SUPREME COURT OF QUEENSLAND

CITATION:	*Currumbin Investments Pty Ltd v Body Corp Mitchell Park Parkwood CTS* [2012] QCA 9
PARTIES:	**CURRUMBIN INVESTMENTS PTY LTD (ACN 010 304 677)** (appellant) **v** **BODY CORP MITCHELL PARK PARKWOOD CTS** (respondent)
FILE NO/S:	Appeal No 1879 of 2011 SC No 13890 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 February 2012
DELIVERED AT:	Brisbane
HEARING DATE:	13 September 2011
JUDGES:	Margaret McMurdo P, Fraser JA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS:

1. **Appeal allowed with costs to be assessed.**
2. **Set aside the orders of Ann Lyons J made on 7 February 2011.**
3. **In lieu thereof:**
   (a) **declare that on the proper construction of easement D, being registered easement number 601120704 (L40195B), "drainage" includes the drainage of sewage;**
   (b) **declare that on the proper construction of that easement and of easement AA, being registered easement number 601120695 (L256081C), the applicant is entitled to use the drains under the surface of the latter easement so that water and sewage entering them is permitted to pass through them and into easement D;**
   (c) **order that the respondent pay the applicant's costs of the application to be assessed, save for the costs of the hearing on 7 February 2011.**

CATCHWORDS: Real Property – Easements – Easements generally – Definitions and construction – Drainage means stormwater and sewage

– – – – Extrinsic evidence

Words and phrases – "drainage"

Integrated Planning Act 1997, s 5.7.8
Land Title Act 1994, s 185(1)(c)
Local Government (Planning and Environment) Act 1990, s 33
Plumbing and Drainage Act 2002, s 128O
Sewerage and Water Supply Act 1949
Sustainable Planning Act 2009, s 73
Real Property Act 1861, s 27, s 35, s 43, s 44, s 121, s 184, s 185, s 201
Real Property Regulations 1986

Birmingham, Dudley and District Banking Co v Ross (1888) 38 Ch D 295, cited
Cannon v Villars (1878) 8 Ch D 415, considered
Chick v Dockray [2011] TASFC 1, cited
Fermora Pty Ltd v Kelvedon Pty Ltd [2011] WASC 281, considered
Neighbourhood Association DP No 285220 v Moffat [2008] NSWSC 54, considered
Overland v Lenehan (1901) 11 QLJ 59*,* considered
Pilbrow v Vestry of the Parish of St Leonard, Shoreditch [1895] 1 QB 433, considered
Powell v Langdon (1944) 45 SR (NSW) 136*,* cited
Sertari Pty Ltd v Nirimba Developments Pty Ltd [2007] NSWCA 324, considered
Westfield Management Ltd v Perpetual Trustee Co Ltd [2007] HCA 45; (2007) 233 CLR 528, cited

COUNSEL: P O'Shea SC for the appellant
S J Carius for the respondents

SOLICITORS: Kinneally Miley Law for the appellant
Adamson Bernays Kyle & Jones Lawyers for the respondent

[1] **MARGARET McMURDO P:** This appeal is from the primary judge's order dismissing the appellant's application for a declaration as to the proper construction of registered easement number 601120695 (L256081C) (Easement AA). The application concerned only the construction of Easement AA, not the construction of registered easement number 601120704 (L40195B) (Easement D), although in the course of *ex tempore* reasons the primary judge found that the term "drainage" in the grant of Easement D did not include the drainage of sewage.

[2] The appellant's grounds of appeal include that the primary judge erred in finding that Easement AA and Easement D did not permit the use of the respondent's private drain to pass sewage under, through and along Easement D; in failing to find

that Easement AA entitled the appellant to connect to drains and pipes within Easement AA even if sewage subsequently entered and passed along and through Easement D; and in failing to find that Easement AA and Easement D did permit the use of the respondent's private drain to pass sewage under, through and along Easement D. During the appeal hearing, the notice of appeal was amended to seek an order that there be a declaration that on the proper construction of Easement D, "drainage" includes the drainage of sewage.

[3] Fryberg J has set out the issues, relevant facts, the terms of the grants of the easements and the registered survey plan of the relevant land. Both easements were granted by the one grantor in 1992 when a continuous sewer main was constructed along both easements connecting to the sewage authority's sewer.

[4] Like Fryberg J, I consider the word "drainage" in the phrase "drainage and stormwater" in the grant of Easement D includes drainage of sewage. That is the ordinary meaning of the term "drainage".[1] The ordinary meaning of "stormwater" is the sudden, excessive runoff of water following a storm.[2] The grant of Easement D refers to "drainage and stormwater" not "stormwater drainage". The use of the latter phrase would have supported the respondent's contention that "drainage" does not include the drainage of sewage. The use of the phrase "drainage and stormwater", however, favours a construction giving "drainage" in that phrase its ordinary meaning of a channel for all liquids, including sewage. The primary judge erred in not construing "drainage" in Easement D in this way. I consider that when the terms of the grants of Easement AA and Easement D are read together with each other and the registered survey plan, their proper construction is that Easement AA entitles the appellant to use the drains under the surface of Easement AA so that water and sewage entering them is permitted to pass through them and into Easement D. This construction does not offend the principle stated by the High Court in *Westfield Management Ltd v Perpetual Trustee Co Ltd*[3] that:

> "Together with the information appearing on the relevant folio, the registration of dealings manifests the scheme of the Torrens system to provide third parties with the information necessary to comprehend the extent or state of the registered title to the land in question." [4]

[5] I agree with Fryberg J that there should be no order as to costs of the hearing at first instance. This is because the appellant did not seek there the declaration it has sought in this appeal and the primary judge was right to refuse the substantive declaration sought. I also agree with the orders proposed by Fryberg J in this appeal.

[6] **FRASER JA:** For the reasons given by Fryberg J at [62]-[71], the word “drainage” in easement D refers to drainage of both stormwater and sewage. For that reason I would allow the appeal, which, I note, was argued very differently from the way in which the proceeding in the Trial Division was argued.

[7] I agree with the orders proposed by Fryberg J.

