PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Pike & Anor v Tighe & Ors* [2016] QPEC 30
PARTIES:	**JOSHUA JAMES PIKE and NATALIE PATRICIA PIKE** **(Applicants)** **-and-** **KYM LOUISE TIGHE and MICHAEL JAMES TIGHE** **(First Respondents)** **-and-** **TOWNSVILLE CITY COUNCIL** **(Second Respondent)**
FILE NO:	Townsville 46/2015
DIVISION:	Environment and Planning
PROCEEDING:	Originating Application
ORIGINATING COURT:	Planning & Environment Court at Townsville
DELIVERED ON:	9 March, 2016
DELIVERED AT:	Townsville
HEARING DATE:	20 November 2015
JUDGE:	Durward SC DCJ
ORDERS:	**1 Application granted** **2 The first respondents have committed a development offence by not complying with the condition of the development approval with respect to the easement on the subdivided lot 2.** **3 The parties are to provide a draft order giving effect to the judgment.** **4 I will hear the parties further on costs. The parties are to file and serve written submissions on costs within 21 days.**
CATCHWORDS:	ENVIRONMENT & PLANNING – RECONFIGURATION OF A LOT – SUBDIVISION – DEVELOPMENT APPROVAL CONDITION - on-sale by developer of two lots to bona fide purchasers for valuable consideration – where one of two lots

landlocked - where easement made for access to that benefited lot – where development approval condition required an easement for access, on-site manoeuvring and connection of services and utilities to be provided – where owner of burdened lot purchased without knowledge of the condition – where Local Authority approved the development with the easement for access only – where owner of benefited lot unable to construct a residence.

ENVIRONMENT & PLANNING – DEVELOPMENT APPROVAL CONDITION – PARTICULAR BENEFIT INTENDED IN EASEMENT – whether a development offence has been committed – whether condition that an easement granting access and other benefits in respect of a subdivision lot be provided is enforceable.

ENVIRONMENT & PLANNING – DEVELOPMENT APPROVAL CONDITION – FUTURE BUYERS - where subdivision into two lots completed and approved by Local Authority – where both lots on-sold by developer - whether a development approval condition runs with the land so as to bind future buyers in context of reconfiguration of a lot – whether principle distinguishable from the context of a minor change of use condition.

LAND LAW – INDEFEASIBILITY OF TITLE - SUBDIVISION – EASEMENT – where registered titles issued for each lot with easement for access only endorsed - where two lots in subdivision on-sold by developer – where 'purpose' stated in easement document is different and narrower than condition in development approval – whether 'purpose' stated in registered easement document amounts to an "omission from the document" or is a "misdescription in the document" in terms of s185 (3) of Land Titles Act 1994.

PROPERTY – SALE & PURCHASE - OBLIGATION OF A BUYER TO INQUIRE - whether a buyer has an obligation to go behind the registered title to ascertain or confirm rights, interest and title – principles relating to sale and purchase of land and prudent enquiry.

LAND LAW – EASEMENTS – NATURE OF - where developer/seller was both grantor and grantee of easement proposed upon registration of survey plan – whether easement 'private' or 'public' – distinction between the two descriptions – whether distinction relevant in circumstances or generally.

LEGISLATION: Integrated Planning Act 1997 sections 3.5.15, 3.5.28, 3.7.2, 4.3.22; Sustainable Planning Act 2009 sections 245, 334, 456, 580, 601, 604, 801, 802; Land Title Act 1994 sections 37, 46, 81A, 82, 83, 85B, 86 and 185; *The Real Property Act 1861* section 44.

CASES: *Cross v Manning Shire Council* (1980) 49 LGRA 1; *Southorn v Jovanovic* (1985) 56 LGRA 67; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604; *Parramore v Duggan* 91995) 183 CLR 633; *Leader v*

Beames [1998] QCA 368; *Overland v Lenehan* (1901) 11 QLJ 59; *Castle Constructions Pty Limited v Sahab Holdings Pty Ltd* [2013] HCA 11, (2013) 87 ALJR 528; *Rofail v Wells* [2011] QPEC 107; *Rofail v Wells (No 2)* [2012] QPELR 151; *Hillpalm Pty Ltd v Heavens Door Pty Ltd* [2004] 220 CLR 472; *Mofo Group Pty Ltd v Brisbane City Council* [2011] QPELR 32; *Sunshine Coast Regional Council v Sugarbag Road Pty Ltd* [2012] QPELR 139; *Peet Flagstone Pty Ltd v Logan City Council* [2015] QPELR 68; *Wirkus v Wilson Lawyers* [2012] QSC 150; *KCY Investments (No 2) Pty Ltd v Redland City Council* [2012] QPEC 17; *Ainsworth v Yarrowee Pty Ltd* (unreported, 40461/2009, Sheahan J L&ECNSW 09 July 2009); *Gold Coast City Council v Crest Hill Pastoral Company Pty Ltd* [2012] QPELR 495; *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335; 63 LGRA 361.

COUNSEL: J G Lyons of Counsel for the applicants
J D Houston of Counsel for the first respondents
Ms C A Stockall, Solicitor, for the second respondent

SOLICITORS: Wilson Ryan Grose Lawyers for the applicants
Connolly Suthers Lawyers for the first respondents
Legal Services, Townsville City Council for the second respondent

[1] The Originating Application seeks a Declaration and an Enforcement Order in relation to a development approval for reconfiguration of a lot issued by the second respondent in 2009, so as to compel the first respondents to comply with the development approval condition which required the granting of an easement giving particular benefits.

The issues

[2] I am asked to consider a number of issues, including indefeasibility of title, the effect of registration of an easement, whether a development approval condition for a reconfiguration of a lot does or does not run with the land so as to bind a subsequent buyer (the first respondents) of a lot in the completed subdivision and whether a development offence has or has not been committed by the first respondents for non-compliance with the development approval condition.

