and
>
> (d) the carrying out of a work, and
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> (e) the demolition of a building or work, and
>
> (f) any other act, matter or thing referred to in section 26 that is controlled by an environmental planning instrument,
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> but does not include any development of a class or description prescribed by the regulations for the purposes of this definition."

37 Section 76A(1) of the EPAA provided that:

> "If an environmental planning instrument provides that specified development may not be carried out except with development consent, a person must not carry the development out on land to which the provision applies unless:
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> (a) such a consent has been obtained and is in force, and

(b) the development is carried out in accordance with the consent and the instrument."

Thus, if by "an environmental planning instrument" permission was given to subdivide land, that subdivision (the "specified development") might not be carried out on the land otherwise than "in accordance with the consent and the instrument".

38 An "environmental planning instrument" included what the EPAA referred to[13] as a "deemed environmental planning instrument". A "deemed environmental planning instrument" meant "a former planning instrument referred to in clause 2 of Schedule 3 to the *Miscellaneous Acts (Planning) Repeal and Amendment Act 1979* and include[d] an instrument referred to in clause 3(2) of that Schedule". The respondent asserted, and the appellant did not dispute, that the Interim Development Order No 2 – Shire of Tweed was a "deemed environmental planning instrument" for the purposes of the EPAA.

39 The appellant did submit that the particular transitional provisions made by the *Miscellaneous Acts (Planning) Repeal and Amendment Act* 1979 (NSW) (as later amplified by the *Environmental Planning Legislation Amendment Act* 1995 (NSW)) would not have served to preserve any condition which the Council had imposed in respect of the subdivision of the Winchcombe Carson land beyond a limited time. But it is unnecessary to consider the validity of that submission. The more fundamental point made by the appellant was that, even if the correspondence which passed between the surveyor and the Council, or the depiction of the "proposed right of way 10 wide" on the plan of subdivision did constitute a condition on which the Council approved the subdivision, that condition was not enforceable against the appellant. That contention should be accepted.

40 For the reasons given earlier, we do not accept that either the correspondence to which we have referred, or the depiction on the plan of the "proposed right of way 10 wide" constituted or evidenced a condition on which the Council approved subdivision, or at least any condition that went beyond Winchcombe Carson being required to state that it intended to create at an unspecified future time such a right of carriageway. In order to explain why, even if that conclusion is not right, we accept the appellant's submission that any condition that was imposed was not enforceable against it, it is necessary to return to examine the nature of the proceedings instituted by the respondent in the Land and Environment Court and then to notice some particular aspects of

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13 s 4.

the reasoning of the Court of Appeal which led that Court to conclude that the respondent had been entitled to the relief which it had sought and obtained in the Land and Environment Court.

Section 123 of the *Environmental Planning and Assessment Act*

41 As noted previously, the respondent sought two forms of order in the Land and Environment Court – a declaration and an order in the nature of a mandatory injunction. The latter form of order was sought pursuant to s 123 of the EPAA. Sub-section (1) of that section provided that:

> "Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach."

Pressed, in oral argument, to identify the breach of the EPAA which it was sought to remedy or restrain by the mandatory order to create an easement and construct a carriageway, the respondent pointed to that part of s 76A of the EPAA which provided that a person must not carry the development out on land to which the provision of an environmental planning instrument applies unless "the development is carried out in accordance with the consent and the instrument".

42 No doubt, as counsel for the respondent pointed out, "development", as used in the EPAA, could refer to the subdivision of land, the use of land or to both subdivision and use. It by no means follows, however, that a person occupying a lot in a plan of subdivision carries a development out on the land by simply occupying the land. Where, as here, the *subdivision* of the land was the relevant development, the subsequent purchaser of a subdivided lot does not "carry *that* development out" by occupying, and thus using, one of the lots in the subdivision.

43 It follows that, even if there was a relevant condition of the subdivision concerning the creation of a right of way, the appellant did not contravene s 76A of the EPAA by using the land without creating that right of way. It did not breach s 76A because it did not carry the development of subdivision out on the land.

44 In the courts below, two points emerged in response to this apparent difficulty in applying s 123 of the EPAA to the facts of the present matter. It will be convenient to refer to those points as the "objective contravention" point and the "rights in rem" point, and to deal with them separately, even though, on examination, they are revealed to be closely connected.

The "objective contravention" point

45 In the Court of Appeal, Meagher JA gave the principal judgment. Handley and Hodgson JJA agreed with the reasons of Meagher JA but Hodgson JA added some additional reasons for concluding that the appeal to that Court by the owner of the appellant's land should be dismissed.

46 Hodgson JA said[14] that, if the development in question in the proceedings had been a use of the land, then any person who made that use of the land pursuant to a development consent, without complying with a condition of that consent, would "be in breach of the [EPAA] and [could] plainly be ordered to rectify that breach". His Honour went on to say[15] that:

> "If the development in question is a subdivision, then a later owner of the subdivided land or of a subdivided part of it may not be guilty of any breach of the [EPAA], but nevertheless, so long as the land remains subdivided in accordance with a development consent without a condition of that consent being fulfilled, *there is objectively speaking a continuing contravention of the condition*; and s 123 of the [EPAA] then gives power to the Land and Environment Court to order the rectification of that contravention by such person as is able to do so, again irrespective of what appears on the title of the land." (emphasis added)

The reference to there being "objectively speaking" a continuing contravention of the condition obscures an important question about the proper construction of s 123. In particular, it assumes that s 123 empowers the making of orders to remedy or restrain a breach of the EPAA even if the person to whom the order is directed has not committed any breach of the Act and would not commit a breach of the Act.

47 There is no doubt that s 123, as a provision conferring powers on a court, should be read giving the words of the provision full amplitude. As was said in the judgment of the Court in *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc*[16]:

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14 (2002) 55 NSWLR 446 at 449 [19].

15 (2002) 55 NSWLR 446 at 449 [19].

16 (1994) 181 CLR 404 at 421. See also *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 283-284 per Wilson J, 290 per Gaudron J; *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 275-276 per Gummow J; *PMT Partners Pty Ltd (In Liq) v Australian*

(Footnote continues on next page)

> "It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words."

Nonetheless, s 123 of the EPAA is not to be read as conferring power on the Land and Environment Court to make orders to remedy or restrain breaches of the Act against persons who are not themselves in breach of the Act or who, unless restrained, would be in breach of the Act.

48 So much follows from the description of the kind of order which may be made under s 123, namely, "an order to remedy or restrain a breach of this Act". An order directed to a person who is not actually in breach of the Act, and not threatening to act in breach, would neither remedy nor restrain any breach.

49 To read s 123 in this way does not lead to any artificial, let alone absurd, result; it does not strip s 123 of utility. In the common case where the relevant development of the land is a particular permitted use of the land, any person who uses the land in some other way carries out a development of the land (by using it in that other way) contrary to the consent that was given. It matters not whether the user of the land was the applicant for consent. Section 76A of the EPAA forbids the user of the land from carrying out the development constituted by that use otherwise than in accordance with the consent given. Accordingly, orders may be made against those who use land in a manner not permitted by development consent. A person using the land in that way is in breach of s 76A of the EPAA. But in the present case the relevant development was not the *use* of the land; the relevant development was the *subdivision.*

50 The operation of the EPAA to forbid any person using land otherwise than in accordance with the use permitted by a development consent has sometimes been described by drawing analogies with principles of the law of real property. References may be found in the decided cases to planning restrictions "enur[ing] for the benefit of all future owners or occupiers"[17] or giving rise to rights "in

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National Parks and Wildlife Service (1995) 184 CLR 301 at 313 per Brennan CJ, Gaudron and McHugh JJ; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81 [21] per Gaudron and Gummow JJ; *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 at 279 [17] per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ.

17 *Auburn Municipal Council v Szabo* (1971) 67 LGRA 427 at 433-434.

rem"[18]. Drawing analogies of that kind may, in the particular facts of an individual case, provide a familiar or convenient summary of the result of applying the relevant statutory provisions. Such analogies, however, provide no satisfactory basis for the consideration of any novel case. It is the applicable statutory provisions, and those alone, which must be examined in order to determine the rights of the parties. In particular, to say as Meagher JA did in the Court of Appeal[19] that "the council's consent to the subdivision *operates to create a right in rem*, so that it may be relied on (inter alia) by all later transferees of any lot" is to express a conclusion which, if valid, must find its justification in the relevant statutes.