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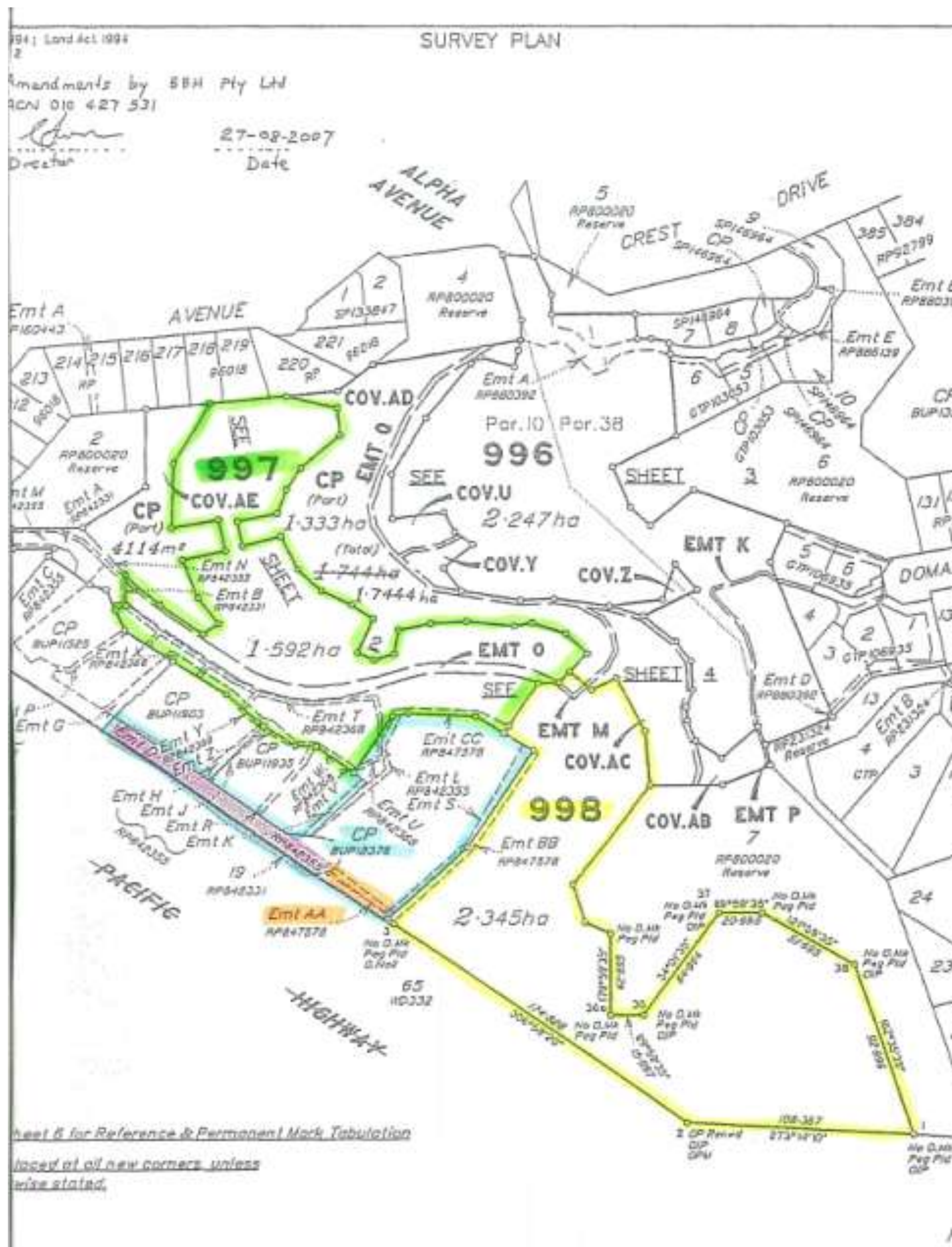
1 See the dictionary definition set out in Fryberg J's reasons at [63].

2 *The Macquarie Dictionary,* Federation ed (2001).

3 (2007) 233 CLR 528; [2007] HCA 45.

4 Above, 531.

[8] **FRYBERG J:** The respondent, Parkwood, owns some land at Currumbin on the Gold Coast. The appellant, Currumbin, owns other land in the vicinity, including two lots which abut the Parkwood land. The present configuration of the land appears on the following plan:



The Parkwood land is the battle-axe shaped area outlined in blue. The Currumbin land includes the two lots outlined in green and yellow.[5]

The easements

[9] The appeal involves the interpretation of two easements over the Parkwood land. Both easements were granted in 1992. It is a matter for regret that the registered plan or plans on which they were denoted and the relevant certificates of title were not placed in evidence. That omission has rendered identification of the precise facts difficult.

[5] The diagram is taken from registered survey plan 175406.

[10] In April 1992 the Parkwood land was owned by Currumbin Crest Development Pty Ltd ("**Currumbin Crest**")[6], which then also owned the Currumbin land.[7] In that month that company executed a Grant of Easement to itself.[8] The Grant was registered on 13 May 1992. The servient tenement is coloured purple in the plan above. The dominant tenement included what is now the Currumbin land.[9] In that Grant the dominant tenement was described as Lot 8 on RP 842355, the Parkwood land was described as Lot 13 on RP 842355 and the servient tenement was described as easement D on Lot 13 on RP 842355. The fact that all three areas were designated on the same plan suggests that plan was the one which denoted not only the easement but also the two lots. In other words it seems that the easement was created in the course of the subdivision by which the two lots were created. Neither party made any attempt in the evidence to explain why the south-eastern boundary of the easement area was fixed where it is.

[11] The Grant was in form 10 of the forms prescribed under the *Real Property Regulations 1986*. The short general description of the purpose of the easement was "DRAINAGE AND STORMWATER". The operative clause was cl 12, which was part of the prescribed form:

> "THE GRANTOR FOR THE ABOVE CONSIDERATION HEREBY GRANTS TO THE GRANTEE THE EASEMENT HEREIN DESCRIBED AND THE GRANTOR AND THE GRANTEE HEREBY COVENANT WITH EACH OTHER IN THE TERMS OF THE SCHEDULE HERETO."

The schedule (form 33) stated simply "Covenants – Nil".[10]

[12] By October 1992 the registered proprietor of the Parkwood land was Cubit Corporation Pty Limited. Currumbin Crest remained the registered proprietor of Lot 8. In that month Cubit executed a Grant of Easement to Currumbin Crest over part of Lot 13. The Grant was registered on 5 November 1992. It too was in form 10 but the schedule, form 33, also set out at some length the terms of a grant in traditional form, with detailed covenants[11] by each party. The dominant tenement again was Lot 8. The servient tenement was another part of the Parkwood land denoted on a new registered plan as easement AA; its location is coloured orange in the plan above. The short general description of the purpose of the easement was "SEWERAGE". Easement AA abutted the Currumbin land at its south-eastern end and easement D at its north-western end.

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6 AR 35, para 4. I take this to mean the whole of the Parkwood land.

7 AR 57.

8 Both parties accepted that this could lawfully be done: *Property Law Act 1974*, s 14(3).

9 AR 46, item 3; AR 49, item 3.

10 Presumably this was done because at common law, a person may not validly covenant with himself. See the discussion in MacDonald et al, *Real Property Law in Queensland*, 3rd ed, Lawbook Co, 2010 at para 15.70.

