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*Law and Public Policy: Taming the Unruly Horse?*

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Edited by Professor Michael Adams, Professor David Barker AM and Ms Katherine Poludniewski

**ALTA Secretariat**  
PO Box 222  
Lindfield NSW 2070  
AUSTRALIA  
Tel: +61 (2) 9514 5414  
Fax: +61 (2) 9514 5175  
[admin@alta.edu.au](mailto:admin@alta.edu.au)  
[www.alta.edu.au](http://www.alta.edu.au)

**'PRESCRIPTIVE AND IMPLIED EASEMENTS: DO THEY HAVE A  
FUTURE IN THE TORRENS SYSTEM IN NSW?'**

FIONA BURNS\*

This paper traces the attitude of the High Court, the Supreme Court of NSW and the NSW legislature to the compatibility of prescriptive and implied easements with the Torrens system in NSW. Despite the fact that early High Court decisions indicated that such easements were part of Australian law, the trend in NSW was (and is) towards the removal of such easements from the Torrens system in that state. A combination of judicial attitudes and recent legislation has ensured the effective abolition of prescriptive easements in all, except a small minority of situations. The status of implied easements is unclear, because courts in NSW have never displayed a consistent objection to the principle of easements by implication. The impact of two groundbreaking NSW Court of Appeal decisions, *Williams v State Transit Authority of New South Wales* [2004] 60 NSWLR 286; and *McGrath v Campbell* [2006] NSWCA 180 (7 July 2006) demonstrate the different approaches that courts in NSW have taken to prescriptive and implied easements respectively. The paper concludes by considering whether prescriptive and implied easements should remain part of the Torrens system of NSW.

## I INTRODUCTION

When the predominant form of land title was old system or common law title, there was no doubt that prescriptive and implied easements were a recognized and acceptable part of the land law system. In the late 19<sup>th</sup> century and early 20<sup>th</sup> century, courts in NSW began to consider that some prescriptive easements were no longer viable for the economic development of NSW. In the late 20<sup>th</sup> century, legal policy increasingly focussed on the protection of indefeasibility of title and bona fide purchasers. Prescriptive and implied easements became two of the 'unruly horses' of the modern Torrens system. As they were created outside the norms of registration, they were increasingly considered problematical.

The hard-edged implementation of the Torrens system in NSW has effectively abolished prescriptive easements in NSW and thrown into doubt whether implied easements have a future role in that state. This paper outlines the attitude of the High Court and courts in NSW to prescriptive and implied easements; and the legislative response to such easements. The paper considers two recent decisions of the NSW Court of Appeal which highlight the difficulties of relying on prescriptive implied easements in the Torrens

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\* Dr Fiona Burns is a Senior Lecturer at the Faculty of Law, University of Sydney.

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system: *Williams v State Transit Authority of New South Wales* ('Williams')<sup>1</sup> and *McGrath v Campbell* ('McGrath').<sup>2</sup>

*A Prescriptive Easements – A Brief Overview*

A prescriptive easement is one by which title is 'acquired by use or enjoyment had during the time and in the manner fixed by law'.<sup>3</sup> Prescriptive easements are based on a de facto enjoyment of land, which falls short of exclusive possession.<sup>4</sup> Traditionally, an easement has conferred on the dominant landholder a legal interest in the servient land.<sup>5</sup>

Prescription depends upon acquiescence.<sup>6</sup> The servient owner of the land has allowed the owner of the dominant land to exercise easement rights over the land for a considerable period of time. It was ultimately and reasonably assumed that the right had been acquired lawfully because the servient owner knew of the user in accordance with the law of prescription and had the power to prevent the user, but did not do so. The acquisition of the prescriptive easement was constrained to a user, which was without force, secrecy or antecedent permission.<sup>7</sup>

In Australia, a prescriptive easement can be claimed on two grounds.<sup>8</sup> One is the doctrine of lost modern grant made in modern times.<sup>9</sup> In *Dalton v Angus*<sup>10</sup> the House of Lords established that a claimant may seek a prescriptive easement when there is evidence of 20 years uninterrupted user, but there is no evidence that the putative grantor of the lost grant was legally incompetent. This doctrine has become important in the Australian context,<sup>11</sup> including NSW. This was the sole ground upon which a claimant in NSW could rely.

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<sup>1</sup> (2004) 60 NSWLR 286.

<sup>2</sup> [2006] NSWCA 180 (7 July 2006).

<sup>3</sup> J Gaunt QC and P Morgan QC, *Gale on Easements* (17<sup>th</sup> ed, 2002) [4-01].

<sup>4</sup> Peter Butt, *Land Law* (5<sup>th</sup> ed, 2006) [1621].

<sup>5</sup> *Ibid* [1605].

<sup>6</sup> See, eg *Dalton v Angus & Co* (1881) 6 App Cas 740, 773 (Fry J); EH Burn, *Cheshire and Burn's Modern Law of Real Property* (16<sup>th</sup> ed, 2000) 595.

<sup>7</sup> Butt, above n 4, [1672]-[1675].

<sup>8</sup> Another ground is that the user commenced before 1189 (the accession of Richard 1). However, it was not possible to rely on this ground in Australia: *Stevens v McClung* (1859) 2 Legge 1226; Butt, above n 4, [1667].

<sup>9</sup> Butt, above n 4, [1667]-[1668]. For a discussion of the early origins of the doctrine in English law see: WS Holdsworth, *A History of English Law* (13 vols, 1922-1952) vol 7, 346-347.

<sup>10</sup> (1881) 6 App Cas 710.

<sup>11</sup> *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283.

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Claimants in some Australian states could also rely on the *Prescription Act 1832* (UK), which is still in operation in England.<sup>12</sup> The *Prescription Act*<sup>13</sup> has never applied in NSW and there was no equivalent to it in that state.<sup>14</sup>

*B The High Court and Prescriptive Easements*

In *Delohery v Permanent Trustee Co of NSW* ('*Delohery*')<sup>15</sup> the plaintiff relied on the right to ancient lights based on the doctrine of lost modern grant to restrain the defendant from diminishing light coming through the plaintiff's windows. The right to 'ancient lights' arose when there was the demonstrated passage of light through specific apertures or channels (such as windows) for a continuous period of 20 years or more.<sup>16</sup> The High Court held that such prescriptive easements had a role to play in Australian law.<sup>17</sup> Two aspects of the case were particularly remarkable. One was that the title system governing the dominant and servient tenements did not appear to be highlighted and critically examined by the Court. The other was that the Court did not consider that prescriptive easements and ancient lights were incompatible with the Torrens system, pointing out that the Torrens legislation in all the states:

...expressly mention easements, and provide that as to them the register is not conclusive evidence of title. This is a plain recognition of the existence of a law under which interests can be created otherwise than by written instruments, since there could have been no difficulty in providing for the registration of grants for the creation of easements if it had been desired to do so.<sup>18</sup>

The Court did not consider the apparent anomaly that prescriptive easements were acquired by de facto user outside any system of registration, whereas under the Torrens

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<sup>12</sup> South Australia and Western Australia: Adrian J Bradbrook and Marcia A Neave: *Easements and Restrictive Covenants in Australia* (2<sup>nd</sup> ed, 2000) [5.44] & [5.45]. While the legislation was part of the law of Tasmania under the *Prescription Act 1934* (Tas), that legislation has been repealed under s 138I of the *Land Titles Act 1980* (Tas).

