# *Case and Comment*

## *Dobbie v Davidson*[1]

*Dobbie v Davidson* doubts the recent unanimous authority of the Court of Appeal in *Australian Hi-Fi v Gehl*.[2] It is submitted that this aspect of *Gehl* will no longer be followed, resulting in a significant extension in the scope of the exception to indefeasibility by way of omission. An unintended consequence of the decision may be to re-open the controversy as to whether easements may be acquired by prescription over Torrens Title land. Finally, the decision is notable for the detailed examination of historical material made in the leading judgment of Priestley JA, in contrast to the approach taken by Kirby P.

### *The Facts*

The parties to this matter were the registered proprietors of two neighbouring properties, "Lumley Park" and "Ellerslie". The owners of Ellerslie had used an access road through Lumley Park over a period extending from before 1905 until May 1988, when the appellants bought the property. Lumley Park had been bought under the provisions of the *Real Property Act* 1900 (NSW) ("the Act") in 1964, but no right of way appeared on the Certificate of Title. Two questions arose before Waddell CJ in Eq at first instance, and the Court of Appeal: (i) immediately prior to Lumley Park being brought under the Act, did a right of way exist by prescription?; and (ii) if it did, was its absence from the Certificate of Title an "omission" within the meaning of s42(b) of the Act?

### *The Prescriptive Right of Way*

On the first question, all members of the Court of Appeal affirmed the decision of the trial judge on the facts that a right of way had come into existence by prescription prior to 1964. Kirby P and Priestley JA held that the requisite conduct "as of right" had been present. Handley JA relied independently on the principle that "in a case of long continuous user ... the Court will make every possible presumption necessary to give that long enjoyment a legal origin". This is an application of the doctrine of the lost modern grant.[3] In *Tehidy Minerals Ltd v Norman*,[4] Buckley LJ stated that "circumstantial evidence tending to negative the existence of a grant ... should not be permitted to displace the fiction".[5] Hence, in the instant case, evidence that the user in question began as of grace and not as of right — which inference was drawn by the trial judge — was not

1 (1991) 23 NSWLR 625. New South Wales Court of Appeal, 4 July 1991. An application for special leave to appeal to the High Court has been lodged.

2 [1979] 2 NSWLR 618 (hereafter *Gehl*).

3 *Phillips v Halliday* [1891] AC 228 at 231 per Lord Herschell; *Clippers Oil Co v Edinburgh District Water Trustees* [1904] AC 64 at 69-70 per Lord Halsbury. Received into Australian law: *Delohery v Permanent Trustee Co* (1904) 1 CLR 283; *Hamilton v Joyce* [1984] 3 NSWLR 279 at 287-8 per Powell J.

4 [1971] 2 QB 528.

5 Id at 552.

capable of displacing the presumption that there was a lost modern grant. Handley's JA approach commends itself for its concision, as regularly in such cases an extensive body of evidence is led before the court.[6]

### *Section 42(b)*

Accordingly, it was necessary for the Court to consider whether the absence of the easement from the Certificate of Title was an exception to indefeasibility under s42(b) of the Act. In 1964, that section provided that:

> The registered proprietor of land, or any ... interest in land [should hold it] except in case of fraud ... absolutely free from all other ... interests whatsoever except ...
>
> (b) in the case of the omission or misdescription of any right-of-way or other easement created in or existing upon any land;

This in turn entailed an examination of *Australian Hi-Fi Publications v Gehl*, where Mahoney JA, delivering the judgment of the Court, held that "Omission involves two things: that something is not there', and that it is so because something which should have been done was not done".[7]

No member of the Court in *Dobbie v Davidson* followed this statement, instead holding that an "omission" is merely the first component of the *Gehl* definition: "something not there".[8]

### *The Approaches to Interpretation*

The procedures by which the members of the Court of Appeal doubted a decision of the same court of only twelve years standing merit closer examination.

Priestley JA in *Dobbie* approached the question of construction in three separate ways: the context of the word "omission" in the Act, the meaning the word was originally thought to have, and its subsequent interpretation in case law. Of these, the second approach comprises the substantial part of his Honour's judgment.

The judgment contains a detailed exposition of the arcane history of the Torrens legislation. Priestley JA traces a direct line of descent from Torrens' first Act,[9] to the *Real Property Act* 1862 (NSW)[10] and its consolidation, which is the present *Real Property Act* 1900 (NSW). This ancestry justifies an analysis of the original meaning the words had. It is important to define the question here addressed carefully. The task is not to find the subjective intention of the legislators when the Bill was approved.[11] This concept, known as "intentionalism", is to be distinguished from the proper approach of "original understanding".