11 Paragraph [27].

[13] The two easements may be summarised as follows:

Emt	Date lodged	Dominant tenement	Owner of dominant tenement	Servient tenement	Owner of servient tenement	Short general description of purpose
D	13/5/92	Lot 8 on RP 842355	Currumbin Crest Development Pty Ltd	Part lot 13 on RP 842355	Currumbin Crest Development Pty Ltd	Drainage and stormwater
AA	5/11/92	Lot 8 on RP 842355	Currumbin Crest Development Pty Ltd	Part lot 13 on RP 847578	Cubit Corporation Pty Ltd	Sewerage

[14] In or about 1992 Currumbin Crest, with the approval of the Gold Coast City Council, constructed a sewer main which ran along the full length of both easements.[12] It connected to the sewer owned by the sewerage authority.[13] Connections into that sewer were made from the three Community Title Schemes abutting the handle of the battleaxe (by whom it is unclear) and provision was made for future connection from the Currumbin land.

The dispute

[15] By 2010 the appellant was the registered proprietor of the Currumbin land and Parkwood was the registered proprietor of the two servient tenements. The appellant was developing its land for residential use and in reliance on its easements, connected the sewerage system for its land to the sewer at the south-eastern end of easement AA. Initially only one dwelling was connected to that system, but toward the end of the year Currumbin wished to add a further six dwellings. By letter dated 4 October 2010 Parkwood asserted that Currumbin had no authority to enter the servient tenement without Parkwood's approval. It also demanded that all works already connected to the sewer in easement AA be disconnected forthwith. It claimed that Parkwood was the dominant tenement under easement D and, by implication, that Currumbin had no right to use that easement.

[16] Parkwood also contacted the sewerage authority to oppose the grant of permission for the connection of the further dwellings to the sewerage system, at least to the extent that it used the easements. It supplied documents to that authority (the documents are not in evidence) which caused the authority to form the belief that the sewer main was a private sewer belonging to Parkwood. As a result the authority refused permission for the connection. It asserted, presumably on the basis of what it had been told by Parkwood:

> "The internal sewer main is owned, operated and maintained by Mitchell Park [i.e. Parkwood] and not covered by an easement for sewerage purposes in favour of Currumbin Investments as communicated by you previously."[14]

[17] Currumbin applied to the court for declaratory relief. The declarations sought were wide ranging, but at least by the time of the hearing below only one was in dispute:

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12 AR 36, 93, 97, 281.

13 Then the Gold Coast City Council, but at the time of the hearing, a utility provider named Allconnex Water.

14 AR 241.

> "(b) On the proper construction of Easement AA, the Applicant is entitled in accordance with the terms of Easement AA to the full and free right and liberty at all times to:
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> …
>
> (iv) use the drains under the surface of the Easement AA Servient Tenement, such that sewerage entering into the drains and sewerage works on the Easement AA Servient Tenement be permitted to freely run and pass water and sewage through, under and along them and enter, run and pass water and sewage through, under and along the sewerage line in Registered Easement No. 601120704 (L40195B) over an area of land described as Easement D on Lot 13 on RP No. 842355 ("Easement D")."[15]

[18] Parkland suggested in correspondence and in an affidavit filed in the application that it was concerned that the capacity of the sewer main might have been insufficient to handle the additional sewage. It also raised an issue about maintenance of the sewer main. It abandoned these issues at the hearing below.

The proceedings at first instance

[19] Consistently with the terms of the declarations sought, Currumbin focused its submissions on its rights in relation to easement AA. It submitted that the nature of its rights over easement D was irrelevant to the application. It had the right to discharge sewage into easement AA. Once it had done so it had no further interest in the sewage. Parkwood submitted that on no construction could the Grant of Easement AA confer rights over the land comprising easement D, when the grant of that easement did not confer such rights. Currumbin responded that its rights over easement D were irrelevant, and it made no submissions about them as it submitted that what was in issue was the extent of the rights conferred by the Grant of Easement AA. It sought and was granted leave to amend the application to seek a declaration that:

> "(b) On the proper construction of Easement AA, the Applicant is entitled in accordance with the terms of Easement AA to the full and free right and liberty at all times to:
>
> …
>
> (iv) use the drains under the surface of the Easement AA Servient Tenement, such that sewerage entering into the drains and sewerage works on the Easement AA Servient Tenement be permitted to freely run and pass water and sewage through, under and along them and enter, run and pass water and sewage through, under and along the sewerage line <u>notwithstanding the terms of Easement D</u>."

Parkwood then submitted that if easement D were ignored, any declaration would lack of utility.

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15 AR 283-4.

[20] In an *ex tempore* judgment her Honour held that on its proper construction the Grant of Easement for easement AA did not confer rights of use outside the three-dimensional space of the servient tenement. She said:

> "It's clear the easement is not for all purposes, but for limited purposes. Specifically, easement AA is a grant for sewerage purposes over the servient tenement, to use the said drains under the surface of the servient tenement and freely to run and pass water and sewage through, under and along the same.
>
> In my view they are words of limitation. The applicant is permitted to build pipes and connect to drains, but only for the purpose of running water and sewage through, under and along the servient tenement of easement AA. Nothing in the text of easement AA could be construed as authorising the applicant to enter another easement and pass water and sewage along a private drain within that easement. *Importantly, easement D is expressly limited to drainage and stormwater purposes.*
>
> I consider that the decision of Westfield is determinative and that it's necessary to adopt the reasoning of the High Court in that case. In particular, a prospective purchaser of the respondent's land must be able to ascertain the extent to which the land is burdened by an examination of the terms of the registered instruments. *Significantly, the interpretation urged by the applicant would in fact permit the use of the respondent's private drain to pass sewage under, through and along easement D in circumstances where such use would not be discoverable on the face of the registered document.* Such an interpretation is inconsistent with the principles of the Torrens system.
>
> Accordingly, in my view, a proper construction of easement AA means that the applicant is not entitled to connect to drains and pipes within the easement AA for the purpose of allowing sewage to enter, pass along and through easement D."[16]

[21] Her Honour further held that a declaration in terms of the amended application would lack utility.

The appeal

[22] For the appeal Currumbin shifted position. Its original notice of appeal specified the declarations sought in the following terms:

> "(ii) on the proper construction of Easement AA, *or alternatively on the proper construction of Easement AA and registered Easement no. 601120704 (L40195B) ("Easement D")*, the applicant is entitled in accordance with the terms of Easement AA to the full and free right and liberty at all times to:
>
> (A) enter upon the Easement AA Servient Tenement to lay, construct or build sewerage works for the sewerage purposes;

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16 AR 313–4, emphasis added.