<sup>13</sup> See generally, Gaunt QC and Morgan QC, above n 3, [4-17]-[4-44].

<sup>14</sup> *Rodwell v GR Evans & Co Ltd Pty Ltd* [1978] 1 NSWLR 448, 451. Note in contrast that it is the law of other states such as South Australia and Western Australia: *Golding v Tanner* (1991) 56 SASR 482; *Wayella Nominees Pty Ltd v Cowden Ltd* [2003] WASC 210 (Unreported, Roberts-Smith J, November 2003).

<sup>15</sup> (1904) 1 CLR 283.

<sup>16</sup> Although ancient lights has been effectively abolished in NSW: *Conveyancing Act 1919* (NSW), s 179, a right to light may still be acquired as a prescriptive easement in England. For a discussion of this issue see Gaunt and Morgan, above n 3, ch 7.

<sup>17</sup> Griffiths CJ gave the judgment of the Court. Barton and O'Connor JJ agreed with him.

<sup>18</sup> (1904) 1 CLR 283, 312.

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system a person generally acquired a legal proprietary interest by registration.<sup>19</sup> How can this significant oversight be explained? It is submitted that there were several reasons.

One is that the initial aim of Robert Torrens was the setting up of a simple and efficient conveyancing system that would resolve common transactional problems.<sup>20</sup> The Torrens system had been framed to remove retrospective investigation of title. It was never envisaged that the register would constitute a completely reliable mirror of all interests affecting the land.<sup>21</sup> Another reason is that although the Torrens system had been implemented, *Delohery* was decided very early in the 20<sup>th</sup> century before significant High Court decisions about the system.<sup>22</sup> Finally, the central question before the Court was whether prescriptive easements (based on a doctrine of lost modern grant) were part of Australian land law, rather than the relevance of such easements to a title by registration system. However, despite these qualifications, the case is an authority supporting the general proposition that prescriptive easements are part of Australian law.

*C Implied Easements –A Brief Overview*

Implied easements cover a wide array of easements that were not expressly created, but impliedly granted or reserved.<sup>23</sup> Implied easements originated in English case law and were quickly adopted and adapted in Australia.<sup>24</sup> Examples include:

- Easements that have been implied from the description of the land contained in the deeds or the certificate of title. For example, land described as bounded

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<sup>19</sup> This point was raised by Gordon KC in his address to the Court: *ibid* 293. Nevertheless, the courts have recognised unregistered interests in the Torrens system. Courts have held that while the requirement for registration denies effect to the instrument, nevertheless the rights acquired from the transaction remain enforceable. For a helpful discussion of this issue see Butt, above n 4, [2023]-[2025].

<sup>20</sup> Sir Robert Torrens, *Transfer of Land by Registration of Title as Now in Operation in Australia under the 'Torrens System'* (1863) 2-4.

<sup>21</sup> For a helpful discussion on this point see *Dobbie v Davidson* (1991) 23 NSWLR 625, 648-656.

<sup>22</sup> Eg: *Barry v Heider* (1914) 19 CLR 197; *Butler v Fairclough* (1917) 23 CLR 78; *Commonwealth v State of New South Wales* (1918) 25 CLR 325;;*Lapin v Abigail* (1930) 44 CLR 166; *South Eastern Drainage Board v Savings Bank of South Australia* (1939) 62 CLR 603; *IAC (Finance) Pty Ltd v Courteny* (1963) 110 CLR 550; *Breskvar and Wall* (1971) 126 CLR 376; *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326; *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604; *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* [2004] HCA 58; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 (24 May 2007).

<sup>23</sup> Note generally Holdsworth, above n 9, vol 7, 334-335; Kevin Gray and Susan Gray, *Elements of Land Law* (4<sup>th</sup> ed, 2004), [8.128]-[8.152].

<sup>24</sup> Eg consider: *Bradley v McBride* (1886) 2 WN (NSW) 56; *Webb v Were* (1876) 2 VLR (E) 28; *Simmons v Starkey* (1869) 8 SCR (NSW) 186; *Howitt v Fitzgerald* (1898) 24 VLR 387; *Campbell v Jarrett* (1881) 7 VLR (E) 137; *Lyons v Winter* (1899) 25 VLR 464; *Gibson v M'George* (1860) 5 SCR (NSW) 44.

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by land was held entitled to use the land for a frontage;<sup>25</sup> and a conveyance of land abutting onto a lane has been held to be equivalent to permitting access over that lane or right of way.<sup>26</sup>

- Easements based on necessity when a person is unable to use his or her land. The criterion of necessity has been strictly interpreted: the necessity arises only in connection with a severance of the land, where, for example, an owner has owned both the putative dominant and servient tenements;<sup>27</sup> and the easement must be absolutely necessary for the use of the land.<sup>28</sup> Easements of necessity are justified on the actual or presumed intention of the parties.<sup>29</sup>
- Easements implied when it is necessary to give effect to the parties' common intention as to what use the land would be put.<sup>30</sup> The common intention must be inherent in the transaction and the circumstances.<sup>31</sup>
- Easements based on a non-derogation of grant to ensure that a grantee is able to use the land granted for the intended purpose and that the grantor does not use the retained land in a way which makes it difficult for the grantee to do so.<sup>32</sup>
- Easements implied under the rule in *Wheeldon v Burrows*.<sup>33</sup> A grantee acquires all the quasi-easements (continuous and apparent easements), which existed at the time of the severance of the land from the grantor's land. The quasi-easement must be reasonably necessary for the enjoyment of the land granted;<sup>34</sup> and the grantor must have used the quasi-easement for the benefit of the land granted prior to the severance.<sup>35</sup>

#### *D The High Court and Implied Easements*

In *Dabbs v Seaman* ('*Dabbs*'),<sup>36</sup> an appeal from the decision of the NSW Supreme Court, the High Court effectively endorsed an easement by implication even though it arose in the context of the Torrens system and concerned a particular kind of easement by implication. The transfer and certificate of title issued to the defendant indicated: the land

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<sup>25</sup> *Bradley v McBride* (1886) 2 WN (NSW) 56.

<sup>26</sup> *Cowlshaw v Ponford* (1928) 28 SR (NSW) 331; *Webb v Were* (1876) 2 VLR (E) 28.

<sup>27</sup> See eg: *Nickerson v Barraclough* [1981] Ch 426, 440.

<sup>28</sup> See eg: *Parish v Kelly* (1980) 1 BPR 9394, 9400-1. There must be at least evidence of the difficulty of access: *Torrisi v Magame Pty Ltd* [1984] 1 NSWLR 14, 22.

<sup>29</sup> *North Sydney Printing Pty Ltd v Sabemo Investment Co Pty Ltd* [1971] 2 NSWLR 150 at 160; *Parish v Kelly* (1980) 1 BPR 9394, 9399; *Nickerson v Barraclough* [1981] Ch 426.

