Court of Appeal
Supreme Court
New South Wales

Case Name:	**Registrar-General of New South Wales v Jea Holdings (Aust) Pty Ltd**
Medium Neutral Citation:	[2015] NSWCA 74
Hearing Date(s):	8 April 2014
Date of Decision:	27 March 2015
Before:	Bathurst CJ at [1]; Beazley P at [1]; Basten JA at [145]
Decision:	(1) Appeal allowed; dismiss Awar's cross-appeal. (2) The orders made by Windeyer AJ on 21 May 2013 be set aside; (3)(a) Declare that the land contained in Folio Identifier 4/219028 is burdened by an easement in the terms set out in Memorandum of Transfer J493622 dated 20 October 1963 and registered on 23 April 1964 between Green Valley Shopping Centre Pty Ltd as Transferor and Tooth and Co as Transferee ("the Easement"); (b) Order that the appellant register the Easement in Schedule 2 of Folio Identifier 4/219028; (c) Order that the first respondent (Jea Holdings) pay the costs of the appellant (Registrar-General) and the second respondent (Awar) in this Court and in the court below.
Catchwords:	REAL PROPERTY – Torrens title – easements – whether right over land is capable of being the subject matter of a grant of easement – whether right to jointly use car park interferes with ownership rights of servient tenement holder to the extent that the validity of the easement is denied REAL PROPERTY – Torrens title – exceptions to indefeasibility under s 42(1)(1a) – whether easement

"*validly created*" under the *Real Property Act 1900* - where easement never recorded on the certificate of title of the servient tenement – whether easement omitted

Legislation Cited:

Conveyancing Act 1919 (NSW), s 88; Pt 6, Div 4
Real Property Act 1900 (NSW), ss 12, 32, 35, 36, 37, 41, 42, 46, 47, 120, 129; Pts 13, 14
Real Property (Computer Register) Amendment Act 1979 (NSW), Sch 10 (5)(g)
Real Property Act 1862 (Vic)

Cases Cited:

Attorney General of Southern Nigeria v John Holt & Co (Liverpool) Ltd [1915] AC 599
Australian Hi-Fi Publications Pry Ltd v Gehl [1979] 2 NSWLR 618
Berger Bros Trading Co Pty Ltd v Bursill Enterprises Pty Ltd (1969) 91 WN(NSW) 521
Breskvar v Wall [1971] HCA 70; 126 CLR 376
Brydall Pty Ltd v Owners of Strata Plan 66794 [2009] NSWSC 819; 14 BPR 26,831
Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd [1971] HCA 9; 124 CLR 73
Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd [2013] HCA 11; 247 CLR 149
Christopoulos v Kells (1988) 13 NSWLR 541
Clos Farming Estates Pty Ltd v Easton [2002] NSWCA 389; 11 BPR 20,605
Copeland v Greenhalf [1952] Ch 488
Crowley v Templeton [1914] HCA 6; 17 CLR 457
Dobbie v Davidson (1991) 23 NSWLR 625
Gett v Tabet [2009] NSWCA 76; [2009] Aust Torts Reports 82-005; (2009) 254 ALR 504
Goodwin v Papadopoulos (1985) NSW ConVR 55-256
Harada v Registrar of Titles [1981] VR 743
In re Ellenborough Park [1956] 1 Ch 131
James v The Registrar General (1967) 69 SR (NSW) 361
Jobson v Nankervis (1943) 44 SR(NSW) 277; 61 WN(NSW) 76
London & Blenheim Estates v Ladbroke Retail Parks Ltd [1992] 1 WLR 1278
Macquarie Bank Ltd v Fociri Pty Ltd (1992) 27 NSWLR 203
Mercantile General Life Reinsurance Co v Permanent Trustee Ltd (1988) 4 BPR 9534
Moncrieff v Jamieson [2007] UKHL 42; 1 WLR 2620
Papadopoulos v Goodwin [1983] 2 NSWLR 113
Parramore v Duggan [1995] HCA 21; 183 CLR 633
R & R Fazzolari Pty Ltd v Parramatta City Council

	[2009] HCA 12; 237 CLR 603 *The Owners of East Fremantle Shopping Centre West Strata Plan 8618 v Action Supermarkets Pty Ltd* [2008] WASCA 180; 37 WAR 498 *Weigall v Toman* [2006] QSC 349; [2008] 1 Qd R 192 *Wheeldon v Burrows* (1879) 12 Ch D 31 *White v Betalli* [2007] NSWCA 243; 71 NSWLR 381 *Wilcox v Richardson* (1997) 8 BPR 15,491 *Wright v Macadam* [1949] 2KB 744
Texts Cited:	Baalman and Wells, *The Practice of the Land Titles Office (New South Wales)* (3rd ed 1952, Lawbook Co) E A Francis *The Law and Practice Relating to Torrens Title in Australia* (1972, Butterworths) vol 1 K Gray and SF Gray, *Elements of Land Law* (5th ed, 2009, Oxford UP) at [5.1.64], [5.1.66] P Butt, *Land Law* (6th ed 2009, Lawbook Co)
Category:	Principal judgment
Parties:	Registrar General of New South Wales (Appellant) Jea Holdings (Aust) Pty Ltd (First Respondent) Awar Pty Ltd (Second Respondent)
Representation:	Counsel: P Walsh; L Walsh (Appellant) G A Moore; K N E Viglianti (First Respondent) I R Pike SC (Second Respondent) Solicitors: Land & Property Information (Appellant) D A Patterson Partners (First Respondent) Harris & Harris Solicitors (Second Respondent)
File Number(s):	CA 2013/184871

Decision under appeal

Court or Tribunal:	Supreme Court
Medium Neutral Citation:	Jea Holdings (Aust) Pty Ltd v Registrar-General of NSW [2013] NSWSC 587
Date of Decision:	21 May 2013
Before:	Windeyer AJ
File Number(s):	2012/37706

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The first respondent, Jea Holdings (Aust) Pty Ltd (Jea Holdings), is the registered proprietor of a block of land containing 198 car spaces (Lot 4). The second respondent, Awar Pty Ltd (Awar), is the registered proprietor of Lot 5, a block of land which abuts Lot 4 and upon which an hotel is operated.

Prior to 1964, Lots 4 and 5 had formed part of the same parcel of land owned by Green Valley Shopping Centre Pty Ltd (Green Valley). In February 1964, the land was subdivided into 5 lots by registration of a deposited plan. Prior to subdivision, on 10 October 1963, Green Valley transferred Lot 5 to a new registered proprietor. The memorandum of transfer contained a covenant benefiting Lot 5 and burdening Lot 4 (the Covenant). The Covenant purported to limit the use of all of the surface area of Lot 4 to car parking for the use of the owners of Lots 1 to 5 and their respective tenants, lessees, servants, invitees and customers.

The Covenant was recorded on the certificate of title of Lot 5 issued upon subdivision in 1964. However, the Covenant was not, and has never been, recorded on the certificate of title for Lot 4. All transactions relating to the creation of the purported Covenant occurred prior to either Jea Holdings or Awar becoming the proprietors of either Lot 4 or Lot 5.

On 10 January 2012, the Registrar-General of New South Wales served a notice on Jea Holdings pursuant to the *Real Property Act 1900* (NSW), s 12A, advising Jea Holdings that he was proposing to record a covenant on the Folio Identifier of Lot 4 unless restrained by Court order from doing so.

On 3 February 2012, Jea Holdings commenced proceedings seeking an order that the Registrar-General be restrained from recording the Covenant on the title to Lot 4.

The primary judge, Windeyer AJ, held that Jea Holdings held its interest as registered proprietor of Lot 4 free of any easement or restrictive covenant purportedly created by the memorandum of transfer dated 10 October 1963.

The Registrar-General appealed to the Court of Appeal. The principal issues on the appeal were:

(1) Whether the memorandum of transfer dated 10 October 1963 was capable of giving rise to an easement;

(2) If yes, whether the absence of a recording of the easement on the folio of the servient tenement was an "omitted easement" within the meaning of the *Real Property Act*, s 42(1)(a1)?

Held: Per Bathurst CJ and Beazley P, Basten JA agreeing in separate reasons:

(1) Interference with the servient tenement holder's possession of the land which amounts to an effective interference with ownership rights may be sufficient to deny the validity of an easement. It is relevant to consider both whether the owner of the servient tenement has reasonable use of the servient tenement in its entirety and the extent of the interference with the rights of ownership on the part of the servient tenement actually affected by the easement. [64] (Bathurst CJ and Beazley P), [148] (Basten JA).

In re Ellenborough Park [1956] 1 Ch 131; *Clos Farming Estates Pty Ltd v Easton* [2002] NSWCA 389; 11 BPR 20,605; *White v Betalli* [2007] NSWCA 243; 71 NSWLR 381

(2) As Jea Holdings continued to enjoy very substantial use of the land, including the right to use the servient tenement for parking for itself, its servants, agents and invitees, and the right to use both the airspace above and the subterranean land below the car park, the subject matter of the Covenant was capable of constituting a grant of an easement. [64] (Bathurst CJ and Beazley P); [148], [152]-[153] (Basten JA)

(3) In order for an easement to be validly created under the *Real Property Act* as it existed in February 1964, it was only necessary that a memorial of the easement be entered into the register-book upon the folium constituted by the existing certificate of title of the land that was transferred: s 35. In this case, the land transferred was the dominant tenement. The validity of the easement was not affected by the failure to record it upon the certificate of title of the servient tenement. [110]-[112], [115] (Bathurst CJ and Beazley P); and [161]-[163] (Basten JA).

Parramore v Duggan [1995] HCA 21; 183 CLR 633, considered.

(4) As the easement was omitted from the title to the servient tenement in the sense it was not there, the exception to indefeasibility in s 42(1)(a1) of the *Real Property Act* applies. [118] (Bathurst CJ and Beazley P); [178] (Basten JA).

Dobbie v Davidson (1991) 23 NSWLR 625; *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd* [2013] HCA 11; 247 CLR 149.

JUDGMENT

1 **BATHURST CJ and BEAZLEY P**: This is an appeal by the Registrar-General from a decision of Windeyer AJ, in which his Honour declared that the first respondent, Jea Holdings (Aust) Pty Ltd (Jea Holdings), holds its

registered interest in land at Miller free of any easement or restrictive covenant purportedly created in 1963 by Memorandum of Transfer registered number J493622 (MT J493622) and ordered that the Registrar-General be restrained from registering any easement or covenant purportedly created by the said Memorandum of Transfer.

2 The Registrar-General, by its notice of appeal, challenges his Honour's conclusion that MT J493622 did not create an "*omitted*" easement within the meaning of s 42(1)(a1). He contended that his Honour should have found that:

> "a) An easement burdening the Jea Land was created by the registration of the Transfer;
>
> b) The easement was 'omitted' from the folio of the Register for the Jea Land within the meaning of s 42(1)(a1) RPA; and
>
> c) The easement created by registration of the Transfer should be registered in the Schedule 2 of the folio of the Register for the Jea Land."

3 The second respondent, Awar Pty Ltd (Awar), is the owner of the purported dominant tenement. By notice of cross-appeal, Awar supports the Registrar-General's appeal.

4 Jea Holdings filed an amended notice of contention in which it seeks to uphold the decision of Windeyer AJ on grounds other than those upon which his Honour's decision is based.

Issues on the appeal

5 The essential questions on the appeal, including those raised in the amended notice of contention and in the cross-appeal, are:

(1) Whether MT J493622 was capable of giving rise to an easement;

(2) Whether the easement (if any) created by MT J493622 was validly created in circumstances where it did not conform to the requirements of the *Real Property Act 1900* (NSW), s 46;

(3) Whether the absence of a recording of the easement created by MT J493622 on the folio of the servient tenement was an 'omitted easement' within the meaning of the *Real Property Act*, s 42(1)(a1).

6 The primary judge answered "*yes*" to question (1) and "*no*" to each of the remaining questions: see at [45] and [64] respectively.

7 During the course of the hearing of the appeal, a question arose as to whether the easement created by MT J493622 was in conflict with the covenant contained in the earlier dealing MT J490511 and, if so, what effect that has on the issues raised on the appeal. The parties were invited to provide further submissions on that question.

Background facts

8 Jea Holdings is the registered proprietor of three blocks of land, being the land identified in Folio Identifiers 2/545358, 2/219028 and 4/219028. There is a shopping centre on the first of these parcels of land and car parks on the other two. The land in Folio Identifier 4/219028 (Lot 4) is vacant land comprising 198 car spaces except for a telecommunications tower on the lot. Lot 4 is the land said to be burdened by the covenant contained in MT J493622 (the Covenant).

9 Awar is the registered proprietor of land identified in Folio Identifier 5/219028 (Lot 5). This land adjoins Jea Holdings' land in Lot 4. Awar conducts a hotel business on its land. It claims to be entitled to an easement over Lot 4. The history of the transfer and registration of the land, together with the history of the covenants relating to the land, is central to the dispute and requires careful analysis.

10 In March 1963, a Certificate of Title, Vol 9392 Folio 1, was issued in respect of land at Miller, being Lot 1 in Deposited Plan 214,541. The Housing Commission of New South Wales was the registered proprietor of the land. On 4 October 1963, by Memorandum of Transfer registered number J490511, the Housing Commission transferred the land to Green Valley Shopping

Centre Pty Ltd. The transfer contained the following covenant (the initial covenant):

> "2. And the Transferee does further covenant for itself and its successors and its assigns that it will not use or permit to be used any Lot in Deposited Plan No 219028 for any purpose whatsoever other than as follows:
>
> Lot 1 for a Motor Service Station
>
> Lot 2 for a Car Parking Area for free use by members of the public
>
> Lot 3 for Retail Shopping and Commercial Area
>
> Lot 4 for a Car Parking Area for free use by members of the public
>
> Lot 5 for an Hotel."

11 The terms of the initial covenant do not give rise to any controversy but are relevant to the matters in issue between the parties. The initial covenant is also relevant to the question whether there is any conflict between the two covenants.

12 The subdivision of Lots 1 to 5, being the lots referred to in the initial covenant, was effected by the registration of Deposited Plan 219028 on 17 February 1964. Prior to registration of the Deposited Plan, Lot 5 was transferred to Tooth & Co Ltd (Tooth & Co) by MT J493622, dated 10 October 1963. This transfer contained the Covenant, which benefited Lot 5 and burdened Lot 4. The terms of the Covenant are central to the issue on the appeal and are set out at [22] below.