The land

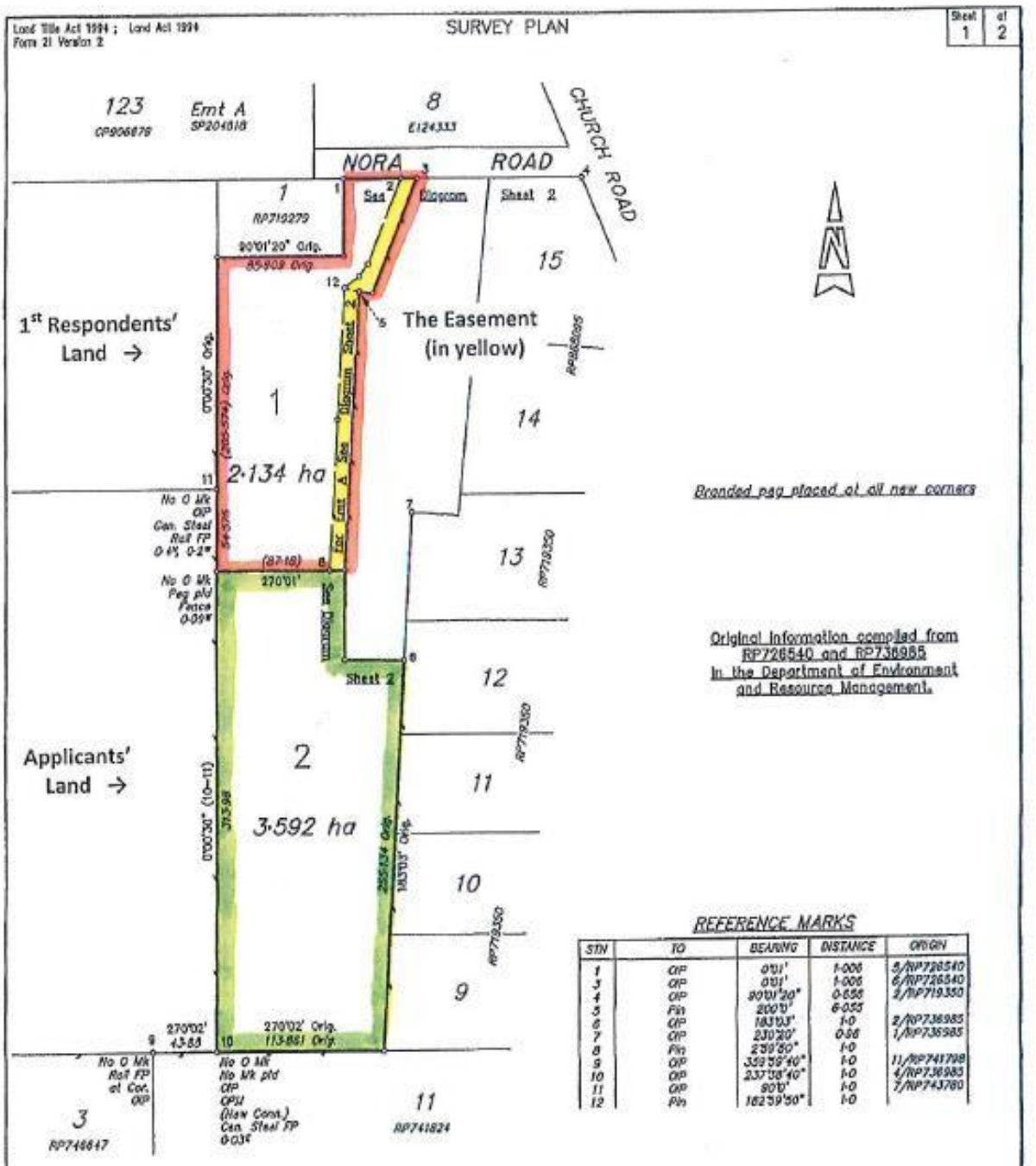
[3] The subdivision was made in respect of land situated at Nora Road, Black River, Townsville and when completed comprised Lots 1 and 2 (and Easement A in Lot 1), on SP 232504 ("the survey plan"), the land previously being part of cancelled Lot 1 on RP 726540 and Lot 2 on RP 736985, Parish of Halifax, County of Elphinstone ("the land"). A reproduction of the survey plan follows:

SP232504 V1 REGISTERED Recorded Date 08/12/2010 11:28 Page 1 of 3 Not To Scale

Land Title Act 1994 ; Land Act 1994
Form 21 Version 2

SURVEY PLAN

Sheet 1 of 2



REFERENCE MARKS

STN	TO	BEARING	DISTANCE	ORIGIN
1	OIP	0°01'	1·006	5/RP726540
3	OIP	0°01'	1·006	6/RP726540
4	OIP	90°01'20"	0·655	2/RP719350
5	Pin	200°0'	6·055	
6	OIP	183°03'	1·0	2/RP736985
7	OIP	230°20'	0·66	1/RP736985
8	Pin	230°20"	1·0	
9	OIP	359°59'40"	1·0	11/RP741708
10	OIP	237°58'40"	1·0	4/RP736985
11	OIP	90°0'	1·0	7/RP743780
12	Pin	182°59'50"	1·0	

PERMANENT MARKS

STN	TO	BEARING	DISTANCE	NUMBER	ORIGIN	TYPE
2	PM	201°40"	1·0	142785		Star Picket and Conc. Collar
10	OPU	265°54'30"	155·395	121586	6/SP190019	Star Picket and Conc. Collar New Conn.

I, Rowlands Surveys Pty Ltd (ACN 010 025 260), hereby certify that the land comprised in this plan was surveyed by the corporation, by John James Rowlands (Cadastral Surveyor) for whom work the corporation accepts responsibility and that the plan is accurate, that the said survey was performed in accordance with the *Survey and Mapping Infrastructure Act 2003* and *Surveyors Act 2003* and associated Regulations and Standards and that the said survey was completed on 23/10/2009.

ROWLANDS SURVEYS PTY LTD ACN 010 025 260 COMMON SEAL

John James Rowlands (Director)

Laurence John Weber (Director)

Date: 28.10.09

0m 25m 125m 250m 375m

PLAN OF

Lots 1, 2 and Easement A in Lot 1

Cancelling Lot 1 on RP726540 and Lot 2 on RP736985

PARISH: HALIFAX COUNTY: Elphinstone

Portion: of RP726540 FA's NO

Scale: 1 : 2500

Format: STANDARD

SP232504

Plan Status:

3

[4] The reproduction of the survey plan shows Nora Road and the land, Lot 1 to the north with Easement A on its eastern boundary and Lot 2 to the south.

[5] In the coloured reproduction of the survey plan, Lot 1 is bordered in red, Lot 2 is bordered in green and Easement A is in yellow.