Right in rem?

51 If the Council's consent to the subdivision operated to create a right in rem that may be relied on by any later transferee of any lot in the subdivision, that would present a fundamental question about how the creation of such a right would be consistent with the effective operation of a system of Torrens Title. In particular, the existence of such a right would be inconsistent with s 42(1) of the *Real Property Act*. That provides that, subject only to the four kinds of exception specified in the succeeding paragraphs of s 42(1), and the further exception "in case of fraud":

> "Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, *the registered proprietor* for the time being of any estate or interest in land recorded in a folio of the Register *shall*, except in case of fraud, *hold the same, subject to such other estates and interests* and such entries, if any, *as are recorded in that folio*, but *absolutely free from all other estates and interests that are not so recorded*". (emphasis added)

(None of the exceptions specified in s 42(1) was said to be engaged in the present matter.)

52 As Barwick CJ said in *Breskvar v Wall*[20]:

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18 *Winn v Director General of National Parks and Wildlife* [2001] NSWCA 17 at [199] per Stein JA.

19 (2002) 55 NSWLR 446 at 449 [13] (emphasis added).

20 (1971) 126 CLR 376 at 385-386.

> "The Torrens system of registered title ... is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. *It is the title which registration itself has vested in the proprietor*." (emphasis added)

It follows that, when the appellant became registered as proprietor of an estate in fee simple in the appellant's land, it obtained the title described in the certificate of title. That title was free from any encumbrance or interest of the kind which the respondent contends it is now entitled to have created.

53 If the consent to the subdivision did create a right in rem, that would be a right or interest in the land not shown on the Computer Folio Certificate. There would then be a real and lively question about how the two statutory schemes (the scheme under the EPAA and the Torrens system for which the *Real Property Act* provides) were to be reconciled, and questions of implied repeal or amendment might arise. But those questions are not raised by this matter. That is because it was common ground that the appellant's title was not and is not now subject to any interest of the kind which the respondent asserted it was entitled to have the appellant create in its favour. If the respondent has any such right, it is a right to have an interest in land *created* and that is said to be a right enforceable by personal action against the appellant, not by any action or application to rectify the Register maintained under the *Real Property Act*. That right, if it exists, is *not* a right in rem.

54 The availability of rights in personam is entirely consistent with the Torrens system of title. The immediate indefeasibility of a title to land under the Torrens system does not deny "the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant"[21] and those proceedings "may have as their terminal point orders binding the registered proprietor to divest himself wholly or partly of the estate or interest vested in him by registration"[22]. If the respondent has a right against the appellant, it is a personal right, not a right in rem, and that personal right must be found, if at all, in the relevant statutory provisions.

55 For the reasons given earlier, however, the respondent has no such right. Section 123 of the EPAA does not provide that right to the respondent in this

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21 *Frazer v Walker* [1967] 1 AC 569 at 585.

22 *Breskvar v Wall* (1971) 126 CLR 376 at 385 per Barwick CJ.

case, the appellant not being in actual or threatened breach of that Act. No other provision of that Act was identified as founding the right asserted. That being so, the respondent's claim to orders obliging the appellant to create an easement and construct a right of way must fail.

Conclusions and Orders

56 The appeal to this Court should be allowed with costs. The orders of the Court of Appeal made on 3 October 2002 should be set aside and in their place should be orders as follows:

(a) Appeal allowed with costs.

(b) Set aside pars 1 to 5 of the orders of the Land and Environment Court of New South Wales made on 7 June 2001 and, in their place, order that the application is dismissed with costs.

57 KIRBY J. This appeal[23] "presents an interesting question of real property law" argued closely on "both sides with reference both to principle and to decided cases"[24]. As I approach the ultimate question in the appeal, it concerns the right of a specialised superior court of record, under deliberately wide statutory powers, to order Hillpalm Pty Ltd ("the appellant"), at the suit of Heaven's Door Pty Ltd ("the respondent"), to create "the 10 metre right of carriageway, shown on DP 601049, by registration thereof on the title to [Hillpalm's] land"[25].

58 The respondent (which succeeded before the primary judge[26] and unanimously in the New South Wales Court of Appeal[27]) suggests that, ultimately, what is at stake is the application of the very broad powers afforded to the Land and Environment Court by the *Environmental Planning and Assessment Act* 1979 (NSW)[28] ("the EPAA") in circumstances where the merits were, and were found to be[29], in the respondent's favour. This, it was said, sustained the making of orders rendering them unassailable in this Court. This Court has said many times that the High Court will not normally disturb collateral findings of fact[30]. It will only do so when the findings are shown to be "clearly erroneous"[31]. Still less will it readily interfere with discretionary orders of a court, so long as those orders are made within power and without legal error.

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23 From the New South Wales Court of Appeal: *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2002) 55 NSWLR 446.

24 *Pratten v Warringah Shire Council* (1969) 90 WN (Pt 1) (NSW) 134 at 139 per Street J.

25 Terms of the order of the Land and Environment Court, entered 7 June 2001, par 2. See *Heavens Door Pty Ltd v Hillpalm Pty Ltd* (2001) 116 LGERA 138 at 157 [114].

26 *Hillpalm* (2001) 116 LGERA 138 per Sheahan J.

27 *Hillpalm* (2002) 55 NSWLR 446 per Meagher JA (Handley JA concurring; Hodgson JA agreeing with further reasons).

28 In particular, see ss 122, 123 and 124.

29 *Hillpalm* (2001) 116 LGERA 138 at 156 [102]-[104].

30 eg *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 568-569 [51]-[54].

31 *Barclay Oysters* (2002) 211 CLR 540 at 568 [53].

59 For the appellant, however, the issue at stake concerns a fundamental aspect of the system of land title by registration, regulated in this case by the *Real Property Act* 1900 (NSW) ("the RPA"). The appellant argued that the courts below had erred in failing to hold that, when it became the registered proprietor of the land, supposedly subject to an unfulfilled condition of development and subdivision consent for a right of carriageway in favour of the respondent, the appellant took its interest in the land free of an easement necessary for the right of carriageway to be effective, and free of any obligation to recognise or create such an easement. At the time the appellant acquired title to the subject land, the appellant's Certificate of Title to the land did not disclose the existence of any easement, actual or proposed. Reference to the proposed right of carriageway existed only in a deposited plan. It was not on the registered title. For the appellant, then, the appeal concerned the suggested precedence which the RPA took, both as a matter of legal principle, and in the factual circumstances of the case.

The facts, legislation and issues

60 *The background facts*: The way the dispute arose between the parties is stated in the reasons of McHugh ACJ, Hayne and Heydon JJ ("the joint reasons")[32]. The relevant circumstances include those giving rise to the subdivision of the once unified parcel of land owned by Winchcombe Carson Trustee Co (Canberra) Ltd ("Winchcombe Carson") near Tweed Heads in New South Wales; the condition of a constructed right of carriageway imposed on Winchcombe Carson by the Tweed Heads Shire Council ("the Council") as a requirement for subdivision consent; and the survival of that condition despite intervening changes to planning law[33]. All of these are explained in the joint reasons[34].

61 *The applicable legislation*: It is perhaps as well to spell out, in a little more detail, the two different statutory regimes of planning law that successively applied to the development and use of the subject land. When Winchcombe Carson initially proposed the subdivision of the then unified allotment, development approval belonged to the Council under Pt XIIA of the *Local Government Act* 1919 (NSW) ("LGA"). For the proposed separation of the land

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32 Joint reasons at [4]-[13]. See also reasons of Callinan J at [111]-[124].

33 *Miscellaneous Acts (Planning) Repeal and Amendment Act* 1979 (NSW), Sched 3, cl 7.

34 Joint reasons at [14]-[24], [36]-[39].

into two lots, subdivision approval was required under Pt XII of the LGA, specifically applicable in the late 1970s whenever a subdivision was proposed[35].