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6 For example, see *Attorney General v Simpson* [1901] 2 Ch 671 at 687-8 per Farwell J, who found it "impossible ... to dissect and comment on [the evidence adduced] in detail".

7 [1979] 2 NSWLR 618 at 622.

8 However, it was not necessary to overrule the result in *Gehl* , because that judgment relied additionally on a second basis: that s42 did not apply to a *Wheeldon v Burrows* easement.

9 (1857) 21 Vic No 15.

10 For which Torrens gave detailed evidence to the Select Committee of the Legislative Assembly.

11 *Corporate Affairs Commission of New South Wales v Yuill* (1991) 4 ACSR 624 at 626 per Brennan J.

Monaghan, contributing to the vast academic output on this theme,[12] writes that "the relevant inquiry must focus on the public understanding of the language when the [law] was developed".[13]

Priestley JA referred to a substantial amount of contemporary evidence,[14] which showed that legislation in the same terms as s42(b) was, at the time of enactment, not thought to be qualified in the manner submitted by the appellants. The same result followed from each of the other more usual routes of interpretation. Handley JA agreed with the reasoning of Priestley JA.

In contrast, Kirby P relied on a number of factors, such as: the primary dictionary definition; the purposive approach to interpretation; the prior practice of the Registrar-General; a desire to attain uniformity throughout Australia; and the consequences of the alternative construction.

The historical approach of reasoning from first principles provides the most secure foundation for construction.[15] All of the approaches of Priestley JA are to be preferred over reasoning which is merely a collection of persuasive factors. This is especially the case when doubting or overturning recent unanimous appellate authority. In *Metal Manufacturers v Lewis*,[16] Mahoney JA criticised Kirby's P approach as being more open to subjectivity, because "a judge may see a policy or purpose behind legislation for reasons which are idiosyncratic".[17]

### *The Decision*

All members of the Court agreed that *Gehl* should not be followed. For the instant decision, it was sufficient to confine *Gehl* to its facts: that is, the case of whether a *Wheeldon v Burrows* easement might come into existence over land already under the Act. Strictly therefore, the word "omission" means merely "left out" for some purposes, while for other purposes it means "left out" *with fault*. However, the explicitly stated preference of all members of the Court is for "omission" to mean merely "left out", in a colourless sense.

### *Prescriptive Easements over Torrens Title Land*

*Dobbie v Davidson* strictly decides that one exception to indefeasibility of Torrens Title land is easements created by prescription prior to the land being brought under the Act. Of much greater importance is the status of prescriptive easements created over Torrens Title land. This question has been the subject of a substantial body of judicial[18] and academic[19] discussion, which appeared to be

12 Focussed primarily on the interpretation of the United States Constitution by the Supreme Court.

13 "Stare Decisis and Constitutional Adjudication" (1988) 88 *Columbia LR* 723 at 725.

14 Including various Reports and Proposals by Law Commissioners, and an unreported 1863 judgment of the South Australian Supreme Court.

15 *Contemporanea expositio est optima et fortissima in lege — Broom's Legal Maxims* (10th edn, 1939) at 463.

16 (1988) 13 NSWLR 315.

17 Id at 326.

18 In favour of prescriptive acquisition: Griffith CJ, *Delohery v Permanent Trustee Co* (1904) 1 CLR 283 at 312; Starke J, *Dabbs v Seaman* (1925) 36 CLR 538 at 574-5. Undecided: Shand J, *Boulter v Jochheim* (1921) QSR 105 at 124; Burbury CJ, *Wilkinson v Spooner* (1957) Tas SR 121 at 126-7. Against: Higgins J, *Dabbs v Seaman* at 558-9; Nicolas CJ in Eq, *Jobson v Nankervis* (1944) 61 WN (NSW) 76.

19 In favour of prescriptive acquisition: Beckenham and Harris, *The Real Property Act* (NSW)

resolved first by *Jobson v Nankervis*,[20] and secondly by *Gehl*. On the basis of the doctrine in *Gehl*, a prescriptive easement could not constitute an exception to indefeasibility, because it would not have been omitted "with the fault" of the Registrar-General. However, now that the word "omission" merely means "left out", *Gehl* does not stand in the way of prescriptive acquisition.