<sup>30</sup> See eg *Beck v Auerbach* (1985) 6 NSWLR 425, 433-444.

<sup>31</sup> *RJ Finlayson Ltd v Elder, Smith & Co* [1936] SASR 209, 234.

<sup>32</sup> See eg: *Kebewar Pty Ltd v Harkin* (1987) 9 NSWLR 738, 741.

<sup>33</sup> (1879) 12 Ch D 31.

<sup>34</sup> *Stevens v Allan* (1955) 58 WALR 1, 15.

<sup>35</sup> *Lancaster v Lloyd* (1927) 27 SR (NSW) 379, 384-385.

<sup>36</sup> (1925) 36 CLR 538.

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of which the defendant was the registered proprietor; and a 20-foot strip marked with the words 'twenty foot lane'. Neither the transfer nor the certificate of title mentioned the existence or creation of an easement. The plaintiff who was the registered proprietor of the lane and other adjacent land applied for the consolidation of titles and the deletion of the words 'twenty foot lane'. The Registrar-General would not delete the notation without the defendant's consent, which was refused.

At first instance the plaintiff was granted declaratory and injunctive relief.<sup>37</sup> On appeal, the High Court allowed the defendant's appeal on several bases which led to the conclusion that the defendant was entitled to rely on the certificate and the register. A majority of the Court<sup>38</sup> recognised the defendant's implied easement by description which was dependent upon the diagram of the land. The easement was based on earlier case law which implied a right of way in favour of a purchaser when the land or street was owned by the vendor and was described in the conveyance.<sup>39</sup> The implied easement applied in the Torrens system.<sup>40</sup> Isaacs J also acknowledged the principle of indefeasibility of title. However, this indefeasibility of title was based on the conclusive evidence of the certificate of title (which referred to the lane).<sup>41</sup> They did confront directly the question whether implied easements undermined the Torrens system because it was arguable that in this case the implied easement assisted the operation of the title by registration system. Moreover, the decision in *Dabbs* was consistent with earlier High Court decisions in so far that implied easements based on a derogation from grant,<sup>42</sup> implied reservation<sup>43</sup> or *Wheeldon v Burrows* easements,<sup>44</sup> were assumed to be part of Australian law, although such easements may not have been found to exist on the particular facts of the case.<sup>45</sup> However, the courts have tended to confine the decision in *Dabbs* to its own special facts.<sup>46</sup>

The dissenting judgment of Higgins J is noteworthy. His Honour stressed, *inter alia*, that the land was Torrens title land.<sup>47</sup> Easements could not be transferred or created over the land except in accordance with the terms of the *Real Property Act 1900* (NSW).<sup>48</sup> Accordingly, the defendant had no right of access over the lane (despite the statement on

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<sup>37</sup> (1924) 24 SR 481.

<sup>38</sup> Isaacs and Starke JJ.

<sup>39</sup> (1925) 36 CLR 538, 546-548 (Isaacs J); 573 (Starke J). Helpful discussion is contained in Butt, above n 4, [1645]; Gaunt and Morgan, above n 3, [3-20]-[3-25].

<sup>40</sup> *Ibid*, 573 (Starke J).

<sup>41</sup> *Ibid* 545-546.

<sup>42</sup> *Nelson v Walker* (1910) 10 CLR 560, particularly 582-586 (Isaacs J).

<sup>43</sup> *Mayor of Perth v Halle* (1911) 13 CLR 393.

<sup>44</sup> *Horsfall v Braye* (1908) 7 CLR 629.

<sup>45</sup> Note *Nelson v Walker* (1910) 10 CLR 560; *Horsfall v Braye* (1908) 7 CLR 629; *Mayor of Perth v Halle* (1911) 13 CLR 393.

<sup>46</sup> Butt, above n 4, [2093].

<sup>47</sup> (1925) 36 CLR 538, 558-560

<sup>48</sup> *Ibid*.

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the certificate of title), because the alleged easement was not created according to the legislation. In *Nelson v Walker*<sup>49</sup> Higgins J also raised the issue whether natural rights and the principle of derogation from grant, binding successors in title, applied in a Torrens context. However, His Honour did not pursue that line of reasoning because he considered that no grant could be implied initially.<sup>50</sup>

In the light of *Delohery* and *Dabbs*, it could have been assumed that prescriptive and implied easements were permanently part of the NSW Torrens system. However, three factors rendered this unlikely. First, the High Court's decisions did not directly grapple with compatibility of the easements with the Torrens system. Second, there was a tendency of the courts in NSW to treat prescriptive easements unfavourably. Third, there were significant legislative changes in the 20<sup>th</sup> century, which, literally read, left little room for the operation of such easements. The second and third issues are considered below.

## **II THE TORRENS SYSTEM IN NSW: EARLY APPROACHES TO PRESCRIPTIVE AND IMPLIED EASEMENTS**

### *A Early Judicial Approaches to Prescriptive Easements in NSW*

In New South Wales colonial courts questioned whether prescriptive easements for light were part of the law of that colony.<sup>51</sup> In *Sheehy v Edwards, Dunlop & Co*,<sup>52</sup> in a claim for a right to ancient lights based on the doctrine of lost modern grant, Manning J acknowledged that the doctrine of lost modern grant was part of the law of England when NSW was founded and later when its reception was confirmed by statute.<sup>53</sup> English courts had made it clear that the colonists brought such common law, as was 'reasonably applicable to the conditions of the colony'.<sup>54</sup> However, he held that a historical approach did not convincingly determine whether prescriptive easements based on ancient lights ought to be protected. He questioned whether in a practical terms, easements by prescription could have ever applied when the colony was first settled. In addition, he held that as the right to ancient lights had not been part of the law adopted by the colony on its foundation, it would be necessary for the colonial legislature to pass legislation to introduce it.<sup>55</sup> He also held that the prescriptive period set by law was analogous to the *Statute of Limitations* that expressly did not apply to Torrens title land.<sup>56</sup> Notably, he did

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<sup>49</sup> (1910) 10 CLR 560.

<sup>50</sup> Ibid 592-593.

<sup>51</sup> Cf other colonies: *White v McLean* (1890) 24 SALR 97; *Thwiates v Brahe* (1895) 21 VLR 192.

<sup>52</sup> (1897) 13 WN (NSW) 165.

<sup>53</sup> *Australian Courts Act*, 9 Geo IV, c 83.

<sup>54</sup> Ibid 168.

<sup>55</sup> (1897) 13 WN (NSW) 165, 168.

<sup>56</sup> Ibid.