(B) connect sewer drains and sewerage works for sewerage purposes to any other drains, drainage systems, drain pipes or sewerage works in the Easement AA Servient Tenement;

(C) use the drains under the surface of the Easement AA Servient Tenement and freely to run and pass water and sewage through, under and along them;

(D) use the drains under the surface of the easement AA Servient Tenement, such that water and sewage entering into the drains and sewerage works on the Easement AA Servient Tenement be permitted to freely run and pass water and sewage through, under and along them *even if such water and sewage subsequently enters, runs and passes through, under and along the sewerage line in the area of land described as Easement D on Lot 13 on RP No. 842355*."[17]

[23] Those changes evoked some muttering from counsel for Parkwood, but eventually he accepted that it was open to Currumbin to take the course which it did. As the hearing progressed it became apparent that even the new version of the declaration was deficient. During its submissions in reply, Currumbin sought leave to amend the notice of appeal and, there being no opposition to that course, leave was granted. In its final form the notice of appeal sought, in addition to the declaration just quoted, a further declaration that:

"(iii) on the proper construction of registered Easement no. 601120704 (L40195B) ('Easement D'):

(A) 'Drainage' includes the drainage of sewage;

(B) the applicant is entitled in accordance with Easement D to use the drains under the surface of the land described as Easement D in Lot 13 on RP no. 842355 to run and pass water and sewage through and along them."

[24] Senior counsel for Currumbin accepted an observation from the Bench that para 3(c)(iii)(B) seemed to raise something new and advanced no argument in support of it.

Submissions

[25] Currumbin repeated its submission at first instance as to the construction of the Grant of Easement for easement AA. It accepted that no regard should be had to extrinsic evidence when construing this easement. It further submitted that on the proper construction of the Grant of Easement for easement D, it was entitled at the very least to pass sewage through the pipe in that easement; "drainage" included sewerage. It submitted that the purpose of construing the easement, evidence of the surrounding circumstances, in the form of documents from the development application file of the Gold Coast City Council, could be taken into account. The

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[17] AR 318–9, changes emphasised.

decision of the High Court in *Westfield Management Ltd v Perpetual Trustee Co Ltd*[18] did not apply to a bare easement where the grant was devoid of covenants.

[26] Parkwood too repeated its submission at first instance as to the construction of the Grant of Easement for easement AA. It submitted that the construction of easement D was not before the judge, implying that her Honour had erred in taking it into account. Alternatively it submitted that upon its proper construction, the Grant of Easement for easement D did not comprehend sewerage. Had it been intended to include sewerage, that word would have been used. The absence of any covenants obliging or permitting Currumbin to enter the land to connect or maintain pipes supported that construction, since it was inconceivable that sewage would have been intended to be conveyed otherwise than in a pipe. Stormwater on the other hand could drain through the easement either in pipes or overland. Extrinsic evidence was inadmissible in construing the Grant of Easement.

Easement AA

[27] It is unnecessary to set out the full terms of the Grant and its covenants. They were written in a continuous, unpunctuated flow of prose calculated to make understanding difficult. Instead, I set out the subject matter of the Grant broken up in a manner which is, I hope, more readily comprehensible. In deconstructing the relevant clauses I have substituted the verb "lay" for the expression "lay construct build repair and maintain" and the noun "drains" for the expression "drains drainage systems drainpipes sewerage works and drainage works for sewerage purposes". I have also added in parentheses words and expressions to demonstrate my interpretation of the clauses. What was granted was

> "the following easement for sewerage purposes over the servient tenement namely
>
> the full and free right and liberty at all times
>
> to enter upon and to break up the surface thereof
>
> and [therein]
> to lay such drains
> and to connect such drains to any other drains
> as the grantee may from time to time see fit
>
> and thereafter forever
> to use the said drains [ie those drains laid etc pursuant to the right just referred to] under the surface of the servient tenement
>
> and freely to run and pass water and sewage through under and along the same
>
> and from time to time
> to enter upon the servient tenement to inspect cleanse repair and maintain the said drains and sewerage works
>
> and when and where necessary to lay new drains in substitution therefore."

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[18] [2007] HCA 45; (2007) 233 CLR 528.

[28] Currumbin drew attention to the fact that the easement gave it the right to connect sewerage built, repaired or maintained by it or a predecessor in title in the easement area "to any other … drainage works for sewerage purposes as the Grantee may from time to time see fit". At the very least, it submitted, that must include drains in its own land. Accordingly it had the right to connect its sewerage system to the south-eastern end of the drain in easement AA and to pass sewage from that system through those in the servient tenement. I did not understand Parkwood to challenge those propositions.

[29] It followed, continued the submission, that upon the correct construction of the Grant, Currumbin had the right to discharge the sewage at the lower end of the easement. That followed because, although no such right was explicitly conferred by the Grant, the right to "pass" sewage through drains in the servient tenement necessitated such discharge. There was no right to collect or store sewage on the servient tenement. The shape and dimensions of the tenement indicated the impossibility of constructing treatment works on it. Even if easement D conferred no relevant right on Currumbin, Parkwood could not prevent the discharge, for to do so would be to derogate from the Grant of easement AA.

[30] The first part of that submission asks too much of the words of the Grant. It may be accepted that the right to pass sewage through a pipe in an easement connotes a right to discharge the sewage from the end of the pipe at the boundary of the servient tenement; in the present context to discharge it into another pipe, not an open drain. What the express terms of the grant do not and cannot entitle the owner of the dominant tenement to do is to pass sewage through land outside the servient tenement. He is given no express rights over that land. But the derogation submission raises a different problem.

[31] More than 100 years ago, Griffith CJ observed, "Before any question of derogation from grant can arise there must be a grant, either express or implied."[19] The last part of Currumbin's submission thus implicitly asserts the existence of an implied term (or implied covenant if you will) in the grant of easement AA to the effect that the grantor will permit the flow of sewage through part of his land not included in the servient tenement, or at least through that part of it which is constituted by the handle of the battleaxe, namely easement D.

[32] There is a good deal to be said in favour of such an implied term. Easement AA abutted the handle of the battleaxe. The shape of that handle suggested an area intended to contain service facilities such as sewerage. The land sloped downhill from the Currumbin land and through easement AA and through easement D to the lowest point of the three.[20] Easement D itself was for drainage and the Currumbin land was the dominant tenement at the time easement AA was created. Both easements were part of the single allotment owned by Parkwood's predecessor in title and both were granted in the same year. And finally, easement AA granted the right to *pass* sewage *through* that servient tenement.

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[19] *Nelson v Walker* [1910] HCA 27; (1910) 10 CLR 560 at p 572.

[20] AR 40, para 23. The decision of the High Court in *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2007] HCA 45; (2007) 233 CLR 528 does not make evidence of the physical characteristics of the dominant and servient tenements inadmissible: *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324.