13 On registration of Deposited Plan 219028, new certificates of title were issued in respect of each lot. Certificate of Title Vol 9671 Folio 61 was issued for Lot 4. Certificate of Title Vol 9671 Folio 62 was issued for Lot 5. Schedule 2 in each certificate of title contained the notation "*covenant created by Transfer No J490511*". This was a reference to the initial covenant, pursuant to which Lot 4 was designated as a car parking area for free use by the public and Lot 5 was designated for an hotel. The Covenant was recorded in Sch 2 of the certificate of title for Lot 5, but not recorded on the certificate of title for Lot 4.

14 In 1970, Lot 3, which was designated in the initial covenant as a retail shopping and commercial area, was subdivided, creating Lots 1 and 2 in Deposited Plan 545348. Subsequently, Green Valley Shopping Centre transferred its land to Gold Valley Investment Pty Ltd, which became the registered proprietor of the land now owned by Jea Holdings.

15 In 1988, a system of computerised certificates of title (Folio Identifiers) was introduced and new certificates of title for the land were issued. Relevantly, the Folio Identifier issued for Lot 4 was Folio Identifier 4/219028. The Covenant was not registered on the new certificate of title. The result is that the Covenant has never been registered on the title of Lot 4.

16 On 4 January 2001, the second respondent Awar became the registered proprietor of Lot 5. The Folio Identifier for that lot is Folio Identifier 5/219028.

17 On 17 December 2010, Jea Holdings purchased Lot 2 in Deposited Plan 545358 and Lots 2 and 4 in Deposited Plan 219028, being the land in Folio Identifiers 2/545358, 2/219028 and 4/219028, referred to above at [12] and [14]-[15], for a purchase price of $11.9 million. A shopping centre is on the first of these parcels of land, with the latter two being car parks. Completion took place on 7 March 2011.

18 The present position may, therefore, be summarised as follows. The uses specified in the initial covenant have essentially been retained, but ownership of the lots has changed. Relevantly, Jea Holdings is the registered proprietor of Lots 3 and 4, which are used as a shopping centre and public car park respectively. The Covenant, which would otherwise burden Lot 4, is not, and never has been, recorded in Sch 2 of the certificate of title or the Folio Identifier for Lot 4. Awar is the registered proprietor of Lot 5, which abuts Lot 4 and upon which an hotel is operated. The Covenant, which benefits Lot 5, is and always has been recorded in Sch 2 of the certificates of title or Folio Identifier for Lot 5.

19 On 10 January 2012, the Registrar-General served a notice on Jea Holdings pursuant to the *Real Property Act*, s 12A, advising Jea Holdings that he was proposing to record the burden of the Covenant on the Folio Identifier of Lot 4 unless restrained by Court order from doing so. The only basis upon which the Covenant could now be recorded on the title of Lot 4 is if it was an 'omitted' easement within the meaning of the *Real Property Act*, s 42(1)(a1).

20 On 3 February 2012, Jea Holdings commenced proceedings seeking an order that the Registrar-General be restrained from recording the Covenant on the title to Lot 4.

21 The controversy between the parties arises because of the absence of registration of the Covenant on Lot 4. The resolution of the controversy depends upon the answers to the questions raised on the appeal. Although the answers to those questions potentially have significant commercial and financial consequences for the parties, the Court is not concerned with those consequences. The Court did not have regard to the concept plans for Jea Holdings to develop its properties, including above and below the ground level of Lot 4, which were before the Court by way of background only.

The Covenant

22 The terms of the Covenant were as follows:

> "THE said Transferor for itself its successors and assigns and the owners for the time being of the land hereinafter mentioned (hereinafter called 'the parking area') HEREBY COVENANTS with the Transferee its successors and assigns and the owner for the time being of the land hereby transferred that the Transferor its successors and assigns and the owner for the time being of the parking area being Lot 4 in Deposited Plan 219028 will not use or permit or suffer any act matter or thing which might obstruct or prevent the use of the said parking area or any part thereof except for the purposes hereinafter mentioned or any of them and will not do permit or suffer any act matter or thing which might obstruct or prevent the use of the said parking area for such purposes or any of them ...
>
> (a) That the parking area shall at all times be for the exclusive use (save that the Transferor its successors and assigns and the owner for the time being of the land having the burden of this covenant shall be permitted to erect over or under the said parking area such building or buildings at a height of not less than 12 feet which shall not obstruct or

prevent the use of the said parking area for the purposes herein provided and which shall not obstruct the ingress or egress therefrom or therein) for the parking of motor vehicles by the Transferee its successors and assigns and the owner for the time being of the land hereby transferred and their respective tenants and lessees and it and their servants and invitees and the customers and patrons of the hotel to be erected on the land hereby transferred together with the Transferor its successors and assigns and the owner or owners for the time being of Lots 1 to 4 inclusive in Deposited Plan 219028 and their respective tenants and lessees and it and their servants and invitees and their customers.

...

(b) That the Transferee its successors and assigns and the owner for the time being of the land hereby transferred and their respective tenants and lessees and it and their servants and invitees and the customers and patrons of the hotel to be erected on the land hereby transferred shall have full right and liberty to pass and repass with or without motor vehicles at all times and during the exercise of such right to park such motor vehicles as aforesaid and for the purpose of passing to and from such motor vehicles and to and from the said parking area or any part thereof for the purpose of gaining access to the land hereby transferred PROVIDED THAT both parties to this covenant shall respectively use their best endeavours to ensure that any such motor vehicles using the said parking area shall not be of a gross weight exceeding 40 cwt AND PROVIDED THAT:

(i) The Owner for the time being of the parking area shall at all times pay all Municipal and Water and Sewerage rates as and when the same are assessed from time to time upon or in respect of the parking area and shall at all times cleanse and keep clean and maintain and keep in good and sufficient repair the pavement of the parking area and upon production from time to time of certificates of the Auditor for the Owner for the time being of the parking area certifying as to the amounts paid in respect of such rates and the cost of such cleansing and maintenance the Owner for the time being of the land hereby transferred shall thereupon refund to the Owner for the time being of the parking area during such time as the same shall be subject to the above covenant one-half of the amounts shown by such certificates as are so submitted PROVIDED HOWEVER that if the Transferor its successors and assigns and the owner for the time being of the parking area shall be in pursuance of the right hereinbefore given erect over or under the said parking area any such building or buildings as are hereinbefore referred to the proportion of such amounts as shall be payable by the Owner for the time being of the land hereby transferred shall be so reduced as to represent a fair and proper contribution thereto and of the appropriate parties shall not be able to agree upon such proportion then such proportion shall be determined in accordance with the law relating to Arbitration for the time being in force in the state of New South Wales.

(ii) The Owner for the time being of the land hereby transferred shall from time to time and at all times during such time as the parking area shall be subject to the above covenant pay to the appropriate authority or to the Owner for the time being of the parking area as the case may be such amounts as shall become payable for electric current used for lighting the parking area calculated at proper rates in accordance with a separate meter which will be provided by the Transferor but so that a control switch shall be provided by the Transferor at the premises to be erected on the land hereby transferred in such position thereon as shall be required by the Transferee to enable the occupant for the time being of such premises to turn off such lighting not earlier than 10.30pm on each night.

...

IT IS AGREED that the land to which the benefit of the foregoing covenant is appurtenant is the land hereby transferred being Lot 5 in Deposited Plan 219028.

The land which is subject to the burden of the foregoing covenant is the said Lot 4 in Deposited Plan No 219028.

The foregoing covenant may be released varied or modified only by agreement between the Transferor the Transferee and the Council of the City of Liverpool."

Reasons of the primary judge

23 The primary judge, at [12], observed that in order for Awar to have the benefit of s 42(1)(a1) so as to enable the Registrar-General, acting under s 12, to record an omitted easement on the title of Lot 4, the servient tenement, it was necessary for it to establish, first, that MT J493622, containing the Covenant, gave rise to an easement and, secondly, that the absence of a recording of the easement on the register of the land in Folio Identifier 4/219028 was an omission of a validly created easement within the terms of s 42(1)(a1).

24 His Honour, at [14], identified the four characteristics of a valid easement: there must be both a dominant and servient tenement; the easement must accommodate the dominant tenements; the dominant and servient tenements must be in different ownership; and a right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant: see *In re Ellenborough Park* [1956] 1 Ch 131. It was only the last of these characteristics that was in contention in the present case.

25 His Honour concluded, at [45], that having regard to the decision of this Court in *Clos Farming Estates Pty Ltd v Easton* [2002] NSWCA 389; 11 BPR 20,605 (*Clos Farming Estates*) the purported easement was capable of being validly granted. In reaching this conclusion, his Honour reviewed other Australian and English authorities and in particular, the decision of the UK Court of Appeal in *Moncrieff v Jamieson* [2007] UKHL 42; 1 WLR 2620. His Honour considered that the law as expounded in that case was substantively different from Australian law and that he was bound to follow the decision of this Court in *Clos Farming Estates.* That gave rise, in his Honour's view, to two questions. First, whether it was relevant to consider the impact of the purported easement on the servient owner's proprietorship of only that part of the servient tenement that is actually affected by the easement, or the effect of the purported easement on the entirety of the servient tenement. Secondly, whether, for there to be a valid easement, it was enough that the owner of the servient tenement maintains possession and control, or whether the servient owner must retain some substantive or reasonable use of the land.

26 His Honour reasoned as follows:

> "39 If the applicable test is whether there remains to the servient owner a reasonable use of the servient tenement in its entirety then I think that the purported easement under consideration here must be capable of being validly granted. It is true that the vast majority of the surface area of the land is affected by the easement. However, the plaintiff is permitted to build above the surface area into the airspace and also to use the subterranean space. The plaintiff thereby enjoys a very substantial user of the land.
>
> 40 Moreover, even limiting consideration to the use of the surface of the land, the plaintiff is not excluded from the land but remains able to use the land in conjunction with the second defendant. The plaintiff can do as it pleases with the surface of the land insofar as this does not disturb the rights of the second defendant to park on the land. The plaintiff, its agents and its invitees and so on can park on the land. It is true that the second defendant and its patrons could entirely fill the car park and leave the plaintiff without any car spaces. This would no doubt substantially detract from the plaintiff's user of the land if this were to occur. But the practical reality is that both parties will use the car park simultaneously to a greater or lesser extent. An easement inherently involves tempering the servient owner's user of the servient tenement so as to accommodate the dominant owner's user. In a case such as this where the purported easement enables both the dominant and servient owners to share a resource, it is necessary to

> have regard to how the easement will be used as a matter of practice rather than focus unduly on the rights available to one party should the other exercise its rights to the maximum extent available if such an event is unlikely to occur. The plaintiff is able to use the car park and from a practical perspective the extent of its user is substantial in that there are 198 car spaces available for the patrons of both the plaintiff's and the second defendant's businesses to share. The plaintiff has far more than nominal proprietorship."

27 His Honour, at [41], rejected Jea Holding's submission that the Covenant in effect amounted to a claim for joint ownership, as the Covenant was confined to use of the servient tenement for car parking. His Honour considered that the Covenant here was different from the purported easement by prescription in *Copeland v Greenhalf* [1952] Ch 488 upon which Jea Holdings had relied.

28 His Honour, at [43], considered that even if the correct approach was that taken in *Moncrieff v Jamieson*, the Covenant was capable of being a valid easement, as Jea Holdings remained in possession and control of the land and could both use the land and limit Awar's use of the land to car parking. In his Honour's opinion:

> "In the event that the approach in *Moncrieff v Jamieson* ought to be applied as the test of the validity of this easement, I am still inclined to think that this is capable of being a valid easement as the plaintiff remains in possession and control of the land. It is not excluded from the land and it can use the land as a car park simultaneously with the second defendant. Moreover, the ability of the plaintiff to enforce the limitation on the second defendant's user - that it is limited to using the land as a car park - constitutes an ability in the plaintiff to control the land such that the defendant's rights do not derogate impermissibly from servient owner's proprietorship: see *Evanel Pty Ltd v Nelson* and *Ryan v Sutherland* (assuming in this situation that *Clos Farming Estates Pty Ltd v Easton* was not applicable authority)."

29 His Honour, at [44], also considered it relevant, if the approach in *Moncrieff v Jamieson* was correct, that Jea Holdings was entitled to use the airspace and subterranean space for its own unconstrained purposes, subject only to non-interference with the rights conferred by the Covenant.

30 His Honour concluded, at [45], that the wording in the transfer was capable of giving rise to an easement.

31 However, his Honour concluded that the easement was not an omitted easement within the meaning of s 42(1)(a1) because, due to an absence of registration on the servient tenement, there was neither an "*omission*" of the easement, nor was the easement validly created. In his Honour's view, at [61]:

> "... registration of the easement by recording it on the servient tenement pursuant to s 35 is the requirement for existence of the easement."

32 His Honour added that for an easement to be "*omitted*" from the Register, it "*must satisfy the presupposition of existence*": see *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd* [2013] HCA 11; 247 CLR 149 at [24]. In this regard, his Honour rejected the submission of the Registrar-General and Awar that s 47 provided the necessary pre-condition for the existence of the easement. In his Honour's view, satisfaction of s 35 was necessary. His Honour observed that as s 41 provided that the instrument purportedly creating the estate or interest in land was of no effect to pass any such estate or interest until it was registered in accordance with the act, then unless the requirements of registration under s 35 were fulfilled, the easement could not exist. His Honour relied upon the view expressed by Professor Butt in his book *Land Law* (6th ed 2009, Lawbook Co), that to be validly created, the easement had to be registered. His Honour considered, at [63], that this led to:

> "... the inescapable conclusion ... that if the easement has never been recorded on the servient tenement then it was never registered and so was not validly created."

33 In coming to this conclusion, his Honour, at [62], rejected the construction of ss 35 and 47 advanced by the Registrar-General and Awar, who had contended before his Honour that, even if an easement was not recorded on the title of the servient tenement, it was nonetheless validly created provided that it was recorded on the title of the dominant tenement. In his Honour's view, that argument was contrary to the decision of the High Court in *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty* Ltd [1971] HCA 9; 124 CLR 73 at 88.

34 Accordingly, his Honour made the following declaration and order:

> "2. Declare that [Jea Holdings] holds its interest as registered proprietor of the land in Certificate of Title Folio Identifier 4/219028 free of any easement or restrictive covenant purportedly created by Memorandum of Transfer J493622 dated 10 October 1963 between Green Valley Shopping Centre Pty Ltd as transferor and Tooth & Co Ltd as transferee.
>
> 3. Order that [the Registrar-General] be restrained from registering any easement or restrictive covenant purportedly created by Memorandum of Transfer J493622 on Certificate of Title Folio Identifier 4/219028."