62 The applicable request for development consent to create a 45 hectare rural lot (Lot 1) specified a right of way access from the lot to Clothiers Creek Road. Approval was sought pursuant to the Interim Development Order No 2 – Shire of Tweed ("the IDO"), cl 11(1). The Council had no power to grant development consent to the application unless it provided for access from the proposed lot to a main road. Clause 11(1)(c) of the IDO imposed a development standard requiring frontage to a main road of not less than 400 metres[36], although that requirement was capable of waiver in cases involving "minor" departures from the specified standard[37]. However, not only was the provision of the right of way a legal requirement for the exercise of the Council's powers to grant development consent. It was essential from the point of view of the purchaser of the proposed rural lot, otherwise effectively cut off from access to the nearest road. It was necessary to protect the interests of the public (including service utilities), having legitimate purposes to gain access to Lot 1 of the proposed subdivision.

63 Long before the times in question here, experience in planning control law taught that, unless the requirements for access from a proposed new lot to a main road were incorporated in development consent, subsequent contests over the creation of an easement[38] would take time, involve cost, inconvenience landowners and the public, burden public utilities and consume the energies of the courts sorting out the consequences. All of these considerations explain the imperative planning and land management interest in attaching clear conditions concerning a right of way to a public road when development consent to a subdivision was invoked. So it was that the Council granted development consent to the proposed subdivision with right of way access to Clothiers Creek Road, subject to conditions requiring provision of a constructed right of carriageway of a specified width and road thickness from Clothiers Creek Road together with the submission of final plans and payment of the requisite fees to the Council.

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35 The equivalent provisions to Pt XIIA LGA are now found in Pt 4 EPAA. Those in Pt XII LGA are now found in Pt 4A EPAA.

36 IDO, cl 11(1)(c): "... land shall not be sub-divided ... unless ... the frontage of any such allotment to a main road is not less than 400 metres".

37 IDO, cl 35.

38 Under the *Conveyancing Act* 1919 (NSW), s 88B.

64 What ensued was approval by the Council of the subdivision under Pt XII LGA. That approval was part of the separate regulatory scheme then in force in the State of New South Wales for the control of subdivisions. So much was confirmed by the expert evidence given at trial; by the separate (subdivision) number given to the approval; and by the release of a linen plan of survey impressed with the certificate of the Shire Clerk to the Council which was the final step in implementing the Council's subdivision approval before registration of the plan as a deposited plan under the *Conveyancing Act* 1919 (NSW). Once this plan was registered, a subdivision of the land was effected. It yielded two lots. Such a subdivision was also a step in implementing the applicable development consent under Pt XIIA LGA.

65 Each of the deposited plans for subdivision of the subject land (including the title diagram incorporated by reference in the appellant's Certificate of Title) referred to "Title diagram: DP 1003396". That deposited plan clearly showed the proposed right of way, a fact proved in evidence at the trial and clear in any case on the face of that document.

66 *Transitional legislation and its effect*: Because it would have been unlawful for the Council to approve the subdivision without imposing a condition with respect to the access road, the development consent granted by the Council is to be read as incorporating that condition. The applicable development consent was granted under Pt XIIA LGA. When the EPAA commenced on 1 September 1980, the applicable Parts of the LGA were repealed. However, the New South Wales Parliament took great care to preserve consents given under the LGA and any conditions attaching thereto. Thus the *Miscellaneous Acts (Planning) Repeal and Amendment Act* 1979 (NSW) ("Miscellaneous Transitional Act") provided[39]:

> "Any consent, approval or permission granted in respect of an application made under a former planning instrument, and in force immediately before the appointed day, shall, subject to subclause (2), continue in full force and effect subject to –
>
> (a) the operation of any provision of that instrument or any term or condition of that consent, approval or permission governing or relating to the currency, duration or continuing legal effect of that consent, approval or permission; and
>
> (b) the operation of any condition (other than that referred to in paragraph (a)), restriction or limitation, subject to which that consent, approval or permission was granted."

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39 See Sched 3, cl 7(1).

67 This provision of the transitional legislation indicates that an objective of the New South Wales Parliament was (amongst other things) to ensure that unperformed conditions attaching to planning consents did not abate on the coming into force of the new planning legislation. They were not treated as inherently fragile or such as could be taken as abandoned or extinguished before or under the new statutory regime. On the contrary, cl 7(1) was clearly enacted on the assumption that the conditions attached to subdivision and development consents granted under the LGA were intended to survive into the new planning law created by the EPAA. Indeed, a development consent under the LGA was to be taken to have been made under the EPAA.

68 This position was further reinforced by cl 9 of the Miscellaneous Acts (Planning) Savings and Transitional Provisions Regulation (NSW) ("the Miscellaneous Transitional Regulation"):

> "For the purposes of Division 3 of Part 6 of the [EPAA] –
>
> (a) a consent, approval or permission referred to in –
>
> (i) clause 7(1) of Schedule 3 to the Act; …
>
> shall be deemed to be a consent referred to in section 122(b)(ii) of the [EPAA]; and
>
> (b) a term or condition of a consent, approval or permission referred to in paragraph (a) shall be deemed to be a condition referred to in section 122(b)(iii) of the [EPAA]".

69 This provision is important because, by force of s 122(b)(iii) of the EPAA, a breach of a condition of consent is a breach of the Act, that is, of the EPAA. A breach of that Act attracts remedies under the EPAA, and in particular ss 123 and 124 of that Act. It was under those sections that the respondent sought, and obtained, relief in the Land and Environment Court in this case.

70 The joint reasons conclude that the condition imposed by the Council pursuant to the IDO was not enforceable against the appellant[40]. Additionally, they decide that, even if that conclusion is not correct, any condition that was imposed was not a subject of an order by the Land and Environment Court under the EPAA, s 123[41]. I disagree with each of these conclusions. The former involves an artificially narrow view of the condition imposed by the Council (for good, lawful and practical reasons), long thereafter maintained on the register of

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40 Joint reasons at [40].

41 Joint reasons at [41]-[44].

title[42] and known to the appellant. The latter arises from an unacceptably confined reading of the powers of the Land and Environment Court, contrary to the plain language of the EPAA and to established judicial authority.

The Council's condition is enforceable against the appellant

71 *The nature and purpose of land use law*: In order to understand the operation of planning law – both under the LGA and, when it came into force, the EPAA, it is necessary to appreciate that it is concerned with fundamentally more important objectives than the rights of those with various interests in land *inter se*. Of their nature, such laws, governing consent to development generally, and to subdivisions in particular, are concerned with the orderly management of land in society so as to protect at once the interests of individuals, the community and the environment.

72 This point was well made by Street CJ in *F Hannon Pty Ltd v Electricity Commission of NSW [No 3]*[43]. His Honour's analysis is generally accepted as the classic exposition of the nature and scope of the jurisdiction and powers of the Land and Environment Court to grant remedies for breaches of the EPAA pursuant to the provisions whose scope is in issue in this appeal[44]. However, much of what Street CJ says in that connection (whilst especially pertinent here) is also applicable to the purpose and effect of conditions imposed under the former planning law in the LGA. I shall return to his Honour's analysis later. For the moment it is enough to notice the essential point he made[45]:

> "[T]he task of the Court is to administer social justice in the enforcement of the legislative scheme of the Act. It is a task that travels far beyond administering justice inter partes."

73 The reason for the breadth of this principle lies in the central purpose of planning law for land management and use. That purpose is to ensure, relevantly, that the basic purposes necessary to that task are observed and conditions essential to a modern interdependent society observed. Apart from the considerations already mentioned, one has only to think of societies that do not protect their environment and land-based infrastructure, but permit developments to occur without observance of overall planning control and environmental

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42 See reasons of Callinan J at [111].

43 (1985) 66 LGRA 306 at 310-313.

44 EPAA, ss 122, 123 and 124. See *Mandalong Progress Association Inc v Minister for Planning* (2003) 126 LGERA 408 at 418-419 [30]-[32].

45 *Hannon* (1985) 66 LGRA 306 at 313.

protection. It is because of the chaos that can ensue in such circumstances that the ultimate focus of planning regulation law is the land itself. It is not, as such, merely the ephemeral ownership or possession of the land.

74 Were it otherwise, planning law could easily be circumvented by changes of ownership and possession immediately following the imposition of conditions upon proposed development of the land. This is a reason why it is a fundamental mistake to read the LGA, the EPAA or associated laws strictly, so as to confine their application to those who owned or possessed the subject land at the time applicable conditions were imposed. Yet that is what the majority do in this appeal.