[33] If such a term were to be implied, there would also be a good deal to be said for the view that a refusal by the owner of the servient tenement to permit sewage to pass through an existing pipe in the handle of the battleaxe constituted a derogation from the grant. That is an ancient principle. Bowen LJ once said it appeared to be "as old, I will not say as the hills, but as old as the Year Books and a great deal older." He paraphrased it: "A grantor having given a thing with one hand is not to take away the means of enjoying it with the other."[21] In the present case it cannot be doubted that unless the dominant tenement can pass sewage through the handle, easement AA is and always was of little value to it; and in the absence of any clear indication of the intention of the parties, the maxim that a grant must be construed strongly against the grantor is to be applied.[22]

[34] Currumbin did not at any stage of the proceedings assert the existence of any such implied term. Had the issue been raised at first instance Parkwood might (depending upon the ambit of the decision of the High Court in *Westfield*) have reconsidered its case theory and sought to lead additional evidence. Had it been directly raised in this division, attention might have been given to the circumstances in which terms might be implied in deeds granting easements, particularly under the Torrens system. The contention regarding non-derogation from the grant was made only in oral submissions and was unsupported by any reference to authority. In these circumstances I do not think we should consider the submission.

[35] On that basis Ann Lyons J was correct in rejecting Currumbin's argument about the construction of easement AA.

[36] Her Honour also concluded in effect that, since Currumbin did not have any right to pass sewage through easement D, there was no utility in granting declaratory relief in relation to its right to connect to the sewerage in easement AA. She rightly held that declaratory relief was discretionary, and should be refused if it lacked utility. If the premise regarding easement D was correct, so was her decision. On the appeal Currumbin for the first time argued the question of what rights it has in relation to easement D.

Easement D: materiality of evidence

[37] Currumbin submitted that in construing the grant it was legitimate to take into account the following evidence, which had been admitted without objection:

(a) the Currumbin land and the Parkwood land were originally one lot[23];

(b) a proposal was submitted to the Gold Coast City Council in 1989 for seven bodies corporate to be established on that land[24];

(c) it was obvious from the plan of subdivision for the proposal that bodies corporate without direct access to roads and public facilities would need easements for services, including sewerage[25];

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[21] *Birmingham, Dudley and District Banking Company v Ross* (1888) 38 Ch D 295 at p 313, most recently cited in Queensland by Chesterman JA in *Heslin v Director General, Department of Environment and Resource Management* [2010] QCA 347 at [33].

[22] *Chick v Dockray* [2011] TASFC 1 at [27] and the cases there cited; although this has been said to be a principle of last resort: *Perpetual Trustee Company Ltd v Westfield Management Ltd* [2006] NSWCA 337 at [32].

[23] AR 94, para 4.

[24] AR 95, Para 5.

[25] AR 95, Paras 6-7.

(d) the town planning file of the Gold Coast City Council contained the conditions of approval of the subdivision leading to the creation of the lots for the various bodies corporate[26];

(e) condition 13 required the various lots to have the benefit of easements for, among other things, sewerage over a proposed Lot 18[27];

(f) although the file contained no plan containing a Lot 18, such a plan did exist in the files of the town planners who had acted for the then developer[28];

(g) on that plan the proposed Lot 18 included the area that is now the subject of easements AA and D.[29]

[38] There was no real dispute about para (a); that fact could have been discerned from an examination of the register of titles. The dispute centred on the council and planners' files. Parkwood submitted that registered easements must be construed without regard to extrinsic evidence and also, somewhat inconsistently, that in interpreting a registered easement, the only matters to which it is permissible to have regard are the folio identifiers, the registered instrument, the deposited plans and the physical characteristics of the tenements. Currumbin submitted that the extrinsic evidence supported the conclusion that easement D was granted in April 1992 to meet the anticipated requirement set out in condition 13. Regard could be had to extrinsic material to establish the intention of the grantor and the grantee at the time of the grant because the easement was a bare easement. Both sides cited *Westfield Management Ltd v Perpetual Trustee Co Ltd*[30], *Sertari Pty Ltd v Nirimba Developments Pty Ltd*[31] and *Neighbourhood Association DP No 285220 v Moffat*.[32]

The cases

[39] *Westfield* involved an easement conferring a right of carriageway on a city allotment. The issue was whether the registered proprietor of the dominant tenement was entitled to use the servient tenement for the purpose of travelling across it and across the dominant tenement to land on the other side of the dominant tenement. At first instance Brereton J held that it was entitled to do so. That decision was reversed in the New South Wales Court of Appeal. The further appeal to the High Court was dismissed.

[40] The leading judgment in the Court of Appeal was delivered by Hodgson JA. In allowing the appeal his Honour wrote:

> "69 … In my opinion, the contrary decision of the primary judge was in error, the error resulting from a preparedness to look for *the intention or contemplation of the parties outside what was manifested by the grant itself, construed in the circumstances*, the admission of certain evidence for that purpose, and

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26 AR 100-1, 119 ff.

27 AR 121.

28 AR 101.

29 AR 118.

30 [2007] HCA 45; (2007) 233 CLR 528.

31 [2007] NSWCA 324.

32 [2008] NSWSC 54.

> addressing the question of the use contemplated for the site of the easement in a general sense, rather than focusing on the use intended and contemplated by the grant itself for the benefit of the dominant tenement only."[33]

[41] The unanimous judgment of the High Court referred to that passage under the heading "Extrinsic material":

> "35 In going on to allow the appeal, Hodgson JA (again correctly) remarked that the decision of the primary judge appeared to be the product of an error in preparedness to look for the *intention or contemplation of the parties to the grant of the Easement outside what was manifested by the terms of the grant*. Extensive evidence of that nature had been led by Westfield on affidavit with supporting documentation."[34]

[42] The court then went on to consider a number of cases and circumstances in which evidence of circumstances surrounding the execution of an instrument might be admissible. It concluded:

> "45 [N]one of the foregoing supports the admission in this case of evidence to establish the *intention or contemplation of the parties to the grant of the Easement*."[35]

[43] The foregoing passages are important in determining precisely what the High Court held in relation to the use of extrinsic evidence. Although the last passage speaks of the *admissibility* of such evidence, it is clear that the court was referring to the use which might be made of such evidence in construing a registered easement. Consequently, nothing turns on the fact that in the present case the evidence was admitted without objection. The High Court was concerned about the manner in which evidence of the intention or contemplation of the parties might be used in the construction of a Deed of Grant under the Torrens system. Such evidence may be admissible in the construction of a contract.[36] However the fact that the Torrens system was designed for use by third parties was significant:

> "Together with the information appearing on the relevant folio, the registration of dealings manifests the scheme of the Torrens system to provide third parties with the information necessary to comprehend the extent or state of the registered title to the land in question. This important element in the Torrens system is discussed by Barwick CJ in *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd*.[37]"

[44] The particular focus of the court was the statement by Brereton J, "It is not in excess of the grant to use a right of way to access the dominant tenement for those

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33 [2006] NSWCA 337, emphasis added.

34 [2007] HCA 45; (2007) 233 CLR 528 at p 538, emphasis added.

35 At p 541, emphasis added.

36 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337.

