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Local Government Update

Easement in gross to local government found to be enforceable: *Saldanha* v *City of Belmont*

The Western Australian Court of Appeal has held that an easement in gross granted in 1993 under the now-repealed section 33A of the *Public Works Act 1902* (WA), was fully enforceable. The owners of the land burdened by the easement **(burdened owners)** had mounted a range of arguments seeking to challenge the enforceability of the easement, and all of these arguments were unsuccessful. The Court of Appeal's decision was ***Saldanha v City of Belmont*** [2018] WASCA 7, on appeal from a decision of Allanson J in the Supreme Court, ***City of Belmont v Saldanha*** [2016] WASC 37.

Factual background

The burdened owners purchased a parcel of residential land in 2014, encumbered with a pre-existing easement in gross to the City of Belmont **(City)**. The easement was a registered encumbrance on the title to the land **(burdened land).**

The easement was for a right of carriageway 6 metres wide running along most of the north-eastern boundary of the burdened land. The burdened land contained a triplex, constructed in 1992-1993, but on one green title. A driveway was located along a strip which roughly corresponded with the easement.

An adjacent site abutting the easement, was also a triplex site, constructed in 1996 **(adjacent triplex)**. The two rear lots of that triplex site had no constructed driveway within their own site to the public road, but depended rather, on use of the driveway located within the easement on the adjacent burdened land.

The easement in gross was granted to the City under section 33A of the subsequently-repealed *Public Works Act 1902.* The deed of easement contained a clause permitting access by the City 'and its authorized officers, employees, agents and other persons from time to time authorised' by the City.

Shortly after the burdened owners had purchased the burdened land, they approached the City requesting the surrender of the easement. The City refused to surrender the easement. A dispute also arose as to whether the burdened owners were entitled to erect a fence along the whole of the north-eastern boundary, which would have had the effect of preventing access to the rear units of the adjacent triplex which had historically depended on the use of the easement. The City took the position that it had both impliedly and expressly authorised the adjacent triplex occupiers to use the easement: impliedly by granting the development approval for the adjacent triplex with no self-contained driveway; and expressly by more recent letters.

In light of the burdened owners' stated intention to erect a fence, the City commenced legal action seeking injunctive and declaratory relief.

Decision at first instance: easement enforceable

The principal issues at trial were:

- Whether the easement, on its proper interpretation, was for a right of way through to the adjacent property, or only for access to parts of the burdened land; and

- If the easement was for access to the adjacent property, then whether it infringed an implied requirement of section 33A of the *Public Works Act* that the easement must be granted for a public purpose.

The trial Judge held that the proper interpretation of the easement was to permit access along the driveway, and from there onto the adjacent property. In light of that finding, it was necessary to determine whether the easement was granted for an improper purpose.

The burdened owners argued that a section 33A easement in gross needed to be for a public purpose, and the easement in question here was for an improper, private purpose of benefitting an adjacent property. The trial Judge, Allanson J, determined that section 33A of the *Public Works Act* did not import any requirement, express or implied, that the easement needed to be for a public purpose. His Honour held that section 33A merely altered the common law position that an easement does not require a dominant tenement, if the easement is granted to certain State or local government entities.[1] Justice Allanson noted that section 33A 'says nothing about the taking or acquiring of [an] interest, the legality of which must be determined otherwise': [76]. It should be noted that even though section 33A of the *Public Works Act* has been repealed, an equivalent provision survives in section 195 of the *Land Administration Act 1997* (WA). The Judge went on to note certain statutory powers which the City had to acquire land or interests in land under planning legislation and a local planning scheme. Allanson J found that the easement qualified as an agreement 'in implementing the [local planning scheme]' and 'in respect of … matters pertaining to the Scheme'. In that regard, there were planning policies and an Outline Development Plan which encouraged 'establishing the method of access to land which can be developed to avoid repetitious driveways and crossovers. This may be achieved by joint use of access ways on adjoining lots rather than separate access ways side by side'.

Appeal decision

The burdened owners appealed against this decision to the Court of Appeal division of the Supreme Court of Western Australia.

