Duggan v Parramore and *Parramore v Duggan*: When Do Omitted Easements Bind Torrens Registered Land in Tasmania?

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Introduction

If a legal easement is expressly granted by deed over servient land held at general law in favour of dominant land also held at general law, and the folio of the dominant tenement records this easement when it is first brought onto the Torrens Register, but the later registered folio of the servient tenement fails to do so, can the owner of the dominant tenement enforce the easement? This was the main question which faced Mr Justice Zeeman in the Supreme Court of Tasmania (*Duggan v Parramore*[1]) and the Full Court on appeal (*Parramore v Duggan*[2]).

Prior to the enactment of the *Land Titles Act* 1980 (Tas), such omitted easements were considered to be binding on the registered proprietor of the servient land under section 40 of the *Real Property Act* 1862 (Tas):

> [T]he omission by the registrar to enter the easement as an encumbrance on the certificate of the servient tenement ... would not relieve the servient tenement of its liability. In like manner the omission of the Registrar to state on the certificates granted to the [dominant owners] the existence of the rights-of-way they claim is no bar to that claim.[3]

In *Wilkinson v Spooner*[4] Burbury CJ assumed that expressly created (but omitted) easements were binding on the registered proprietor, treating *James v Stevenson* as applicable to s 40 of the *Real Property Act* 1862.

When section 40 of the *Real Property Act* 1862 was recast as section 40(3)(e)(i) of the *Land Titles Act* 1980, there was a significant change in the wording of the provision which created doubts as to whether the earlier law relating to omitted expressly created easements still

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1 Unreported Judgment Serial No A65/1993.

2 Unreported Judgment Serial No A50/1994.

3 *James v Stevenson* [1893] AC 162 at 169.

4 [1957] Tas SR 121.

applied. These doubts now seem to have been laid to rest by *Duggan v Parramore* and *Parramore v Duggan*.

Duggan v Parramore

Duggan v Parramore was a special case stated to determine, as a question of law, whether certain land of which the defendant was the registered proprietor was subject to a right of way. That right of way was claimed to be appurtenant to land of which the plaintiff was the registered proprietor, by virtue of what was contained in the folio of the Register relating to that land, or alternatively, by virtue of an express grant by deed.

The agreed facts were as follows. The plaintiff was the registered proprietor of an estate in fee simple in two portions of land[5] which were contained in the same folio of the Torrens Register[6] ('the plaintiff's land'). That folio stated that the plaintiff was the registered proprietor of a fee simple estate in the land 'together with such interests ... as are shown in the Second Schedule'. The Second Schedule recorded that the plaintiff was entitled to an easement of right of way over a road which passed through the defendant's land.

The defendant was the registered proprietor of an estate in fee simple in registered land.[7] This folio stated that the defendant's title was 'subject to such encumbrances and interests as are shown in the Second Schedule'. Nothing was shown in the Second Schedule. So although the roadway referred to in the easement on the plaintiff's title formed a portion of the defendant's land, the existence of the easement was not in any way disclosed by the folio of the defendant's title.[8]

The plaintiff's land had been brought under the provisions of the *Real Property Act* 1862 on 10 March 1980. The defendant's land was brought under the provisions of the *Land Titles Act* 1980 at a later date (on 11 April 1983).

All three portions of land had once been part of the same title. The plaintiff's land (both lots 1 and 2) and the defendant's land had once formed part of a larger area of land which had been conveyed to one Alfred Nichols in 1877. Nichols devised part of this land (which contained both the plaintiff's and the defendant's land) to his daughter, Miss Nichols, who sold various portions of that land at different times. In 1925, Miss Nichols, by an indenture of mortgage and conveyance, sold the land comprised in lot 1 on plan P13956 (ie,

5 Lots 1 and 2 on plan P13956.

6 Vol 3820 Fol 26.

7 Vol 4012 Fol 97.

8 Vol 4012 Fol 97.

part of the land currently owned by the plaintiff) to a Mr Dransfield, together with the easement referred to in Schedule 2 of the plaintiffs title for an estate in fee simple. The easement was created by the conveyance, Miss Nichols retaining the land over which it was granted. This retained land was the unsold portion of the land which her father had devised to her, and comprised the defendant's land and lot 2 on plan P13956 (now part of the plaintiff's land).