37 [2007] HCA 45 at [5]; (2007) 233 CLR 528 at p 531.

purposes that were contemplated at the time of the grant."[38] Of that statement the High Court wrote:

> "28. … The difficulty is in the phrase 'that were contemplated'. Contemplated by whom? By what evidentiary means is this contemplation later to be revealed to the court? How do these steps accommodate the Torrens system? To these matters it will be necessary to return."

[45] When the court returned to the question its reasoning was explained:

> 37 However, in the course of oral argument in this Court it became apparent that what was engaged by the submissions respecting the use of extrinsic evidence of any of those descriptions[39], as an aid in construction of the terms of the grant, were more fundamental considerations. These concern the operation of the Torrens system of title by registration, with the maintenance of a publicly accessible register containing the terms of the dealings with land under that system. To put the matter shortly, rules of evidence assisting the construction of contracts inter partes, of the nature explained by authorities such as *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*[40], did not apply to the construction of the Easement.
>
> 38 Recent decisions, including *Halloran v Minister Administering National Parks and Wildlife Act 1974*[41], *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[42], and *Black v Garnock*[43], have stressed the importance in litigation respecting title to land under the Torrens system of the principle of indefeasibility expounded in particular by this Court in *Breskvar v Wall*.[44]
>
> 39 The importance this has for the construction of the terms in which easements are granted has been remarked by Gillard J in *Riley v Penttila*[45] and by Everett J in *Pearce v City of Hobart*[46]. The statement by McHugh J in *Gallagher v Rainbow*[47], that: '[t]he principles of construction that have been adopted in respect of the grant of an easement at common law ... are equally applicable to the grant of an easement in respect of land under the Torrens system' is too widely expressed. The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at

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38 *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2006] NSWSC 716 at [24].

39 Evidence of the "factual matrix", evidence of the subjective intention of the owner of the servient tenements and evidence of a preceding oral agreement between the original parties.

40 [1982] HCA 24; (1982) 149 CLR 337 at pp 350-352.

41 [2006] HCA 3 at [35]; (2006) 80 ALJR 519 at p 526.

42 [2007] HCA 22 at [190] – [198]; (2007) 81 ALJR 1107 at pp 1150-2.

43 [2007] HCA 31 at [10]; (2007) 237 ALR 1 at p 4.

44 [1971] HCA 70; (1971) 126 CLR 376.

45 [1974] VicRp 67; [1974] VR 547 at p 573.

46 [1981] Tas R 334 at pp 349-350.

47 [1994] HCA 24; (1994) 179 CLR 624 at pp 639-640.

> the time of the creation of the registered dealing *and placing the third party (or any court later seized of a dispute) in the situation of the grantee*[48]."[49]

[46] The words emphasised are important. The High Court was not saying that a third party who inspects the register never needs to look further. It was not saying that extrinsic evidence of facts and circumstances existing at the time of the creation of the easement must always be disregarded. On the contrary, it referred to situations where extrinsic evidence might be taken into account. What the court held was to be disregarded was evidence which not only established facts and circumstances at the time of the creation of the registered dealing but which also placed the third party in the situation of the grantee (or for that matter, the grantor – the reasoning would be the same). That was the reason for the court's emphasis on disregarding "evidence to establish the intention or contemplation of the parties to the grant of the Easement".

[47] That is consistent with the High Court's approval of the closing remarks in the judgment of Hodgson JA in the Court of Appeal to which reference has already been made.[50] His Honour referred to "the error resulting from a preparedness to look for the intention or contemplation of the parties outside what was manifested by the grant itself, *construed in the circumstances*".[51]

[48] Earlier in his reasons for judgment, Hodgson JA had indicated two matters which he would have included in the material circumstances: "the physical circumstances of the dominant and servient tenements and the use actually being made of them at the time of the grant." The High Court did not comment on that part of his Honour's judgment. It did however refer without disapproval to the acceptance in *Powell v Langdon*[52] of a statement made by Sir George Jessel MR in *Cannon v Villars*[53], which it paraphrased thus:

> "40 … This was that the content of the bare grant of a right of way per se was to be ascertained by looking to the circumstances surrounding the execution of the instrument, including the nature of the surface over which the grant applied."

The New South Wales Court of Appeal in *Sertari Pty Ltd v Nirimba Developments Pty Ltd*, took this passage as establishing an exception to the rule that extrinsic material was not relevant to the construction of registered instruments, the exception being the physical characteristics of the tenements. It did not suggest that the admissibility of that evidence was limited to the case of bare easements. Nothing in *Cannon v Villars* suggests that the Master of the Rolls intended to limit what he said to the case of bare grants, although obviously, extrinsic evidence is more likely to be helpful in such cases than in cases where the ambit of the rights

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48 Cf *Proprietors Strata Plan No 9,968 v Proprietors Strata Plan No 11,173* [1979] 2 NSWLR 605 at p 610-2.

49 [2007] HCA 45; (2007) 233 CLR 528 at p 539, emphasis added.

50 Paragraph [40].

51 [2006] NSWCA 337 at [69], emphasis added.

52 (1944) 45 SR (NSW) 136 at p 137.

53 (1878) 8 Ch D 415 at p 420.

granted is carefully delineated in the Deed of Grant. Where the matter in issue is dealt with expressly, as his Lordship put it, "there is nothing to argue".[54]

[49] Acceptance of the relevance of that circumstance is not inconsistent with what the High Court wrote about the position of third parties. Usually, the physical characteristics of the tenements may freely be observed by any third party interested in them. But depending on the nature of the characteristic in question or the possibility of change in the characteristic over the period since the easement was granted, cases may arise where even a physical characteristic may not be able to be taken into account consistently with the principles of the Torrens system. For similar reasons, Hodgson JA's reference to the use being made of the tenements at the time of the grant is problematic. In a dispute not long after the grant, that information may be readily available to third parties, but this may not be the position many years later. If the question of construction is to be approached from the point of view of a third party inspecting the register, it may be that the scope for consideration of extrinsic evidence is reduced over time. The consequences of such an approach would need to be considered carefully. I express no opinion on the matter.

[50] As noted above[55], Currumbin submitted that in construing the easement D the court could have regard to extrinsic material which might establish the intention of the grantor and the grantee at the time of the grant. Perhaps encouraged by some of what was said in *Neighbourhood Association DP No 285220 v Moffat*,[56] it expressed that submission without any limitation, on the basis that here the grant was a bare grant of easement. It relied on *Cannon v Villars*, pointing out that the High Court had not disapproved what was said there in relation to a bare grant. I reject that submission. Even if one assumes that the absence of any expression of disapproval amounts to tacit approval, the High Court did not suggest that evidence of the intentions and contemplations of the parties to a registered instrument was admissible by reason of *Cannon v Villars*.