75 *Preservation of the applicable condition*: To give effect to the purpose of planning conditions, a different approach to the construction of laws providing for such conditions is required. That approach is confirmed and reinforced by the care taken in the Miscellaneous Transitional Act and Miscellaneous Transitional Regulation to preserve a "consent, approval or permission" granted under a "former planning instrument" so that it would continue "in full force and effect" and be deemed to be a consent or condition, as referred to in s 122(b)(iii) of the EPAA.

76 The parties to the present appeal did not contest that the IDO, under which the Council had imposed the conditions on the development by way of subdivision "that a right of carriageway over the existing track shall be created in favour of the proposed rural lot" was a "deemed environmental planning instrument" for the purposes of the EPAA[46]. Clearly, the conditions attached to that development by way of subdivision were not complied with. On the face of things, this meant that there was a breach of the development consent initially given which continued as a breach of the "development consent" deemed to be given under the EPAA.

77 The appellant also conceded (rightly in my view) that the Miscellaneous Transitional Act preserved any condition which the Council had imposed in respect of the subdivision and would have bound Winchcombe Carson had it remained the owner of the land. It simply asserted that the condition was not enforceable against it. However, once it is conceded that the condition travels with the land and survives, despite breach of its terms, the passage of years and the commencement of the EPAA, the attempt of the appellant to exempt itself from the consequences of the breach (or to deny the Land and Environment Court the power to afford a remedy designed to enforce the condition) is unpersuasive in this case both as a matter of law and fact.

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46 See joint reasons at [38].

78 Nor does the course of correspondence between the Shire Clerk, for the Council, and the surveyor for Winchcombe Carson alter the essential terms of the condition on the development and subdivision, namely the "provision of a … right of carriageway from Clothiers Creek Road" of specified dimensions. It is unsurprising that this is so, given that the LGA[47] contemplated and the IDO required, that such a condition be imposed as a planning necessity.

79 *Immaterial evidentiary imperfections*: There are unsatisfactory features of the evidence at the trial of this case. The initial proposed plan of subdivision, lodged with the Council, was lost. There was misdescription of the lots affected by the proposed right of carriageway[48]. The width of the carriageway was described in successive diagrams by a digit (10) but without an express indication that it referred (as it clearly did) to "10 metres". There was inconclusive correspondence[49] concerning a suggested variation of the exact trajectory of the proposed right of carriageway. By 1990, the Certificate of Title, as such, did not disclose on its face the existence of any easement, actual or proposed, relating to the intended carriageway.

80 Despite these evidentiary imperfections, through all of the deposited plans relating to the subject land, notwithstanding later subdivisions, the title diagram in the deposited plan clearly showed the access road as a "proposed right of carriageway" or "proposed right of way 10 wide". To a skilled conveyancer, this bore a plain meaning that it was intended at a later time to create an easement in the location shown in the diagram as a condition of the subdivision. The Council did not necessarily wish to be forced into involvement in a dispute between the owners of the adjoining lots in respect of the exact position of the proposed easement and right of carriageway. Sensibly, this was something the Council was content to leave to them. But at no stage did the Council withdraw or rescind the condition it had imposed for the development and subdivision of the land. The existence of that subdivision condition continued to be evidenced in the title diagrams appearing in the successive deposited plans relating to the subject lots.

81 *The unfulfilled condition was enforceable*: I would therefore reject the appellant's contention that, of its nature, the condition imposed by the Council upon the development and subdivision that ultimately produced the allotments of

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47 s 327(2). See joint reasons at [14].

48 See joint reasons at [17].

49 See joint reasons at [19]-[22].

land owned by the appellant and respondent respectively was not enforceable in its own terms. I agree with the remark of Hodgson JA in the Court of Appeal[50]:

> "[The EPAA] is concerned with land as a topographical entity, indifferently to its proprietorship; and … there is a continuing contravention of a condition of a development consent for so long as the development continues and the condition is unfulfilled.
>
> If the development in question is a use of land, then any person who makes that use of the land pursuant to the consent without complying with the condition will be in breach of the Act".

82 It follows that, on the face of things, the legal rights of the appellant as the successor to Winchcombe Carson in respect of Lot 2 were subject to the condition imposed by the Council upon the development and subdivision concerning the land. The breach of the condition imposed by the Council continued. The real issue in the case is thus reached. It concerns whether the Land and Environment Court had the power under the EPAA in these circumstances to order the appellant, belatedly, to comply with the condition. The resolution of that issue, both as a matter of law and of discretion, depends on the argument of the appellant that no such order could or should be made having regard to its "clean" Certificate of Title (bearing no notification of a proposed easement with respect to the right of carriageway) taking into account the provisions and purposes of the RPA, read together with the EPAA.

The Land and Environment Court's power was engaged

83 *Wide interpretation of court powers*: The Land and Environment Court "is both a superior court of record and a court of limited jurisdiction"[51]. It follows from the fact that it is a superior court of record that "within its defined jurisdiction, amply construed, it will be entitled to do the large range of things that superior courts of record traditionally do"[52].

84 The definition of the jurisdiction and powers of the Land and Environment Court is found in its Act[53], the EPAA and in implications inherent in the express

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50 *Hillpalm* (2002) 55 NSWLR 446 at 449 [18]-[19].

51 *National Parks and Wildlife Service v Stables Perisher Pty Ltd* (1990) 20 NSWLR 573 at 578, 585.

52 *Stables Perisher* (1990) 20 NSWLR 573 at 585.

53 *Land and Environment Court Act* 1979 (NSW).

grants of power[54]. The peculiarity of the functions of the Court, to uphold the public interest in planning law, to protect the public interest beyond the interests of the parties and also to protect the environment are most clearly indicated by a provision in s 123(1) of the EPAA. This permits "any person" to bring proceedings in the Court "for an order to remedy or restrain a breach of this Act". That power, which transcends traditional notions of standing under the general law[55], reinforces in this context the principle stated in the general rule that the jurisdiction and powers conferred by statute on a superior court of record must be construed amply, in the confidence that such a repository will need to be in a position to deal with the great variety of circumstances coming before it and that it will not misuse such powers[56].

85 In terms of the EPAA, the broad entitlement of any person to commence proceedings "for an order to remedy or restrain a breach" is given still further emphasis by the acknowledgment in that Act that the person bringing such proceedings may do so "whether or not any right of that person has been or may be infringed by or as a consequence of that breach"[57]. Such provisions scarcely suggest a strict or narrow reading of the powers of the Land and Environment Court when invoked to remedy or restrain an established breach of the EPAA.

86 *Breach includes failure to comply*: By the EPAA, a "breach of this Act" includes "a contravention of *or failure to comply with*" a "condition subject to which a consent is granted"[58]. Pursuant to the Miscellaneous Transitional Act, the "condition" imposed on the subdivision and development of the subject land is a deemed "environmental planning instrument" for the purposes of the EPAA. It is thus referred to in s 122 of the EPAA. Even if it might be argued that the appellant did not "contravene" the condition (eg at the time of the creation of the subdivision itself) the same is not true of the phrase "failure to comply with" the condition. There are, with respect, dangers in posing the question solely as to whether a party is "in breach of the Act"[59]. This is not an accurate paraphrase of

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54 See *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 422-423 [108].

55 See *Sydney City Council v Building Owners and Managers Association of Australia Ltd* (1985) 2 NSWLR 383 at 386-387.

56 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 204; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582; *Logwon Pty Ltd v Warringah Shire Council* (1993) 33 NSWLR 13 at 28-30.

57 EPAA, s 123(1).

58 EPAA, s 122 (emphasis added).

59 Joint reasons at [47].

the EPAA when the extended definition of "breach" is taken into account. Here the "breach" was a "failure to comply".

87 The condition never having been rescinded (and on the contrary maintained and carried into force under the EPAA by the transitional legislation and regulation) it remains applicable to the land in the resulting subdivision. It has not been complied with either by Winchcombe Carson or the appellant as the owner and occupier of the land. The "condition subject to which a consent is granted" remains unfulfilled. The "failure to comply with" it therefore enlivens the jurisdiction and powers of the Land and Environment Court under the EPAA.

