SYDNEY JACOBS LL.M (Cam)

Seminar for

Television Education Network
7th Annual NSW Property Law Conference
Friday, 15 February 2013, 1.05pm - 4.25pm
Swissotel, Sydney

Topic 3: Professional Skills: Preparing & Drafting Applications for Easements Under *Conveyancing Act 1919*, s 88K

- Court Ordered Easements - Section 88K - Requirements - Onus of proof
- Preparing the Evidence
    - Expert evidence - Reasonably necessary & public interest - architects - surveyors - engineers - town planners - Compensation - valuers
    - Lay Affidavits - public interest - compensation – reasonable attempts to obtain
- Drafting the Application - Summons - Easement sought - Sketches
- Registration - Land Titles Office Practice
- Form of Order - drafting issues
- Recent cases - Carriageways - *Rainbowforce v Skyton; Samy Saad v City of Canterbury* - Drainage - *Stepanoski v Chen - Kocagil v Chen* - Access - To Road - *Tan Lane v Moorebank Recyclers* - To Stairs - *Lonergan v Lewis*

1. The yardstick in section 88K(1) of the *Conveyancing Act* gives the Court the power to *"make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement"*.

2. In terms of s88K(2)(a)-(c), the Court must be satisfied that the use of the land having the benefit of the easement will not be inconsistent with the public purpose; the owner of the servient tenement can be *"adequately compensated for any loss or other disadvantage that will arise from the imposition of the easement; and in addition: "all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful"*.

3. The reasonableness of those attempts is to be assessed objectively in all the circumstances. It includes the circumstances up to, and including, the date of the Court making the order (ie events after Summons are relevant and admissible on this aspect): *Coles Myer NSW Ltd v Dymocks Book Arcade Ltd* (Supreme Court of New South Wales, Simos J, 19 March 1996, unreported); and *Goodwin v Yee Holdings Pty Ltd* (1997) BPR 15,795; *Stepanoski* v *Chen.*

4. An order must specify the matters required by subsection (3). Subsection (4) contains provisions which must be observed on the making of the Court's order and subsection (5) makes special provisions for costs (plaintiff usually to pay: *Khattar v Wiese* [2005] NSWSC 1014, paras [76] ff, though not necessarily on an indemnity basis unless there has been unreasonable conduct).

5. It is for the plaintiff/applicant to propose the nature and terms of the easement (including any options ranked in some logical order, preferably in different colours or hatchings to clearly show the options) and this is best done by:

   (a) an engineer's or architect's sketch provided to the relevant neighbours (and which in due course can be attached to the summons);

   (b) terms propounded;

   (c) an appropriate offer for compensation to traverse *each of* blot on title, disturbance and loss of amenity.

6. The letter should, in my view, be on an open basis and not “without prejudice” - one important matter for the Plaintiff to prove is that reasonable efforts have been made to obtain an easement; and the initial letters are crucial in this regard.

All reasonable attempts

7. Section 88K(2)(c) requires the court to be satisfied that *"all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful"*. The easement referred to is that which the applicant asks the court to impose.

8. In *Rainbowforce*, the principles were stated as follows:

> “131 In order for an applicant for an order to make all reasonable attempts to obtain an easement:
>
> (a) the applicant for the order must make an initial attempt to obtain the easement by negotiation with the person affected and some monetary offer should be made: *Hanny v Lewis*at 16,210;
>
> (b) the applicant for the order should sufficiently inform the person affected of what is being sought and provide for the person affected an opportunity to consider his or her position and requirements in relation thereto: *Coles Myer NSW Ltd v Dymocks Book Arcade Ltd* (1996) 7 BPR 14,638 at 14,654;
>
> (c) the applicant for the order is not required to continue to negotiate with a person affected by making more and more concessions until consensus is reached to the satisfaction of the person affected: *Coles Myer NSW Ltd v Dymocks Book Arcade Ltd* at 14,654; and
>
> (d) the whole of the circumstances are to be considered from an objective point of view; once it appears from an objective point of view that it is extremely unlikely that further negotiations will produce a consensus within the reasonably foreseeable future, it may be concluded that all reasonable attempts have been made to obtain the easement: *Coles Myer NSW Ltd v*

Dymocks Book Arcade at 14,653-14,654 and see also *Antipas v Kutcher* at [14]."

(cited w approval in *Samy Saad v City of Canterbury* [2012] NSWSC 389 para [45]).