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not raise the potential clash between the tenets of title by registration and prescription. These arguments would become important in a later age.<sup>57</sup>

As there was a strong legal trend in NSW, which was adverse to prescriptive easements and their role in the Torrens system, it is not surprising that the fundamental issue of whether prescriptive easements were part of Australian law arose in a NSW case, which went subsequently on appeal to the High Court. In *Delohery v Permanent Trustee Co of NSW*<sup>58</sup> Simpson CJ in Equity held that as the *Prescription Act 1832* had not been adopted in NSW, it was left to the court to determine whether the right to ancient lights based on the doctrine of lost modern grant was beneficial for the country. He held that the doctrine ought not to be adopted in NSW, principally due to concerns about economic development.<sup>59</sup>

*B Early Judicial Approaches to Implied Easements in NSW*

There are several early decisions (some prior to *Dabbs*), which indicated that the courts accepted that implied easements were part of the law of NSW.<sup>60</sup> The more difficult issue was whether such easements operated in the Torrens system. The attitude of the courts appears at best equivocal.

One early NSW decision is very important. Maughan AJ in *Seaman v Dabbs*<sup>61</sup> (the facts of which were briefly referred to above)<sup>62</sup> considered that the statutory framework of the Torrens system was the most significant factor in determining whether an implied easement by description existed in this case. Traditionally, when a vendor of land owns a lane or street which is contiguous to the land sold, and the land or street is described in words or by diagram in the conveyance, a right of way over the land is implied in favour of the purchaser.<sup>63</sup> Maughan J pointed out, inter alia, that notwithstanding the traditional principles, the then section 40 of the *Real Property Act 1900* (NSW) stated that every certificate of title was 'conclusive evidence' of a person's interest in the land subject to the certificate of title.<sup>64</sup> However he held that the certificate of title was not conclusive

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<sup>57</sup> *Williams v State Transit Authority of New South Wales* (2004) 60 NSWLR 286.

<sup>58</sup> (1903) 4 NSWLR 1.

<sup>59</sup> Ibid 6. The decision of Simpson CJ was heavily influenced by Manning J's decision in *Sheehy v Edwards, Dunlop & Co* (1897) 13 WN (NSW) 165.

<sup>60</sup> Such as *Wheeldon v Burrows* easements: *Lancaster v Lloyd* (1927) 27 SR (NSW) 379; and easements of necessity: *Sharp v Emery* (1860) 2 Legge 1281; *Gibson v M'George* (1866) 5 SCR (NSW) 44.

<sup>61</sup> (1924) 24 SR 481.

<sup>62</sup> Above page 5 of this paper.

<sup>63</sup> For helpful discussion of implied easements by description see Gaunt and Morgan, above n 3, [3.20]-[3-25].

<sup>64</sup> (1924) 24 SR 481, 493.

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evidence of anything else that appeared on the certificate.<sup>65</sup> Therefore, it was not possible to rely on the certificate of title, nor imply an easement by description. Nevertheless, he neither criticised the inherent concept of implied easements by description per se; nor considered the provisions in the legislation dealing with easements as exceptions to indefeasibility.

*C Early Academic Approaches to Prescriptive and Implied Easements in the Torrens System in NSW*

It is helpful to note several earlier academic commentators on the operation of prescriptive and implied easements in the Torrens system in NSW. They demonstrate that while it was initially assumed after *Delohery* and *Dabbs* that these easements functioned within the Torrens system, a 'sea change' occurred, in part due to the redrafting of statutory exceptions to indefeasibility (which will be dealt with below).

Beckingham and Harris<sup>66</sup> referred to cases from other states and commented that in NSW 'a commonly accepted view in NSW appears to be' that Torrens title land was 'subject to any easements that may be proved to exist, whether they are noted as encumbrances or not, whether created before or after the land was brought under the Act, irrespective of the method of their creation'.<sup>67</sup> Not only were both prescriptive and implied easements recognised within the Torrens system, but also they were given equal recognition, so long as they were created in accordance with the general law.

Several decades later Baalman pointed out that originally '... easements were 'rights outside' the R.P. Act; that an unregistered easement could be as efficacious as a registered one'.<sup>68</sup> Implicitly from what Baalman stated, this view applied to both prescriptive and implied easements. However Baalman went on to point out that this view changed in the 1943 decision, *Jobson v Nankervis*,<sup>69</sup> as a response to legislative changes.<sup>70</sup>

Writing the second edition of Baalman's work, Woodman and Grimes accentuated the importance of registration.<sup>71</sup> They argued that in the light of legislative amendments, the recognition of prescriptive easements would now be incongruous in the Torrens system in NSW.<sup>72</sup> In regard to implied easements, they contended that *Dabbs* ought to be limited to

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<sup>65</sup> Ibid.

<sup>66</sup> JG Beckingham and Lewis A Harris, *The Real Property Act NSW (as amended to the end of 1928)* (1929) 96-97.

<sup>67</sup> Ibid 96.

<sup>68</sup> John Baalman, *The Torrens System in New South Wales* (1951) 202. .

<sup>69</sup> (1943) 44 SR 277.

<sup>70</sup> Below at page 10 of this paper.

<sup>71</sup> RA Woodman and PJ Grimes, *Baalman: The Torrens System in New South Wales* (2<sup>nd</sup> ed, 1974) 186.

<sup>72</sup> Ibid 185.

its own peculiar circumstances.<sup>73</sup> However, they noted that in *Wheeldon v Burrows* easements, 'the purchaser may well have a personal equity sufficient to support an application'<sup>74</sup> requiring the vendor to execute a transfer granting an easement. An important early trend was re-emerging with greater clarity - a different approach to the operation of prescriptive and implied easements in the Torrens system in NSW.

### **III THE TORRENS SYSTEM IN NSW: LEGISLATIVE PROGRESSION**

#### *A The First Torrens Legislation in NSW*

The Torrens system was originally implemented by the *Real Property Act 1862*.<sup>75</sup> This legislation remained in operation until the current legislation, the *Real Property Act 1900*, was enacted. The earlier legislation did contain a provision setting out statutory exceptions to indefeasibility. Section 40 provided that the registered proprietor, except in the case of fraud and interests notified on the folio, took the land 'free from all other encumbrances liens estates or interests' subject to inter alia, 'the omission or misdescription of any right of way or other easement created in or existing upon any land.' This appeared wide enough to cover prescriptive easements created under the doctrine of lost modern grant – consistently with the approach taken by the High Court in *Delohery*.<sup>76</sup>

#### *B The Real Property Act 1900 (NSW)*

In 1900, section 42 of the *Real Property Act 1900* (NSW) set down specific statutory exceptions to indefeasibility including para (b) which stated:

... in the case of the omission or misdescription of any right-of-way or other easement created in or existing upon any land.

The wording of the legislation could arguably cover prescriptive or implied easements because such easements were created and existing upon any land. Beckingham and Harris referred to this view.<sup>77</sup> However, the situation was complicated by the fact that section 42 also provided that a registered proprietor was subject to the interests recorded on the register, but otherwise took the land 'absolutely free from all other encumbrances, liens or interests whatsoever'. Two important issues arose in subsequent case law: the definition of 'omission' in section 42(b) and whether a prescriptive or implied easement constituted an in personam right.

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<sup>73</sup> Ibid 185, referring to *Jobson v Nankervis* (1943) 44 SR (NSW) 277, 280.

<sup>74</sup> Ibid.

<sup>75</sup> (1862) 26 Vic No 9.

<sup>76</sup> (1904) 1 CLR 283, 312.