In 1929 Miss Nichols mortgaged the unsold portion of the land, the mortgage (apparently through oversight on the part of the draftsman) making no reference to the fact that the land was subject to a legal easement. Miss Nichols defaulted under the mortgage and in 1950, in exercise of the mortgagee's power of sale, the personal representative of the mortgagee, granted and conveyed the mortgaged land to a purchaser for an estate in fee simple. That conveyance made no mention of the legal easement.

At some date in the past, one of the defendant's predecessors in title had excised lot 2 on plan P13956 from the unsold portion and sold it to one of the plaintiff's predecessors in title without any express grant of easement over the defendant's land.[9] On the face of it, the folio of the Register relating to the plaintiff's land made the easement appurtenant to the whole of that land whereas the grant of the easement had made it appurtenant to lot 1 on plan P13956 only.

All conveyances of the plaintiff's land described as lot 1, from the creation of the easement in 1925 up until the time that that land was first registered in the Torrens register, expressly granted and conveyed the land together with the benefit of the easement for an estate in fee simple. Neither the first conveyance of the defendant's land after the creation of the easement, nor any subsequent conveyance mentioned the existence of the easement, and when the defendant's land was first registered under the *Land Titles Act* 1980, the easement was not noted on the folio of the Register relating to it.

The plaintiff claimed to be entitled to the benefit of the easement by virtue of what appeared in the folio of the Register which related to her land or by virtue of the grant thereof by conveyance in 1925. The defendant denied that the plaintiff had such an entitlement and based his case on the statutory indefeasibility of his title and on nothing else. The defendant accepted that if that provided no answer to the plaintiff's claim so based then he had no defence. The plaintiff submitted that indefeasibility provided no answer to her claim because of various provisions contained in the *Land Titles Act*

9 It is not clear whether a claim to an implied easement in favour of lot 2 could have been maintained. There is no reference to this possibility in the judgment, though from the facts it appears likely that an easement by implication or prescription could have arisen.

1980. She relied primarily on s 40(3)(b). In the alternative she relied on ss 106 and 40(3)(e). These sections are in the following terms:

> 40 (3) The title of a registered proprietor of land is not indefeasible -
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> ...
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> (b) where 2 or more folios of the Register subsist for conflicting estates in respect of the same land, in which case the title which was first brought under this Act or the repealed Act defeats the titles subsequently brought under this Act or the repealed Act;
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> ...
>
> (e) so far as regards -
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> (i) an easement arising by implication or under a statute which would have given rise to a legal interest if the servient land had not been registered land; and
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> (ii) an equitable easement, except as against a bona fide purchaser for value without notice of the easement who has lodged a transfer for registration;
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> 106 (1) Subject to subsection (2), a statement in a folio of the Register to the effect that the land comprised in the folio has the benefit of an easement shall be conclusive evidence that the land has that benefit.
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> (2) Subsection (1) shall not be construed so as to give effect as an easement to a right which is not recognised as an easement at common law.
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> (3) An easement shall not be implied from anything appearing on a plan deposited with the Recorder after the proclaimed date.

Also of relevance was the definition of the word 'land' which is given an extended meaning by s 3(1) of the *Land Titles Act* 1980 in the following terms:

> '[L]and' includes messuages, tenements, and hereditaments, corporeal and incorporeal, of every kind and description (whatever may be the estate or interest therein), together with all paths, passages, ways, waters, watercourses, liberties, privileges, easements, plantations, gardens, mines, minerals, and quarries, and all trees and timber thereon or thereunder lying or being ...