First issue: was MT J493622 capable of giving rise to an easement?

35 Jea Holdings in its amended notice of contention submitted that the primary judge erred in finding, at [45], that MT J493622 was capable of giving rise to an easement for car parking. Its contention was based upon the following propositions, all of which are interrelated:

(i) the alleged entitlement of the dominant tenement to limit the use of all of the surface area of Lot 4 to car parking amounted to a right of joint occupation or alternatively, substantially deprived the owner of the servient tenement of proprietorship or legal possession (contention grounds 2 and 3);

(ii) the decision of this Court in *Clos Farming Estates* applied and the primary judge erred in distinguishing it (contention grounds 4, 5 and 6);

(iii) the primary judge erred in finding that the Covenant in MT J493622 was capable of forming the subject matter of the grant of an easement even if:

(a) the approach of the House of Lords in *Moncrieff v Jamieson* is good law (contention ground 7);

(b) the applicable test is whether there remains to the owner of the servient tenement reasonable use of the surface area of Lot 4 (contention ground 8); and/or

(c) the applicable test is whether there remains to the owner of the servient tenement reasonable use of the servient land in its entirety (contention ground 9);

(iv) the primary judge erred in finding that Jea Holdings' entitlement to build above and below the surface area of Lot 4 gave it very substantial uses of the land (contention ground 10);

(v) the primary judge erred in failing to have sufficient regard to the magnitude of the car parking rights granted to the alleged dominant owner (a total of 198 car spaces over the entirety of the surface area of Lot 4) (contention ground 11).

36 It was accepted by the parties, as the primary judge recognised at [13], that although the wording in MT J493622 was of a covenant, it was necessary to have regard to the effect of the document: see *Bursill Enterprises*. Jea Holdings, for its part, also accepted that a right to park a car was capable of forming the subject matter of the grant of an easement: see *The Owners of East Fremantle Shopping Centre West Strata Plan 8618 v Action Supermarkets Pty Ltd* [2008] WASCA 180; 37 WAR 498; *Moncrieff v Jamieson*; *Weigall v Toman* [2006] QSC 349; [2008] 1 Qd R 192; *Brydall Pty Ltd v Owners of Strata Plan 66794* [2009] NSWSC 819; 14 BPR 26,831.

37 However, Jea Holdings contended that the grant of use as a car park deprived the owner of Lot 4 of the effective use of the land and thus could not constitute the grant of an easement. This is its central proposition on the first issue. In other words, questions of degree and proportionality were essential to the determination of whether there had been the grant of an easement: see *Clos Farming Estates*. Jea Holdings submitted that this was an aspect of the fourth requirement for a valid easement identified in *In re Ellenborough Park*. Jea Holdings contended that the cases where an easement for car parking had been recognised were distinguishable from the position here, having regard to questions of degree and proportionality.

38 In *In re Ellenborough Park*, the question in issue was whether a covenant granting "*the full enjoyment*" of a park "*in common with the other persons to whom such easements may be granted*" to purchasers of lots surrounding the park constituted an easement. The question in issue was whether the second and fourth characteristics of an easement had been satisfied. In determining whether the fourth characteristic had been satisfied, Evershed MR, at 164, 175-176, considered that there were three cognate questions: whether the rights purported to be given by the covenant were expressed in terms that were "*of too wide and vague a character*"; whether such rights would amount to rights of joint occupation or would substantially deprive the park owners of proprietorship or legal possession; or whether the rights granted mere rights of recreation without utility or benefit. Jea Holdings submitted that the Covenant in this case failed as an easement because of the second of these factors, that is, having regard to the degree or extent of the use conferred by the Covenant, there was a substantial deprivation of the owner of Lot 4's proprietorship or legal ownership.

39 The approach taken in *In re Ellenborough Park* to the fourth characteristic of an easement was applied by this Court in *Clos Farming Estates*. Jea Holdings submitted that *Clos Farming Estates* was authority for the proposition that it was a matter of degree whether the grant had exceeded the boundaries of an easement. It contended that the Covenant affected the whole of the surface area of Lot 4 so that its effect was to permit the patrons of the hotel located on Lot 5 to park anywhere on Lot 4. What the Covenant permitted, according to the submission, was the joint use of the entirety of the Lot. Jea Holdings submitted that this constituted such an interference with the rights of the owner of the servient tenement that it could not constitute an easement contrary to the fourth element in *In Re Ellenborough Park*.

40 *Clos Farming Estates* involved a development of 80 residential lots and eight other lots. The residential lots were divided into two parts. Part A comprised some 1,500 m^2 and was, in effect, the residential component of the lot. Part B comprised approximately 1.5 ha and was the part of the lot upon which it was

intended that grapevines would be grown. The developer retained Lot 86, Clos Farming being the registered proprietor of that lot.

41 The deposited plan covering the estate was registered pursuant to the *Conveyancing Act 1919* (NSW), s 88B. Included in the s 88B instrument was a restriction, labelled "*Easement for Vineyard*", which was designed to allow the registered proprietor of Lot 86, Clos Farming, to have the benefit or a right to enter or pass through the residential lots and to remain on it to carry out vineyard work or to harvest and market the crop. There were other restrictions in the s 88B instrument, including in relation to matters such as tree preservation, building materials and fences.

42 The estate was marketed as a version of the French Clos Farming system whereby the owners of the lots in the estate combined to present a contiguous arc for agricultural purposes, with Clos Farming having the right to control and manage the operation and to sell the product pursuant to a "*Grape Sale and Purchase Agreement*". Clos Farming remitted to the owners of the lots the net proceeds after deduction of the costs of the operation. In addition, lot owners entered into a Farm Development Maintenance agreement. The combined effect of that agreement, the Grape Sale and Purchase Agreement and the Easement for Vineyard was to enable Clos Farming to conduct a single farm operation on the estate.

43 In his judgment, Santow JA described the effect of the Easement for Vineyard as being:

> "... designed to allow Clos Farming or authorised persons to enter or pass through the burdened property with or without vehicles, farming implements and machinery. Also to remain on the burdened property for the purposes of carrying out vineyard establishment works, the planting and replanting of vines and crops, the harvesting of crops and crop maintenance. In addition it sought to confer on Clos Farming a right from time to time to sell the produce of such harvest and to deduct from the proceeds of sale the costs of farm maintenance, marketing and administration of such sales."

44 One of the arguments advanced by Clos Farming in support of its contention that there was an easement over the lots was that the rights in the covenants

in the Easement for Vineyard touched only part of the lot, leaving the owner to have uninterrupted use of the residential portion. This argument was rejected. Santow JA (Mason P and Beazley JA agreeing) held, at [46], that the fact that:

> "... the rights [conferred] only touch part of the lot is insufficient to preclude the finding that the rights so vastly interfere[d] with the servient owners' rights, were they exercised, as to preclude them constituting an easement".

45 In *Clos Farming Estates* the relevant covenant affected five-sixths, or almost 85 per cent, of the supposed servient tenement. Whilst the Court considered that to be relevant, it was the extent to which the right of the owner to use the servient tenement which was essentially determinant. As Santow JA pointed out, at [38], the covenant "*effectively precluded* [*the servient owners*] *from engaging in any real farming or agricultural type activities attendant on its possession*". Such residual rights as the servient owners had were "*totally subordinated to the over-arching rights of Clos Farming*": at [46]. His Honour concluded that when:

> "... [the covenant was] placed in its context of those further restrictions that apply to the lot in total, the servient owner's rights are so attenuated as no longer to meet the description of exclusive possession."

46 The primary judge also had regard to the subsequent decisions of this Court in *White v Betalli* [2007] NSWCA 243; 71 NSWLR 381. By majority (Santow JA, Campbell JA agreeing) the Court held that a by-law in a strata plan allowing the dominant owners to store small watercraft within a specified area of the servient tenement was valid. His Honour concluded that because of the different approach of the majority as compared to that taken by McColl JA in dissent, the case was not of assistance on the question as to what portion of the servient tenement ought to be considered when evaluating the validity of an easement.

47 In *Moncrieff v Jamieson*, the question for determination whether there was an ancillary right to park motor vehicles on a right of way over a particular servient tenement. This required a consideration of whether a right to park could itself be the subject of the grant of an easement. Their Lordships accepted that a servitude for parking could exist. As indicated, there is no

dispute on this appeal that a right to park could be the subject of an easement. Although each of their Lordships wrote separate judgments, there was substantial agreement in the judgments with the reasons of Lord Scott and Lord Neuberger.

48 Lord Scott, at [47], stated that he:

> "... [could] see no reason in principle, subject to a few qualifications, why any right of limited use of the land of a neighbour that is of its nature of benefit to the dominant land and its owners from time to time should not be capable of being created as a servitudal right in rem appurtenant to the dominant land: see *Gale on Easements*, 17th ed (2002), para 1-35."

49 His Lordship observed that an essential qualification to that principle was that:

> "The right must be such that a reasonable use thereof by the owner of the dominant land would not be inconsistent with the beneficial ownership of the servient land by the servient owner."

50 His Lordship, at [54] ff, examined the "*ouster*" principle which purports to prevent the creation of a servitude if it would prevent any reasonable use being made of the servient land.

51 His Lordship noted that in *Wright v Macadam* [1949] 2KB 744, the Court of Appeal held that the right to use a coal shed could exist as an easement. Lord Scott noted that there had been suggestions that the case may have turned on whether or not the owner of the dominant tenement had sole use of the coal shed. His Lordship dismissed that as being a relevant consideration. As his Lordship remarked, at [55], "[s]*ole user, as a concept, is quite different from, and fundamentally inferior to, exclusive possession*".

52 Lord Scott also considered the decision in *Copeland v Greenhalf* where Upjohn J rejected a claimed prescriptive easement to use land by the side of a private roadway to deposit vehicles and for other purposes connected with a particular business on the basis that it virtually involved a claim for possession of the whole servient tenement, if necessary, to the exclusion of the owner. His Lordship observed that *Wright v Macadam* had not been cited to Upjohn J and that there had been a subsequent but unsatisfactory attempt to reconcile

the two decisions in *London & Blenheim Estates v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278. His Lordship further remarked that the test formulated in the latter case, whereby a claim to an easement would be rejected if its exercise left the owner of the servient tenement without any reasonable use to which he could put the servient land, required qualification. In his Lordship's opinion, at [59]:

> "... [i]t is impossible to assert that there would be no use that could be made by an owner of land over which he had granted parking rights. He could, for example, build above or under the parking area. He could place advertising hoardings on the walls. Other possible uses can be conjured up ..."

His Lordship added that he could not see why an owner of land could not grant such rights of a servitudal character to any extent that he wished. As his Lordship commented, "[*t*]*he servient owner would remain the owner of the land and in possession and control of it*". In his Lordship's view, the correct test was "*whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient tenement*".

53 Lord Neuberger, who otherwise substantially agreed with the reasons of Lord Scott, stated his own view on this at [140]:

> "... I am not satisfied that a right is prevented from being a servitude or an easement simply because the right granted would involve the servient owner being effectively excluded from the property."

54 His Lordship also observed that *Wright v Macadam* was not cited to Lord Upjohn in *Copeland v Greenhalf* nor was the Privy Council decision in *Attorney General of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599 at 617 which also supported the conclusion to which his Lordship had come. His Lordship also noted that there were Australian cases which supported the notion that a right could be an easement even if the servient owner was thereby excluded from the land concerned. He cited *Mercantile General Life Reinsurance Co v Permanent Trustee Ltd* (1988) 4 BPR 9534 and *Wilcox v Richardson* (1997) 8 BPR 15,491 per Handley JA.

55 *Mercantile General Life Reassurance Co v Permanent Trustee Ltd* concerned the legal effect of a memorandum purporting to grant a number of easements to the dominant owner to use a portion of the servient tenement as a secure yard into which it could receive, unload, load or despatch its clients' goods, and garage its vehicles. The purported easements also granted a right to maintain the wall of an existing building on the dominant tenement which bordered and encroached over the servient tenement.

56 A dispute arose when the owners of the dominant tenement sought to use the yard for storing building materials and vehicles while adding an extension to the building on their land. The owner of the servient tenement disputed that such activities were within the grant, and sought an order restraining the use of the servient tenement for that purpose.

57 The owners of the dominant tenement submitted that the memorandum operated not as a grant of easements but as a transfer of rights of ownership to the surface of the yard space, and to at least some of the airspace above it. Powell J noted that there were authorities that held that a right to the exclusive or unrestricted use of a piece of land, or a right to share the proprietary rights with the so-called servient owner, could not be an easement. His Honour cautioned that "*such statements must be scrutinised with care because of the varying contexts in which they have originated*". His Honour also noted that there were authorities in which the grant of a right to use of a portion of the servient tenement to the exclusion of the servient owner, or to use of the whole of the servient tenement in common with the servient owner or another person deriving their interest from the servient owner, had been held to be valid easements.

58 His Honour concluded that, despite the apparent width of the rights intended to be conferred by the memorandum, those rights fell short of the transfer, to the total exclusion of the servient owner, of any portion of the surface or airspace of the servient tenement and constituted the grant of an easement. However, his Honour held that the purpose of the grant was to permit the

dominant owners to have a secure yard, so that the construction activities were not authorised by the easements.

59 *Wilcox v Richards* concerned the rights attached to a sublease over part of a lot. In the course of determining that the subleases had rights of the kind described in *Wheeldon v Burrows* (1879) 12 Ch D 31, Handley JA (Meagher JA substantially agreeing) found that the primary judge erred by holding that because the appellants had no right to exclusive possession of some areas, they could have no rights at all. His Honour noted that in cases relating to the rights of tenants to access common areas, the rights had been variously found to be licenses coupled with a grant or as easements.

60 It should be noted that neither of these Australian authorities was cited by the Court in *Clos Farming Estates*.

Consideration of first issue: was MT J493622 capable of giving rise to an easement?

