

**PERPETUAL TRUSTEE COMPANY LIMITED v WESTFIELD MANAGEMENT LIMITED & ANOR (S166/2007)**

Court appealed from: New South Wales Court of Appeal

Date of judgment: 8 September 2006

Date referred into the Full Court: 21 June 2007

On 24 February 1986 a development consent was granted in relation to the Glasshouse Shopping Mall site ("the Glasshouse") in Sydney. That consent, as later amended, contained Condition 56. Condition 56 effectively provided that a right-of-way applicable to the basement service parking levels of the Glasshouse in favour of the adjoining Skygarden Shopping Mall ("Skygarden") be extended to the neighbouring Imperial Arcade and the Centrepont Shopping Mall ("Centrepont"). The Perpetual Trustee Company Ltd ("Perpetual") is the current owner of the Glasshouse, while Westfield Management Limited ("Westfield") is the current owner of the other three sites. All four sites front the Pitt Street Mall.

Westfield unsuccessfully sought a declaration in the Supreme Court that Perpetual had failed to comply with Condition 56. Perpetual however successfully sought a declaration that Condition 56 was both invalid and severable.

Westfield submitted that the following issues were relevant to its appeal:

- (1) whether Condition 56 was void for uncertainty;
- (2) whether Condition 56 was void for unreasonableness;
- (3) if yes to either of the above, whether Condition 56 was severable.

The primary judge answered "Yes" to all three questions.

On 8 September 2006 the Court of Appeal (Hodgson, Tobias and Basten JJA) unanimously allowed Westfield's appeal. Their Honours held that:

- 1) The primary judge had erred in holding that Condition 56 was void for uncertainty. They found that it should be construed in light of the objective circumstances, including the Council policy of keeping traffic in the Pitt Street Mall to a minimum. Condition 56 therefore obliged Perpetual, without consideration, to take such action as required to extend the easement if and when there is appropriate co-operation from the owners of Skygarden, the Imperial Arcade and Centrepont. The Court of Appeal further held that the approach taken in *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* could be applied to determine the terms of the extended easement.
- 2) Condition 56 was not unreasonable in the *Wednesbury* sense and that the primary judge was wrong to hold that it was. This was having regard to the transferable floor space made available to the then owner of Glasshouse in exchange for the imposition of Condition 56. Furthermore, the additional legal burden was not shown to have had a disproportionate effect on the Glasshouse site's value.

3) In light of the above, the question of severance did not arise.

On 24 April 2007 special leave to appeal was granted by Chief Justice Gleeson and Justice Heydon in a related matter, *Westfield Management Limited v Perpetual Trustee Company Limited* ("the Westfield appeal"). That appeal is set down for hearing before the Full Court in Canberra on 31 July 2007. On 21 June 2007 Justices Gummow, Kirby and Heydon referred this matter into the Full Court to be heard at the same time as the Westfield appeal.

The questions of law said to justify a grant of special leave to appeal include:

- In construing a condition of a development consent is it correct to adopt the principles of construction in relation to contracts reflected in the decisions of this Court in *Mehan v Jones* and *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd*.