The First Submission

Relying on *Pearce v City of Hobart*,[10] counsel for the plaintiff submitted that because the plaintiff's land was brought under the provisions of the *Real Property Act* 1862 before the defendant's land was brought under the *Land Titles Act* 1980, by virtue of the operation of s 40(3)(b) of the *Land Titles Act*, the plaintiff's title

10 [1981] Tas SR 334.

prevailed so that her land had the benefit of the easement, notwithstanding that its existence was not disclosed by the folio of the Register relating to the defendant's land. In *Pearce v City of Hobart*, Everett J held, in circumstances indistinguishable from *Duggan v Parramore*, that s 40(3)(b) had the effect contended for by the plaintiff. Everett J appears to have treated[11] as self-evident the proposition that by virtue of s 40(3)(b) the plaintiff in that case was entitled to the benefit of the relevant easement, notwithstanding that its existence was not disclosed by the folio of the Register relating to the servient land, once it had been established that the plaintiff's land, including the easement, had been brought under the Act before the servient land had been brought under the Act. His Honour expressed no reasons for coming to that conclusion, and the proposition appears to have been agreed to by counsel without argument. After considering section 40(3)(b) in detail, Zeeman J came to the conclusion that *Pearce v City of Hobart* had been wrongly decided on this point, and ought not be followed. He stated:

> The key to understanding the proper operation of s 40(3)(b) is to be found in the expression 'conflicting estates in respect of the same land' as properly construed. The word 'estate' is not defined for the purposes of the Act and is to be given the meaning which it bears according to the general law unless some sufficient contrary intention appears in the Act (see *Attorney-General for New South Wales v The Brewery Employees Union of New South Wales* (1908) 6 CLR 469 at 531). The nature of an estate in land is that it gives to the holder thereof a right to seisin or possession, the extent and duration of which is determined by the nature of the particular estate. Estates may be freehold (fee simple, fee tail or a life estate) or leasehold. The fact that land is subject to an easement does not derogate from any estate in that land. That flows from the character of an incorporeal hereditament of which an easement is an example. The suggestion, once put forward, that an easement is not an incorporeal hereditament, is unsound...
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> Bearing in mind the definition of 'land' contained in s 3(1), the questions which must be answered in the present case in the context of s 40(3)(b) are the following:
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> 1 Do two or more folios of the Register subsist for conflicting estates in respect of the land of which the defendant is the registered proprietor? and
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> 2 Do two or more folios of the Register subsist for conflicting estates in respect of the easement disclosed in the folio of the Register relating to the plaintiff's land?
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> The answer to the first question clearly must be in the negative because the plaintiff has no estate in the land of which the defendant is the registered proprietor. The answer to the second

11 Id at 347-348.

> question also must be in the negative because the defendant has no estate in the easement disclosed by the folio of the Register relating to the plaintiff's land. The question is not whether what is certified in the respective folios of the Register is inconsistent but whether conflicting estates purportedly subsist in respect of the same land. Whilst there is some inconsistency between what is stated in the two folios of the Register, that is not sufficient to bring the matter within s 40(3)(b). It is only where two or more folios of the Register subsist in terms where persons hold conflicting estates in respect of the same land that the provision applies. The clearest case would be where there are two or more folios of the Register in respect of the same land and each of them certifies to a different person being the registered proprietor of an estate in fee simple in that land. The defendant has no estate in respect of the easement. Such estate as he does have in his land is not cut down by the easement described in the plaintiff's folio of the Register. It follows that there do not subsist two folios of the Register subsisting for conflicting estates in respect of the same land. Section 40(3)(b) has no application.[12]

The Second, Alternative Submission

Having disposed of the plaintiff's argument based on section 40(3)(b), Zeeman J went on to consider the plaintiff's second alternative argument where she claimed that she was entitled to the benefit of the easement by operation of section 106(1) of the *Land Titles Act* 1980.

His Honour stated (at p 5) that:

> Section 106(1) ought not to be read as giving an unqualified finality to a statement in a folio of the Register that the land comprised therein has the benefit of an easement described therein. To do so would derogate from other provisions of the Act in a way plainly not intended. If none of the exceptions to indefeasibility operate so as to make the defendant's land subject to the easement, s 106(1) does not avail the plaintiff.[13]

He considered that as authority for that proposition, it was sufficient to refer to the dictum of Dixon J in *Clements v Ellis*,[14] where his Honour dealt with the conclusive evidence provisions contained in the *Transfer of Land Act* 1928 (Vic),[15] stating in effect that, '[i]n spite of their absolute terms, these provisions do not mean to give an unqualified finality to the certificate in all circumstances.'[16]

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12 *Duggan v Parramore*, note 1 above, at 4-5.

13 Id at 5.

14 (1934) 51 CLR 217 at 238-239.