88 It is the extended definition of "breach" of the EPAA that affords the textual foundation in that Act for the appellant's liability under s 76A(1) of the Act to relief in favour of the respondent directed at the previous carrying out of the specified development and subdivision otherwise than "in accordance with the consent and the [environmental planning] instrument"[60]. Relevantly, this is the deemed environmental planning instrument[61] (in this case the Shire of Tweed IDO made under the LGA).

89 *Established authority on Court powers*: This approach, and the notion that conditions governing subdivision and development consent relate to the land and survive intermediate changes in the ownership and possession of the land, is well established in New South Wales law[62]. It has roots in earlier English cases[63]. It helps to explain the care taken in the Miscellaneous Transitional Act to preserve conditions, restrictions and limitations on consents made under a "former planning instrument". In *Winn v Director General of National Parks and Wildlife*[64], Spigelman CJ correctly described the position hitherto accepted as settled law in New South Wales:

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60 EPAA, s 76A(1)(b).

61 EPAA, s 4 (definition of "environmental planning instrument").

62 *Ryde Municipal Council v The Royal Ryde Homes* (1970) 19 LGRA 321 at 324; *Parramatta City Council v Shell Co of Australia Ltd* [1972] 2 NSWLR 632 at 637 per Hope JA (Jacobs P and Manning JA concurring); *Friends of Stradbroke Island Association Inc v Sandunes Pty Ltd* (1998) 101 LGERA 161 at 169; *House of Peace Pty Ltd v Bankstown City Council* (2000) 48 NSWLR 498 at 504 [23], 507 [37].

63 *Miller-Mead v Minister of Housing and Local Government* [1963] 2 QB 196 at 215 per Lord Denning MR ("A grant of permission runs with the land and may come into the hands of people who have never seen the application at all"); see also at 223 per Upjohn LJ.

64 [2001] NSWCA 17 at [4].

> "A public document, such as a development consent, constitutes a unilateral act on the part of the consent authority expressed in a formal manner, required and intended to operate in accordance with its own terms. It has … an inherent quality that it will be used to the benefit of subsequent owners and occupiers. It is also a document intended to be relied upon by many persons dealing with the original grantee, or assignees of the grantee, in such contexts as the provision of security. In some respects it is equivalent to a document of title. It must be construed in accordance with its enduring functions."

90 This Court could only now overturn this settled authority by adopting an exceedingly narrow approach to the meaning and operation of the EPAA which, contrary to its language, history and object, confined it effectively to an *inter partes* operation. That is not an approach that I would take. The unlikelihood that Parliament would have contemplated the need for fresh Council consideration (and the imposition of new development and subdivision conditions) upon each new purchaser or assignee of a party itself subject to current conditions has only to be stated to be understood. The disruption that would ensue for the orderly operation of planning law, and compliance with conditional consents under that law, should not be embraced lightly.

91 *Court powers and the public interest*: I would therefore reject the appellant's submission that the "condition" imposed by the Council on the subdivision and development of its land did not apply to the appellant and that it was not in "breach" of the EPAA (as defined) so as to attract the jurisdiction and powers of the Land and Environment Court under s 123 of the EPAA. I agree with what Street CJ said in *Hannon* to which I return[65]:

> "The width of the powers and jurisdiction of the Land and Environment Court is apparent from the legislative provisions … Likewise it is apparent that the court enjoys a wide discretionary range within which to consider the formulation of orders or to remedy or restrain breaches of the planning legislation. … It is the duty of that Court, in formulating 'such order as it thinks fit', to have regard at all times to the pursuit of the objects of the [EPAA] as set out in s 5. This involves, in appropriate cases, the evaluation of matters extending beyond the mere determination of the rights and matters in dispute between the immediate parties. It involves due weight being given to the public interest and the interests of other affected persons in the overall context of the pursuit of the objects broadly set out in s 5."

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65 (1985) 66 LGRA 306 at 312-313.

92 Similar observations have been made in many later cases[66]. I do not believe that the established line of authority on this point in the Court of Appeal is wrong. The Act, its exceptional language and large purposes all support the correctness of the broad view hitherto taken. It has not been shown to be erroneous. In my view, it is fully sustained by the wide language of the EPAA, its history and purposes. This Court errs in adopting a different view.

Indefeasibility under the RPA and unfulfilled conditions

93 *Indefeasibility: a legal innovation*: The argument that the appellant pressed most strongly on this Court, to support the construction that it urged of the EPAA, including in relation to the jurisdiction and powers of the Land and Environment Court, was based on the view it urged of the language and purposes of the RPA.

94 There is no doubt that the RPA represents the implementation in New South Wales of one of the most important legal innovations adopted in Australia[67]. I refer to the implementation of the Torrens system of land title by registration[68]. Virtually from the start, the Torrens system succeeded in Australia because of its great advantages for all those concerned with interests in land. Its success has encouraged the adoption of similar laws in many other countries, modelled to some extent on the Australian precedent[69]. Although the initial model in South Australia was probably influenced by the system of land registration operating for many years in the Hanseatic towns of Northern Germany, such as Hamburg[70], this providence does not detract from the

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66 See eg *Sydney County Council* (1985) 2 NSWLR 383 at 386-387; *Mandalong Progress Association Inc* (2003) 126 LGERA 408 at 418-419 [30]-[33].

67 See Fox, "The Story behind the Torrens System", (1950) 23 *Australian Law Journal* 489.

68 The applicable provisions of the RPA appear in the reasons of Callinan J at [117]-[120]. See also Whalan, "Immediate Success of Registration of Title to Land in Australasia and Early Failures in England", (1967) 2 *New Zealand Universities Law Review* 416 at 424.

69 Cooper, "Equity and Unregistered Land Rights in Commonwealth Registration Systems", (2003) 3 *Oxford University Commonwealth Law Journal* 201; Agbosu, "Land Registration in Ghana: Past, Present and Future", (1990) 34 *Journal of African Law* 104.

70 Raff, *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law*, (2004); Esposito, "A Comparison of the Australian ('Torrens') System of Land Registration of 1858 and the Law of Hamburg in the 1850s", (2003) 7 *Australian Journal of Legal History* 193.

enormous influence of the Torrens reform in Australia and beyond. That influence continues to this day[71]. I would not lightly reach a conclusion on a contested legal point that diminished the effective operation of the RPA.

95 One of the important benefits of the RPA, from the start, has been observance of the principle that it is the register, created by that Act, that expresses the title to land brought under the Act. The register is not merely evidence of a title to land existing otherwise. It is the "title which registration itself has vested in the proprietor"[72].

96 *The RPA and statutory burdens*: Concern has been expressed in some writing that has followed the decisions in the courts below that their holding undermines one of the central purposes of the RPA. Thus, it has been suggested that the decision of the Court of Appeal effectively necessitates the undertaking by conveyancers of "a historical search of the property of a type akin to the searches that need to be undertaken in relation to old system title land". This, it is said, is an undesirable consequence "in that the Torrens system of registered title was designed to avoid the need to make such historical searches of a vendor's title"[73].

97 Clearly, there are advantages of certainty, efficiency and speed in settlements for purchasers, vendors and others interested in dealings in land being able to rely on the face of the register to discover applicable interests in the land where the land has been brought under the Torrens system. Formulating requisitions and conducting inquiries addressed to local government consent authorities[74] add to cost and delays in transactions affecting land to the extent that it is necessary to go beyond the register. These are legitimate concerns. Any erosion or diminution of a principal objective of the RPA is not something to be accepted lightly.

98 However, this is not a new problem for this Court. In *South-Eastern Drainage Board (SA) v Savings Bank of South Australia*[75] the question arose

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71 Simpson, *Land Law and Registration*, (1976) at Ch 21.

72 *Breskvar v Wall* (1971) 126 CLR 376 at 386. The passage is quoted in the joint reasons at [52].

73 Radan, "Indefeasibility and Overriding Statutes", (2003) 41(6) *Law Society Journal* 66 at 67.

74 Which in New South Wales must maintain a register of development consents that is open to public inspection. See EPAA, s 100; Environmental Planning and Assessment Regulation (NSW), Pt 16.