In *Jobson v Nankervis*, Nicholas CJ in Eq held that an easement over land subject to the Act can only be created by the execution of a memorandum in the manner prescribed by s46.[21] The only exceptions were those referred to in *Dabbs v Seaman*[22] easements arising by estoppel[23] or by implication from the description of the land on the Certificate of Title. His Honour relied solely on three New Zealand cases,[24] based on section 57 of the New Zealand *Land Transfer Act* 1885[25] which explicitly abrogated prescriptive acquisition by possession or user. However, the New South Wales Act prohibited acquisition by possession but not by user.[26] Therefore, it is arguable that the New Zealand authorities do not support the conclusion reached in *Jobson v Nankervis*. The case has also been criticised on other grounds,[27] explained,[28] and declined to be followed.[29] In New Zealand itself, the *Jobson* approach is no longer maintainable.[30]

If it is possible to create easements by prescription over Torrens Title land, one immediate consequence would be widely felt. Every building from the moment it is erected begins to acquire an easement for support from the adjacent owner's land.[31] After twenty years the easement crystallises, protecting owners from neighbouring excavations and disturbances.

On the other hand, such an expansion of exceptions to indefeasibility may be considered contrary to the purpose of Torrens registration. "The very object of the Torrens system is defeated if people are to be deprived of its certainty and simplicity, and forced back on old inferences and implications and conjectures".[32] With this justification the Victorian Law Reform Commission,[33] the New Zealand Law Commission[34] and the English Law Commission[35] have

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(1929) at 96; Hinde, et al, *Land Law* (1978) Vol I at 171-2. Undecided: Hogg, *Australian Torrens System* (1905) at 884. Against: Kerr, *The Australian Lands Title (Torrens) System* at 286; Baalman, *Commentary on the Torrens System in NSW* at 179, and (1944) 18 *ALJ* 186. See also Selby "Acquisition of Easements by Prescription" (1936) 9 *ALJ* 395.

20 (1944) 61 WN (NSW) 76.

21 Id at 77.

22 (1925) 36 CLR 538.

23 This is criticised by Baalman, "Easement by Estoppel" (1958) 31 *ALJ* 800.

24 *Mackenzie v Waimumu Queen Gold-Dredging Co (Limited)* (1901) 21 NZLR 231; *Strang v Russell* (1905) 24 NZLR 916; *Barber v Mayor*, etc of Petone (1908) 28 NZLR 600.

25 Nicholas CJ in Eq cites the equivalent section in the 1915 Act, which had not been passed when the New Zealand cases were decided.

26 S45f (now s45C(1)).

27 Sappideen, et al, *Real Property Cases and Materials* (3rd edn, 1990) at 224; Hinde, et al, above n18 at 171.

28 *James v Registrar-General* (1967) 69 SR (NSW) 316 at 368-9 per Wallace P.

29 *Rock v Todeschino* (1983) 1 QdR 351 at 366 per McPherson J; *Maurice Toltz Pty Ltd v Macy Emporium Pty Ltd* (1969) 91 WN (NSW) 521 at 527 per McLelland CJ in Eq, whose reasoning on this point was not discussed on appeal.

30 See *Sutton v O'Kane* [1973] 2 NZLR 304 at 315-6 per Wild CJ, at 349-50 per Richmond J.

31 *Dalton v Angus* (1881) 1 App Cas 740.

32 *Dabbs v Seaman* (1925) 36 CLR 538 at 561 per Higgins J. See also *Gehl* at 622-3 per Mahoney JA.

33 Discussion Paper No 15 Easements and Covenants Feb 1989.

34 Preliminary Paper No 16 *The Property Law Act* 1952 July 1991 par 174-183.

recommended abolishing the creation of easements by long use. The Queensland Parliament did so in 1975.[36]

However this issue is to be resolved, it is particularly desirable that a final authoritative decision be reached. In *Corin v Patton*[37] Deane J has recently pointed out the desirability of certainty in the area of land law.[38] Legislative reform has long been called for.[39] In 1867 Cockburn CJ stated "the law of England ever has been and still is, in respect of prescriptive rights, in a most unsatisfactory state".[40] It is submitted that this remains the case in New South Wales. The Victorian Law Reform Commission has also proposed that unregistered easements created by prescription before land is brought under the Act should have five years to be registered, after which they are unenforceable.[41] It scarcely needs to be observed that if this were the law in New South Wales, *Dobbie v Davidson* would never have reached court.

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35 Fourteenth Report (1966) Cmnd 3100.
36 *Property Law Act* 1974 (Qld) s194A.
37 (1990) 169 CLR 540.
38 Id at 584.
39 See *Tehidy Mineral Ltd v Norman* [1971] 2 QB 528 at 543 per Buckley LJ.
40 *Bryant v Foor* (1867) LR 2 QB 161 at 169.
41 Discussion Paper No 15, Proposal 17.