The development approval

[6] On 29 may 2001 the second respondent issued a Decision Notice and Development Permit ("the development approval") for the land (reconfiguring a lot for proposed Lots 1 and 2 and Easement A in Lot 1). The development approval was subject to a condition that provided as follows:

> *"2. Access and Utilities Easement*
>
> *An easement(s) to allow pedestrian and vehicle access, on-site manoeuvring and connection of services and utilities for benefited Lot (2) overburdened Lot (1) must be provided. The easement(s) must be registered in accordance with the* Land Title Act 1994*, in conjunction with the Survey Plan."*

The registration of the survey plan

[7] The easement document, the condition of the second respondent's approval, was executed on 04 November 2009 by Glenn Joseph Carey and Cathleen Mary Carey ("Carey"). The survey plan, including the easement executed on 04 November 2009, was not lodged for registration within six months of the date of the second respondent's approval of it. The reasons are not relevant in this judgment.

[8] A further easement document in almost the same terms as the former was executed by Carey on 23 November 2010. It did not include clauses relating to Local Authority Approval and Grant of Further Easement (clauses 11 and 12 respectively). The parties in this hearing did not consider that to be a matter of any significance.

[9] More relevantly, however, it also described the purpose of the grant of the easement as "access" and did not describe any other purposes. Hence the "benefit/burden" created by the easement was different from that described in the development approval condition.

[10] The second respondent approved the survey plan, which included the grant of an easement from Carey as grantors, to themselves as grantees, on 23 November 2010. The easement did not contain the "utilities" (on-site manoeuvring and connection of services and utilities) condition.

[11] The survey plan and the easement dated 23 November 2010 were registered on 08 December 2010. Titles for Lots 1 and 2 were created on 9 December 2010. The Title for Lot 1 is endorsed to describe the easement burdening that lot; and the Title for Lot 2 is endorsed to describe the easement benefiting it.

[12] On 18 January 2011, the first respondents were registered as the owners of Lot 1. On 11 January 2012, the applicants were registered as the owners of Lot 2.

The practical effect of the registration of the survey plan

[13] The first respondents maintain that the title, including the easement providing access, as registered describes their legal right, interest and title in respect of Lot 1. They have been and still are unwilling to provide the easement for anything more than its stated purpose of "access". The applicants maintain that the condition in the development approval and the description of the purpose of the easement dated 08 December, 2010, runs with the land and is binding on the first respondents, despite the description of "access" (and nothing more) in the registered easement.

[14] The applicants say that as a consequence of the position adopted by the first respondents, they are unable to construct and provide utility services to, a dwelling house on their land, which had been and continues to be the purpose for which they purchased Lot 2.

The hearing

[15] The hearing proceeded upon agreed facts, oral evidence, affidavit evidence and the second respondent's development application file ("the Council file) relating to the development approval process. It is upon that basis that counsel have made their written and oral submissions.

[16] A consideration of the history of the development approval by reference to the Council file – comprising mainly documents created at the material time - and the evidence of Mr Hay, a solicitor and legal officer employed by the second respondent, the agreed facts and the other affidavit evidence give some indication as to what historically may have transpired with respect to the purpose stated in the easement.

The second respondent's file and the evidence of Mr Hay.

[17] In his affidavit Mr Hay set out his knowledge of the chronology of events so far as the second respondent was concerned, acquired from the Council file and from copies of the easements. He also deposed that *"the Council was not a party to the easement required by the Decision Notice as it was for the purpose of servicing private property"*. In oral testimony he said that statement referred to the easement document not being examined to the same level that an easement involving the second respondent might be examined, its purpose *"not protecting infrastructure and matters that Council would have a direct pecuniary interest in"*.

[18] He said that second respondent had not previously obtained a copy of the easement that was registered. He obtained a copy to verify some of the material that had been exchanged between the parties as to what was actually in the easement document. He said the two easement documents were expressed in the same terms save for the omission of clauses 11 and 12 in the registered easement.

[19] Mr Hay was referred to exhibits 3 and 4 (email correspondence from the Council file) and was asked whom the writers were and the positions they were employed in by the second respondent. Those documents otherwise speak for themselves. Mr Hay had been aware of exhibit 3, but not exhibit 4, at the time he had considered the Council file in preparing his affidavit.

[20] Exhibit 3 is an email communication between the second respondents Lance Olsen (whom Mr Hay believed was an employee of Townsville Water at the relevant time) to Pedro Mendioela, an employee of Townsville Water and Sue-Ellen Bannister, a field officer employed by the second respondent. The email, so far as may be relevant, referred to there being no condition in the development application for the provision of a water supply.

[21] Exhibit 4 is an email reply from Ms Bannister to Mr Olsen which refers to a meeting between her and an employee of the second respondent (one 'Denise', in the planning and development section) and states that the subject development permit was *"for the access easement only"* and that the applicant did *"not have to have a connection at this point in time"*. It refers to Carey having been telephoned, informed of that matter and his satisfaction with that decision. It also referred to the survey plan therefore being able to be released. Mr Hay expressed the view that there had been no need under the planning scheme for a water connection to be provided at that particular time.

[22] In paragraph 13 of his affidavit Mr Hay deposed that *"Council had no knowledge of the failure of the applicant and/or property owner to fully comply with the conditions of the Decision Notice until receipt of the Appellants' originating application dated 13 February 2015"*. In his oral testimony he said that he was referring to Carey and a failure on the part of them.

[23] To the extent that the content of the Council file and Mr Hay's observations about it is a relevant consideration that seems to be a fair summary of Mr Hay's evidence. Mr Lyons did not cross-examine Mr Hay.

[24] The issue of construction of the development approval condition and the determination of the respective rights of the parties are, however, the relevant matters for my consideration.

Objections to evidence

[25] Mr Houston raised a number of objections to the affidavit of Mr Pike (document 14) filed on 25 September 2015. In the affidavit Mr Pike makes statements in paragraphs 2, 3, 5 and 6 about his understanding of matters of legal construction.

[26] He submitted that Mr Pike's understanding about such matters was of no probative value and the opinions should be ignored. Mr Lyons did not take issue with this but indicated that the affidavit pre-dated the agreed facts statement relied upon by the parties in the hearing and was deposed in order to provide contextual information. I reserved my consideration of the objections to this judgment.

[27] I agree with Mr Houston. The objections are upheld. Nevertheless, the matters referred to by Mr Pike are contained in the agreed facts and it is to that document that I will be making reference.

Onus of proof

[28] The evidentiary onus is satisfied by the agreement on the facts. The issue is the legal consequences flowing from those factual circumstances. Whilst it is for the applicants to discharge the legal onus of proof, it is the submission of Mr Houston that the development approval condition does not run with the land because this is a case involving a reconfiguration of a lot and a subdivision that has been completed, the two lots created having been on-sold and a the prima facie satisfaction by the second respondent that the development approval condition had been satisfied, that is the principal issue. Hence I will deal with the submissions of counsel in reverse order.