15 Sections 51 and 67 of that Act.

16 *Duggan v Parramore*, note 1 above, at 5.

His Honour concluded that section 106(1) of the *Land Titles Act* 1980 did not assist the plaintiff if the indefeasibility provisions of the Act operate so that the defendant's land is held free of the easement.

The Third, Alternative Submission

The third string in the plaintiff's bow to establish the enforceability of the easement was section 40(3)(e)(i) of the *Land Titles Act* 1980. That subsection, as noted above, states that the title of a registered proprietor of land is not indefeasible so far as regards 'an easement arising by implication or under a statute which would have given rise to a legal interest if the servient land had not been registered land'.

After referring to the fact that the major Australian textbook on easements had noted that section 40(3)(e) 'does not extend to easements created by express grant or reservation (except in the case of equitable easements) under any circumstances',[17] and after further noting that if this was a correct statement of the law, s 40(3)(e) could not avail the plaintiff (because she was relying upon an express grant by a deed made before either the plaintiff's land or the defendant's land was first registered in the Torrens register), Zeeman J went on to consider whether the statement by Bradbrook and Neave was indeed correct.

His Honour had regard to the predecessor provision to section 40(3)(e),[18] and to the fact that it had been accepted that that section had provided that easements that had been expressly created before the alleged servient tenement had been brought onto the register, but omitted from the register when the servient title was first registered, were exceptions to indefeasibility.[19] Section 40(b) of the *Real Property Act* 1862 would therefore have protected the plaintiff's easement and Zeeman J considered that:

> [i]t would be remarkable if Parliament had intended, by the [*Land Titles Act* 1980], to take away all legal easements, properly created by express grant or reservation before either the dominant tenement or the servient tenement had been brought under the [*Real Property Act* 1862], merely because the existence of the easement was not

17 Bradbrook and Neave, *Easements and Restrictive Covenants in Australia* (Butterworths, 1981) para 1138. Id at 6.

18 Section 40(b) of the *Real Property Act* 1862.

19 His Honour relied on the Privy Council decision of *James v Stevenson* [1893] AC 162 at 169 (a case decided on a corresponding Victorian provision) which Burbury CJ in *Wilkinson v Spooner* [1957] Tas SR 121 had accepted as stating correctly the position on the Tasmanian provision.

> disclosed by the folio of the Register relating to the servient tenement.[20]

His Honour considered that section 40(3)(e)(i) would not protect expressly created easements which were omitted when the land was first registered:

> ...if that provision only applies to easements arising by implication or under a statute. It might be thought that the words 'which would have given rise to a legal interest if the servient land had not been registered land', appearing in s 40(3)(e)(i), are qualifying words limiting the types of implied easements or easements arising under a statute which are the subject of that provision. Alternatively it might be thought that they are qualifying words limiting only the types of easements arising under a statute which are the subject of that provision. If they are qualifying words they suggest that it is possible to have easements of the relevant type or types which would not have given rise to a legal interest if the servient land had not been registered land. Such a suggestion is unsound. Any implied easement over registered land necessarily gives rise to a legal interest because it is an easement created by implied grant.[21] Similarly, if a statute creates an easement, the easement gives rise to a legal interest by force of the statute. I am lead [sic] to conclude that the words to which I have referred as perhaps being qualifying words could not have been intended by Parliament to be such because they are incapable of operating as such. This leads me to the further conclusion that they were intended to refer to a separate category of easement, namely one created by express grant or reservation by deed. A deed is of course required before an express grant may give rise to a legal interest because of the *Conveyancing and Law of Property Act* 1884, s 60(1), which provides that 'all conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed' except for irrelevant exceptions. What has occurred is that the word 'or' has been omitted after the word 'statute' appearing in s 40(3)(e)(i).[22]

He considered that it was permissible to construe s 40(3)(e)(i) as though the word 'or' did appear after the word 'statute'. He further considered that:

> Where the alternatives are to supply a word which appears to have been omitted accidentally or to adopt a construction which deprives certain existing words of all meaning, it is permissible to supply the omitted word and construe the provision accordingly.[23]

His Honour was of the opinion that if the relevant words were read literally as qualifying words they had no meaning because they could

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20 *Duggan v Parramore*, note 1 above, at 6.