75 (1939) 62 CLR 603.

whether charges on land, purportedly created by various South-Eastern Drainage Acts[76], took priority over a mortgage affecting the same land registered under the *Real Property Act* 1886 (SA), a counterpart to the RPA. This Court upheld the priority of the statutory charge against the registered charge. In explaining the interaction of the two statutes, Dixon J said[77]:

> "[T]he question upon which our decision must turn is whether in the enactments creating the statutory charges such a clear intention is expressed to include land under the *Real Property Act* and to give to the charges an absolute and indefeasible priority over all other interests that, notwithstanding s 6 of that Act, no course is open but to allow the intention so expressed in the later enactments to be paramount over the earlier *Real Property Act*.
>
> In my opinion this question ought to be answered that such an intention so plainly appears that no other course is open."

99 There have been similar decisions of the Privy Council[78] and of State Supreme Courts in Australia[79]. Some of these decisions have been criticised by commentators understandably anxious about the prospect of the loss, or diminution, of one of the most important objectives of the Torrens principle of title by registration[80]. However, for a number of reasons (which the foregoing line of decisional authority supports) I cannot accept the appellant's submission that the fact that its title to land under the RPA was "clean" (bearing no note of any easement in favour of the respondent's land to permit the proposed right of carriageway over it) operates somehow to extinguish the legal effect of the "condition" imposed on the subdivision and development of that land under planning law or on the jurisdiction and power of the Land and Environment Court to provide remedial orders under s 123 of the EPAA designed to oblige

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76 *South-Eastern Drainage Board* (1939) 62 CLR 603 at 615-616.

77 (1939) 62 CLR 603 at 627-628. See also at 621-622 per Starke J.

78 *Miller v Minister of Mines* [1963] AC 484 at 498.

79 See eg *Vickery v Municipality of Strathfield* (1911) 11 SR (NSW) 354 at 361-364 per Rich AJ; *Trieste Investments Pty Ltd v Watson* (1963) 64 SR (NSW) 98 at 103; *Pratten* (1969) 90 WN (Pt 1) (NSW) 134 at 140-142 per Street J; *Quach v Marrickville Municipal Council [Nos 1 & 2]* (1990) 22 NSWLR 55 at 70 per Young J.

80 As stated in *Breskvar* (1971) 126 CLR 376 at 385-386. See eg O'Connor, "Public Rights and Overriding Statutes as Exceptions to Indefeasibility of Title", (1994) 19 *Melbourne University Law Review* 649.

compliance with such a condition where the facts of the case warranted such an order.

100 *Primary operation of statutory requirements*: It is elementary under our system of law, that if a written law is valid, clear and applicable, it must be given effect according to its terms[81]. Where there is conflict between the commands of written laws enacted by the same legislature, courts endeavour to reconcile the texts. If they cannot do so in other ways in terms of their language, they have resort to established canons of construction. Here, these canons include obedience to the law made later in time[82]; priority to the law on a subject classified as more specific over one regarded as more general[83]; and precedence to public over purely private rights[84].

101 The last principle affords little guidance in the present case. There is a public interest in the observance of planning laws and consent decisions and protection of the environment. However, there is also a public interest in upholding the indefeasibility principle of the RPA which transcends the private rights of parties expressed in Certificates of Title issued under that Act. However that may be, each of the stated canons of construction favour the respondent's argument. The EPAA is later in time than the RPA. The EPAA is more specific and particular than the RPA. To any necessary extent, its provisions would take priority over those of the RPA so far as there is any conflict.

102 *Court powers to create new rights*: When properly analysed, the order of the Land and Environment Court that the appellant challenges creates *new* rights which arise from the making of the order. They are superimposed upon the rights of the parties, by force of the EPAA. This is so notwithstanding any rights that the parties to that time may have enjoyed under the RPA. In this sense, there is no irreconcilable conflict between the two Acts. There is no ultimate need to

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81 *Trust Co of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [68]-[69]; 197 ALR 297 at 310-311.

82 *Goodwin v Phillips* (1908) 7 CLR 1 at 7; *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 at 33-34 per Gibbs J.

83 See *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 78 ALJR 737 at 769 [176]; 206 ALR 130 at 174, citing *Phillips v Lynch* (1907) 5 CLR 12 at 28-29. See also *Goodwin* (1908) 7 CLR 1 at 7; *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 at 276, 280, 290-291; *Saraswati v The Queen* (1991) 172 CLR 1 at 17-18, 23.

84 *P E Bakers Pty Ltd v Yehuda* (1988) 66 LGRA 403 at 410; *Hillpalm* (2002) 55 NSWLR 446 at 449 [14].

treat the EPAA as repealing or amending the RPA *pro tanto*. The Acts simply operate sequentially. Until the order is made by the Land and Environment Court, the appellant's title was indeed "clear", although in this case the appellant was on notice of the respondent's claim for relief once made and, possibly (as I shall show) much earlier.

103 *Clean title and judicial discretion*: The consideration of a "clean" Certificate of Title of a purchaser or assignee of land, ignorant of the breach of planning law that gives rise to the claim for relief from the Land and Environment Court, would indeed be a matter highly relevant to the decision of that Court about whether to exercise its jurisdiction and powers at all, and if so, upon what conditions. I agree with the opinion of Hodgson JA that, in such a case[85]:

> "[P]articularly if there is no hint of this condition [of a subdivision] on the title documents … the Court may decline as a matter of discretion to order compliance with it, or may order compliance only subject to conditions, including conditions requiring payment of money by the person seeking the order if that person's acts or omissions have contributed to the problem."

104 As Hodgson JA pointed out, long before this case was decided, it had been customary for purchasers to inquire about compliance of buildings with relevant planning consents of local government consent authorities. It may not have been usual to make similar inquiries with respect to consents to subdivisions[86]. The modification of requisitions and initiation of investigation, although new obligations, are not so substantial a burden as to cast doubt on the wide ambit in which the discretionary power of the Land and Environment Court is expressed in the EPAA.

Conclusion: the relief was lawful and justified

105 *The discretionary order was justified*: Once the jurisdiction and power of the Land and Environment Court is established, the exercise of its discretionary power in the present case in favour of the respondent cannot be criticised. Contrary to submissions made for the appellant at trial[87], the primary judge found that the appellant did have notice of the Council's conditional consent to the subdivision affecting its land[88]. He found that, having regard to the way the

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85 *Hillpalm* (2002) 55 NSWLR 446 at 450 [22].

86 *Hillpalm* (2002) 55 NSWLR 446 at 449-450 [21].

87 *Hillpalm* (2001) 116 LGERA 138 at 143 [18].

88 *Hillpalm* (2001) 116 LGERA 138 at 156 [102]-[103].

consortium was formed to purchase the property and the corporate vehicle (Hillpalm) that was created for that purpose, the appellant company itself was on notice of the proposed right of carriageway through examination of the series of deposited plans and otherwise[89]. He concluded that notice to the company had not been lost when the "guiding mind" of the company changed[90].

106 The primary judge reached the foregoing conclusions more comfortably[91] on the footing that, although it had been foreshadowed that the appellant's predecessor in title (who had formed the consortium and created the appellant as a corporate vehicle for the appellant's purposes) would be called to give oral evidence at the trial, in the event he was not[92]. The evidentiary findings of the primary judge in this respect were not challenged before the Court of Appeal. Still less were they disturbed. They cannot be altered by this Court.

107 *The case illustrates utility of the power*: Once jurisdiction and power in the Land and Environment Court is established, the foregoing factual findings reinforce the conclusions available from the course of the successive deposited plans themselves. However, they go further. They illustrate the utility and justice of providing the discretionary power to the Land and Environment Court to provide the relief which it did against the appellant in respect of the subject land, although the appellant's Certificate of Title was "clear" and although it was a purchaser of the land nearly 20 years after the original subdivision was registered upon conditions that still remained unfulfilled.

108 In other factual circumstances, the passage of time could well give rise to other arguments for a party like the appellant acquiring the subject land much later (eg of waiver) in respect of a belated demand to conform with unfulfilled conditions imposed on a subdivision or other development of land. However, the discretion of the Land and Environment Court, and its broad powers to shape its orders to suit the particular case[93] afford ample protection against unreasonable demands or demands that should not be met without the imposition of countervailing terms. All of these points were well made in the Court of Appeal by Hodgson JA. I agree with him.