On appeal, the burdened owners sought to rely more heavily on a condition of the development approval for the triplex on the burdened land. That development approval was granted in 1992, and it was granted to a predecessor-in-title. The development approval contained a condition requiring the granting of an easement in gross 'to facilitate the orderly movement of vehicular traffic associated with the subject land'. The burdened owners' argument on appeal was two-fold: *either* the condition's reference to 'the subject land' was a reference only to the burdened land, in which case there was an impermissible divergence between the condition and the easement; *or* if 'the subject land' referred to the adjacent property as well, then the condition infringed the ***Newbury***[2] test for validity of planning conditions, and if so the condition was invalid, and the easement which was granted in apparent pursuance of the condition, should also be regarded as unenforceable.

The Court of Appeal (Mitchell and Beech JJA and Pritchard J) held that neither of these arguments based on the development approval condition had been argued at trial, and these grounds were dismissed. However, a number of reasons were also given as to why they would not have succeeded anyway. Among those reasons were:

- It did *not* follow that if the condition was voidable, that the easement, which was a legally-distinct transaction, would also fall: [128]-[129];
- The burdened owners were not the original grantors of the easement: [134]-[136].

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1. There is a requirement at common law that every easement must have a 'dominant tenement', that is, the benefit that it confers must attach to a piece of adjacent or nearby land also owned by the grantee of the easement. The City of Belmont owned no such adjacent or nearby land, and in that sense the City's easement was 'in gross'.
2. ***Newbury District Council v Secretary of State for the Environment*** [1981] AC 578. The elements of validity for such a condition are:
   (1) that it serves a proper planning purpose;
   (2) that it has a reasonable nexus to the approved development; and
   (3) that it is not so unreasonable that no reasonable planning authority would approve it.

The City further argued that the burdened owners' arguments should not be accepted by reason of discretionary factors such as the fact that a 1992 planning condition and a 1993 easement were being challenged more than two decades after the event; the prejudice to the adjacent triplex occupiers; and the acceptance by the burdened owners of the easement as a pre-existing encumbrance at the time of registration of the transfer to them of the burdened land. By reason of the other findings mentioned, however, the Court was not required to deal with those arguments.

The Court agreed with the trial Judge that section 33A merely modified the common law by removing the requirement of a dominant tenement as a necessary element of an easement, where the easement is granted in favour of the Crown or a local authority: [155]. Accordingly, there was no implied element of a public purpose to be derived from section 33A itself.

…the Court determined that, even if there had been some underlying irregularity associated with the easement, once the City became registered on the title to the burdened land as the holder of an easement in gross, the City acquired an indefeasible title to the easement.

One aspect which loomed large in the Court of Appeal's decision, were the indefeasibility provisions of Western Australian Torrens system legislation, the *Transfer of Land Act 1893*. Essentially, the Court determined that, even if there had been some underlying irregularity associated with the easement, once the City became registered on the title to the burdened land as the holder of an easement in gross, the City acquired an indefeasible title to the easement, subject only to exceptions identified in the *Transfer of Land Act*[3] , none of which was held to be applicable in the circumstances.[4]

Implications of Saldanha v City of Belmont

Section 33A of the *Public Works Act*, and its successor, section 195 of the *Land Administration Act*, do not in themselves import a requirement that an easement in gross to the Crown or to a local government must be for a public purpose. If there is to be any challenge to the legal enforceability of an easement in gross, the challenge needs to be based on some lack or excess of power found elsewhere than in sections 33A or 195. Even if an argument could be raised on some other ground in relation to the validity of an easement in gross, the Torrens title registration of such an easement is likely to be a significant barrier to any challenge to the enforceability of the easement.

Saldanha v City of Belmont also establishes that if an agreement is entered into as a requirement of a condition of a statutory permit (such as a development approval), then any invalidity of the condition does not necessarily render the agreement unenforceable, as the agreement is a separate legal transaction. Accordingly, the decision is also significant as regards the intersection between administrative law and contract law.

For further information please contact Peter Wittkuhn on 9383 3133 or by email to pwittkuhn@mcleods.com.au. The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.

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3 [82].

4 [93], [113]-114].

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