21 Here Zeeman J referred to *Wheeldon v Burrows* (1879) 12 Ch D 31 at 49.

22 Id at 6-7.

23 Id at 7.

have no operative effect. On the other hand, if the word 'or' was inserted before those words, they had independent operative effect. That effect was one which resulted in the relevant law remaining substantially the same as it had been by virtue of the *Real Property Act* 1862, and not one which resulted in a radical alteration of the law by depriving persons of rights which they possessed under the *Real Property Act* 1862. Seeing that the *Land Titles Act* 1980, by its long title, was declared to be a consolidating Act (albeit a consolidating Act which also amended the relevant law), he felt justified in applying the principle of construction to be applied to a consolidating Act, viz, that:

> Where two constructions are open, under one of which the consolidating Act is read to make an amendment of the law, whilst the other appears to confine the Act to its professed purpose of mere consolidation, then, other things being equal, the courts will adopt the construction which confines the Act to its purpose of consolidation.[24]

His Honour also made use of extrinsic material[25] to 'confirm' his view that the word 'or' must have been accidentally omitted and ought to be read into the statute. He relied on both the Minister's second reading speech in the House of Assembly during the passage of the Land Titles Bill,[26] and the accompanying *Clause Notes*.[27]

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24 Ibid.

25 Section 8b of the *Acts Interpretation Act* 1931 (inserted in 1992) permits the court to have regard, in certain stated circumstances, to particular types of extrinsic material to assist it in interpreting statutes.

26 The Minister stated:

'In clause 40, two exception[s] to indefeasibility—those relating to the interest of a tenant and to easements—are stated in a different form from the present [A]ct. The form in which they are stated in the bill is thought to declare the present law as interpreted by the courts. The form in which the possibility of two folios of the register existing for conflicting estates on the same land is stated more clearly.'

27 The relevant section of the *Clause Notes* stated:

'At common law an easement can only operate at law if it is created by a grant under seal, or where the existence of the grant is implied, eg by prescription under the *Prescription Act* 1934, or under the doctrine of lost modern grant. However there are many other kinds of implied easements arising by estoppel, acquiescence or agreement which operate in equity only.

Under this Act an easement can only operate at law if it is created by the prescribed form and registered, but by analogy with *Smith v Ritchie* [(1919) 15 Tas LR 60], the Bill has been drawn to provide

(i) That where, but for this Act an easement would have operated at law, the right of a registered proprietor is always subject to it, and

The end result was that the plaintiff was successful on the third ground on which she relied.

Parramore v Duggan

The defendant appealed to the Full Court of the Supreme Court. Both Wright and Crawford JJ agreed with the rulings of Zeeman J (basically for the reasons advanced by the learned judge) regarding sections 40(3)(b), 106 and 40(3)(e)(i) of the *Land Titles Act* 1980. Cox J on the other hand, although agreeing with Zeeman J that section 40(3)(b) did not avail the plaintiff in that she did not have an 'estate' in land which conflicted with an estate of which the defendant was registered proprietor, differed from Zeeman J and Wright and Crawford JJ on the effect of section 106. He considered that it had the effect of allowing the plaintiff to enforce the omitted easement. He had 'some reservations' about the learned trial judge's ruling regarding the effect of section 40(3)(e)(i), but having ruled in favour of the plaintiff on the issue of section 106, found it 'unnecessary to express a final opinion' on the matter.[28]

Besides warning that a court should be very cautious before reading into an Act of Parliament a word which was not there, Cox J pointed out, it is submitted quite correctly, that to read the word 'or' into section 40(3)(3)(i) 'makes otiose the words "arising by implication or under a statute"'. It did not seem to him 'necessarily remarkable that Parliament should exclude as an exception to indefeasibility an easement by express grant but protect one by implication or statute' as the latter:

> might be more readily ascertainable by inquiry and inspection of the subject land than would an easement not appearing on the title to adjoining land already registered (and therefore not having the benefit of s 106) but deriving from express grant outside the period of commencement of title mentioned in the *Conveyancing and Law of Property Act* 1884, s 35.[29]

He further considered that although the exclusion of omitted express easements from the list of exceptions to indefeasibility covered in section 40(3) of the *Land Titles Act* 1980 'would appear to change the law as it appears from certain obiter remarks of Burbury CJ in *Wilkinson v Spooner*', the owner of the dominant tenement would be able to claim compensation from the assurance fund for the loss of the benefit of the easement.