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89 *Hillpalm* (2001) 116 LGERA 138 at 156 [103].

90 *Hillpalm* (2001) 116 LGERA 138 at 156 [104].

91 On the basis of the principle stated in *Jones v Dunkel* (1959) 101 CLR 298 at 320-321 per Windeyer J.

92 *Hillpalm* (2001) 116 LGERA 138 at 156 [105].

93 EPAA, s 124(1).

Order

109 The appellant's criticism of the reasons of the Court of Appeal and the orders of the Land and Environment Court fails. The appeal should be dismissed with costs.

110 CALLINAN J. It is true, as the respondent in this appeal submits, that planning and real property legislation should be enacted and administered so as to enable each to be read and applied as complementing the other. And if those responsible for the drafting and administration of legislation of these kinds keep this elementary truth firmly in mind, little difficulty in giving full effect to them should arise. In this case however, it appears that this truth has not been kept in mind. I say this by reason not only of the facts stated by McHugh ACJ, Hayne and Heydon JJ and Kirby J, with the conclusion of the latter of whom I agree, but also by reason of other facts and statutory provisions which require particular consideration.

111 The first of the facts is that until 1990 a search of the folio for the certificate of title of the proposed servient tenement would have disclosed the existence and location of the proposed right of way, albeit of an unstated unit of measurement of "10". It is difficult to understand how and precisely why this important information ceased to appear on the relevant folio of the Register of Titles. Perhaps it was because of the introduction of an electronic Register. Whether that is so or not, the fact remains that a highly relevant piece of information concerning the title was replaced by a cryptic reference to a deposited plan by number which did contain that information.

112 The second of the facts relates to the language in which an amendment to condition (a)[94] as originally imposed, was made by the Council as the planning authority. It is necessary to understand how the amendment came to be made. This appears, first, from the letter of the applicant's[95] surveyor of 4 April 1978 to the Council:

> "It was originally envisaged that the right of carriageway was to follow the proposed route of a new road of which part is to be constructed in Stage 1 and part in Stage 3 of the overall development. Physical access to the proposed new Lot can at present be gained by an existing track which follows the intended route of the road in Stage 3 but traverses the proposed allotments in Stage 1 as shown on the accompanying plan.
>
> It would be logical if the right of carriageway was to follow the existing track, however not wishing to involve ourselves in any possible legal entanglements at the time of development of Stage 1 the right of

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94 See the reasons of McHugh ACJ, Hayne and Heydon JJ at [18].

95 The applicant for the initial subdivision was Winchcombe Carson Trustee Co (Canberra) Ltd ("Winchcombe Carson"), which owned the land of which the appellant's land and the respondent's land formed a part. See the reasons of McHugh ACJ, Hayne and Heydon JJ at [4], [5] and [19].

> carriageway should follow the route of the proposed new road. This further poses the problem of the difficulty in construction of the carriageway over the section of road in Stage 1 because of the nature of the terrain.
>
> Would Council advise if consideration would be given to physical access being attained over the existing track but the actual right of carriageway being granted over the route of the intended new road. I am advised that the road in Stage 1 of the project will begin as of the 1st July 1978."

113 It is clear from the letter that the applicant accepted that it was bound to provide a "right of carriageway" over its land: secondly, that as a temporary expedient only, actual physical access would be provided by way of an existing track; and, thirdly, that there was to be constructed a "right of carriageway [to] follow the route of the proposed new road."

114 The Council, as appears from its letter of response of 22 May 1978, acceded in part to the applicant's request. The form of the condition that then emerged was as follows:

> "This acceptance is conditional upon the rural/residential estate development proceeding. Consequently your client company shall be required to declare by statutory document as a condition of subdivision that a right of carriageway over the existing track shall be created in favour of the proposed rural lot if the new roads are not dedicated within two years of the date of this letter."

115 It is true that the expression "statutory document" is not a precise one. In the circumstances however I do not doubt that what the writer of the letter had in mind, and the applicant would have understood him to mean, was a document given legal effect by, or under a relevant enactment, to the applicant's obligation to create and construct a right of carriageway if new roads were not dedicated within two years.

116 What may appear ambiguous now was no doubt clear to the Council and the applicant at the time of the correspondence between them. It may also be safely assumed that any ambiguity to anyone was dispelled, not only by the deposit of the plan in the office of the Registrar-General of Titles, but also by the diagram drawn to scale on it, indicating both the location and the intended width of the proposed right of way.

117 A map or a plan (of subdivision) is by definition an instrument under the *Real Property Act* 1900 (NSW) (the "RPA")[96]. Section 31B(2) of the RPA defines the "Register" as follows:

> "(2) The Register shall be comprised of:
>
> (a) folios,
>
> (b) dealings registered therein under this or any other Act,
>
> (c) the record required to be kept pursuant to section 32(7),
>
> (d) instruments of a prescribed class, and
>
> (e) records required by the regulations to be kept as part of the Register."

Section 32(7) of the RPA provides as follows:

> "(7) The Registrar-General shall maintain a record of all dealings recorded in, or action taken in respect of, a computer folio and *such other information, if any, relating to the folio as the Registrar-General thinks fit*." (emphasis added)

118 Here the deposited plan filed in the office of the Registrar-General and given its own number, was consistently also expressly referred to on the folio containing the title deed to the lot for the appellant's land. It follows that the deposited plan was an instrument under the RPA and formed part of the Register. That this is so is reinforced by s 13K(1)(d) which provides as follows:

> "**13K Conversions, purchases, extensions of term, subdivisions etc**
>
> (1) Where a holding comprising land to which this Part applies is subject to the provisions of this Act and the following action is taken in regard to the holding:
>
> ...
>
> (d) it is subdivided,
>
> ...

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96 Section 3(1)(a) defines instrument in this way: "Any grant, certificate of title, conveyance, assurance, deed, map, plan, will, probate, or exemplification of will, or any other document in writing relating to the disposition, devolution or acquisition of land or evidencing title thereto."

> the Registrar-General may create such folios of, and make such recordings in, the Register as, in the Registrar-General's opinion, are appropriate to give effect to that action."

119 Next, the actual language of the indefeasibility provision set out in s 42 of the RPA should be noticed:

> "**42 Estate of registered proprietor paramount**
>
> (1) Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded ..."

The emphasis in the section is upon the "folio". Here, as we now know, no proposed right of way was in terms recorded on the current folio in respect of the appellant's land although the existence of another instrument "relating to [that] folio", forming part of the Register, and indicating clearly the existence of a proposed right of way was. Were it not for the emphasis upon the folio in s 42 it could hardly be argued to afford very much support for the appellant's case.

120 The evidence established that the appellant by its advisers did know of the deposited plan before completing the acquisition of the land. Neither that fact, nor the fact that the appellant asserted that it thought that all of the "proposed" interests shown on the Register, had, in effect lapsed, on the abandonment of the scheme for the development of all of the land in the 1970s, whatever bearing either might have on the apparent merits of the case, can of itself be of no necessary significance to the disposition of the appeal in light of s 43 of the RPA which provides as follows:

> "**43 Purchaser from registered proprietor not to be affected by notice**
>
> (1) Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money or any part

> thereof, or shall be affected by notice direct or constructive of any trust *or unregistered interest*, any rule of law or equity to the contrary notwithstanding, *and the knowledge that any* such trust or *unregistered interest is in existence shall not of itself be imputed as fraud*.
>
> (2) Subsection (1) does not operate to defeat any claim based on a subsisting interest, within the meaning of Part 4A, affecting land comprised in a *qualified folio* of the Register." (emphasis added)

121 It is a curiosity, that although the Registrar-General was prepared to accept and include as part of the Register, a plan showing a "proposed right of way", neither the term "proposed right of way" nor "proposed right of carriageway" appears in the RPA. Section 47 is concerned with the creation of "easements", and it is common ground here that no easement has as yet been created.