61 Windeyer AJ considered that there is a difference between *Clos Farming Estates* and *Moncrieff v Jamieson* as to the test to be applied for the fourth element in *In re Ellenborough Park* to be satisfied. The difference his Honour discerned would appear to come from [46] of the judgment in *Clos Farming Estates* (set out above at [44]) where the Court concluded that the rights of the owners of the servient tenement were so attenuated as not to meet the description of "*exclusive possession*". However, that statement has to be understood in the context of Santow JA's earlier statement, at [35]:

> "The fourth condition from *In Re Ellenborough Park* requires that the right be capable of forming the subject matter of a grant. Evershed MR explained that the resolution of whether condition four is satisfied is to be answered by posing three cognate questions. First, whether the rights purported to be given are expressed in terms too wide and vague in character. **Second, whether such rights would amount to rights of joint occupation or would substantially deprive the park owners of proprietorship or legal possession.** Third, whether such rights constitute mere rights of recreation, possessing no quality of utility or benefit (*In Re Ellenborough Park* at 163-164). In the present case Bryson J held that the first and third of the cognate questions were adequately resolved in favour of the right satisfying condition four though that did not suffice; Judgment at [23] and [25]." (emphasis added)

62 The Court accepted that Bryson J, at first instance, had been correct in his assessment that the Easement for Vineyard did not constitute an easement. His Honour's reasons for that conclusion was summarised by Santow JA, at [36], in the following terms:

> "... [the covenant in the easement] on its own and in conjunction with the scheme of restrictions [in the s 88B instrument], deprived the title-holders to the burdened lots from any real proprietorship over the burdened land, such that **the rights sought to be conferred on the farm managers were inconsistent with the proprietorship and possession by the servient owners** (Judgment at [49]-[50]). In support for this conclusion Bryson J highlighted that although the servient owners own the vines, that is the uppermost limit of their rights of ownership. In contrast, the dominant owner has a plethora of rights, such as rights to: cultivate and harvest the vines; take and sell and the produce; prevent the titleholder from using the land for other agricultural purposes; to exclude others from the lot; and limit the recreational usage of the lot. Most significantly, the production and accumulation of profits from use of the land is wholly within the control of the dominant owner, with the servient owners having minimal capacity to exercise any control over the agricultural produce and economic use of the land (Judgment at [59]). In this regard reference was made to the fact that under [the covenant] there were minimal rights reserved to the servient owners to hold the dominant owners accountable for the conduct of the commercial enterprise through the web of restrictions on the rights of the servient owners (Judgment at [52])." (emphasis added)

63 Santow JA's conclusion, at [46], is clearly an abbreviated or summary form of what his Honour had stated at [36]. Having said that, it is apparent from his Honour's reference, at [45], to *Copeland v Greenhalf* and its application in Australia in *Harada v Registrar of Titles* [1981] VR 743 that the extent of a restriction on use of the servient tenement may mean that no easement is created. *Harada v Registrar of Titles* concerned a claim for easement by an electricity company in favour of an overhead power line transmitting electricity over the plaintiff's land. King J, at 753, had emphasised that the restriction on the owner of the servient tenement not to build on the easement went further than a prohibition of interference with the enjoyment of the claimed rights of the electricity company. King J stated that, if the rights the subject of an alleged easement meant the owner of the servient tenement would be left with very few rights over that property, the rights claimed would not constitute a common law easement but rather were really rights of joint user.

64 Notwithstanding the reference to *Copeland v Greenhalf* in Santow JA's judgment, we do not consider that *Clos Farming Estates* stands only for the proposition that the owner of the servient tenement must have reasonable use of the servient tenement in its entirety. That is a relevant consideration and, in a given case may be decisive, but it is also relevant to consider the extent of the interference with the rights of ownership on that part of the servient tenement actually affected by the easement. That is apparent from the bolded portion of the summary from Bryson J's judgment to which reference is made above. It is also consistent, in our view, with the approach taken in *Harada v Registrar of Titles*. It may be that if the interference with possession amounts to an effective interference with ownership rights, that may be sufficient to deny the validity of an easement. However, that is not this case. In our opinion, Windeyer AJ was correct in his conclusion, at [39] and [40], that Jea Holdings "*enjoyed a very substantial use of the land*". It not only has the right to use the servient tenement for parking for itself, its servants, agents and invitees, it could be added for matters such as advertising on fencing and the like, and it has the valuable right to use both the airspace above and the subterranean land below. It also follows that, as his Honour also indicated and for the reasons he gave, the Covenant would be a valid easement if the correct approach was that taken in *Moncrieff v Jamieson.*

Second issue: was the covenant in MT J493622 a validly created easement?

Third issue: did the absence of a recording on the servient tenement of the covenant in MT J493622 constitute an omitted easement for the purposes of s 42(1)(a1)?

65 Having found that the Covenant was capable of constituting a grant, the next question is whether the Registrar-General has power to amend the Register so as to record its existence on Jea Holdings' title. The power of the Registrar-General to amend the register so as to include an omitted easement is conferred by the *Real Property Act*, s 12. Notice requirements are specified in s 12A. There was no issue as to the power to amend, nor that the appropriate notice was given in accordance with s 12A. What was in issue was whether the power to amend was available in the present case. That in turn raised the question whether the easement created by the Covenant, was

"*omitted*" from the Register. The determination of those questions involves a consideration of the operation of the *Real Property Act* as at 1964 when the Covenant was entered into as well as whether amendments to the Act, and in particular, amendments introduced in 1995 by the *Property Legislation Amendment (Easements) Act* 1995 (the 1995 amendments), affect the position.

66 Before setting out the relevant provisions of the Act as at 1964 and 1995, it is convenient to set out the relevant provisions of ss 12 and 12A:

> "**12 Powers of Registrar-General**
>
> (1) The Registrar-General may exercise the following powers, that is to say:
> ...
>
> (d) The Registrar-General may, subject to this section and upon such evidence as appears to the Registrar-General sufficient, correct errors and omissions in the Register.
>
> ...
>
> (3) Where the Registrar-General, in the exercise of the powers conferred upon the Registrar-General by subsection (1) (d), makes a correction in the Register:
> ...
>
> (b) to the extent that, but for this paragraph, the correction would prejudice or affect a right accrued from a recording made in the Register before the correction, the correction shall be deemed to have no force or effect ...
>
> **12A Power of Registrar-General to serve notice of proposed action**
>
> (1) The Registrar-General may, before taking any action that alters the Register, give notice of the proposed action to any person that the Registrar-General considers should be notified of it.
>
> (2) Where the Registrar-General has given notice pursuant to the powers conferred upon the Registrar-General by subsection (1), the Registrar-General may refuse to take the action until after the expiration of a period specified in the notice and the Registrar-General may proceed to take the action at or after the expiration of the period so specified unless the Registrar-General is first served with, or with written notice of, an order of the Supreme Court restraining the Registrar-General from so doing.
>
> (3) Where a person given notice under subsection (1) does not within the time limited by the notice serve upon the Registrar-General or give the

Registrar-General written notice of an order made by the Supreme Court restraining the Registrar-General from taking the action, no action by that person or by any person claiming through or under that person shall lie against the Registrar-General in respect of the taking of the action specified in the notice.

(4) No action shall lie against the Registrar-General for failure to give a notice under subsection (1)."

67 As mentioned, Jea Holdings sought to restrain the Registrar-General from amending the Register after being served with a notice under s 12A(1).

Relevant legislation

68 The parties accepted, correctly, that the question of whether the easement was validly created depended on the provisions of the Act as it existed at the time of the transfer by which it was said to have been created. The relevant provisions were in the following terms:

"**32.**(1) The Registrar-General shall keep a book, to be called the 'register-book', and shall bind up herein the duplicates of all grants and certificates of title.

(2) Each grant and certificate of title shall constitute a separate folium of such book, and the Registrar-General shall record thereon the particulars of all instruments, dealings, and other matters by this Act required to be registered or entered on the register-book affecting the land included under each such grant or certificate of title distinct and apart:

Provided that so far as any such instrument, dealing, or other matter is a memorandum under paragraph (b), (c) or (d) of subsection one of section ninety-one of the Conveyancing Act, 1919, or affects only a mortgage, encumbrance, or lease, it shall be sufficient if particulars of the instrument, dealing, or other matter are recorded on the memorandum of mortgage, encumbrance, or lease affected; and for the purposes of the record of any such particulars whether required or authorised by this or any other Act, the memorandum of mortgage, encumbrance, or lease on which the particulars are recorded shall be deemed to be part of the grant or certificate of title, and this subsection shall take effect as if this proviso so amended as aforesaid had been included in subsection one of section three of the Real Property (Amendment) Act, 1938.

(3) The Registrar-General shall have and be deemed always to have had power by an entry in the register-book to cancel any entry in the register-book relating to anything which he is satisfied has ceased to affect the land to which that entry relates.

...

35. Every grant and certificate of title shall be deemed to be registered under the provisions and for the purposes of this Act, so soon as the same has been marked by the Registrar-General with the folium and volume as embodied in the register-book, and every memorandum of transfer or other instrument purporting to transfer or in any way to affect land under the provisions of this Act, shall be deemed to be so registered so soon as a memorial thereof, as hereinafter described, has been entered in the register-book upon the folium constituted by the existing grant or certificate of title of such land, and the person named in any grant, certificate of title, or other instrument so registered as seised of or taking any estate or interest shall be deemed to be the registered proprietor thereof.

...

37. Every memorial entered in the register-book shall state the nature of the instrument to which it relates and such other particulars as the Registrar-General directs, and shall be signed by the Registrar-General.

38.(1) Whenever a memorial of any instrument has been entered in the register-book, the Registrar-General shall record the like memorial on any duplicate grant, certificate, or other instrument evidencing title to the estate or interest intended to be dealt with or in any way affected unless the Registrar-General, as hereinafter provided, dispenses with the production of the same.

(2) The Registrar-General may dispense with the production of any instrument for the purpose of recording such memorial thereon, and shall in such case notify in the memorial in the register-book that no entry of such memorial has been made on the duplicate instrument, and thereupon the dealing shall be as valid and effectual as if such entry had been made.

...

41.(1) No instrument, until registered in manner hereinbefore prescribed, shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money, but upon the registration of any instrument in manner hereinbefore prescribed, the estate or interest specified in such instrument shall pass, or as the case may be the land shall become liable as security in manner and subject to the covenants, conditions, and contingencies set forth and specified in such instrument, or by this Act declared to be implied in instruments of a like nature.

...

42. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same, subject to such encumbrances, liens, estates or interests as may be notified on the folium of the register-book constituted by the grant or certificate of title of such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever except:

(a) the estate or interest of a proprietor claiming the same land under a prior certificate of title or under a prior grant registered under the provisions of this Act; and

(b) in the case of the omission or misdescription of any right-of-way or other easement created in or existing upon any land;

...

46. When land under the provisions of this Act or any estate or interest in such land is intended to be transferred or any right-of-way or other easement is intended to be created or transferred, the registered proprietor may execute a memorandum of transfer in the form of the Fifth, Sixth, of Seventh Schedule hereto, which memorandum shall, for description of the land intended to be dealt with, refer to the grant or certificate of title of such land, or shall give such description as may be sufficient to identify the same, and shall contain an accurate statement of the estate, interest, or easement intended to be transferred or created, and a memorandum of all leases, mortgages, and other encumbrances to which the same may be subject.

...

47. Whenever any easement or any incorporeal right ...in or over any land under the provisions of this Act is created for the purpose of being annexed to or used and enjoyed together with other land under the provisions of this Act, the Registrar-General shall enter a memorial of the instrument creating such easement or incorporeal right upon the folium of the register-book, constituted by the existing grant or certificate of title of such other land."

69 There have been significant amendments to these provisions since that time. To understand some of the cases dealing with the issues the subject of the appeal it is necessary to have regard to a number of those amendments.

70 Section 35 has been repealed and been replaced by s 36(6A) which is in the following terms:

"36(6A) A dealing is registered when the Registrar-General has made such recording in the Register with respect to the dealing as the Registrar-General thinks fit."

71 Section 38 has been subject to significant amendments. However, it is not necessary to set them out in this judgment.

72 There have been certain minor amendments to s 41(1) but it is not necessary to set them out.

73 Section 42(b) has been repealed and now provides as follows:

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

...

(a1) 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"

74 Section 46 so far as relevant now provides as follows:

"46(1) Where land under the provisions of this Act is intended to be transferred, or any easement or profit à prendre affecting land under the provisions of this Act is intended to be created, the proprietor shall execute a transfer in the approved form."

75 There have been significant amendments to s 47. The relevant portion of that section is now in the following terms:

"47(1A) In this section, ***affecting interest*** means an easement, profit à prendre or restriction on the use of land.

(1) When an affecting interest that burdens land under the provisions of this Act is created, the Registrar-General is to record particulars of the dealing creating the affecting interest:

(a) in the folio of the Register for the land burdened, and

(b) if the affecting interest is an easement or profit à prendre that benefits land under the provisions of this Act—in the folio of the Register for the land benefited."

Reasons of the primary judge

76 The primary judge, at [47], stated that the exception to indefeasibility provided for by s 42(1)(a1) has two requirements. First, there must be an omission of the easement from the register. Secondly, the easement must have been validly created under the *Real Property Act*, his Honour considering that no other Act was relevant to the creation of the easement in this case. His Honour stated that the relevant question in addressing both these

requirements was whether the easement had been registered. This, in turn, raised the question as to what it meant for "*an easement to be registered*". His Honour also observed, at [48], that there was no requirement in the former s 42(1)(b) that the easement be "*validly created*", being the language of s 42(a1). Rather, in the language of s 42(1)(b), what was required was that the easement be "*created in*" any land.

77 His Honour next observed that "*omission*" in s 42(1)(b) had been construed to mean merely "*absent from the Register*": *Dobbie v Davidson* (1991) 23 NSWLR 625, overruling the earlier decision of *Australian Hi-Fi Publications Pry Ltd v Gehl* [1979] 2 NSWLR 618, in which it had been held, at 622, that for an easement to be omitted for the purposes of s 42(1)(b), it must be absent from the Register as a result of fault or neglect on the part of the Registrar-General. His Honour noted that Jea Holdings accepted the meaning of "*omitted*" within s 42(1)(a1) to be as held in *Dobbie v Davidson.*

78 His Honour, at [50]-[51], accepted Jea Holdings' argument that the requirement in s 42(1)(a1) that the easement be "*validly created*" meant that the easement must have been registered, as registration was the manner in which easements are created under the *Real Property Act*: see P Butt, *Land Law* (6th ed 2009, Law Book Co), [20-86]. On this argument, an easement did not exist at law before registration, except where it was created whilst the land was under Old System title or under some other Act of Parliament. Neither of those was relevant to the present case. His Honour rejected the argument advanced by Awar that an easement was validly created if it complied with the *Conveyancing Act*, s 88. In his Honour's opinion, s 88(1) related to the enforceability of easements and not their creation.