Submissions

Ms Stockall

[29] The second respondent did not oppose the orders sought by the applicant and adopted the submissions made by Mr Lyons in respect of the construction of the legal issue. Ms Stockall submitted that the second respondent had required in its development approval condition an easement to allow pedestrian and vehicle access, manoeuvring and utilities connections. She submitted there was no inconsistency between the condition required by the second respondent and the requirements of the Department of Main Roads. She submitted that the easement registered was different to that that which the second respondent had required in the first instance. It was difficult to say what the second respondent's officers had in their minds at the time that the matters were considered in 2009. She submitted, however, the second respondent had not been complicit in any change to the condition it required and that had it seen or realised the effect of the easement that was entered into, it may have formed a different view with respect to the document that was registered.

[30] In so far as the existence of two survey plans was concerned, counsel and Ms Stockall conferred during an adjournment and it was agreed that the development application that was lodged with the second respondent included the plan that was subsequently a part of the concurrence agency response from Department of Main Roads: that is, the rough sketch or plan that showed the three metre width easement that formed part of the development application. It was also agreed that the second respondent sent a copy of the development application to the Department of Main Roads as a referral agency and that is how it would have received that document. The Department of Main Roads provided its response, which was attached to the Decision Notice, but it had not actually considered anything else, other than the original survey plan rough sketch which was attached to its response, at any material time.

[31] With respect to Clauses 11 and 12 that were not included in the easement document made on 23 November 2010 (upon which the easement was registered), they reflected section 83(2) (b) of the *Land Title Act* 1994, which provides that if an easement is created which gives access to a lot from a

constructed road and there is a reconfiguration of the lot, the survey plan must be approved by the referral agency. The two clause are, in effect and in the circumstances of this case, superfluous.

Mr Houston

[32] Mr Houston submitted that the court should find that the first respondents have not committed or are committing a development offence and that the order sought by the applicants should not be made.

[33] He submitted that the first respondents ought to have been aware of the extent of the benefit in the easement which was registered on the title when they purchased Lot 2. There was no evidence that the applicants purchased Lot 2 in reliance along the development approval condition. The second respondent allowed the titles to be registered. Lot 1 was subsequently sold to the first respondents.

[34] He submitted that the reconfiguration of a lot application has steps that are not required in a minor change of use application, the conditions of which run with the land. Mr Houston accepted the case authorities relied on by the applicant, but distinguished them from the circumstances in this case where there was a reconfiguration of a lot application on the basis that this was a matter of a different character from those matters in which conditions customarily were said to run with the land.

[35] He submitted that the first respondents had purchased the proposed Lot 1 from Carey on 23 November 2010 and that the contract of sale referred to the development approval for reconfiguration and the survey plan having been sealed by the second respondent for the purpose of registration.

[36] He referred to the width of the easement, in the context of the dimensions of the easement not being shown in the plan attached to the development approval. He said the first respondent, Mr Tighe had deposed in his affidavit to having been shown a sketch of the easement with a Department of Main Roads' endorsement, where the dimension was described as "proposed easement, 3 metres wide, 790 square metres".

[37] Mr Houston said that there was inconsistency between the two documents: one plan showed a width of three metres and the other a width of ten metres. The first Survey Plan and first easement document were not registered within six months of the date of the development approval. The second respondent's approval of the survey plan was granted on the basis of the second easement document. The second respondent's officers had identified the condition on the reconfiguration of a lot as requiring an access easement only, with no water services (that is,*"utilities"*) being connected. The survey plan was discussed between them and Carey before it was approved.

[38] He submitted that the easement document was a 'private' easement document, because Carey was both grantor and grantee. He said nothing turned on the omitted two clauses and that the second respondent had satisfied itself on the face of the documents the Council file, that the condition of the development

approval was complied with. He said the second respondent had thoroughly canvassed the matter prior to it giving its approval.

[39] He submitted that the first respondents were entitled to rely on the titles as registered. They were not required to make further enquiries. He said the first respondents were taken by surprise by the condition the applicants now sought to enforce. He surmised that the court may need to consider what a buyer of a property needed to do or to take into account in the sale and purchase process. That impliedly would require a consideration of well-established principles in land law.

[40] He referred to a number of case authorities in the context that whilst they may not be directly applicable to the point for consideration in this case, they nevertheless dealt with principles of indefeasibility of title and the potential implications of the effect of a condition on a development approval of a subdivision of land and the on-sale of allotments to future purchasers. The principles in the case authorities highlighted the different characteristics of a reconfiguration of a lot application, in the context of a condition running with the land.

[41] Mr Houston referred to subsection (2) of section 245 of the Sustainable Planning Act 2009 (”SPA”) and submitted that it simply made it clear that subsection (1) applied even if later development, including reconfiguration of a lot, was approved for the land as configured.

[42] I will consider the case authorities referred to by Mr Houston.

Mr Lyons

[43] Mr Lyons submitted that the easement that has been registered does not comply with the easement as contemplated by the condition of the development approval. He submitted that none of the case authorities supported the proposition of the first respondents that a condition of approval of the reconfiguration of a lot does not run with the land so as to bind subsequent buyers of a lot in the completed subdivision.

[44] He submitted that the case authorities supported the proposition that indefeasibility of title was not a bar to the court enforcing a condition on the basis that it ran with the land. In this case the condition had not been complied with. The easement granted did not contain rights to the extent that the development approval contemplated. Whilst the second respondent had approved the subdivision, it was not relevant that the easement as contemplated had not been granted prior to registration. The first respondents were nevertheless obliged to comply with the condition and the obligation was ongoing.

[45] He submitted that the easement document was a ‘public’ document, not a ‘private’ document.

[46] He submitted that the court was required to construe the development approval according to its terms and that what the second respondent or anyone else may have thought the development approval meant was irrelevant.

[47] He referred to *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335; 63 LGRA 361 and guidelines about enforcement of development approval conditions. He submitted that in this case there was no special disadvantage for the first respondents, compliance could be achieved at no great cost or inconvenience, the applicants had a valuable right and the non-compliance had a tangible and real impact on them.