<sup>77</sup> Beckingham and Harris, above n 69, 96-97.

## 1 *Omitted Easements*

In *Jobson v Nankervis*<sup>78</sup> Nicholas CJ held that only a registered memorandum of transfer could create an easement; and that only unregistered easements in existence before the land was brought onto the Torrens system ought to otherwise burden the land.<sup>79</sup> He also considered the decision in *Dabbs* to be an exceptional one, which ought to be confined to its own special facts.<sup>80</sup> Therefore, it was arguable that it ought not to be relied on as an authoritative endorsement of implied easements in the Torrens system in NSW.<sup>81</sup>

In *Australian Hi-Fi Publications v Gehl* (*'Australian Hi-Fi'*)<sup>82</sup> the NSW Supreme Court had held that the word 'omission' in section 42(b) required evidence that something was not on the register and that was because something should have been done, but was not done. In practical terms, it was necessary for an easement to be omitted due to the fault of the Registrar-General.<sup>83</sup> The problem was that prescriptive or implied easements would not constitute an exception to indefeasibility because they were not omitted due to administrative error.

The decision in *Dobbie v Davidson* (*'Dobbie'*)<sup>84</sup> changed the interpretation of 'omission'. In that case, a prescriptive easement in the form of an access road had been used since 1905. The servient land had been brought under the Torrens title system in 1964, but no right of way appeared on the Certificate of Title. The NSW Court of Appeal confirmed that a prescriptive right of way had been in existence at the time that the land was brought onto the Torrens system, but its omission was not due to administrative error. Contrary to earlier decisions, the NSW Court of Appeal held that the word 'omission' did not require proof of fault on the part of the Registrar-General, but simply meant that the easement was not recorded on the title, nothing more.<sup>85</sup> Priestley JA extensively reviewed the early Torrens legislation and the early reports about it. His Honour concluded that the NSW Court of Appeal's interpretation was consistent with that of the early framers of the Torrens legislation.<sup>86</sup>

Subject to what is stated below, the decision left the door open for prescriptive and implied easements, not only in situations when the easement already existed over the land before conversion to Torrens title, but also when the land was under the Torrens system and the conditions necessary for prescriptive or implied easements were satisfied.

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<sup>78</sup> (1943) 44 SR (NSW) 277; 61 WN (NSW) 76.

<sup>79</sup> See also *Kostis v Devitt* (1979) 1 BPR 9231; *Dewhirst v Edwards* [1983] 1 NSW 34; *Australian Hi-Fi Publications Pty Ltd v Gehl* [1979] 2 NSWLR 618.

<sup>80</sup> *Jobson v Nankervis* (1943) 44 SR (NSW) 277, 280.

<sup>81</sup> See Butt, above n 4, [2093]; Baalman, above n 72, 199. It has been argued that the decision in *Dabbs* is not a satisfactory authority. Baalman considered that what the transferee got was 'something in the nature of a judicial mystery.'

<sup>82</sup> [1979] NSWLR 618.

<sup>83</sup> [1979] NSWLR 618, 632 (Mahoney J).

<sup>84</sup> (1991) 56 SASR 482.

<sup>85</sup> *Ibid* 630-633 (Kirby P); 660 (Priestley JA).

<sup>86</sup> *Ibid* 647-657 (Priestley JA). Kirby JA agreed on this point: 635.

## *2 In Personam Right*

In *Australian Hi-Fi*<sup>87</sup> another issue was whether a registered proprietor would take land subject to a *Wheeldon v Burrows* easement. The Court of Appeal held that generally an easement by implication could not arise over land already in the Torrens system. An easement by implication would be defeated by later registered interests.<sup>88</sup> A newly registered proprietor of the servient land would not be subject to such an easement due to the impact of s 42(b). However, the Court also made it clear that such an implied easement would still have limited enforceability under an in personam (or personal equity) exception to indefeasibility of title. The easement would only be enforceable against the original parties to the transaction, which initially gave rise to the easement. Once the servient land was transferred to a new registered proprietor who had not taken the land fraudulently, the easement could no longer be enforced.<sup>89</sup>

This decision gave some limited protection to a grantee acquiring land that was previously benefited by a quasi-easement. However, the implication was that subsequent owners of the dominant land ought to take steps to formalise the easement by registration. The extent to which the approach in *Australian Hi-Fi* ought to apply to other kinds of easements implied by law was somewhat unsettled, particularly as both previous cases and commentators had suggested that in personam rights should not apply to other implied easements.<sup>90</sup> There was also the issue whether the finding in *Australian Hi-Fi* could also apply to prescriptive easements, particularly in the light of a decision of the Supreme Court of South Australia, which followed *Australian Hi-Fi* and preserved a prescriptive easement in the Torrens system under the concept of an in personam right.<sup>91</sup>

### *C The Property Legislation Amendment (Easements) Act 1995 (NSW).*

In 1995, the NSW legislature made amendments to section 42 that affected prescriptive and implied easements.<sup>92</sup> The legislature abolished the former para (b) and replaced it with section 42(1) (a1) as a new exception to indefeasibility:

... in the case of the omission or misdescription of an easement subsisting immediately before the land was brought under the provisions of this Act or validly created at or after that time under this or any other Act or a Commonwealth Act.

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<sup>87</sup> [1979] 2 NSWLR 618.

<sup>88</sup> Ibid 623-624.

<sup>89</sup> Ibid See also *Kebewar Pty Ltd v Harkin* [1987] 9 NSWLR 738, 743.

<sup>90</sup> See Woodman and Grimes, above n 76 185. Note also that the indefeasibility provisions were held to prevent easements by necessity: *Parish v Kelly* (1980) 1 BPR 9394; *Torrissi v Magame Pty Ltd* [1984] 1 NSWLR 14.

<sup>91</sup> *Golding v Tanner* (1991) 56 SASR 482.

<sup>92</sup> *Property Legislation Amendment (Easements) Act 1995 (NSW)* s 3 and sch 2 [1].

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This provision clearly creates an exception to indefeasibility consistent with the decision and factual circumstances in *Dobbie*. Moreover, easements that are validly created under the *Real Property Act* (by registration) or under any other NSW or Commonwealth legislation that is omitted or misdescribed will still constitute exceptions to indefeasibility. Administrative omissions or misdescriptions or easements created by overriding statutes will be covered. However, a literal reading of the provision suggests that easements arising under the common law or equity will not constitute exceptions to indefeasibility (unless in some way they are linked to the fraud exception or a judicial exception in the form of an in personam right or they arose before the land was converted to Torrens title). While the legislature did not directly abolish prescriptive or implied easements, it arguably attempted to do so indirectly because most residential and commercial land, that is 'non-Crown' land in NSW, is regulated by the Torrens system.<sup>93</sup>