[51] The High Court also referred without disapproval to *Overland v Lenehan*[57] where, it wrote, "Griffith CJ admitted extrinsic evidence to show a misdescription of the boundaries of the land comprised in a certificate of title". The court pointed out that that was a matter now dealt with explicitly in the *Real Property Act 1900* (NSW). The position may be different in the event of an omission or misdescription of an easement, as, at least in Queensland, those errors may amount to exceptions to indefeasibility of title.[58] It is unnecessary here to explore this aspect of the matter.

[52] Another external circumstance which gives rise to problems occurs when a registered instrument explicitly incorporates an unregistered instrument by reference. In such a case the hypothetical third party must be taken to have notice of the position. On the other hand he or she may be unable to obtain the referenced document. I express no view regarding the applicability of the decision of the

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[54] Ibid at p 421.

[55] Para [38].

[56] [2008] NSWSC 54 at [35]-[37].

[57] (1901) 11 QLJ 59 at p 60.

[58] *Real Property Act 1861,* s44; *Land Title Act 1994*, s185(1)(c).

Supreme Court of Western Australia in *Fermora Pty Ltd v Kelvedon Pty Ltd*[59] to the Queensland *Land Title Act*.

[53] The High Court did not in *Westfield* attempt to define the circumstances in which extrinsic evidence could be taken into account in construing a registered instrument. We must take it, I think, that an important consideration in determining whether information or a document can be so used is whether the information or document was and remains publicly available to third parties without unreasonable effort, expense or delay. That consideration is helpful in the present case.

Application of the cases to easements under the Torrens system in Queensland

[54] In 1992 the statutory provisions in Queensland relating to the creation of easements over Torrens system land were fairly rudimentary. Section 51 of the *Real Property Act 1861* provided:

> "**51. Easements and incorporeal right to be registered.**
>
> (1) Whenever any easement or any incorporeal right other than an annuity or rent charge affecting 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 of Titles shall record in the [registrar] *sic* particulars of the instrument creating that easement or incorporeal right in relation to such other land when such instrument is produced to him for registration."

Section 33 of the same Act had the effect of requiring particulars of an easement to be noted on the Certificate of Title of the land containing the servient tenement.

[55] Regulation 2 of the *Real Property Regulations 1986* required the use of the forms in the schedules to those regulations the purposes for which they were respectively applicable, and the first schedule contained form 10, headed "GRANT OF EASEMENT". Regulation 4 provided that where space for a particular purpose in the prescribed form was insufficient to contain all required information, that information should be set out in form 33 and a reference to that form should be inserted in the space provided in the original form.

[56] Form 10 has already been substantially described.[60] However it is necessary to say a little more about it, in particular, about cl 12 of the form, because as used in the Grant of Easement, some words were (permissibly) deleted from it. The full text of the clause in the form was:

> "THE GRANTOR FOR THE ABOVE CONSIDERATION HEREBY GRANTS TO THE GRANTEE THE EASEMENT HEREIN DESCRIBED AND THE GRANTOR AND THE GRANTEE HEREBY COVENANT WITH EACH OTHER IN THE TERMS OF THE SCHEDULE HERETO AND #MEMORANDUM NO . . . . FILED IN THE OFFICE OF THE REGISTRAR OF TITLES. "

A sidenote to the hash symbol instructed "Delete inapplicable words (if any)".

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[59] [2011] WASC 281 (Edelman J).

[60] Paragraphs [10] - [11].

[57] Queensland had no provision equivalent to Div 4 of Pt 6 or s 181A of the *Conveyancing Act 1919* (NSW). However use of the prescribed forms for creating an easement was mandatory. An executed form was an instrument within the meaning of the Act, so that upon registration of an executed Grant of Easement, the interest intended to be granted passed[61] and title to it became paramount.[62] Thereupon the registered proprietor of the servient tenements held that land subject to the easement. Otherwise his title remained paramount except as regards any omission or misdescription of any easement.[63] As soon as a memorial of the instrument was entered in the register book, it was deemed and taken to be embodied in the book as part and parcel thereof[64] and as such was available for inspection by any person.[65] Form 10 demonstrated an intention that all covenants appertaining to the easement should be ascertainable from the register.

[58] The *Land Title Act 1994* repealed the *Real Property Act 1861*. However it provided that each interest in freehold land held by a person immediately before its commencement, and recorded under the 1861 Act, was taken to be an interest held by the person in the freehold land register required to be kept under it.[66] Such an interest was (and is) held subject to registered interests but free from all unregistered interests[67], save for irrelevant exceptions.[68]

[59] What was said by the High Court of the Torrens system in New South Wales applies equally to the system in Queensland:

> "5 Together with the information appearing on the relevant folio, the registration of dealings manifests the scheme of the Torrens system to provide third parties with the information necessary to comprehend the extent or state of the registered title to the land in question."[69]

Materiality of the disputed evidence

[60] In my judgment the disputed evidence should be disregarded in construing the grant of easement. It comprises information derived from documents on a file of the Gold Coast City Council and another of a firm of town planners. The documents are not publicly available and nothing in the freehold land register hints at their content. A third party viewing the register might expect that documents of this sort would once have existed, but would not know whether they were now available or held in some archive or destroyed. Some of the information appears to be based on

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61 *Real Property Act 1861*, s 43.

62 *Ibid*, s 44.

63 *Ibid.*

64 *Ibid*, s 35.

65 *Ibid*, s 121.

66 Sections 201, 27.

67 Section 184.

68 Section 185.

69 *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2007] HCA 45; (2007) 233 CLR 528 at p 531.

inferences drawn by Currumbin's solicitor from the files. How the solicitor came by the documents is not disclosed in the evidence.

[61] It may be that the information, or at least some of it, is publicly available, but Currumbin made no attempt to demonstrate that this was so. At all material times there has existed statutory provision for any person to obtain a planning certificate from the Council.[70] The information in such a certificate would, I expect, be able to be used in the construction of a registered grant of easement if it threw light on the subject. We can only speculate about what such a certificate would have contained in the present case.

Construction of the grant of easement D

[62] In identifying what is meant by the purpose of "drainage and stormwater", it is appropriate to have regard to ordinary usage of the words and to the statutory context in which the easement was created.

Dictionaries and dicta

[63] The first and most relevant definition of "drainage" in the Oxford English Dictionary is "a channel by which liquid is drained or gradually carried off; *esp.* an artificial conduit or channel for carrying off water, sewage, etc". Macquarie Dictionary defines the same word as "a system of drains, artificial or natural" and defines "drain" as "that by which anything is drained, as a pipe or conduit". Neither dictionary contains any suggestion that the word is somehow inappropriate for use in relation to the discharge of sewage. Both are consistent with the view that sewerage is a subset of drainage.