[48] Mr Lyons referred to section 245(1) and (2) of SPA which he said removed any doubt that the principle of a condition running with the land applied to a reconfiguration of a lot approval. He said there was no basis to distinguish the operative effect of the section, based on the fact that the development approval here was a reconfiguration of a lot. He submitted that there was no inconsistency as between the second respondent's requirements and those of the concurrence agency. The Department of Main Roads response provided a "rougher depiction" of the requirements. Both requirements worked harmoniously together. The fact that there was a wider easement required by the second respondent was entirely consistent with the proposition that the easement was required for more than just access. Section 3.5.15(1) (b) of the *Integrated Planning Act 1997* ("IPA") [expressed in similar terms in SPA] required the development approval to be provided to the concurrence agency. It required written notice of the decision in an approved form.

[49] He submitted that the public nature of the development approvals required a construction according to their terms and that it was not relevant to consider or give weight to a Council Officer's construction of the document. Further, in so far as the provision of water was concerned, the condition did not refer to "water", it referred to "connection of services and utilities".

[50] He submitted that if the construction sought by Mr Houston was followed it would mean that innocent third parties could never have relief in circumstances where a reconfiguration of a lot approval was given by a Council, even where the Council mistakenly or otherwise allowed a survey plan to be sealed without particular conditions being complied with: that was simply not the consequence of conditions running with the land. He submitted that conditions do not terminate once the development has been completed, they continue. The existing development approval continued to apply, whether in circumstances of a material change of use or something else, even though there was a subsequent subdivision of land over which the original approval had been granted.

[51] He submitted that the condition here made it clear that certain things had to be done or be provided. The applicants simply required the first respondents to comply with the development approval condition and nothing more.

[52] I will consider the case authorities referred to by Mr Lyons.

Discussion

A. What is the obligation of a purchaser of land with respect to identifying any interests in the land?

[53] Generally speaking, beyond customary "requisitions on title" on a purchase of land, the obligation, if any, of a buyer to make enquiries will depend upon the

particular circumstances of each case: see the discussion in *Voumard: The Sale of Land (6th edition, Thomson Reuters* 2009) by Wikramanayake SC [at paragraphs 10470, 10500 and 10510].

[54] The first respondent Mr Tighe has deposed the following:

- He purchased lot 1 of the land on 23 November 2011 from Carey, pursuant to a contract that, inter alia, contained a special condition burdening lot 1 with the easement (which describes its "purpose" as being for "access").

- The real estate agent representing Carey had, prior to the execution of the contract, shown him a "sketch plan" and he was told that the easement depicted in it would be *"3 metres wide/790m^2"* and that lot 2 *"could not be built upon and used for residential purposes as it had no rights to utility services and would only be used for grazing livestock."*

- His residence on lot 1 was 20 m from the easement and that flooding in heavy rain across the lot would be increased by a "building-up" of the easement for a "roadway".

[55] The applicant Mr Pike has deposed that unless the easement *"provides for the connection of services and utilities"* for the benefit of lot 2, the applicants *"are not in a position to construct and service a dwelling house"*.

[56] If one accepts the fact of the conversation with the real estate agent that Mr Tighe has deposed to, then the real estate agent was either mistaken (believing it was an access only easement) or misleading (believing the land was for grazing livestock only) or both. The area of lot 2 is 3.592h (or 8.875 ac) an area so small as to arguably be barely viable for grazing of livestock.

[57] Perhaps Mr Tighe should have been put on notice by that conversation and made for further enquiry. On other hand, Mr Pike (not being a party to that conversation) perhaps should have made his own enquiry as to the suitability of the easement, as registered for his purposes and proposed use of lot 2.

[58] It seems that neither of the parties enquired about the easement, by reference to the Titles and the requirement in the Development Approval has only come to light as a result of the dispute that arose between them.

[59] That neither of them did so is in this case not a critical issue, for the reasons that follow in Discussion at points C, D and E. Accordingly I do not need to further consider the issue of a purchaser's obligations to make enquiry beyond the detail recorded in the registered title or a registered instrument.

B. What is the distinction between 'private' and 'public' easements? Is any distinction relevant to the issues in this case?

[60] I have referred to the submission made about "*private"* and *"public"* easement documents and the oral testimony of Mr Hay. Counsel had opposing views of whether the easement was open to be described as one (Mr Houston – *"private"*) or the other (Mr Lyons – *"public"*). Mr Hay distinguished the easement in this case from one in which the second respondent might have *"a direct pecuniary* [infrastructure protection] *interest in"*.

[61] Historically, the distinction has been said to relate to how the easement vests: that is, in the owner of the land benefited by its creation (*"private"* easement) or in the local authority. For example, a local authority which has the benefit of an easement for say, infrastructure (*"public"* easement): *Cross v Manning Shire Council* (1980) 49 LGRA 1. The distinction has also been described as the creation of an express grant of easement (*"private"*) on the one hand; and a statutory easement (*"public"* or *"service"*) - save for public access or infrastructure purposes - on the other without affecting ownership of the servient land: *Southorn v Jovanovic* (1985) 56 LGRA 67. See also the definition of *"public utility easement"* and "*public utility provider"* in section 81A of the *LTAct*.

[62] The subject easement is prima facie a private easement. Carey was both grantor and grantee. However, because the easement of necessity implicated a public road (access from an egress onto Nora Road; and the Department of Main Roads as a concurrence agency) there is also an element of public easement because, in an holistic sense, there was an infrastructure consideration involved.

[63] Nevertheless, that is the only extent to which the distinction may be relevant to the issues here. The critical issue is the fact of registration of the easement on the Titles of each lot.

C. What distinguishes an 'Application for Reconfiguration of a Lot' from an 'Application for Minor Change of Use' in the context of interests running with the land?

[64] Mr Houston makes the distinction, not simply on the basis that Carey was both grantor and grantee of the easement, but that by reason of the registration of the easement on the titles, the first respondent's interest created thereby is indefeasible because the reconfiguration of a lot involves registration of the titles thus created for the two lots and the easement is registered on both certificates of title; and a Minor Change of Use, on the other hand, does not involve registration or invoke the principle of indefeasibility. His argument is that whilst conditions in a Development Approval run with the land in respect to an application such as a Minor Change of Use they do not in respect of an application for reconfiguration of a lot, because registration protects the titles made in a subdivision, on the basis of indefeasibility.

[65] The provenance of this submission depends on the continuation of a condition in a Development Approval as one that runs with the land, regardless of registration and indefeasibility. An analysis of the cases about conditions, in this case the easement, running with the land; and the provisions of the Land Title Act 1974 (*Land Title Act"*) with respect to easements, together provide the answer in this case.