#### **IV WILLIAMS V STATE TRANSIT AUTHORITY OF NEW SOUTH WALES<sup>94</sup>**

As suggested earlier, some early NSW decisions had considered prescriptive easements unfavourably. In the light of *Delohery*<sup>95</sup> and the ongoing development of the Torrens legislation, this matter was left undecided.<sup>96</sup> However, in the 1970s and 1980s there were several first instance cases where courts held that a prescriptive easement could not arise in respect of land under the Torrens system, except where the easement arose before the conversion of the land from old system to Torrens title.<sup>97</sup> These cases were determined before the 1995 amendments and were influenced by the decisions in *Jobson v Nankervis*<sup>98</sup> and *Australian Hi-Fi*<sup>99</sup> in so far that they emphasised that registration was necessary to create an easement. It appears that the Courts were wary of the acquisition of rights by mere user, particularly as there was no statutory recognition of them.<sup>100</sup>

In *Williams*<sup>101</sup> the question whether prescriptive easements could arise outside the registration system and bind registered proprietors was considered. In that case, a portion of Randwick Racecourse had been resumed for use as a tramway and then as a busway and access for taxis, particularly on race days. The owner was the State Transit Authority of NSW. It sought tenders for the sale of the land. The Australian Jockey Club made a bid, but then refused to accept the terms of sale. The State Transit Authority exchanged contracts with a rival bidder. The Australian Jockey Club lodged caveats, claiming various rights of way and a sewerage easement over the land based on uninterrupted usage in excess of 20 years. The State Transit Authority claimed, inter alia, that there had

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<sup>93</sup> Butt, above n 4, [2005].

<sup>94</sup> (2004) 60 NSWLR 286.

<sup>95</sup> (1904) 1 CLR 283.

<sup>96</sup> Consider eg, *Rodwell v GR Evans & Co Pty Ltd* [1978] 1 NSWLR 448, 451.

<sup>97</sup> *Kostis v Devitt* (1979) 1 BPR 9231; *Dewhirst v Edwards* [1983] 1 NSWLR 34.

<sup>98</sup> (1943) 44 SR (NSW) 277; 61 WN (NSW) 76.

<sup>99</sup> [1979] 2 NSWLR 618.

<sup>100</sup> *Dewhirst v Edwards* [1983] 1 NSWLR 34, 46-48 (Powell J).

<sup>101</sup> (2004) 60 NSWLR 286.

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not been the necessary user required to comply with the doctrine of lost modern grant; and that in any event the doctrine was incompatible with the Torrens title system.

The Court held that prescriptive easements did not fall within section 42(1) (a1), nor did they create an in personam right against the registered owner of the servient land.<sup>102</sup> The Court also considered that not only was the doctrine of lost modern grant a fiction, but the fiction would be further contorted and stretched if it were adapted to a title by registration system. It would be necessary both to presume the delivery of a registrable transfer and certificate of title and the registration of the easement by an administrative official whose acquiescence as to user would be difficult to maintain.<sup>103</sup>

In *Williams*, the Court acknowledged that prescriptive easements were based on acquiescence<sup>104</sup> and that a successful claimant acquired a legal easement rather than an in personam right.<sup>105</sup> The Court approached prescription and the doctrine of lost modern grant from the perspective of the inviolability of the title-by-registration system. It applied the doctrine of lost modern grant literally to the machinery of the Torrens system<sup>106</sup> and gave primacy to the statutory framework of the Torrens system over traditional common law norms. It ignored the broader issue of whether acquiescence ought to give rise to a legal right in exceptional circumstances (despite the precise terms of the legislation). Unless there are some radical amendments to the legislation, it can be said with certainty that prescriptive easements, one of the species of 'unruly horses' confronting the policy of the Torrens system are almost extinct in NSW law (except where the prescriptive easement arose prior to the conversion of land from old system to the Torrens system). The High Court refused leave to appeal from the decision.<sup>107</sup>

### **V MCGRATH V CAMPBELL<sup>108</sup>**

The approach of courts in NSW to the compatibility of implied easements to the Torrens system has been far more equivocal than their attitude to prescriptive easements. It is submitted that there have been three reasons. First, courts never displayed the same aversion to the principle of implication. The implication of easements has been a way of completing or fulfilling what were the intentions of the parties; or in a practical fashion ensuring that the dominant land was usable.<sup>109</sup> Second, implied easements may arise in a number of ways, so that a decision in respect of one kind of implied easement could

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<sup>102</sup> Ibid, 301-302. The Court relied on the legislative abolition of prescriptive rights of way against the Crown: *Conveyancing Act 1900* (NSW) s178.

<sup>103</sup> Ibid, 299-301.

<sup>104</sup> Ibid, 292-293.

<sup>105</sup> Ibid, 299-300.

<sup>106</sup> Ibid, 300.

<sup>107</sup> [2005] HCA Trans 296.

<sup>108</sup> [2006] NSWCA 180 (7 July 2006).

<sup>109</sup> Consider eg *Wilcox v Richardson* (1997) 43 NSWLR 4.

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arguably have limited influence over cases in regard to other forms of implied easements. Third, courts have responded differently and inconsistently to implied easements in the 20<sup>th</sup> century. There had been a number of cases which have:

- avoided the question whether implied easements were compatible with the Torrens system;<sup>110</sup> or
- determined that a claim for an implied easement failed because of non-compliance with the provisions for express creation of easements;<sup>111</sup> or
- determined that the earlier exception to indefeasibility (s 42 (1)(b) of the *Real Property Act*) precluded reliance on easements of implication (such as easements of necessity);<sup>112</sup> or
- determined that a person could acquire an in personam right against the person in respect of which the easement initially arose;<sup>113</sup> or
- determined that an easement or ancillary right implied in an instrument registered under the *Real Property Act* (such as a *Wheeldon v Burrows* easement) is not defeated by any indefeasibility provisions.<sup>114</sup>

In *McGrath*, the Court of Appeal had the opportunity to provide clear guidance on how and to what extent, implied easements operated in the Torrens system. Unfortunately, it did not do so, thereby creating uncertainty and a significant divide between prescriptive and implied easements in the Torrens system. In this case, two adjoining lots were owned by a single registered proprietor. The common owner of Lot 6 and Lot 12 sold these lots to the respondents and the appellants respectively. The respondents continued to use an unregistered easement over Lot 12 to gain access to Lot 6. The appellants argued that the respondents were not entitled to claim or use such an easement; and that such an easement was repugnant to s 42 (1) (a1). The respondents argued that they were entitled to do so, relying on *Aldridge v Wright*.<sup>115</sup> In *Aldridge v Wright*, Greer LJ had considered the situation where both properties to which a continuous and apparent implied easement may apply, are sold to separate purchasers. He held:

Where an owner executes contemporaneous conveyances of adjoining plots with the houses erected on them, and there exists a made road across the land of one plot to an

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<sup>110</sup> *North Sydney Printing Pty Ltd v Sabemo Investment Corporation Pty Ltd* [1971] 1 NSWLR 150 (Hope J); *Wilcox v Richardson* (1997) 43 NSWLR 4.

<sup>111</sup> Consider *Real Property Act 1900* (NSW) ss 46 and 47; *Tarrant v Zandstra* (1973) 1 BPR 9381 (Mahoney J).

<sup>112</sup> *Parish v Kelly* (1980) 1 BPR 9394; *Torrissi v Magame Pty Ltd* [1984] 1 NSWLR 14 (Powell J).