[64] Counsel for Currumbin helpfully referred the court to dicta in *Pilbrow v Vestry of St Leonard, Shoreditch*. There, Lord Esher MR said of an underground pipe used for the purpose of collecting sewage from a set of apartments, "It is, in fact, according to the ordinary use of language, a drain made from these buildings to communicate with the public sewer."[71] Rigby LJ said:

> "But before proceeding to construe the section, I think we must consider what is the general meaning in law of the expressions used in it. I am not aware that, apart from statutory definitions, there is any specific distinction in law between a 'drain' and a 'sewer'. As a matter of conveyancing, I should say that the one expression would generally have the same meaning when used in a conveyance as the other."[72]

One might question whether Rigby LJ's meanings were meanings in law rather than in common usage, but that is hardly the point.

Statutory provisions relating to sewerage

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[70] *Local Government (Planning and Environment) Act 1990*, s 33; *Integrated Planning Act 1999*, s 5.7.8; *Sustainable Planning Act 2009,* s 737.

[71] [1895] 1 QB 433 at p 439.

[72] *Ibid* at pp 441-2.

[65] When the easement was granted, sewerage in areas outside Brisbane was regulated by the Standard Sewerage Bylaws enacted as a schedule to the *Sewerage and Water Supply Act 1949*. Implementation and enforcement of those bylaws at Currumbin was the responsibility of the Gold Coast City Council, which also administered the town plan. Under the bylaws the council was obliged as part of its sewerage to provide a sewer up to the boundary of any premises within its sewered area for the purpose of carrying off sewage from such premises.[73] If it so resolved the Council could also provide house drainage for the sewerage of such premises.[74] If it did not provide house drainage the owner of the premises was obliged to do so.[75] The occupier of any sewered premises was obliged to discharge all faecal matters, urine, household slops, and liquid waste from sinks, baths and similar fixtures into the sewers and a substantial penalty for breach of that obligation was prescribed.[76]

[66] For the purposes of the bylaws the following definitions applied:

> "'House drain' – Any pipe (including fittings) normally laid underground, situated within the curtilage of any premises and provided to convey to a sewer the discharge of soil and waste pipes from such premises: The terms includes disconnector gully traps and bends at the foot of stacks at or below ground: In relation to a septic tank installation, the terms also includes any pipe (including fittings) not being a waste pipe or soil pipe which is provided to convey sewage to or from a septic tank whether such pipe is situated within or outside the curtilage of the premises served by such installation;
>
> 'House drainage' – The work of installing, extending, altering, repairing, renewing or in any way interfering with a house drain: The term, where necessary, includes a house drain;
>
> 'Sewer' – Any conduit for the carrying off of sewage from any premises which is not a house drain, soil or waste pipe;
>
> 'Sewerage' – Any sewer, house drain, plumbing, manhole, vent, engine, pump, structure, machinery, outfall or other work required for receiving, storing, transportation or treating sewage: The term includes the work of installing, extending, altering, repairing, renewing, or in any way interfering with sewerage."

Those definitions and their usage suggest that sewerage (which is a system of pipes carrying sewage and associated pumps and works) is one form of drainage.

[67] Bylaw 34 was particularly relevant:

> " **34. Prohibited Discharges**
>
> A person shall not discharge or cause to be discharged into any house drain or sewer any of the following:-
>
> ...
>
> (c) Any roof, rain, storm, surface, flood, subsoil, or seepage waters."

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[73] Bylaw 3.

[74] Bylaw 4.

[75] Bylaw 5.

[76] Bylaw 33.

The law continues to require the physical separation of sewage and stormwater.[77] In other words the law recognises a clear distinction between sewerage and stormwater drains.

Conclusion

[68] Parkwood submitted that drainage should be understood to refer to stormwater drainage. It did so on the basis that the adjacent easement AA specifically referred to sewerage. The absence of that word in the Grant of Easement D was, it was submitted, significant. So was the absence of any special condition relating to entering Parkwood land to connect pipes or perform maintenance, something which would be expected were a sewerage system contemplated.

[69] One may ask rhetorically, why should drainage be limited to stormwater drainage? Both stormwater and sewage had to be removed from the subdivisions whose existence was apparent on the face of the register. "Drainage" was capable of comprehending both, at least by use of underground pipes. I doubt that one gains much enlightenment from an examination of the wording of easement AA. The probable reason why easement D was constituted by a bare grant has already been referred to.[78]

[70] If "drainage" refers to drains for both stormwater and sewage, why were the words "and stormwater" included in the purpose of the easement? I conclude that the purpose of those words was to extend the ambit of the easement to include the unchannelled flow of stormwater across the land. That adds utility to the easement. Plainly enough sewage would have to be carried by pipe, not by an open channel. An open stormwater drain in close proximity to sewerage seems unlikely. Given the configuration of the ground, an easement for the free and unobstructed flow of stormwater across the ground seems likely.

[71] In my judgment "drainage" in easement D refers to drainage of both stormwater and sewage.

Afterthought

[72] Finally, I would not accept Parkwood's premise that the easement confers no right or even duty on Currumbin in relation to the proper connection and maintenance of the drainage. It may well be possible to imply a term that Currumbin and its successors are obliged to pay a proportionate share of the cost of maintaining the drainage in good order and condition simply on the basis of documents available on the face of the register and by public search. Such an implication would not seem inconsistent with anything said in *Westfield*.

Order

[73] The consequence of the foregoing is that the assumption underlying the judgment at first instance has been falsified on appeal. Currumbin does have the right to pass sewage through easement D. Consequently there is utility in the declarations sought in respect of easement AA.

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77 *Plumbing and Drainage Act 2002*, s 128O.

78 Para [11].

[74] The question whether Currumbin is obliged to construct a new pipe in easement D rather than use the existing pipe was not argued. We should not foreclose the issue. I point out however that the existing pipe is part of the land which comprises the servient tenement.[79] No reason is immediately apparent why the existing pipe should not be used. It is to be hoped that the parties can resolve this question and also the issue of the cost of maintenance of the sewer main without further litigation.

[75] Having regard to the manner in which the case was conducted below, I would make no order as to the costs of the hearing at first instance.

[76] I propose the following orders:

1. Appeal allowed with costs to be assessed.
2. Set aside the orders of Ann Lyons J made on 7 February 2011.
3. In lieu thereof:
   (a) declare that on the proper construction of easement D, being registered easement number 601120704 (L40195B), "drainage" includes the drainage of sewage;
   (b) declare that on the proper construction of that easement and of easement AA, being registered easement number 601120695 (L256081C), the applicant is entitled to use the drains under the surface of the latter easement so that water and sewage entering them is permitted to pass through them and into easement D;
   (c) order that the respondent pay the applicant's costs of the application to be assessed, save for the costs of the hearing on 7 February 2011.

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[79] *North Shore Gas Co Ltd v Commissioner of Stamp Duties (NSW)* [1940] HCA 7; (1940) 63 CLR 52.