[66] In *Rofail & Ors v Wells* [2011] QPEC 107, the applicants sought declarations that certain work carried out by the respondents was unlawful, being in breach of conditions of a reconfiguration. The respondents sought a summary dismissal of the application. In the course of the judgment, Judge Robin QC wrote [at p 4-5]:

> *"My general impression is that the law in respect of the extent to which development approvals and conditions in them by reason of s 245 of the Sustainable Planning Act 2009 (formerly s3.1.28 of the integrated Planning Act 1997) bind subsequent owners, particularly those who may not have notice of certain matters, is relatively undeveloped and can't be said to be certain. For example Hillpalm Pty Ltd v Heaven's Door Pty Ltd (2004) 220 CLR 472."*

[67] His Honour adjourned the trial and it was subsequently heard by Judge Dorney QC, reported at [2011] QPEC 125.

[68] The subject works involved a swimming pool and a roofwater drain along a boundary. The Operational Works Development Approval did not contain a condition that created any obligation about a drainage easement.

[69] His Honour was required to consider the effect of s 245 of the *Sustainable Planning Act* 2009:

> *"[14] There is, unfortunately for present purposes, no express guidance by any relevant authority of any kind which provides for an easy resolution of the question of the continuing effect of a development approval after all operational works have been completed and all conditions fulfilled."*
>
> *"[17] As raised by the Respondent's counsel, the effect of a provision such as s.245 of the SPA needs to be considered in light of the doctrine of indefeasibility of title granted by s.184 of the Land Title Act 1994, particularly where, as here, there is no form of any easement of any kind."*
>
> *"[24] It is necessary in this case to reach a final conclusion about whether s.245 does create rights in rem. This is because, whether it does or not, it is clear from Hillpalm that planning legislation will not be readily interpreted as interfering with private property rights of remote parties. This notion must have the effect that, where there is no continuing condition, or term, as to "use" – or works – with respect to a development approval, the effect of any legislative provision dealing with such development approval after completion of its task is exhausted."*

[70] Mr Houston relied on this decision and that of *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* [2004] 220 CLR 472. In *Hillpalm* the High Court applied *Breskvar v Wall* (1971) 126 CLR 376 in holding that registration of an estate in fee simple provided a title as described in the Certificate of title, free from any encumbrance or interest that might otherwise be recorded in a registered plan of subdivision, <u>subject to specified exceptions</u> *(my underlining*).

[71] The latter qualification is an important consideration. The legislation under review by the High Court was New South Wales legislation. In Queensland there are statutory exceptions. Indefeasibility of title in Queensland is not

absolute. The *Land Title Act* makes that clear in my view. *Hillpalm* is a High Court decision and I do not find it comfortable to distinguish it, but I do not find *Hillpalm* to be of binding effect because the judgment concerns specific NSW legislation and not specific Queensland legislation, nor general principle.

[72] Whilst the learned author in *"Butt: Indefeasibility and Council Consent Conditions"* (2003) 79 ALJ 143 reviewed *Hillpalm* and opined *"that as a practical matter, purchasers need not fear unfulfilled consent conditions relating to subdivision"* [at 145], his views specifically relate to NSW [at 144].

[73] The learned author, Edgeworth, in "Planning Law v Property Law: Overriding statutes and the Torrens system after *Hillpalm v Heaven's Door Pty Ltd* [2004] 220 CLR 472" (2008) 25 EPLJ 82, discusses the issue in the context of NSW legislation and refers to a narrower approach to legislation that seeks to override the indefeasibility of title and the need for 'unambiguous' drafting of such legislation [at p83], but advances a view that favours "the primacy of planning and environmental legislation over inconsistent Torrens provisions".

[74] I do not consider that these articles advance the submissions made on behalf of the first respondents. *Hillpalm* focused on NSW legislation. It and its application in *Rofail*, because of that focus, is not helpful. On the other hand, s 242 SPA is clear and unambiguous in its terms and has primacy over the principle of indefeasibility, quite apart from the application of exceptions to indefeasibility in the *Land Title Act*.

[75] The respondent also relied on another decision of Judge Dorney QC in *Sunshine Coast Regional Council v Sugarbag Road Pty Ltd & Anor* [2011] QPEC 124. His Honour referred to *Hillpalm* and the tension between the Torrens system and legislation that sought to override or modify those principles in respect of rights 'in rem'. Once again, that case referred to NSW legislation and a provision such as s 245 of SPA was not under consideration. Indeed, s 245 fell for consideration, but the case His Honour heard was about a 'contractor' or 'occupier' of land, not an owner and the respondent sought to distinguish its position from that of an owner, the implication being that of an 'owner', as distinct from an owner, subsequent in time, is a 'successor in title' and banned by s 245 insofar as Approval Conditions are concerned. His Honour expressed the issue thus:

> *"[25] For present purposes, it is unnecessary to determine whether the combination of the statutory rights, and obligations, arising from s.245(1) of the SPA as a whole creates rights in rem. But what the above analysis does is to indicate the nature of what s.245(b) of the SPA covers when it states that the development approval "binds" not only the owner and the owner's successors in title but also "any occupier of the land"."*

[76] This authority does not therefore assist the first respondent.

[77] In *Wirkus & Anor v Wilson Lawyers* [2012] QSC 150, the plaintiffs sued their solicitors for damages relating to the provision of legal services about access to land, in the context of a condition in an earlier Development Approval requiring a grant of easement rights in respect of the land. The defendants sought

summary dismissal of the claim. The case involved the obligation of the owners of a body corporate to comply with the condition. The defendants advanced the argument in their defence that there was no obligation to comply and their client (the plaintiffs) had no legal entitlement and no basis to claim damages against the defendants. Hence the case was primarily focused on the damages claim. His Honour Peter Lyons J found that submissions of the defendant based on indefeasibility of title did not warrant summary dismissal of the plaintiff's claim.

[78] Mr Houston referred to *Ainsworth v Yarrowee Pty Ltd*, a judgment of the Land and Environment Court of NSW (unreported, Sheahan J, 09 July 2010, No 40461 of 2009), where the applicant sought enforcement with a development condition despite the local authority having agreed that there had been compliance. Once again, *Hillpalm* was referred to in the judgment and the relevant legislative provision were those applicable in NSW. However, His Honour did write [at 37] that *"any knowledge or action on the part of the Council suggesting full compliance with the conditions of consent does not preclude this court finding the respondent to be somehow in at least partial breach of [the] condition"*. I do not consider this authority assists the first respondent's contention.