122 Schedule 8 Pts 1 and 2 of the *Conveyancing Act* 1919 (NSW) (the "CA") set out the basic elements of a right of carriageway and right of footway as follows:

> "**Schedule 8 Construction of certain expressions**
>
> **Part 1 Right of carriage way**
>
> Full and free right for every person who is at any time entitled to an estate or interest in possession in the land herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment, and every person authorised by that person, to go, pass and repass at all times and for all purposes with or without animals or vehicles or both to and from the said dominant tenement or any such part thereof.
>
> **Part 2 Right of foot way**
>
> Full and free right for every person who is at any time entitled to an estate or interest in possession in the land herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment, and every person authorised by that person, to go, pass and repass on foot at all times and for all purposes, without animals or vehicles to and from the said dominant tenement or any such part thereof."

123 Section 88 of the CA draws a distinction between an easement and a restriction on use of land. Relevantly it provides as follows:

"**88 Requirements for easements and restrictions on use of land**

(1) ... a restriction arising under covenant *or otherwise* as to the user of any land, the benefit of which is intended to be annexed to other land, contained in an instrument coming into operation after such commencement, shall not be enforceable ... unless the instrument clearly indicates:

(a) the land to which the benefit of the easement or restriction is appurtenant,

(b) the land which is subject to the burden of the easement or restriction:

Provided that it shall not be necessary to indicate the sites of easements intended to be created in respect of existing tunnels, pipes, conduits, wires, or other similar objects which are underground or which are within or beneath an existing building otherwise than by indicating on a plan of the land traversed by the easement the approximate position of such easement,

(c) the persons (if any) having the right to release, vary, or modify the restriction, other than the persons having, in the absence of agreement to the contrary, the right by law to release, vary, or modify the restriction, and

(d) the persons (if any) whose consent to a release, variation, or modification of the easement or restriction is stipulated for.

(1A) Land (including the site of an easement) is clearly indicated for the purposes of this section if it is shown:

(a) in the manner prescribed by regulations made under this Act or the *Real Property Act* 1900, or

(b) in any other manner satisfactory to the Registrar-General in the particular case or class of cases concerned.

This subsection does not limit other ways in which land may be clearly indicated."

The restriction intended by s 88 of the CA may well have been a restrictive covenant, but in terms it seems to me to be so generally stated as to be capable of embracing a proposed right of way. The inclusion of the proposed right of way

was apparently sufficiently and satisfactorily shown for the purposes of the Registrar-General for he gave the deposited plan indicating it a number, and expressly referred to that on the folio.

124 It is necessary to go now to 52(A) of the Regulations made under the CA. At all material times it provided as follows:

> "**Indication of site of easement created by instrument of grant or reservation**
>
> **52A(1)** In any deposited plan lodged for registration in the office of the Registrar-General no notation shall be entered referring to an intention to create easements, restrictions on the use of land or positive covenants which are not intended to be created pursuant to section 88B of the Act.
>
> (2) Notwithstanding the provisions of clause (1) of this Regulation, the diagram in such a plan may illustrate the site of an easement intended to be created by an instrument of grant or reservation, provided the designation of such site includes the word 'proposed' or an abbreviation thereof and provided no written statement of such intention is entered elsewhere on the plan.
>
> (3) The illustration and designation of the site of an easement in accordance with clause (2) of this Regulation shall not be taken for the purposes of the said section 88B to indicate in the prescribed manner an intention to create an easement."

One effect of the regulation was to ensure that only easements intended to be duly created according to law, could be designated as "proposed" on a relevant plan of subdivision. Any person responsible for the preparation and deposit of a plan of subdivision (as was the applicant) must therefore be taken to have intended, and to be clearly and expressly signalling an intention to create an easement in accordance with its location and dimensions as shown on a proposed right of way on the deposited plan. Another effect of the regulation was to make it clear that the deposited plan could not, and did not of itself create an easement.

125 There can be no doubt in my opinion that the applicant was obliged to give effect to its stated intention. The condition with respect to the proposed right of way was a condition of the development. Section 76A(1) of the *Environmental Planning and Assessment Act* 1979 (NSW) (the "EPAA") provides as follows:

"**76A Development that needs consent**

(1) **General**

If an environmental planning instrument provides that specified development may not be carried out except with development consent, a person must not carry the development out on land to which the provision applies unless:

(a) such a consent has been obtained and is in force, and

(b) the development is carried out in accordance with the consent and the instrument."

126 The fact that a development, in this case a subdivision, was carried out without satisfaction of a condition, cannot relieve an applicant of its obligation to satisfy it. But there is a further reason why the applicant was obliged to give effect to the condition. Winchcombe Carson got the benefit of the approval which relieved it, temporarily only, of an obligation that it was, in due course, obliged to meet. The principle laid down in *Coke on Littleton* is relevant: that "a man who takes the benefit of a deed is bound by a condition contained in it though he does not execute it"[97]. The deposited plan may not have been a deed[98], but it contains what I would take to be a solemn promise, to create, initially, a proposed right of way, and subsequently, an easement. That was the burden that Winchcombe Carson assumed. By way of benefit it got the subdivisional approval and the postponement of the obligation to create the easement. Although not in terms a deed, the deposited plan was adopted and sealed by Winchcombe Carson as well as the Council, the latter of which was essential for its registration. The preceding correspondence between Winchcombe Carson's surveyors and the Council is to a similar effect.

127 The question remains however, whether the appellant as a successor in title, should now be saddled with the obligation of satisfying the condition, for that it should do so was the effect of the decision of the court at first instance and the Court of Appeal of New South Wales. Arguably the appellant did take and have a relevant benefit, the land in its subdivided state, thereby placing itself

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97 At 230 b; see also *Rufa Pty Ltd v Cross* [1981] Qd R 365 at 371 per Kneipp J.

98 Contrast s 176 of the *Land Title Act* 1994 (Q) which relevantly provides:

"**176 Registered instrument operates as a deed**

A registered instrument operates as a deed."

under an obligation to grant and construct the easement, but I do not find it necessary to determine the appeal on that basis.

128 It is important to notice the language of s 123(1) of the EPAA[99], upon which, in the end, I think the case turns. It is its unqualified language which is decisive. It allows *any* person (without reference to the passage of time) to seek to have the Court make an order "to remedy ... a breach of [the] Act", and s 122(b)(iii) defines a breach of the Act to include a failure to comply with a condition subject to which a consent is granted. Section 123 does not, expressly or by implication, confine the remedy to a remedy against the person originally responsible for the breach. No doubt in deciding whether to grant relief, being relief of an equitable kind, and in the nature of a mandatory injunction, a court would take into account such matters as the financial and other capacities of a successor in title, his or her knowledge of the circumstances, the conduct of the applicant, the indications which did appear on the folio and the plan, hardship, the period of time that has passed since the breach first occurred, any windfall or otherwise to the parties, and other relevant matters. There is no reason to doubt that the primary judge did have regard to such of these as were relevant in deciding to grant the relief that he did to the respondent. The view that I have formed makes it unnecessary therefore for me to decide whether the reference on the folio of the certificate of title incorporates by reference, the deposited plan and what is shown clearly on it, the dimensions and location of the proposed right of way.

129 As a matter of construction therefore of the instruments, and the regulation to which I have referred, s 42 of the RPA although at first sight, an apparently formidable barrier to a grant of relief to the respondent, simply has nothing conclusive to say about the remedying of a breach of the kind that has occurred here of the EPAA. The fact that an order made under it might cause an owner of land under the RPA to assume a burden or restriction on his or her land that could have been, but was not clearly shown on the folio in the Register as an encumbrance of any kind, although a matter relevant to a decision whether to grant or withhold relief, does not mean that s 42 of the RPA provides a watertight defence to a claim of the kind made by the respondent here.

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99 Section 123(1) provides:

> "**123 Restraint etc of breaches of this Act**
>
> (1) Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach."

130 I cannot leave this appeal without making these observations. This litigation should never have occurred and possibly never would have, had the Council been diligent in enforcing its conditions, and perhaps if the Registrar-General had not, so far as the evidence goes, inexplicably allowed the explicit and detailed reference to the proposed right of way formerly appearing there, to drop off the folio in the Register for the appellant's land. It may not even have happened had there been no such creature as a proposed right of way under the CA, a somewhat anomalous interest, serving no necessary purpose, at best barely compatible with the *intent* of the RPA, and seemingly unique to New South Wales.

131 I would dismiss the appeal with costs.