(ii) a person who takes as a bona fide purchaser for value without notice of an equitable easement takes free from it on lodgement of his transfer for registration.'

28 *Parramore v Duggan*, note 2 above, at 2-3.

29 Ibid.

As noted above, Cox J came to the conclusion that the plaintiff was entitled to the benefit of the easement (presumably in favour of both Lots 1 and 2) by virtue of section 106 of the *Land Titles Act* 1980. He referred to the judgment of the learned trial judge where he stated, inter alia, that '[i]f none of the exceptions to indefeasibility operate so as to make the defendant's land subject to the easement, s 106(1) does not avail the plaintiff' and further stated that, although:

> I agree with all his Honour says ... this overlooks the fact that the indefeasibility provisions do not prevail 'so far as regards an easement arising ... under a statute which would have given rise to a legal interest if the servient land had not been registered land'.[30]

Cox J held that the plaintiff retained the benefit of the expressly granted easement, 'which was furthermore recognised by the *Real Property Act* 1886, s 26'. He considered that:

> the statutory recognition accorded the easement [by s 26 of the *Real Property Act* 1886, the predecessor section of section 106] was given added strength when the [*Land Titles Act* 1980] was passed, for s 106 extended the evidentiary weight to be given to the record from conclusive evidence as to the registered proprietor's entitlement (which is preserved in any event by s 39) to conclusive evidence that the land described in the folio has the benefit of the easements stated therein.[31]

He continued:

> Upon the subsequent bringing of the servient tenement under the provisions of the Act, the benefit of the easement attaching to the dominant tenement was, in my view, in no way diminished. It is no misdescription to say that the easement, having been accorded statutory force, had arisen under a statute (ie, the repealed Act and/or the [existing] Act) which would have given rise to a legal interest if the servient land had not been registered land and which in fact did give rise to such an interest when that land was not yet registered. In my view the fact that the easement had its genesis in an express grant does not exclude it from qualifying as an easement 'arising under a statute' (or 'under a statute', for the word 'arising' may qualify the preceding words 'by implication' only and may not extend to 'under a statute, etc'). I am of the opinion that the plaintiff's entitlement to the benefit of the easement is established in the circumstances of this case by virtue of s 106.[32]

30 s 40(3)(e)(i); Id at 2.

31 Id at 2.

32 Id at 2.

Critique of the Judgments

Conflicting Estates in Two or More Folios in Respect of the Same Land

There seems to be little doubt that Zeeman J and the Full Court were correct in concluding that section 40(3)(b) of the *Land Titles Act* 1980 had no application to the facts of the case, and that *Pearce v City of Hobart* had been wrongly decided on the effect of that section. Zeeman J advances cogent reasons for considering that the section is dealing with 'estates' and not with lesser interests or encumbrances, and that it is dealing with two folios over the *same* parcel of land rather than conflicting entries in the register concerning respective rights and liabilities between *two* neighbouring parcels of land. Although the Full Court did not expressly overrule *Pearce v City of Hobart* on this point, it cannot be doubted that no further reliance can be placed on the judgment of Everett J dealing with this point.

The Effect of Section 106 of the *Land Titles Act* 1980

It is submitted that the failure of the learned trial judge, as well as Wright and Crawford JJ, to refer to and deal with authorities from other Australian jurisdictions, particularly Victoria, on the effect of provisions corresponding to section 106 of the *Land Titles Act* 1980, has weakened the authority of their judgments on the effect of section 106. There is clear judicial authority to the effect that a statement in the certificate of title of the dominant tenement that neighbouring land is burdened by an easement appurtenant to that tenement is conclusive of the matter.[33] This point is the more telling considering that these cases interpret a provision from which section 106 of the *Land Titles Act* 1980 ultimately derived.

The failure to cite these very relevant authorities would also have prevented Cox J from giving effect to section 106 by a more convoluted means and, it could be argued, without doing violence to the words used in section 40(3)(e)(i).