79 His Honour, at [52] ff, next considered the recent decision of the High Court in *Castle Constructions v Sahab Holdings*. That decision is considered below. It is sufficient to note at this point that his Honour accepted that the decision was authority for the proposition that "*omitted*" meant "*not there*" as held in *Dobbie v Davidson*, but drew attention to the observation of the plurality that "*omission*" from the Register pre-supposed the existence of the easement.

His Honour accepted that that had been established in *Dobbie v Davidson* as the easement there had been created when the land was under Old System title. It therefore "*existed*" when the land was brought under the *Real Property Act*.

80 His Honour then quoted from [24] of the plurality's judgment in *Castle Constructions v Sahab Holdings* (see below at [136]) and stated that it was apparent from the reasons of the plurality that an easement could be created by registration without it being recorded on the servient tenement: see judgment at [55]. His Honour considered that two points thus emerged. The first was that registration was identified as **the** requirement for the creation of an easement. Secondly, s 36(6A) specified the requirement for registration to have occurred.

81 His Honour, at [56], considered, therefore, that registration was necessary for both requirements of s 42(1)(a1), namely, that there had been an omission and that the easement had been validly created. His Honour then observed that s 36(6A) was not in force at the time that the easement was created. The relevant provisions at that time were ss 35 and 37 of the Act in their form prior to the 1995 amendments.

82 His Honour, at [57], considered that the effect of s 35 was that a memorandum that affected land was deemed to be registered when a memorial was entered on the certificate of title of "*such land*". That is, s 35 provided for a necessary pre-condition for an easement to be registered, namely, its recording on the servient tenement. Without such recording, the easement was not registered and thus could not be said to have been created. As the easement was not created, it could not be "*omitted*" for the purposes of s 42(1)(a1). His Honour observed that the memorial noted on the certificate of title would normally be in terms "*created by transfer no*", but that in accordance with *Bursill Enterprises v Berger Bros* it would be sufficient if the easement were stated to be a covenant.

83 His Honour rejected the submission advanced by the Registrar-General and Awar that s 35 must be read in the context of the former s 47. In brief, that argument was that for there to be an omission for the purposes of founding an exception to indefeasibility, it was sufficient that there was compliance with s 47. Section 47 only required that the easement be recorded on the dominant tenement. The failure to record the easement on the servient tenement was an omission of the easement. In other words, the existence of an easement did not depend upon whether it was recorded on the servient tenement so long as it was recorded on the dominant tenement.

84 His Honour considered that *Papadopoulos v Goodwin* [1983] 2 NSWLR 113 and *Christopoulos v Kells* (1988) 13 NSWLR 541, upon which the Registrar-General and Awar relied, did not support this argument. His Honour, at [62], considered that the submission so advanced was contrary to the decision in *Bursill Enterprises v Berger Bros Trading* at 88. In his Honour's view, registration of the easement by recording it on the servient tenement pursuant to s 35 was a requirement for the existence of the easement.

85 His Honour considered, at [61], that the effect of the submission advanced by the Registrar-General and Awar reversed the roles of ss 35 and 47. His Honour stated that registration of the easement by recording it on the servient tenement was the requirement for the existence of the easement. This followed, in his Honour's view, from *Castle Constructions v Sahab Holdings*. In that case, the Court had referred to s 36(6A). His Honour considered that the content of the requirements of that provision in this case were to be found in s 35, not in s 47. His Honour considered that this view of the operation of s 35 was supported by s 41, which provided that there was no interest in land until the instrument creating it was registered in accordance with the provisions of the Act.

86 His Honour, at [63], stated that if his conclusion as to the interaction of ss 37 and 47 was wrong, he nonetheless considered that as s 42(1)(a1) required that the easement be "*validly created ... this meant that the easement must*

have been registered". His Honour referred to Professor Butt's point to this effect. His Honour continued:

> "Where s 35 provides the criterion for registration of an easement ... the inescapable conclusion is that if the easement has never been recorded on the servient tenement then it was never registered and so was not validly created."

87 It followed that as there was neither an "*omission of the easement*" on the register, nor was it "*validly created*", the exception in s 42(1)(a1) was not enlivened. His Honour observed, at [65], that in determining whether a dealing was registered, it was necessary to look at the provisions in force at the time when registration took place: see *Papadopoulos v Goodwin* at 121. His Honour considered, however, that in determining whether there was an exception to indefeasibility, it was necessary to look at the provisions in the current form. It followed that the relevant provision to which regard was necessary was s 42(1)(a1) and not the predecessor provision, s 42(1)(b). The Registrar-General accepted that this was correct.

88 His Honour, at [66], referred briefly to s 46, set above at [74]. At [67], his Honour referred to the observation in *Crowley v Templeton* [1914] HCA 6; 17 CLR 457 that "*an instrument in the form of a covenant will not be registered under the RP Act as an easement*". See Baalman and Wells, *The Practice of the Land Titles Office (New South Wales)* (3rd ed 1952, Lawbook Co) at 110-111.

89 His Honour drew attention to the fact that easements lie in grant, not in contract, and that a transfer was equivalent to a grant. Thus, where land is transferred and an easement granted in favour of the land transferred over land held by the transferor, the appropriate course was to adopt the form in Sch 5. His Honour noted that after the transfer of land, the easement was created by the words commencing "*together with*" or "*and the transferor hereby grants*". His Honour concluded, at [68], that the covenant-type wording in the present case did not conform to the requirements of s 46. It therefore could not be registered as an easement and would not have been

validly created. His Honour stated that it was not necessary to consider that matter further, as the Covenant had not been registered.

Submissions of the Registrar-General

90 The submissions of the Registrar-General on this aspect of the case were relatively straightforward. First, as indicated above, the Registrar-General accepted that the question whether an easement was omitted fell to be determined by reference to s 42(1)(a1). This required that the burdened land at all relevant times be Torrens Title land and that the easement be "*validly created*".

91 The Registrar-General submitted that at the time that the Covenant in this case was entered into, it was registered in accordance with ss 46 and 47 as at that time. On the Registrar-General's argument, those sections did not require that the easement be recorded on the servient tenement. It was sufficient for the purposes of s 47 that the easement be registered on the dominant tenement.

92 The Registrar-General submitted that on its proper construction, s 35 was a means, but not the exclusive means, by which registration of an interest in land could be proved. The Registrar-General submitted that this was consistent with s 41, which refers to an "*instrument*" being effectual to pass an interest in land upon registration as hereinbefore prescribed. The language of s 41 is in substance to the same effect: namely, that "*no dealing until registered in the manner provided by* [*the*] *Act*" shall become effectual to pass any interest in land. Thus, it was registration of the instrument that was all-important. The only requirement for registration in the Act at that time was that the easement be recorded on the dominant tenement: s 47. It followed that if there was no record of the easement on the dominant tenement, it was "*omitted*" for the purposes of s 42(1)(a1) within the meaning given to that concept in *Dobbie v Davidson*.

93 The Registrar-General submitted that s 35 should be read coherently with s 47. Thus, s 35 provided that an instrument purporting to affect land was to

be registered as soon as a memorial thereof **as hereinafter described** had been entered in the register book upon the folium constituted by the grant or existing certificate of title of the land. Section 47 provided that the Registrar-General was required to enter a memorial of the instrument creating an easement upon the folium of the register book constituted by the existing certificate of title of such other land. It is clear that s 47 related to notation of the easement on the dominant tenement: see *James v The Registrar General* (1967) 69 SR (NSW) 361 at 366 per Wallace P; Walsh JA at 370, where Walsh JA further observed that the Act contained no similar express provision as to the requirement for the notation of an easement on the servient land, but considered that such an entry was authorised.

94 On this approach, according to the Registrar-General, the deeming provision in s 35 was facultative: see for example, *Macquarie Bank Ltd v Fociri Pty Ltd* (1992) 27 NSWLR 203 at 227 per Kirby P. In other words, notation on the folium of the register was not the sole means by which an easement was created. Rather, registration was a means whereby it could be proved that an easement had been created. The Registrar-General relied not only on s 47 to support this approach, but also referred to s 41, which he contended placed emphasis upon an instrument being registered so as to be effectual to pass any estate of interest in land.

95 According to the Registrar-General, the effect of the 1995 amendments was as follows. Section 36(6A) provides that a dealing is registered when the Registrar-General has made such recording in the register with respect to the dealing as the Registrar-General thinks fit. An easement is created by transfer in accordance with s 46. Pursuant to s 46A(2), an easement may only be created by registration of a transfer in the approved form. The transfer must be registered before any interest in the land passed: s 41. This was also the position prior to the amendments, the provisions of s 41 being effectively in the same terms before and after the amendments.

96 Section 47(1) in its present form requires that an interest that burdens land is created when particulars of the dealing creating that interest is entered on the

burdened land. The Registrar-General submitted that there was no such requirement prior to the amendments. The predecessor provision only required that the easement be noted on the title of the dominant tenement. The Registrar-General also submitted that it was apparent from the Explanatory Memorandum and the Second Reading Speech relating to the 1995 amendments that it was not intended to affect the existence of an easement created prior to the amendments which had only been registered on the dominant tenement. The Registrar-General submitted that this position was supported by this Court's decision in *Christopoulos v Kells*.

97 The Registrar-General submitted that the effect of the primary judge's determination that "*validly created*" for the purposes of s 42(1)(a1) required compliance with s 47 in its present form, so that the easement was required to be recorded on the dominant and servient tenements, meant that a person in the position of Awar, whose land had the benefit of an easement which was not recorded on the servient tenement, would be deprived of an interest in property which it had immediately prior to the 1995 amendment. It was submitted that this construction of the legislation offended the following principles of statutory construction:

- Legislation is presumed not to interfere with vested property rights.

- An intention to interfere with valuable property rights, without compensation, cannot be imputed to the legislature unless expressed in unequivocal terms incapable of any other meaning.

- It must be clear that a property right is being affected before the presumption will not apply and this will require careful consideration of the interest being affected and how the person affected came to have that interest.

98 The Registrar-General submitted that if the statement of Jacobs JA in *James v the Registrar General* that what was required for the creation of an easement was compliance with s 46 was correct, it may be that ss 35 and 47

have no bearing on that question. In other words, if there was compliance with s 46 the easement would have been validly created and, therefore, may be "*omitted*" for the purposes of s 42(1)(a).

99 It was submitted that there were no clear words in the text of the amending provisions to indicate that the legislature intended to interfere with property interests created under the pre-1995 legislation. The Registrar-General also submitted that there was nothing in the Explanatory Memorandum that suggested that the legislature intended to interfere with existing rights of those who were entitled to have an omitted easement recorded on the Register. He contended that the phrase "*validly created*" was not intended to add anything of consequence and in particular did not invalidate easements created before the amendments.

Submissions of Awar

100 Awar supported the submissions of the Registrar-General. It emphasised that it was apparent from the Explanatory Memorandum that s 42(1)(a1) was intended to be an exception to the paramountcy of the Register. Awar submitted that the construction given to s 42(1)(a1) by the primary judge narrowed the operation of the section in a way that was not supported by the text, context or purpose of the legislation. Awar pointed out that there was nothing in the Explanatory Memorandum that suggested that the new provision was intended to overcome the result in *Christopoulos v Kells*, which it contended was authority for the proposition that an easement does not have to be have recorded on the servient tenement for the exception to indefeasibility in s 42 to apply. Awar reiterated that s 42(1)(a1) is clearly an exception to the paramountcy of the Register as was demonstrated in the analysis of s 42(b) by Jacobs JA in *James v Registrar General* at 379.

Jea Holdings' submissions

101 Jea Holdings submitted that a recording of the easement on the servient tenement was a necessary prerequisite to its validity at the time the Covenant was entered into. Jea Holdings contended that this followed from ss 35, 41

and 46. It followed that, as found by the primary judge, registration was the prerequisite to creation and if an easement was not created under the provisions of the Act, it could not be omitted. Jea Holdings submitted that it was unhelpful to consider cases such as *Dobbie v Davidson*, which related to Old System land brought under Torrens Title.

102 Jea Holdings submitted that the reference in s 35 to "*as hereinafter described*" was a reference to either s 41 or s 46, but was not a reference to s 47. It submitted that s 47 presupposed that the easement had already been created. Accordingly, an easement was created pursuant to s 35. Section 47 operated as an additional requirement to note the easement on the dominant tenement.

103 Jea Holdings also submitted that s 35 was not replaced by s 36A. Rather, that section was introduced as part of the system of computer registration. It was not so as to permit registration on the dominant tenement to amount to registration of an easement. Jea Holdings submitted that the decision of this Court in *Christopoulos v Kells* was not relevant, but in any event was distinguishable because it related to a time when s 35 was not in place. It also submitted that the court in *Christopoulos* v *Kells* failed to understand that s 36(6A) related to computerisation and had nothing to do with the registration of easements; see also *Bursill Enterprises v Berger Bros* at 93.

104 Jea Holdings also submitted that the Covenant did not comply with the formalities of s 46. It contended that the direction in Sch 5 to the *Real Property Act* was not followed because in terms, the dealing purported to be a restrictive covenant and had always been understood as such until the dispute between the present parties arose.

105 There was a question whether the primary judge determined this point, having regard to his observations at [68], set out above at [89]. The matter was allowed to be argued, as it could be determinative of the appeal should the Registrar-General and Awar succeed on the question that the easement did

not need to be registered on the servient tenement for the purposes of s 41(1)(a1).

Consideration

106 As was pointed out in *Breskvar v Wall* [1971] HCA 70; 126 CLR 376 at 385-386 the Torrens system of registration of title of which the Act is a form is not a system of registration of title but a system of title by registration. The title certified by the certificate is a title that registration itself has vested in the proprietor: see also *Breskvar v Wall* at 389; *Parramore v Duggan* [1995] HCA 21; 183 CLR 633 at 635; *Castle Constructions v Sahab Holdings* at [20].

107 The requirement of registration is embodied in s 41 of the Act. As it existed at the time of the events in question it required registration of an instrument before it was effectual to pass any estate or interest in land but provided that upon registration "*in the manner hereinbefore provided*" the estate or interest specified in such instrument shall pass.