[79] In *KCY Investments (No2) Pty Ltd v Redland City Council & Anor* [2012] QPEC 17, I found that conditions imposed much earlier in time in regard to the preservation and retention of vegetation on land bound the appellant as a successor in title to the land, but left open to the applicant the right to seek to take legal proceedings to free the land of the conditions of the earlier approval.

[80] That s 245 of SPA provided that Development Approval Conditions run with the land, as a general principle at least, was not in issue of course. The section speaks for itself. There are numerous Queensland authorities that refer to that legislative consequence of the imposition of Development Conditions.

[81] In my view, in *Wirkus* (referred to supra) there is clear guidance to the appropriate approach to be taken in the present case in respect of s 245 of SPA. There is also appropriate guidance in *Peet Flagstone Pty Ltd & Anor v Logan City Council & Ors* [2014] QCA 210. Gotterson JA gave leave to appeal because the issue advanced by the appellants *"if accepted, would have significant implications for development approvals beyond this case. That circumstance and the need for clarity of outcome with respect to them, warrants a grant of leave to appeal"* [41].

[82] However, the appeal was dismissed, the appellants had sought a declaration in the Planning and Environment Court that they were not required to comply with the conditions of a Development Approval relating to selective vegetation removal. There had been clearing of vegetation on the land but the respondent alleged contravention of the conditions had occurred. The appellants had submitted that, the vegetation having been cleared, the Development approval and its conditions ceased to have effect, upon the commencement of SPA. The conditions ran with the land, continued in effect and were also to be enforced in the context of a contravention or breach of the conditions.

[83] In *Montrose Creek ty Ltd v BCC; Manningtree (Qld) Pty Ltd v BCC* [2012] QPEC 65, I considered whether a development offence had been committed by the applicants as a consequence of their failure to pay the relevant infrastructure contributions as set out in the development approval. I held that a development approval, including any conditions, attached to the land; and that the obligation to pay the infrastructure charges attaches to the land and binds the owner and any successor in title.

[84] In my view, the authorities do not support Mr Houston's contention that s 245 of SPA is distinguishable as between reconfigurations of a lot and minor change applications, for example. Section 245 applies generally and development approval conditions run with the land and bind an owner and any successor in title.

D. Does the easement (including the condition in the Development Approval about the purpose of the easement) run with the land?

[85] The two registered titles each record the interest (historically and currently) as:

- Lot 1 (Tighe) *"easement no 713613532 08/12/2010 at 11:31 burdening the land to lot 2 on SP 232504 over easement A on SP 232504"*; and

- Lot 2 (Pike) *"easement no 71361532 08/12/2010 at 11:31 benefiting the land to lot 2 on SP 232504 over easement A on SP 232504"*.

[86] The registered easement document describes the purpose of the easement as: *"access"* in terms of the Schedule to the document, namely as *"an easement or right of way"* over the servient tenement as a *"vehicle access way"*, exercisable *"with or without vehicles"* and permitting *"passing and re-passing over the servient tenement by vehicles, machinery, plant or equipment"*, but for no other use than for [the purpose of access].

[87] Mr Houston submitted, as I have referred to above, that he had no issue with the case authorities about the applicability of section 245 *SPA* in respect of minor change of use applications, but drew a distinction between that type of application and reconfiguration of a lot applications.

[88] Section 245 of *SPA* provides as follows:

> *"**245 Development approval attaches to land***
>
> *(1) A development approval –*
>
> *(a) attaches to the land the subject of the application to which the approval relates; and*
>
> *(b) binds the owner, the owner's successors in title and any occupier of the land.*
>
> *(2) To remove any doubt, it is declared that subsection (1) applies even if later development, including reconfiguring a lot, is approved for the land or the land as reconfigured."*

[89] In general terms, the section reflects the common law. Whilst a mere personal right binds only the parties to its creation, an easement *"not only binds the parties to its creation but also their successors in title: 'it runs with the land'"*: *Butt, Land Law* [6th edition 2010 Law Book Co paragraph 1610].

[90] In my view *Hill Palm* must be read in the context of specific New South Wales legislation and the decision is not of assistance in Queensland. *Mofo* and *KCY* are both distinguishable: *KCY* and did not involve an easement and in *Mofo* the conditions were all fulfilled and completed but a change was then sought – it was not an ongoing condition. In S*ugarbag* the issue was whether a contractor should be bound and *Crest Hill Pastoral* was an interim injunction case.

E. Indefeasibility: Does this principle override s245 of SPA? Can the principle co-exist with the statutory provision?

[91] Indefeasibility, of course, is *"'the foundation of the Torrens System': it protects any estate or interest in land"*: *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, albeit that protection has been modified by statute in respect of some forms of interests in land.

[92] The Land Title Act has one of its particular objects in section 3 (a) *"to define the rights of persons with an interest in registered freehold land."* Section 181 provides that *"an instrument does not transfer or create an interest in a lot at law until it is registered."*

[93] An indefeasible title for a lot is created on the recording of the particulars of the lot in the freehold register: section 37 *Land Title Act*. Upon the registration of an easement on the title to the burdened or servient land, the easement has been said to be indefeasible: *Parramore v Duggan* (1995) 183 CLR 633. Hence a Certificate of Title of a lot is conclusive evidence of the indefeasible title for the lot when it is issued, except (so far as is relevant) *"as far as the particulars specified in the certificate in fact differ from the indefeasible title"*: section 46(b) *Land Title Act*.

[94] The *Land Title Act* in Part 6 Division 4 sets out the process that is relevant to indefeasibility. So far as is relevant an easement over a lot may only be created by registering an easement [section 82(1)]; an easement may only be registered if it signed by the registered owners of the burdened and benefited lots [section 83(1)(b) (i) and (ii)].

[95] If under *SPA* the creation of the easement giving access to a lot from a constructed road is the reconfiguration of a lot, the plan of survey must be approved by the relevant local government [section 83(2)(b)]; on registration of the easement document, the easement is created and then vests in the person entitled to the benefit of it [section 85B]; and the easement may be registered even if the registered owner of the burdened lot is the registered owner of the benefited lot: [section 86(a)].