<sup>113</sup> *Australian Hi-Fi Publications Pty Ltd v Gehl* [1979] 2 NSWLR 618; *Lamos Pty Ltd v Hutchison* (1984) NSW ConvR 55-183; *Kebewar Pty Ltd v Harkin* (1987) 9 NSWLR 738;

<sup>114</sup> *Hemmes Hermitage Pty Ltd v Abdurahman* (1991) 22 NSWLR 343; *Kavia Holdings Pty Ltd v Bevillesta Pty Ltd* [2006] NSWSC 633

<sup>115</sup> [1929] 2 KB 117.

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entrance to the house on the other plot, and it is proved that the road was constructed for the use of both houses, there will be implied a grant in the one conveyance of a right to use the road and a corresponding reservation in the other conveyance.<sup>116</sup>

While in that case, Greer LJ did not find that there had been the necessary contemporaneous transactions, the case represents a special extension of the rule in *Wheeldon v Burrows* because the implied easement may arise despite the fact that the grantor retains neither lot. The respondent argued that a continuous and apparent easement applied notwithstanding that two separate parties had acquired the putative dominant and servient land.<sup>117</sup> and that the simultaneous sales created an equity or a right in personam against the appellants.

The Court of Appeal pointed out that *Aldridge v Wright* easements were dependent upon an imputed intention of the purchaser to take the putative servient tenement subject to the easement.<sup>118</sup> Therefore, it was necessary to establish that the appellants, as owners of the servient land, had effectively acceded to the easement by implication in accordance with the rules governing the implication of terms in a contract.<sup>119</sup> The Court determined that there was no evidence from which such an intention could be imputed.. In short, there was insufficient evidence sustaining a claim for an implied easement of the *Aldridge v Wright* variety.<sup>120</sup>

Nevertheless, the Court also considered whether such an implied easement was incompatible with the Torrens title system. Three observations may be made.

First, the Court considered that an implied easement of the *Wheeldon v Burrows* variety (as extended by *Aldridge v Wright*) could only ever constitute an equitable interest because it was unregistered.<sup>121</sup> This is an interesting issue because under conventional approaches to easements, whether implied or otherwise, the dominant owner of the land acquired a legal interest in the land.<sup>122</sup> Therefore, registration as a prerequisite to legal title has taken precedence over and modified traditional principles. However, this view was evident in earlier academic literature<sup>123</sup> and had been endorsed in *Australian Hi-Fi*.<sup>124</sup> Even if implied easements survive the introduction of the Torrens system as

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<sup>116</sup> *Ibid*, 131.

<sup>117</sup> [1929] 2 KB 117.

<sup>118</sup> [2006] NSWCA 180 (7 July 2006) [77].

<sup>119</sup> *Ibid*, [70]-[76].

<sup>120</sup> *Ibid* [78]

<sup>121</sup> *Ibid* [79].

<sup>122</sup> Butt, above n 4, [1656].

<sup>123</sup> Woodman and Grimes, above n 76, 185.

<sup>124</sup> [1979] 2 NSWLR 618, 623-624

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equitable interests, two interesting issues arise. First, it remains unclear how such easements will be treated when there is a priority dispute between the dominant owner and an unregistered interest holder in respect of the servient land. For example, if an implied easement arose on the principles in *Aldridge v Wright*, how would a priority dispute be settled between the dominant owner and an unregistered mortgagee or unregistered lessee of the servient land? Would the Court deem the easement to be a legal interest as against other unregistered interests in order to give effect to orthodox principles? If this were the case, it would be a situation where the interest was regarded as a legal interest for purposes of priority disputes, but an equitable interest when the question of indefeasibility of title was concerned. Alternatively, if the implied easement was simply regarded as equitable, then the standard priority rules could be difficult to apply. The standard rule is that the first equitable interest takes priority.<sup>125</sup> If the unregistered (equitable) mortgagee provided the finance for the servient owner's acquisition of the land, it could be difficult to determine which was the earlier equitable interest, unless it was assumed that the continuous and apparent easement was an earlier quasi-easement waiting to fully crystallise immediately the acquisition took place. Second, it raises a question over the future status of other unregistered legal interests which operate in the Torrens system. For example, there are some leases in NSW which, according to Butt, 'may well be legal, not equitable'.<sup>126</sup> Leases which meet the criteria under s 23D (2) of the *Conveyancing Act 1919* (NSW)<sup>127</sup> are legal leases which take effect according to their own terms and are offered some (but not complete) protection under s 42(1) (d) of the *Real Property Act 1900* (NSW).<sup>128</sup> Leases under s 127 of the *Conveyancing Act 1919* (NSW) take effect as legal tenancies at will determinable by one month's notice. Consistently applying the in personam approach to such interests, the leases would only bind the original lessor. However, it is arguable alternatively that these interests would be treated differently than unregistered implied easements because of the protection afforded under s 42(1)(d) and because they are leases created by legislation.

Second, the Court held that an equitable easement would only be enforceable as a personal equity against the vendor of the land, but not against the vendor's successors in title.<sup>129</sup> In *McGrath*, it was not possible to argue that the appellants were bound by an in personam right, because they had not contributed to the creation of the implied easement or acted in an unconscionable way (which would have led the respondents to believe that such an easement was binding on them).<sup>130</sup> Mere knowledge of the simultaneous transfers

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<sup>125</sup> Butt, above n 4, [2025]

<sup>126</sup> *Ibid.*

<sup>127</sup> Leases which do not exceed three years, are at the best rent reasonably obtainable without taking a fine and take effect in possession. For a discussion of these leases and the Torrens system see Butt, above n 4, [1548]-[1551]; [1556]-[1557].

<sup>128</sup> Butt, above n 4, [2096]-[2097].

<sup>129</sup> [2006] NSWCA 180 (7 July 2006) paras [102]-[104] relying on *Australian Hi-Fi Publications Pty Ltd v Gehl* [1979] 2 NSWLR 618.

<sup>130</sup> *Ibid* [108].

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was not sufficient.<sup>131</sup> The jurisprudential basis for *Wheeldon v Burrows* was that the original owner had created the easement and it was his or her presumed intention to transfer the land with the benefit attached.<sup>132</sup>

Third, the Court noted briefly Professor Peter Butt's view that as both prescriptive and implied easements arise at law without any registrable dealing, the refusal to recognise in personam liability for prescriptive easements casts doubt on the in personam enforceability of implied easements.<sup>133</sup> In short, the argument is that both forms of easement ought to be treated similarly in a title by registration system. Tobias JA for the Court commented that 'there is much force in Professor Butt's observations'.<sup>134</sup> However, he held that he was not required to express a conclusion on this issue because there was no *Aldridge v Wright* easement or personal equity otherwise binding the appellants.<sup>135</sup>

The upshot of the case appears to be that the NSW Court of Appeal refused to move away from the approach taken in *Australian Hi-Fi*,<sup>136</sup> although *Australian Hi-Fi* was decided well before the 1995 amendments. It is arguable that the Court hinted that its future attitude would be that prescriptive and implied easements would be treated similarly. Alternatively, it is equally arguable that the Court did not proceed to make a clear obiter dicta statement, because it wished to leave the matter open for further consideration.