108 Section 46 provided that if an easement was intended to be created the registered proprietor may execute a memorandum of transfer in the form of the fifth, sixth or seventh schedules to the Act containing an accurate statement of the easement intended to be created.

109 However, the mere execution of the instrument is not sufficient to create the easement. The easement is not created until the instrument is registered. So much is made clear by s 41.

110 Although s 41 as it stood at the relevant time required registration "*in the manner hereinbefore provided*", none of the preceding provisions of the Act specifically provided for a mode of registration. Section 35 provided, however, that the instrument of transfer purporting to transfer or in any way to affect land under the Act, shall be deemed to be registered as soon as a memorial thereof has been entered in the register-book upon the folium constituted by the existing certificate of title of such land. The reference to the

entry of a memorial in the register-book on the folium of the certificate of title of the land is a memorial in the form prescribed by s 37 of the Act.

111 In the present case the grant of the easement was contained in MT J493622 from Green Valley Shopping Centre Pty Ltd to Tooth & Co Ltd of part of the land contained in Certificate of Title Volume 9392 Folio 1 being Lot 5 in Deposited Plan 218028. The transfer and grant of easement was in accordance with the provisions of the fifth schedule. Although the instrument was not noted on Certificate of Title Volume 9392 Folio 1, it was noted on the certificate of title which immediately issued for the dominant tenement, Lot 5 being Certificate of Title Volume 9671 Folio 62. That certificate of title indicated Green Valley Shopping Centre Pty Ltd as the original registered proprietor and recorded the transfer of the land to Tooth & Co Ltd by instrument J493622.

112 Thus, a memorial stating the nature of the instrument (a transfer) was entered in compliance with s 37 of the Act and thus the transfer containing the easement was deemed to be registered in accordance with s 35.

113 In addition to entering the memorial required by s 37, the Registrar-General was obliged under s 47 of the Act to enter the "*covenant created by the registration of the transfer on the certificate of title of the dominant tenement*": *Castle Constructions* at [21]. The Registrar-General complied with this obligation by recording the easement in the second schedule to Certificate of Title Volume 9671 Folio 62.

114 There remains the question whether in addition to registering the transfer it was a necessary prerequisite to the creation of a valid easement that it be noted on the certificate of title of the servient tenement.

115 In our view, this was not required by the Act. Section 35 refers to the entry of the instrument in the register-book upon the folium constituted by the certificate of title of the land affected. Such registration has in fact occurred as the land transferred was the dominant tenement. The effect of such

registration as stated in the concluding words of s 35 was that the person named in the instrument as seised of or taking any interest shall be deemed to be the registered proprietor thereof. Thus, registration of the transfer was effective to pass the interest in the land to the transferee and was, in our opinion, effective to create the easement for the benefit of that land. Once the transfer was registered and the easement so created an obligation was imposed on the Registrar-General under s 47 to enter a notation thereof upon the folium of the dominant tenement.

116 The effect of the easement not being recorded on the folium of the certificate of title to the servient tenement was explained by Brennan J in *Parramore v Duggan* in the following terms (dealing with the equivalent Tasmanian legislation):

> "It is erroneous to regard indefeasibility as relating to an interest which merely confers rights in or over the land of another registered proprietor whose title is indefeasible. A registered proprietor of a dominant tenement has an indefeasible title to the land to which the easement is appurtenant but the easement is not indefeasible. Similarly, where the servient tenement is land to which a registered proprietor has title under the Act, that title is indefeasible. Unless the easement is registered on the certificate of that title, or unless the easement falls within one of the exceptions contained in s 40(3), the unencumbered title of the registered proprietor of the servient tenement is not subject to the easement: see s 40(1). In other words, the registered proprietor of land to which an easement is appurtenant has an indefeasible title to that land but not to the easement, so that the easement cannot be enforced unless the certificate of title of the registered proprietor of the servient tenement states that that title is subject to the easement or unless the easement falls within s 40(3)(e) of the Act.
>
> In the present case, although the respondent is entitled to claim indefeasibility of title to the dominant tenement and the appellant is entitled to claim indefeasibility of title to the servient tenement, the indefeasibility conferred by s 40 avails only the registered proprietor of the servient tenement. His title is taken free of any easement that is not recorded on the folio of the register evidencing title to his land unless the respondent can bring the case within one of the exceptions contained in s 40(3)."

117 It follows that the easement was validly created. It was not necessary for its creation that it be recorded on the servient tenement.

118 The easement was omitted from the title to the servient tenement in the sense it was not there: *Dobbie v Davidson*; *Castle Constructions* at [24]-[25]. It follows that the exception to indefeasibility in s 42(1)(a1) of the Act applied.

119 It remains to be considered whether this conclusion is contrary to any of the cases which have dealt with the application of s 42(1)(a1).

120 In *Jobson v Nankervis* (1943) 44 SR 277 Nicholas CJ in Eq concluded that the exception to indefeasibility in s 42(b) only applied to easements created prior to the relevant land being brought under the Act where the easement was not recorded on the certificate of title.

121 That conclusion was held to be incorrect by this Court in *James v The Registrar-General*. That case involved an easement created on transfer of the servient tenement. The easement was noted on the certificate of title to the land but omitted from a subsequent certificate of title.

122 The majority, Wallace P and Jacobs JA, held that the exception applied and the Registrar-General was entitled to exercise his powers under s 12(d) of the Act as it then stood to amend the certificate of title of the servient tenement to record the easement. Wallace P at 364 stated he was unable to agree that an easement which had been duly created under s 46 and s 47 of the Act but which on the subsequent issue of a new certificate of title is omitted by error should not fall within s 42(b).

123 His Honour did not deal with a situation where there had never been a recording on the certificate of title to the servient tenement but his reasoning is not inconsistent with the conclusion which we have reached.

124 Walsh JA who dissented on the applicability of s 12(d) of the Act expressly left open the question. His Honour, at 370, made the following remarks:

> "The primary question is not whether the original notification of the easement on the earlier certificate of title relating to the servient land was authorized by the Act. Section 47 provides expressly for the entry of a memorial of an instrument creating an easement upon the folium constituted by the certificate

> of title of the dominant land. The Act contains no similar express provision as to such an entry on the certificate of title of the servient land. But I think such an entry is authorized.
>
> Questions have been raised before the court as to whether an entry on the certificate of title of the servient land was essential in order to make the easement effective against it, or whether it would have been equally effective against it without such an entry, either because of s. 42 (b) or because, in any event, the entry under s. 47 on the certificate of title of the dominant land would itself, and without more, have subjected the servient land to the burden of the easement. But, whatever answer should be given to those questions, I think that there was power, after the easement had been created, to enter a notification on it on the certificate of title of the servient land. In any event, that was done and no one complained of it. But, at a subsequent time, the applicant took title from a transferor who held a certificate of title without any such notification on it. The question which arises is whether the Registrar-General then had power to put on to that certificate of title the notification placed on it on 8th September, 1966."

125 *Berger Bros Trading Co Pty Ltd v Bursill Enterprises Pty Ltd* (1969) 91 WN(NSW) 521 concerned what was described as an easement conferring building rights in favour of the plaintiff over land owned by the defendant over which the plaintiff had a right of way. The right of way was recorded on the title to the dominant tenement but not on that of the servient tenement.

126 McLelland CJ in Eq stated that the right to conduct the building works was an easement but noted it was not recorded on the title of the servient tenement. He concluded without elaboration that s 42(b) applied and the exception to indefeasibility was established.

127 The High Court varied the decision on the grounds that the building rights did not constitute the grant of an easement but rather there had been in fact a transfer of part of the stratum above the land. In those circumstances it was not necessary for the Court to consider the operation of s 42(b):

128 *Papadopoulos v Goodman* concerned a grant of a right of way which was misdescribed on the title deed to the servient tenement. It should be noted that although s 42(b) and s 46 and s 47 at the time of this judgment remained in the same form as in 1964, s 35 had been repealed and replaced by the present s 36(6A). However, the legislation which existed at the time the right

of way was said to have been created was in the same terms as the legislation the subject of consideration in the present case.

129 Wootten J considered that the misdescription of the right of way constituted an omission within the meaning of s 42(b). He took the view that the fact that it had not been recorded on the servient tenement did not prevent the exception to indefeasibility in s 42(b) applying. His Honour, at 120, made the following remarks:

> "I will assume for the moment that the transfer by which the plaintiffs easement was created had not been registered in the manner provided by the Act and that accordingly, under s 41, it was not effectual to pass any estate or interest in the land. It has been the accepted law since *Barry v Heider* (1914) 19 CLR 197, which was approved by the Privy Council in *Great West Permanent Loan Co v Friesen* [1925] AC 208, that such an unregistered instrument creates in equity an estate or interest in the land. If it were no more than that it could not prevail against the registered proprietor who has a legal estate. It could not prevail against the legal estate of a bona fide purchaser for value under the general law and, being unrecognized by the Act, it could not prevail against the statutory estate of the registered proprietor. However, in the present case the plaintiffs are not relying on the mere effect of an unregistered equitable interest. They are relying on the fact that theirs is the case of the omission of a right of way created in the land within the meaning of s 42(1)(b). The only thing that is wrong with their title is its omission from the defendants' certificate of title. It was properly created pursuant to s 46. It was duly lodged for registration and was accepted by the Registrar-General. The transfer itself was registered.
>
> The only defect is its omission from the defendants' certificate of title. From that the defendants' certificate of title does not, by the express terms of s 42(1)(b), protect them."

130 His Honour, at 121, made the following additional remarks:

> "However, to determine whether a dealing is registered in the manner provided by the Act for the purposes of s 41, I think that it is necessary to look at the provisions in force at the time that the acts relied on as registration were performed. At the time the dealing on which the plaintiffs rely was dealt with by the Registrar-General the relevant provision in s 35 was that:
>
> > '... every memorandum of transfer or other instrument purporting to transfer or in any way to affect land under the provisions of this Act, shall be deemed to be so registered so soon as a memorial thereof, as hereinafter described, has been entered in the register-book, upon the folium constituted by the existing grant or certificate of title of such land ...'

> It would follow that the transfer, in so far as it purported to affect what is now the defendants' land, was not deemed to be registered until it was entered on the certificate of title of that land. Hence it is to be regarded as an unregistered instrument."

131 It would appear from these paragraphs of his Honour's reasoning that his Honour took the view that s 35 of the Act required notation of an easement on the folium of the servient tenement and the Registrar-General's failure to do this constituted an omission. His Honour however appeared to take the view that the easement was properly created. Although for the reasons we have given we are unable to agree that s 35 required notification of the easement on the certificate of title to the servient tenement, his Honour's reasoning does support the proposition that such notification is not a prerequisite to creation of the easement

132 It should be noted that *Papadopoulos v Goodwin* was reversed by this Court on other grounds: *Goodwin v Papadopoulos* (1985) NSW ConVR 55-256.

133 In *Christopoulos v Kells* a right of way was created by transfer dated 17 August 1976. The transfer which reserved the right of way was noted on the certificate of title to the servient tenement but no entry of the right of way was made on the certificate of title to the servient tenement, its absence described by Hope JA, at 543, as an omission by the Registrar-General.

134 Hope JA, with whom the other members of the Court agreed, stated that s 35 and s 37 of the Act (as they existed in 1964) had been repealed and that s 36(6A) dealt with registration of dealings. However he expressed the view, at 545, that it was difficult to see how the relevant provisions were different in substance. His Honour cited a passage from *Papadopoulos v Goodwin* to which we have referred at [129] above and made the following comments, at 547-548:

> "In my opinion both Berger and Papadopoulos (in this regard) were correctly decided. The decision in Papadopoulos was reversed on appeal on another point: Goodwin v Papadopoulos (1985) NSW Conv R 55-256, but this part of the reasoning of Wootten J was not affected. I have so concluded although the provisions as to the registration of dealings considered by McLelland J would have required a memorial to be entered on the certificate of title which

> referred to the easements, and although in Papadopoulos Wootten J considered that the registration provision now in force imposed on the Registrar-General a duty to record the easement on the certificate of title of the servient tenement. In each case the person creating the easement had executed a registrable instrument, that instrument had been lodged with the Registrar-General for registration, the Registrar-General had registered the instrument in so far as it affected a transfer but had erroneously omitted to endorse on the certificate of title of the servient tenement a notation of the creation of the easement."

135 This decision, if not binding on the Court, provides powerful support for the conclusion which we have reached.

136 *Castle Constructions v Sahab Holdings* involved a question of whether an easement, notification of which on the title to the servient tenement was removed deliberately by the Registrar-General could constitute an omission for the purpose of s 42(1)(a1) of the Act, the successor to s 42(b). The plurality allowing an appeal from this Court held it was not. As indicated earlier, the Court noted, at [21], that the effect of s 47 as it stood at the time the events giving rise to these provisions required the Registrar-General to enter a memorial of the instrument creating the easement on the folium of the land benefited. In dealing with the question of omission the plurality after referring to *Dobbie v Davidson* made the following remarks, at [24]:

> "On this understanding of 'omission', s 42(1)(a) both presupposes the continued existence and provides for the continued effect of that which has been omitted notwithstanding it does not appear on the relevant folio of the Register. It is an understanding capable of ready application to an easement created under a Commonwealth Act or under a State Act other than the RPA. The presupposition for applying s 42(1)(a1) (that the easement continues to exist) is accurate. Section 42(1)(a1) then provides for its continued effect in respect of the land. It is an understanding which is also capable of application to easements created under the RPA, at least in the case of an easement created by registration of the relevant dealing under the RPA but not recorded on the folio relating to the servient tenement. The easement in that case continues to exist because it has been registered and not removed from the Register. Section 42(1)(a1) then provides for its continued effect in respect of the land."

137 The reasoning in *Castle Constructions* is consistent with the view we take in the present case and is consistent with the cases which dealt with the operation of s 42(b) and its successor.

138 As Hope JA stated in *Christopoulos* the result may seem to be anomalous in respect of a system of title the lynchpin of which is title by registration and indefeasibility. This was sought to be corrected to some extent by the amendment to s 47 to oblige the Registrar-General to enter particulars of an easement on the title of the servient tenement. However, anomalous or not, s 42(b) (and its successor) must be given effect according to its terms.

139 It has been suggested that s 38 of the Act, as it stood at the relevant time, imposed an obligation on the Registrar-General to register the easement on the folium of the servient tenement.