[96] However, registration of an interest in a lot (an easement is an interest) and the principle of indefeasibility is not absolute, as the following sections of the *Land Title Act* demonstrate:

> *"**184 Quality of registered interests***
>
> *(1) A registered proprietor in a lot holds the interest subject to registered interests affecting the lot but free from all other interests.*
>
> *....*
>
> *(3) However, subsections (1) [and (2)] do not apply –*
>
> *(a) to an interest mentioned in section 185;"*
>
> *and*
>
> ***185 Exceptions to s 184***
>
> *(1) A registered proprietor of a lot does not obtain the benefit of section 184 for the following interests in relation to the lot –*
>
> *... ...*
>
> *(c) the interest of a person entitled to the benefit of an easement if its particulars have been <u>omitted from</u>, or <u>misdescribed in</u>, the freehold land register ..."* [my underlining].

[97] Section 185 (3) provides that *"for subsection (1) (c), For subsection (1)(c), the particulars of an easement (***easement particulars***) are taken to be omitted from the freehold land register only if ..."* the easement existed when the lot burdened by it was first registered but the easement particulars were never recorded in the register against the lot; or the easement particulars were previously recorded but the current particulars in the freehold land register do not include the easement particulars; or the instrument providing for the easement was lodged for registration but because of registry error, was never registered.

[98] Does the description of the purpose of the easement here, that is *"access"*, instead of *"pedestrian and vehicle access, on-site manoeuvring and connection of services and utilities"*, amount to something *"omitted from"* or *"misdescribed in"* the register and hence the title? Or is it neither of those things?

[99] Those terms are relevantly defined in the *Macquarie Dictionary* [2nd Revised Edition pp 1190 and 1096, respectively]: something *"omitted from"* may be said to have been *"left out"*; something *"misdescribed in"* may be said to have been *"described incorrectly"*.

[100] The term *"omitted from"* (or *"left out"*) simply means *"not there"* and pre-supposed that the instrument existed but was not recorded on the register: *Castle Constructions Pty Limited v Sahab Holdings Pty Ltd* [2013] HCA 11, (2013) 87 ALJR 528. As was said at [18] in the joint reasons, "*if one looks at*

the register and the easement is not there but should be, it follows that it has been omitted. The reason for its omission or why it is not there is irrelevant."

[101] What if there is an omission or misdescription of a detail in an instrument registered on a certificate of title?

[102] In *Leader v Beames* [1998] QCA 368, the Court of Appeal considered this issue in the context of the Registrar of Titles refusal to register a plan of survey because it appeared on its face to include a portion of Crown land or 'unallocated Crown land'. The Court upheld the trial judge's decision that the Registrar's refusal, based on her view that the description of the land was incorrect, was wrong. The Court – without making a finding whether there was an error in the description of the land – held that if the Crown in subsequent proceedings litigated the issue and *"as a result of those proceedings an error in the description of lot 29 is disclosed then that error can be corrected and the extent of the land to which the respondent has indefeasibility of tile established."*

[103] The Court of Appeal applied *Overland v Lenehan* (1901) 11 QLJ 59, a case involving a misdescription of the measurements of land in Certificates of Title. Griffith CJ [at pp59-60] had written:

> *"By s. 44 of The Real Property Act of 1861 the estate of a registered proprietor is declared to be paramount, except in certain cases, one of which is* "the wrong description of the land or it's boundaries". *It is clear, therefore, that if it is made out that the description of the land or of the boundaries of the land as set out in a certificate of title is erroneous, the erroneous description is not conclusive."*

[104] His Honour concluded that an error in the description of the land may be disregarded and that *"an error in description of boundaries cannot be relied upon to displace the title, otherwise good, of a person in possession of land erroneously included in the title."*

[105] Section 44 of *The Real property Act 1861* is now in section 185 (1) (g) of the *Land Title Act* and the principle in *Overland v Lenehan* is still applicable.

[106] This issue about error or misdescription was not canvassed in that context in submissions but it is clearly of relevance: if it is an *"omission from"* the title, then the exception – applying the terms of section 185(3) – would not in the circumstances of this case apply; if it is a *"misdescription in"* the title, then section 185 (1) (c) would apply with the result that the registration of the easement on both Titles would not be subject to indefeasibility. If neither term is applicable, then the exceptions are irrelevant and the principle of indefeasibility would apply to the easement.

[107] Whilst the easement per se as registered on the titles is correct insofar as its real property description is concerned, the purpose as described in the registered instrument is incorrect and is inconsistent with the Development Approval. There is no distinction that could rationally be drawn between a misdescription

in the boundaries or area on a site plan or other document and a misdecription in the purpose of an easement.

[108] There is clearly no "omission from" the register in this case. The easement is registered. However, there is arguably a "misdescription in" the easement as registered insofar as its purpose is concerned, if the purpose as described in the Development Approval runs with the land.

[109] In other words, the purpose of the easement in my view is capable of being corrected in the instrument that has been registered. The first respondent's indefeasibility of title is otherwise protected.

Resolution of the issues

[110] In paragraph [2] I referred to a number of issues that I was asked to consider in this judgment. I have resolved those issues to this effect: An interest in a lot, in this case an easement, is created upon registration of the instrument (the easement document). That has occurred here. The indefeasibility of that interest in this case depends on whether there is a misdescription in the purpose for which the easement was created. I have found that there was, that the condition in the development approval binds a subsequent buyer of a lot in the completed subdivision and that the misdescription is open to be corrected so as to have it conform to the condition in the development approval, a condition that I have found runs with the land in respect of a reconfiguration of a lot and consistently with my construction of relevant legislation including the land Title Act and section 242 of SPA. The remaining issue is dealt with in the following paragraph.

Has a development offence been committed by the first respondents?

[111] I find that the condition in the development approval runs with the land, it subsists and has not been complied with and accordingly the first respondents have committed a development offence.

Costs

[112] The parties agreed that the issue of costs should be the subject of further submissions and determination after the delivery of this judgment.

Conclusion

[113] The subject easement (including the condition in the development approval about the purpose of the easement) runs with the land.

[114] There is no inconsistency between section 245 of SPA and the principle of indefeasibility of title in the Torrens system, certainly insofar as Queensland is concerned in the context of the provisions of SPA and the Land Title Act to which I have referred, are concerned.

[115] I have found that a development offence has been committed by the first respondents. The applicants have succeeded in their application, which I grant. It is now a matter for the applicant to provide draft orders and for the parties to consider submissions on costs.

Orders

1 Application granted

2 The first respondents have committed a development offence by not complying with the condition of the development approval with respect to the easement on the subdivided lot 2.

3 The parties are to provide a draft order giving effect to the judgment.

4 I will hear the parties further on costs. The parties are to file and serve written submissions on costs within 21 days.