Although not expressed as a reason for holding that section 106 has no independent operation, the judgments give the impression that the judges were concerned to prevent exceptions from indefeasibility arising outside the provisions of section 40(3) of the *Land Registration*

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33 *Webster v Strong* (1926) VLR 509; *Stevenson v James* (1889) 15 VLR 615 at 624; *Re The Transfer of Land Statute and Byrne; Ex parte The Metropolitan Permanent Building and Investment Society* (1884) 10 VLR 361 at 366 per Holroyd J. Academic authority also accepted this: see H Dallas Wiseman, *The Law Relating to the Transfer of Land* (2nd ed, Law Book Co, 1931) p 89; FG Duffy & JG Eagleson, *The Transfer of Land Act 1890* (Charles F Maxwell, 1895) p 194.

Act 1980. If this perception is correct and there is an underlying unease felt by judges in this respect, some comfort may be derived from the fact that there are at least two other situations[34] where exceptions to indefeasibility arise outside section 40(3).

The Effect of Section 40(3)(e)(i) of the *Land Titles Act* 1980

It is submitted that sections 40(3)(e)(i) and 40(3)(e)(ii) were meant to cover legal and equitable easements respectively and the effect of the majority of the judgments in the case is to upset this simple division. Furthermore, the premise on which Zeeman J constructs his argument for the reading in of the supposedly omitted word 'or', and which upsets this 'simple division', is false. It is contended that if the relevant words in section 40(3)(e)(i) of the *Land Titles Act* 1980 - 'which would have given rise to a legal interest if the servient land had not been registered land' - are read literally as qualifying words, they do have meaning because they can have operative effect. Indeed, by reading-in the word 'or', Zeeman J made the 'qualifying words' otiose, as Cox J rightly points out.

Zeeman J argues that easements arising by implication and easements arising under a statute are *necessarily* legal easements.[35] But this is not so. Even the extrinsic material relied on by his Honour shows that his construction is incorrect. Some easements arising by implication are 'equitable' easements and it is even possible to envisage an equitable easement arising 'under a statute'. Just because an easement depends on grant (whether actual or fictional), it does not automatically follow that the easement created must of necessity be a legal easement. Equitable easements can be created by 'grant', and some implied easements (particularly estoppel easements) are equitable easements. So the 'qualifying words' were meant to be just that - qualifying words.

Zeeman J's interpretation leads to just as many problems as if the word 'or' were not read into the statute. Additional words, similar to the rejected qualification, would have to be read into the categories of easements provided for in section 40(3)(e)(i) of the *Land Titles Act* 1980 to qualify them and distinguish them from 'equitable easements' which section 40(3)(e)(ii) deals with. Otherwise the provisions of section 40(3)(e)(i) duplicate, to a large extent, section 40(3)(e)(ii).

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34 Section 46 and 123 of the *Land Titles Act* 1980 constitute exceptions to indefeasibility external to section 40(3).

35 'Any implied easement over registered land necessarily gives rise to a legal interest because it is an easement created by implied grant: *Wheeldon v Burrows* (1879) 12 Ch D 31 at 49' per Zeeman J in *Duggan v Parramore*, note 1 above, at 6-7.

It is admitted that if one accepts that his Honour was wrong in reading the word 'or' into section 40(3)(e)(i) of the *Land Titles Act* 1980, one is still left with the unsatisfactory situation where a literal reading of that section leads to a conclusion which the available extrinsic evidence clearly militates against, and where there are convincing reasons why the position prior to the *Land Titles Act* ought to obtain. However, it is submitted that what is required is a legislative amendment to get around this problem and not a reading of words into the statute.

Conclusion

The case of *Duggan v Parramore* as affirmed by the Full Court of the Supreme Court is yet another cautionary reminder to purchasers of Torrens registered land in Tasmania, and their lawyers or agents, that it is not sufficient to rely on the information disclosed on the registered title of the property about to be purchased. In order to ensure that the land about to be acquired will not be subject to unwanted burdens, not only should the land be inspected (to ensure that there is no one in possession of the land who can claim ownership based on adverse possession or rights under an unregistered lease or agreement for a lease, for example), but the folios of all adjacent registered land should be searched to make sure that they do not disclose the existence of an easement over the land intended to be acquired.