140 In E A Francis *The Law and Practice Relating to Torrens Title in Australia* (1972, Butterworths) vol 1 pp 504-505, the learned author notes that it is clear from the words of s 47 of the Act (referring to the version in existence in 1964) that "*the recording is required by this provision to be made only on the folio of the register evidencing title to the dominant tenement*". In relation to s 38 the author notes:

> "... where an easement is created pursuant to s 46 the Registrar-General has a clear duty to make a recording of the instrument creating an easement either by grant or reservation on the certificate of title of the servient land so that the combined effect of these provisions (s 47 and s 38(1)) is that the easement will be noted on the certificates to both the dominant and servient tenements."

141 This commentary appears to support the conclusion that the failure of the Registrar-General to record the easement on the servient tenement is not necessarily a requirement for creation of the easement but rather as a duty of the Registrar-General.

Conclusion on the appeal

142 It follows from the construction we have given to the legislation that the appeal should be allowed.

Additional question

143 A question arose in the course of the hearing as to the effect of the covenant created by MT J490511 on the issues raised in the proceedings. In particular, the question arose as to whether MT J490511 and the Covenant were in conflict and if so, what flowed from that conflict. We agree with the observations of Basten JA on this question and have nothing further to add. We also agree that, although the issue raised in Awar's notice of cross-appeal has effectively been determined in its favour, given that the appeal is to be allowed, the appropriate order is that the cross-appeal be dismissed, for the reasons given by Basten JA.

Orders

144 The orders we propose are as follows:

(1) Appeal allowed; dismiss Awar's cross-appeal.

(2) The orders made by Windeyer AJ on 21 May 2013 be set aside;

(3)(a) Declare that the land contained in Folio Identifier 4/219028 is burdened by an easement in the terms set out in Memorandum of Transfer J493622 dated 20 October 1963 and registered on 23 April 1964 between Green Valley Shopping Centre Pty Ltd as Transferor and Tooth and Co as Transferee ("the Easement");

(b) Order that the appellant register the Easement in Schedule 2 of Folio Identifier 4/219028;

(c) Order that the first respondent (Jea Holdings) pay the costs of the appellant (Registrar-General) and the second respondent (Awar) in this Court and in the court below.

145 **BASTEN JA**: The circumstances giving rise to the present appeal were set out with clarity by the primary judge (Windeyer AJ) in *Jea Holdings (Aust) Pty Ltd v Registrar-General of NSW* [2013] NSWSC 587. They have also now been set out in the joint reasons of the Chief Justice and the President. For present purposes they can be dealt with quite succinctly.

146 The Registrar-General sought to register an easement over land owned by the respondent ("JEA Holdings"), as the registered proprietor of lot 4. The easement would confer parking rights for patrons of the hotel run by the registered proprietor of lot 5, Awar Pty Ltd ("Awar"). Unsurprisingly, Awar supported the step proposed by the Registrar-General.

147 The issues which arise for determination may conveniently be identified in the following terms:

(1) Subject to the possible requirement of registration under the *Real Property Act 1900* (NSW), was the covenant contained within the 1963 memorandum of transfer capable of constituting an easement benefiting lot 5 and burdening lot 4?

(2) If yes to (1), was it necessary for the interest in land thus created to be recorded on the register maintained by the Registrar-General under the *Real Property Act* in order to constitute an easement enforceable against subsequent proprietors of lot 4?

(3) If yes to (2), was there a recording of the 1963 memorandum of transfer adequate to create an enforceable easement?

(4) If yes to the preceding questions, did the easement cease to exist as a result of subsequent changes to the *Real Property Act*?

(5) On the basis of the answers to the preceding questions, was the omission of the easement from the folio in the register relating to lot 4 an "omission" for the purposes of s 42(1)(a1) of the *Real Property Act*, which fell within the power of correction conferred on the Registrar-General by s 12(1)(d) of that Act?

(1) Nature of rights created by 1963 transfer

148 The trial judge accepted that the rights dealt with in the covenant were of a kind which could constitute an easement burdening lot 4. As I agree with that conclusion, this point can be dealt with briefly.

149 Parties on both sides of the record agreed that car parking was a right capable of constituting an easement. As a leading property law text has noted, "[m]uch of the recent controversy surrounding the non-possessory character of easements has centred on the proper classification of that most valuable asset of the modern citizen – the right to park a car": K Gray and SF Gray, *Elements of Land Law* (5th ed, 2009, Oxford UP) at [5.1.66]. The only remaining question was whether the right conferred under the 1963 transfer would effectively exclude the owner of lot 4 from possession and use of that land if the right to park cars were exercised to its full extent.

150 Such questions inevitably involve matters of degree and evaluation which will depend on the circumstances of each case. Jea Holdings devoted much of its submissions to challenging the finding of the primary judge as apparently inconsistent with the decision of this Court in *Clos Farming Estates Pty Ltd v Easton* [2002] NSWCA 389; 11 BPR 20,605. The circumstances which arose in that case are sufficiently described in the joint reasons: they are dissimilar in significant respects from the present case.

151 The Registrar-General (and Awar) placed reliance on the decision of the House of Lords in *Moncrieff v Jamieson* [2007] 1 WLR 2620; [2007] UKHL 42. The effect of *Moncrieff*, as Gray and Gray have noted, was to "rationalise the case law in a manner notably more sympathetic to easements which involve substantial exclusion of the servient owner from his land": at [5.1.64]. Statements in more extreme cases of exclusion, such as *Clos Farming*, are not inconsistent with that approach.

152 The limitation on use of lot 4 by the owner of that lot, while capable of extending from time to time to much or even all of the surface area of the parking lot, was a shared right, with the registered owner, to the use of the lot for car parking. Further, it expressly subsisted with the rights of the owner to

use any part of the stratum at a height greater than 12 feet above the surface of the land and to use the underground area to such depth as might be valuable to it. So much is apparent from the terms of par (a) of the covenant set out at [22] above.

153 Disregarding the car parking rights, the rights reserved to the owner of lot 4 (the transferor) would by necessary implication include such use of the surface of lot 4 as would be necessary to erect a building above it, and to obtain egress to the land below it. It is not uncommon for buildings to be erected above ground level, so as to permit parking beneath them. It is also to be expected that not insignificant inroads would be made on the number of parking spaces available if such a building were erected over (or under) lot 4. That would not be inconsistent with the terms of the covenant, which must accommodate reasonable user by the owner of the servient tenement in accordance with its reserved rights. Further, the fact that the use of land by the transferee and its customers and patrons was to be exercised "together with" the transferor and the respective tenants and lessees, invitees and customers of the owners of lots 1-4, was entirely inconsistent with the kind of exclusivity which would prevent the interest being classified as an easement.

(2) Need to record covenant on title

(a) easement with respect to registered land

154 The answer to the second question depends on matters of statutory construction, rather than the general law. The ultimate question, using the current form of the *Real Property Act*, concerns the application of the powers of the Registrar-General under s 12, which relevantly provides:

> **12 Powers of Registrar-General**
>
> (1) The Registrar-General may exercise the following powers, that is to say:
>
> ...
>
> (d) The Registrar-General may, subject to this section and upon such evidence as appears to the Registrar-General sufficient, correct errors and omissions in the Register.

...

(3) Where the Registrar-General, in the exercise of the powers conferred upon the Registrar-General by subsection (1)(d), makes a correction in the Register:

...

(b) to the extent that, but for this paragraph, the correction would prejudice or affect a right accrued from a recording made in the Register before the correction, the correction shall be deemed to have no force or effect, and

(c) subject to paragraph (b), the Register shall, as so corrected, have the same validity and effect as it would have had if the error or omission had not occurred, ...

155 If par (c) is engaged, it will give the corrected register effect, in this case, as a burden on the title of lot 4. However, par (b) will remove that effect if it would affect a pre-existing right. The pre-existing right will be the right of the owner of lot 4 to hold that land free of any unrecorded interest. That right will be found in s 42. Accordingly, the party claiming the benefit of the easement must identify a provision which would allow the correction of an omission to take effect with respect to a successor in title to the transferor (being the owner of the servient tenement). That, relevantly for present purposes, will now be found in s 42(1)(a1):

42 Estate of registered proprietor paramount

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

...

(a1) 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 ...

(b) creation of easement – 1963

156 The easement created in 1963 post-dated the recording of the land in the register. Accordingly, to engage the exception in s 42(1)(a1) it was necessary to demonstrate that the easement was "validly created ... under this or any other Act". There are provisions in the *Conveyancing Act 1919* (NSW), Pt 6, Div 4 dealing with easements and other restrictions arising under covenants as to the user of land. Thus s 88(1) provides that an easement which does not comply with the requirements of that provision "shall not be enforceable" against the owner of the land burdened by the easement: however, it does not otherwise determine whether an easement has been validly created. For present purposes it may be accepted that the easement over registered land, to be validly created, must conform to the requirements of the *Real Property Act*. Further, that question must be answered, at least initially, by reference to the Act as in force at the date of the intended creation of the easement.

157 In 1963, an exception to s 42 arose "in the case of the omission or misdescription of any right-of-way or other easement created in or existing upon any land": s 42(b).

158 This provision was considered in *Jobson v Nankervis* (1943) 44 SR(NSW) 277; 61 WN(NSW) 76. Nicholas CJ in Eq held that the exception only applied to "easements in existence before the land was brought under the Act": 44 SR at 279. The reasoning in support of that submission appears to have been that a later easement could only be created in accordance with the provisions of the *Real Property Act* requiring registration of the instrument, in which case there would be no omission. That was thought to follow from the terms of s 47 which then provided:

> **47.** Whenever any easement or any incorporeal right other than an annuity or rent-charge in or over land under the provisions of this Act is created for the purposes of being annexed to or used and enjoyed together with other land under the provisions of this Act, the Registrar-General shall enter a memorial of the instrument creating such easement or incorporeal right upon the folium of the register-book,

> constituted by the existing grant or certificate of title of such other land.

159 That statement in *Jobson* is no longer good law: it has since been accepted that an easement created under the *Real Property Act* may be omitted from a certificate of title so as to engage the power of correction in s 12. In *James v The Registrar-General* (1967) 69 SR(NSW) 361 at 368-369, Wallace P said:

> "Whilst I appreciate the force of his Honour's reasoning in the light of the particular words used in the provision, I have found much difficulty in agreeing with the proposition that an easement which has been duly created in accordance with the provisions of ss 46 and 47 of our Act, but which on a subsequent issue of a new certificate of title is omitted therefrom by an error in the office of the Registrar-General is not included within the express provisions of s 42(b). In my opinion it is."

160 Section 47 dealt with an easement which "is created": the requirements for the creation of an easement were to be found elsewhere, namely in s 46. So far as relevant, s 46 provided:

> **46.** When land under the provisions of this Act or any estate or interest in such land is intended to be transferred or any right-of-way or other easement is intended to be created or transferred, the registered proprietor may execute a memorandum of transfer in the form of the Fifth, Sixth or Seventh Schedule hereto ....

Although s 46 was facultative in its terms, it has been held that, in relation to similar provisions in the *Real Property Act 1862* (Vic) such language is "in effect peremptory and exclusive": *Crowley v Templeton* [1914] HCA 6; 17 CLR 457 at 463 (Griffiths CJ).

161 The reference in s 47 was to an "easement ... over any land" which was "created for the purposes of being ... enjoyed together with other land", the recording being required on the title of "such other land." This provision is satisfied, therefore, where there is a recording on the title of the dominant tenement. The authorities discussed below held that there was also an implied authority (and obligation) to record the easement on the title of the servient tenement; such authority was not necessary to create the easement,

but was sufficient to render the failure to do so an "omission" capable of correction.

162 Section 35, as then in force, stated:

> **35.** Every grant and certificate of title shall be deemed to be registered under the provisions and for the purposes of this Act, so soon as the same has been marked by the Registrar-General with the folium and volume as embodied in the register-book, and every memorandum of transfer or other instrument purporting to transfer or any way to affect land under the provisions of this Act, shall be deemed to be so registered so soon as a memorial thereof, as hereinafter described, has been entered in the register-book upon the folium constituted by the existing grant or certificate of title of such land, and the person named in any grant, certificate of title, or other instrument so registered as seised of or taking any estate or interest shall be deemed to be the registered proprietor thereof.

163 The effect of s 35 was thus that the registered proprietor of lot 5 became the registered proprietor of the easement which was deemed to be registered. If that were not sufficient, s 41 provided, relevantly for present purposes:

> **41.** (1) No instrument, until registered in manner hereinbefore prescribed, shall be effectual to pass any estate or interest in any land under the provisions of this Act ..., but upon the registration of any instrument in manner hereinbefore prescribed, the estate or interest specified in such instrument shall pass ....

In combination, these provisions allowed for the creation of an easement in the manner prescribed: they were complied with in the present case. Accordingly, the easement was "created" even though there was no notation on the certificate of title for the servient tenement.

(3) Recording of transfer – 1964

164 The transfer of lot 5 in DP219028 (the hotel site) from Green Valley Shopping Centre Pty Ltd to Tooth & Co Ltd, dated 10 October 1963 was duly registered on the certificate of title for that lot, Vol 9671, Folio 62, disclosing the benefit of the covenant. (The certificate has since been cancelled upon the creation of a computer folio in June 1988.) The registered owner is now Awar, and the transfer J493622 and covenant are noted on its title.

165 In any event, the covenant contained within memorandum of transfer J493622 was registered on 23 April 1964. Accordingly the transfer was entered in the register in conformity with s 47 of the *Real Property Act* as then in force.

(4) Variations in Real Property Act

(a) statutory amendments

166 The next question is whether, on the basis that immediately after the registration of transfer J493622 containing the easement the title of the servient tenement could have been corrected by recording the instrument upon the relevant folio, changes to the *Real Property Act* resulted in the loss to the registered proprietor of lot 5 of the benefit of that easement. Whilst there are circumstances in which absence of notice of an easement to a bona fide purchaser for value of a purported servient tenement will appear to work unfairness to that proprietor, that consideration is mitigated by the availability of compensation in circumstances falling within the terms of ss 120 or 129(1) (subject to other limitations appearing in Pts 13 and 14). Nevertheless, it is a well-established principle of statutory interpretation that a provision will not be treated as diminishing the rights of property owners, without just terms compensation, unless such a construction is apparent in the express terms of the provision, or by necessary implication: see eg *R & R Fazzolari Pty Ltd v Parramatta City Council* [2009] HCA 12; 237 CLR 603 at [42] (French CJ). As will appear, there is neither an express indication to that effect, nor does it appear by necessary implication from the subsequent amendments.

