

# PROPERTY LAW REVIEW

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## ARTICLES

### **To the Register and beyond? Restrictive covenants after *Westfield Management Ltd v Perpetual Trustee Company Ltd* – Corey Byrne**

In *Westfield Management Ltd v Perpetual Trustee Company Ltd* (2007) 233 CLR 528, the High Court held that the orthodox approach to contractual interpretation, which permits the admission of extrinsic evidence of the circumstances surrounding the original transaction, did not apply to construction of the provisions of a registered easement. State courts have extended the *Westfield* doctrine to restrictive covenants, which in most jurisdictions are merely “recorded” without indefeasibility, and depend upon equitable rules that are premised on considering the intentions of the original parties and extrinsic evidence. This article argues that this extension of the *Westfield* doctrine will mark a significant and unwelcome change to the law of restrictive covenants. .... 157

### **Joint tenancy, fraud, agency and volunteers under the Torrens system: *Cassegrain v Gerard Cassegrain & Co Pty Ltd* – Rosalind Acland**

This article examines the recent decision of the High Court in *Cassegrain v Gerard Cassegrain & Co Pty Ltd*. It analyses the majority and dissenting judgments in light of the prior reasons at first instance and on appeal. The article focuses in particular on the courts’ findings with regard to the nature of joint tenancy, both at common law and under the Torrens system, fraud and agency; and the status of volunteers in relation to the indefeasibility provisions of the Torrens system. It suggests a requirement for further judicial refinement of the nature of a joint tenancy under the Torrens statutes, and for legislative review and possible harmonisation of the effect of indefeasibility provisions on volunteers. .... 186

### **New real rights to land in South Africa: A twofold test – PJ Badenhorst**

A fundamental distinction between real and personal rights exists in South African law. South Africa does not have a closed system of real rights. New categories of real rights to land can be created and registered in the deeds office; personal rights, however, are not registrable in the deeds office. To determine whether a right is real and registrable, the South African courts have, over the years, developed and used a so-called twofold test. One part of the test focuses on the intention of the parties to create a real right, while the subtraction from the dominium test determines whether a right of another person amounts to a subtraction from ownership of land, and is therefore a real right. It is argued that the doctrine of rights can also be used to draw the distinction or make such determination. The importance of identifying a real right, and the consequences and features of such a right, are illustrated with reference to the Supreme Court of Appeal’s recent decision in *Willow Waters Homeowners Association (Pty) Ltd v Koka* [2014] ZASCA 220. The question is raised as to whether these tests could also be utilised in Australian law to distinguish between contractual and property rights. .... 197

NEW ZEALAND – Editor: Thomas Gibbons

**Developments in residential tenancies** – Thomas Gibbons

This article examines several recent judicial decisions relating to residential tenancies in New Zealand. In these, the courts have considered the relationship between specific provisions of the *Residential Tenancies Act 1986* (NZ) and other statutes, the scope of the Tenancy Tribunal’s jurisdiction, and the purpose of the *Residential Tenancies Act*. Of some significance is the approach to interpretation taken in *Ziki Investments (Properties) Ltd v McDonald*, which views the Act as being directed to achieving a fair balance of the interests of landlords and tenants, rather than as legislation for the benefit of tenants, and which casts an interesting shadow over other *Residential Tenancies Act* cases. .... 207

SINGAPORE – Editor: Kelvin Low

**Recent developments: Sale of land, trusts and proprietary estoppel, conversion** – Kelvin Low

This update on Singapore addresses four main developments. First, a far-reaching decision on the contracting processes for the sale of land. Second, a straightforward clarification on corporate beneficiaries of express trusts. Third, yet another case related to the subjects of resulting trust, constructive trust and proprietary estoppel. Finally, a case concerning the assessment of damages in the tort of conversion. .... 212

NEW SOUTH WALES – Editor: Jennifer Stuckey-Clarke

**Forgery, mortgages and indefeasibility: Perpetual Trustees Victoria Ltd v Cox [2014] NSWCA 328** – Jennifer Stuckey-Clarke

Since the Global Financial Crisis, lenders have sought to extend the protection of indefeasibility to personal covenants to repay in the loan documentation of mortgages. The issue will usually arise in the context of forgery. A recent decision of the New South Wales Court of Appeal, *Perpetual Trustees Victoria Ltd v Cox* [2014] NSWCA 328, highlights the difficulties such arguments will continue to face. .... 219

VICTORIA – Editor: Pamela O’Connor

**Indefeasibility and the forged “all-moneys” mortgage** – Brett Harding

The recent case of *Perpetual Trustees Victoria Limited v Xiao* [2015] VSC 21 is the latest in a series of fraudulent mortgage cases in Australia. The case is important as it examines two contentious questions: first, does the personal covenant to repay the loan advance attract the benefit of indefeasibility? Second, can the mortgagee enforce an “all-moneys” mortgage against the defrauded registered proprietor where the amount of the loan advance is stated in a collateral document which is void due to fraud? This article reviews the decision, and examines the effect it may have on the development of Victorian mortgage law. .... 223

QUEENSLAND – *Editor: Sharon Christensen*

**Property law reforms in Queensland: Is the regulatory burden on land transactions reduced?** – *Sharon Christensen*

The reduction of unnecessary regulation was a clear policy objective of the Queensland government during 2014. In the area of property sales significant reforms were introduced from 1 December 2014. This article examines the key aspects of these reforms and whether there has been a reduction in red tape for sellers and buyers of land. .... 228

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**VOLUME 4 – 2014-2015**

Table of Authors .....	237
Table of Cases .....	239
Table of Statutes .....	251
Index .....	257

