

**WESTFIELD MANAGEMENT LIMITED v PERPETUAL TRUSTEE COMPANY LIMITED (S210/2007)**

Court appealed from: New South Wales Court of Appeal

Date of judgment: 1 December 2006

Date of grant of special leave: 24 April 2007

On 26 April 1988 the then owner of the Glasshouse Shopping Mall ("the Glasshouse") in Pitt Street, Sydney registered an easement over that property in favour of the then owner of the adjacent Skygarden Shopping Mall ("Skygarden"). Both the Glasshouse and Skygarden have since changed ownership, with the former now being owned by the Perpetual Trustee Company Limited ("Perpetual") while the latter is owned by Westfield Management Limited ("Westfield").

Westfield subsequently acquired two other properties known as the Imperial Arcade and Centrepont. The Imperial Arcade is adjacent to Skygarden, while Centrepont is adjacent to the Imperial Arcade. All four properties face the Pitt Street Mall. Westfield successfully sought a declaration in the Supreme Court that persons and vehicles authorised by Skygarden may use its easement over the Glasshouse to access both the Imperial Arcade and Centrepont.

The main issues upon appeal included the proper construction of the easement and the admissibility of certain evidence to aid its construction.

On 1 December 2006 the Court of Appeal (Beazley, Hodgson & Tobias JJA) unanimously allowed Perpetual's appeal. Their Honours held that they would not construe an easement to allow a contrary use to that which was originally intended. They found however that an investigation of what was initially intended was not a separate exercise from the construction of the grant. Any investigation of the original intentions could not therefore go beyond the appropriate method for construing the grant.

For an easement to bind the servient tenement, the Court of Appeal found that its authorised use must be of benefit to the dominant tenement. Regard may also be had to the surrounding circumstances, including the physical circumstances of both tenements at the time of the grant. It could also include evidence of communications between the parties prior to the grant. It could not however include evidence going to the subjective ideas and purposes of the grantor. Their Honours found that the initial grant of an easement may still permit a use for new or additional purposes. They further found that there is no universal rule that an easement granted for the enjoyment of one piece of land cannot be used for the purpose of traversing that land to another. In the present case however, the Court of Appeal held that the owner of Skygarden could not authorise persons to use the easement over the Glasshouse for the purpose of traversing Skygarden in order to access the Imperial Arcade and Centrepont.

The grounds of appeal include:

- The Court of Appeal erred in holding that an easement permitting the registered proprietor of the dominant tenement to access the dominant tenement in order to travel on to some more remote property does not, by itself, accommodate and serve the dominant tenement.
- The Court of Appeal erred, in its construction of an easement, in holding that a grant "for all purposes" is to be confined by the rule that an easement must accommodate and serve the dominant tenement so as to preclude access over the servient tenement to the dominant tenement and to an adjacent property.
- The Court of Appeal erred, in its construction of an easement and its regard to surrounding circumstances, by refusing to separately address and have regard to the commercial purpose and object of the grant.