167 The first significant amendments resulted from the *Real Property (Amendment) Act 1970* (NSW). Those amendments replaced s 12(d), repealed (and did not replace) s 35, inserted a new s 36 and replaced ss 46 and 47. The amendments to ss 46 and 47, dealing with the creation and recording of easements cannot have affected the present case, because there is no reason to suppose that they had retrospective effect upon easements already created. However, with respect to s 46, the result was a simplification, merely requiring that where it is intended to create an

easement, the proprietor "shall execute a memorandum of transfer in the approved form."

168 The present version of s 35, as in force in 1964, is s 36(6A) inserted by the *Real Property (Computer Register) Amendment Act 1979* (NSW), Sch 10 (5)(g). Again the simplified version of the provision as to when a dealing is registered does not affect the creation of the easement in the present case.

169 Changes, however, to provisions which permit the correction of an omission will be relevant. In particular, s 12 was amended, first to introduce a number of new subsections so that the power to correct omissions is that now set out at [154] above. Section 42 has also been amended, in particular by the *Property Legislation Amendment (Easements) Act 1995* (NSW), so that par (b) now deals only with a profit à prendre and a new par (a1) deals with omissions or misdescriptions of easements, in the terms set out at [155] above.

170 There are two changes which have been wrought to that provision. First, it is now made express that the exception applies to easements subsisting immediately before the land was brought under the *Real Property Act* and those created at or after that time. Secondly, in relation to the second category (which includes the present case), "created" has been qualified by the adverb "validly".

171 The first alternation is immaterial; the second is not a change of substance. In other words, as is clear from the foregoing discussion, an easement created under the *Real Property Act* could not have been invalidly created or it would not have been an easement for the purposes of the exception. It follows that, the *Real Property Act* not having been amended in a way which could possibly change any right that the proprietor of lot 5 had with respect to the easement over lot 4 at the time of its creation, the power of the Registrar-General to treat that easement as an omission from the title of the servient lot which may be corrected by an appropriate recording on that title, has not

varied. In other words, it being accepted that such a power existed in the Registrar-General in 1964, no statutory change has varied that situation.

(b) authority

172 It remains to consider whether these conclusions are consistent with authority binding on this Court.

173 *James v The Registrar-General* has further significance in this context. The case concerned an easement entered on the titles of both the dominant and servient tenements, but later omitted from a reissued title. Walsh JA stated at 370:

> "The primary question is not whether the original notification of the easement on the earlier certificate of title relating to the servient land was authorised by the Act. Section 47 provides expressly for the entry of a memorial of an instrument creating an easement upon the folium constituted by the certificate of title of dominant land. The Act contains no similar express provision as to such an entry of the certificate of title of the servient land. But I think such an entry is authorized."

174 In *James*, the Court (Walsh JA dissenting) held that s 12(d) authorised the Registrar-General to correct the register to record the easement on the title of the servient tenement, despite the prejudice to a purchaser of the servient tenement without notice of the easement. In upholding that power, Jacobs JA noted that there was no doubt that a right of way had been created in a proper manner pursuant to the terms of s 46 of the *Real Property Act*: at 379. Jacobs JA further stated, with respect to *Jobson v Nankervis* that, in his view, the case "rather supports the view that an easement created in accordance with the requirement of s 46 would be within the terms of s 42(b), although there are statements therein which would limit s 42(b) to easements in existence before land is brought under the Act." The reference to an easement "created in accordance with the requirement of s 46" was accepted as appropriate by Priestley JA in *Dobbie v Davidson* (1991) 23 NSWLR 625 at 646C.

175 Next it is convenient to refer to the judgment of the High Court in *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd* [2013] HCA 11; 247 CLR 149. The case involved a statute barred attempt to review the decision of the Registrar-General, some years earlier, to remove an easement from the register. The joint reasons of Hayne, Crennan, Kiefel and Bell JJ accepted the reasoning of Priestley JA in *Dobbie* to the effect that "omission" of an unregistered easement meant no more than that the dealing had been "left out" or was "not there": at [23]. However, as the reasons stated at [25] where a dealing was no longer recorded because it had been deliberately removed by the Registrar-General, that could not be treated as a "case of the omission ... of an easement" for the purposes of s 42(1)(a1). That was because, "[t]he presupposition for the operation of s 42(1)(a1), that the easement continues to exist, is not valid." The approach of Gageler J differed from that of the joint reasons, but came to the same conclusion.

176 None of that reasoning has relevance for the present case. However, what was said at [24] is directly apposite. That paragraph reads:

> "On this understanding of 'omission', s 42(1)(a1) both presupposes the continued existence and provides for the continued effect of that which has been omitted notwithstanding it does not appear on the relevant folio of the Register. It is an understanding capable of ready application to an easement created under a Commonwealth Act or under a State Act other than the [*Real Property Act*]. The presupposition for applying s 42(1)(a1) (that the easement continues to exist) is accurate. Section 42(1)(a1) then provides for its continued effect in respect of the land. It is an understanding which is also capable of application to easements created under the [*Real Property Act*], at least in the case of an easement created by registration[48] of the relevant dealing under the [*Real Property Act*] but not recorded on the folio relating to the servient tenement. The easement in that case continues to exist because it has been registered and not removed from the Register. Section 42(1)(a1) then provides for its continued effect in respect of the land."

177 The footnote to the reference to "an easement created by registration" read as follows:

> "Section 36(6A) provided that registration occurs 'when the Registrar-General has made such recording in the Register with respect to the dealing as the Registrar-General thinks fit'."

178 That reasoning is entirely consistent with the reasoning set out above, so long as it was, at the relevant time, sufficient to record the dealing on the title of the dominant tenement. Subject to reference to the cases noted below, it should be accepted that that was sufficient. *Castle Constructions* did not in terms consider how an easement might be created by registration at some earlier point in time, but it did confirm that an easement could be created by registration. There is certainly nothing in the reasoning in *Castle Constructions* which is inconsistent with the analysis set out above.

179 It is then necessary to refer to two cases considered by the primary judge, *Papadopoulos v Goodwin* [1983] 2 NSWLR 113 (Wootten J) and *Christopoulos v Kells* (1988) 13 NSWLR 541. The latter case in this Court (the principal judgment being given by Hope JA, Mahoney and Priestley JJA agreeing) confirmed the reasoning of Wootten J in *Papadopoulos* and, as will be explained, is consistent with the reasoning set out above.

180 *Christopoulos* was directly analogous to the present case in that it involved the subdivision of a property containing four lots with the vendor reserving a right-of-way by way of a back lane across the rear of two lots which were being sold. The transfer took place in 1976. The appellants were the purchasers of the servient tenement (in 1979) the title for which contained no notation of the transfer with the reservation of the right-of-way. Hope JA noted at 545:

> "On 14 September 1976, when the transfer purporting to create the easement was registered, s 32(4) of the *Real Property Act* provided:
>
> > '(4) Upon lodgement of a dealing, the Registrar-General shall allot thereto a distinctive number and the dealing is duly registered when the register has been altered to give effect thereto.'
>
> It is submitted that in order to give effect to a transfer expressed to create an easement when this provision regulated registration, it was necessary to record on the certificate of title of the servient tenement a memorial referring to the creation of the easement. This was not done, and hence, at any rate as regards the easement, the document creating it was not registered and no easement was created."

181 Because reliance had been placed on the reasoning in *James v Registrar-General*, Hope JA then proceeded to consider the provisions of the *Real Property Act*, as they existed before 1970. He extracted or paraphrased ss 35, 37, 46 and 47. Of the last provision he stated at 454F:

> "Section 47 of the Act makes provision for the registration of easements on the certificate of title for the dominant tenement, but there is no express provision in the Act dealing with the registration of the easement on the certificate of title for the servient tenement."

182 In referring to s 42, Hope JA stated that, given its purpose, "it is apparent that the Act contemplates and indeed requires the creation of rights-of-way to be noted on the certificate of title of the servient tenement." He concluded that failure to make such a notation meant that the easements were thus "omitted" for the purposes of s 42.

183 Noting that ss 35 and 37 were omitted when new s 32 containing subs (4) was introduced in 1970, he nevertheless concluded that the provisions in force in 1976 did not differ in substance from those in force when *James* was decided. The reasoning continued at 546F:

> "Section 35 provided that registration of a dealing should take effect as soon a memorial of it, as thereinafter described, had been entered on the register-book on the folium constituted by the certificate of title, and s 37 required that every memorial entered on the register book should state the nature of the instrument to which it relates. If a memorial was to state the nature of an instrument which constituted both a transfer and a creation of a right-of-way, it would have had to refer to both of these matters to satisfy s 37. However the registration of the right-of-way had satisfied s 35 and s 37 at the time when the memorandum of transfer was registered. It was only the omission of a reference to the right-of-way in the subsequently issued certificate of title that gave rise to the omission. Hence on any view the easement had been validly created."

184 The difference between *James* and *Christopoulos* was that in *James* the easement was originally noted on the title of the servient tenement, but omitted from a later certificate of title. In *Christopoulos* the easement was never noted on the certificate for the servient tenement: nevertheless, the Court of Appeal held that the easement had been validly created.

185 The conclusion reached in *Christopoulos* was consistent with both *Papadopoulos v Goodwin* and *Berger Bros Trading Co Pty Ltd v Bursill Enterprises Pty Ltd* (1969) 91 WN(NSW) 521 (McLelland CJ in Eq). (*Berger Bros* involved an easement and a building over the easement: the reasoning of the primary judge with respect to the building was not upheld on appeal, but the reasoning with respect to the easement was not disputed: *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* [1971] HCA 9; 124 CLR 73.) Noting that "[t]he relevant easements had thus never been noted on any certificate of title of the servient tenement", Hope JA concluded at 547C:

> "Applying *James v Registrar-General* [McLelland CJ in Eq] held that the Registrar-General would be entitled to amend the certificate of title under s 12(d) to include a reference to the building rights and that the registered proprietor took subject to them."

186 Hope JA then described *Papadopoulos* as "[a] like case" and, referring to both it and *Berger*, stated at 548A:

> "In each case the person creating the easement had executed a registrable instrument, that instrument had been lodged with the Registrar-General for registration, the Register-General had registered the instrument insofar as it affected a transfer but had erroneously omitted to endorse on the certificate of title of the servient tenement a notation of the creation of the easement."

187 At trial, McLelland J had upheld the power of the Registrar-General to endorse a notification of the right-of-way on the certificate for the servient land. The question as to whether the right-of-way had been validly created for the purposes of the *Real Property Act* was not litigated by McLelland J: nevertheless for the reasons noted above, the appeal was dismissed.

188 Jea Holdings submitted that *Christopoulos* was both distinguishable and not correct. The primary basis on which it was sought to be distinguished was apparently the change created by the introduction of s 36(6A), a point of distinction not accepted by Hope JA. Further, it was said to be wrong because former s 35 required an easement to be recorded on the folio for the servient tenement. For the reasons given in construing the statutory provisions as in force in 1964, I do not think that *Christopoulos* was wrong. Even if there were a contrary argument, it could not be said that there were

compelling reasons to depart from it and accordingly it should be followed: *Gett v Tabet* [2009] NSWCA 76; [2009] Aust Torts Reports 82-005; (2009) 254 ALR 504 at [301].

(c) conclusion

189 Subject to one further consideration, it follows that the appeal should be upheld, the orders made by Windeyer AJ on 21 May 2013 set aside and the orders sought by the Registrar-General as set out at [144] should be made. Awar filed a notice of cross-appeal, but the additional issue it sought to raise was ultimately addressed in an amended notice of appeal filed by the Registrar-General. Both the Registrar-General and Awar have been successful and should have their costs, but the cross-appeal should be dismissed as otiose.

(5) Public car parking

190 The additional issue, which was not raised in the Court below nor in the written submissions in this Court, concerned the operation of an entirely separate covenant created by a transfer (J490511) from the Housing Commission of New South Wales to Green Valley Shopping Centre Pty Ltd. That transfer was registered on 4 October 1963, prior to the subdivision which created lots 1-5. Although the transfer of lot 5 by Green Valley to Tooth & Co was executed on 10 October 1963, it was not then registered. The subdivision was effected by the registration, on 17 February 1964, of DP 219028, creating lots 1-5. The transfer to Tooth & Co (by J493622) containing the covenant discussed above was registered, with the transfer of lot 4, on 2 April 1964. The certificates of title for both lots 4 and 5 noted the earlier covenant created by J490511.

191 That covenant stated that the transferee (Green Valley)

> "does further covenant for its successors and assigns that it will not use or permit to be used any Lot in Deposited Plan No 219028 for any purpose whatsoever other than as follows:
>
> ...

> Lot 4 for a Car Parking Area for free use by members of the public; Lot 5 for an Hotel."

192 The question raised was the possible effect of this covenant, being registered before the covenant in favour of lot 5, on the latter covenant.

193 It was common ground that the effect of the covenant for free use of a lot by members of the public constituted a restrictive covenant which might be enforceable against subsequent purchasers of the land, pursuant to s 88(3) of the *Conveyancing Act*. Jea Holdings accepted that position, contending that it supported its contention that the covenant in favour of lot 5 (created by J493622) was also a restrictive covenant and not an easement, being "part of a scheme of restrictive covenants". For the reasons accepted at (1) above, that submission is not accepted.

194 The Registrar-General submitted that there was "an evident conflict" between the covenants, with the consequence that that registered earlier in time (in favour of the public) must prevail. To that extent, the parking area could not be for the "exclusive use" of the owners and customers of lots 1-5. Recording of the later easement could not affect the operation of the earlier covenant.

195 Awar accepted that the earlier covenant was a restrictive covenant and noted it could be released or modified by the Housing Commission. It also submitted that there was no inconsistency between the rights created by the covenant and those created by the easement. Each provided that lot 4 was to be used as a car park. However, the lack of inconsistency was explained by reference to the rights of the owner of lot 4 with respect to its use of the land otherwise than as a car park (by building over or under the surface area). That does not contradict the element of inconsistency noted by the Registrar-General.

196 The Registrar-General's submissions should be accepted on this point; however, once the covenant contained in J493622 is found to be an omitted easement, the existence of the restrictive covenant is not said by any party to

form a ground for not granting the relief sought by the Registrar-General and supported by Awar. Accordingly, those orders should be made.

****

I certify that the preceding 19 paragraphs are a true copy of the reasons for judgment herein of the Honourable Justice Beazley and of the Court.

Date: 27.3.15

Associate: [signature]