## VI CONCLUSION AND COMMENT

An analysis of the way that the NSW legislature has dealt with prescriptive and implied easements shows that it has consistently and progressively attempted to limit the applicability of both in the Torrens system. There has been no attempt to distinguish between them when constructing exceptions to indefeasibility. It is submitted that the reason for this approach is that from the perspective of a title-by-registration system, both kinds of easements are unregistered interests which arise outside the land title scheme. They create problems because they detract from the principle of indefeasibility of title and undermine the reliability of the scheme as a complete system of title. Therefore, there has been insufficient consideration of the different basis for and function of these easements. Yet, prescriptive easements and implied easements have performed different roles. Prescription is based on acquiescence and long user over a period recognised by law. Implied easements give effect to the parties' intentions at the time of grant or permit

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<sup>131</sup> *Ibid* [111]-[112].

<sup>132</sup> *Ibid* [106].

<sup>133</sup> Butt, above n 4, [2090]-[2091].

<sup>134</sup> *Ibid* [118].

<sup>135</sup> *Ibid* [119].

<sup>136</sup> [1979] 2 NSWLR 618.

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access to landlocked land. Therefore, these separate roles ought to be considered before restricting or eliminating them.

An analysis of the way that courts in NSW have dealt with prescriptive and implied easements indicates that some courts have distinguished between the operation of prescriptive and implied easements in the Torrens system. It is true that there has been a cross-fertilisation of ideas concerning prescriptive and implied easements. Therefore, there are cases pertaining to implied easements and the Torrens system which have influenced courts determining whether prescriptive easements can operate in the Torrens system<sup>137</sup> and vice versa.<sup>138</sup> On the other hand, in *Williams* the Court of Appeal criticised the artifices that would be necessary to apply the doctrine of lost modern grant to the Torrens system. It considered that prescriptive easements based on a lost modern grant were no longer tenable. Yet, in *McGrath*, the Court of Appeal did not automatically determine that the decision in *Williams* ought to apply to implied easements. It did not overrule the operation of *Wheeldon v Burrows* implied easements in the Torrens system. Instead, the Court held that such easements will only bind the original servient owner as an in personam obligation.

Before taking further judicial action to eliminate implied easements, it will be necessary to consider carefully the role and function of both prescriptive and implied easements. So far, the courts in NSW have not adequately explained why a prescriptive easement based on acquiescence and acquired by long user is not protected under the Torrens system, while an easement based on 'continuous and apparent user' is protected in a limited fashion. It is arguable that in some respects, they are similar because both arise due to continuous user over time and must be evident. The difference in approach may lie not only in the problems associated with the application of the doctrine of lost modern grant, but also that prescriptive easements are acquired by the unilateral action of the dominant owner and the deemed acquiescence of the servient owner over time. Prescription allows the acquisition of an interest in land for no consideration.<sup>139</sup> Alternatively, it can be argued that the function of implied easements has been to fill contractual gaps where the parties intended or presumed that an easement existed in favour of the dominant land. Moreover, *Wheeldon v Burrows* easements exist as quasi-easements in the hands of the grantor and crystallise into implied easements when the grant occurs. As the grantor used

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<sup>137</sup> Eg, *Australian Hi-Fi Publications Pty Ltd v Gehl* [1979] 2 NSWLR 618 influenced the decision in *Dewhurst v Edwards* [1983] 1 NSWLR 34.

<sup>138</sup> *Dewhurst v Edwards* [1983] 1 NSWLR 34 in which it was decided that prescriptive easements could not arise over Torrens land, influenced the decision in *Torrise v Magame Pty Ltd* [1984] 1 NSWLR 14 in respect to prescriptive easements of necessity. Powell J made both determinations. Note also Marion McGuire, 'A New South Wales perspective on implied and prescriptive easements and the rights in personam exception to indefeasibility of title' (2006) 12 APLJ 228, 242.

<sup>139</sup> Consider, Law Reform Committee, *Acquisition of Easements and Profits by Prescription*, Report No 14 (1966) 11.

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the quasi-easement when both parcels of land belonged to him or her, he or she cannot argue as the servient owner that the easement does not exist.

A future issue is whether implied easements will continue at all in the NSW Torrens system; or to put it another way, whether prescriptive and implied easements ought to be treated similarly in a Torrens system because they arise in accordance with general principles outside the registration process. It is submitted that broadly there are three approaches.

One is to emphasise that such alleged easements are arising in the context of a title by registration system. If the integrity of the system is to continue, then the literal application of the legislation is important in order to avoid unnecessary fictions and further uncertainty. As Woodman and Grimes stated in 1974:

There appears to be no good reason why easements should merit preferential treatment not available to other interests...treatment running counter to the current judicial approach to Torrens title legislation that the Register is everything...<sup>140</sup>

In any event, it is always open to parties to create expressly and register easements over Torrens title land.

Another is to emphasise that such easements can improve the operation of the Torrens system. There could be good reasons why prescriptive and implied easements ought to be given a preferential treatment. This would require a re-evaluation of the doctrinal basis of these easements and the extent to which they improve the system, rendering a literal reading of the legislation shortsighted. From this perspective, it is arguable that the NSW Court of Appeal undertook this exercise when it clearly found the practical application of the doctrine of lost modern grant deficient. The fact that the Court in *McGrath* did not overrule the concept of a limited in personam right for implied easements means that a doctrinal evaluation is necessary and apposite. Moreover, it may be warranted in the light of the fact that implied easements and reservations may, for example, usefully aid the common or presumed intention of grantor or grantee in the Torrens system. After all, it is strongly arguable that the recognition of other unregistered and equitable interests<sup>141</sup> has aided the smooth and just operation of the Torrens system.

Finally, it is arguable that it is better to sidestep prescriptive and implied easements, emphasising that there is another avenue of easement creation outside the Torrens system - a statutory right of user. Section 88K of the *Conveyancing Act 1919* (NSW) (which was implemented under the same legislation as s 42 (1) (a1) of the *Real Property Act 1900*

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<sup>140</sup> Woodman and Grimes, above n 76, 186.

<sup>141</sup> Eg *Barry v Heider* (1914) 19 CLR 197, 216.

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(NSW))<sup>142</sup> gives the court the power to create easements ‘if the easement is reasonably necessary.’ The implementation of a statutory right of user greatly assists easement creation by incorporating important communitarian norms such the public interest and compensation to the servient owner as central criteria. It encourages the development of a complete and consistent body of law based on a statutory provision. It could justify the removal of prescriptive and implied easements from the Torrens system, particularly as, for example, it imposes less stringent requirements than implied easements of necessity.<sup>143</sup>

Whatever the approach that is finally adopted, it is clear the law of easements in NSW is undergoing a significant transformation.

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<sup>142</sup> *Property Legislation Amendment (Easements) Act 1995* (NSW) s 2 & Sch [13].

<sup>143</sup> *117 York Street Pty Ltd v Proprietors Strata Plan 16123* (1998) 43 NSWLR 504, 508.