9. Each case is strongly influenced by its own facts.

Primary purpose is public interest in effective land use

10. *"The terms and subject matter of section 88K show that its primary purpose relates to the public interest in effective land use. The purpose of section 88K is illustrated by the nature of an easement as a right annexed to land irrespective of who may from time to time own it, a right which touches and concerns that land, and to which another piece of land is servient, again irrespective of who from time to time may own it. The advantages for the proposed dominant land, and the disadvantages for the proposed servient land are the most prominent considerations. As shown in the words of section 88K, that the proposed easement is reasonably necessary for the effective of use or development of the dominant land is not enough to produce a positive exercise of the discretion in section 88K(1); There is discretion, and the effect on the servient land is also relevant and important"*: Per Bryson J in *Stepanoski*, para [14]; cited with approval in *Samy Saad v City of Canterbury* [2012] NSWSC 389 at para [25].

11. As is pointed out in the *Rainbowforce* case at paragraph [70], most of the cases in which an easement has been sought have involved the carrying out of a development on land and the subsequent use of the development.

Integers of "reasonably necessary"

12. Though not all points are relevant to all cases, as with respect, very useful "check list" as the criterion of "reasonable necessity" under section 88(k)(1) is set out by his Honour Chief Justice Preston at paragraphs [67] ff of *Rainbowforce Pty Ltd v Skyton Holdings Pty Ltd* [2010] 171 LGERA 286 at [67]-[83] NSWLEC 2:

(1) The power to impose an easement is made conditional upon satisfaction of the requirement in s88K(1). Subsection (1) has been described as the "governing subsection", although the criteria in subsection (2) must also be met if an order is to be made.

(2) The Court is required to stipulate in the order the nature and terms of the easement: s88K(3).

(3) The inquiry directed by s88K(1) is whether the easement is reasonably necessary for the effective "use" or "development" of the benefited land.

(4) The easement is to be reasonably necessary for the "effective" use or development of that land. "Effective" bears its ordinary dictionary meaning of "serving to effect the purpose; producing the intended or expected result".

(5) The easement is to be reasonably necessary for the effective use or development of the land itself, not merely the current proprietor's enjoyment of that land.

(6) The requirement that the easement be "reasonably necessary" does not mean that there must be an absolute necessity for the easement. Reasonable necessity should be assessed having regard to the burden which the easement would impose. Generally, the greater the burden, the stronger the case needed to justify a finding of reasonable necessity.

(7) The precise consequence of applying the test of reasonable necessity to the effective use or development of the benefited land is not settled on the authorities. On one view, the court will take into account whether, and to what extent, use or development with the easement is preferable to use or development without the easement.

(8) Reasonable necessity does not demand there be no alternative land over which an easement could be equally efficaciously imposed. Consequently, the Court may impose an easement even where an alternate route exists.

(9) Reasonable necessity is to be determined in light of the circumstances at the time of the hearing of the easement application.

(10) The requirement of reasonable necessity can be satisfied notwithstanding that some future action may be required, in addition to obtaining the easement, for

the effective use or development of land, such as obtaining some statutory consent.

13. These requirements are now regarded as a very useful “check list” by the Supreme and L & E Courts, and have been applied as such in recent cases, such as *Clarebridge Holdings Pty Ltd v W Barry Holdings Pty Ltd* [2011] NSWLEC 56 (1 April 2011) and *Tony Stepanoski v Chen* [2011] NSWSC 1573, where Bryson J said at para [16] characterised the Chief Judges list as a meticulous restatement; and also *Wren Investments* Pty Ltd *v Willoughby City Council* [2011] NSWLEC 1167.

14. However, one must assess the “whole picture”; it is not a correct approach to score the applicant's proposal under each separate head; the total effect of all the factors must be weighed: *ING Bank (Aust) Ltd v O'Shea* [2010] NSWCA 71; 14 BPR 27,317 at 27,336 [155]; *Tanlane Pty Ltd v Moorebank Recyclers Pty Ltd* (No 2) [2011] NSWSC 1286 per Young JA (headnote).

15. The requirement for “effective” development, is met if the development of land is for some planning purpose such as residential, commercial or industrial and cannot be achieved without the creation and use of an easement for, say, drainage: *Rainbowforce* paragraph [72], citing *King v Carr-Gregg* [2002] NSWSC 379 at [47] and *Khattar v Wiese* at [30].

16. See eg *Stepanoski*; *Clarebridge* at para [15], citing *Khattar v Wiese* [2005] NSWSC 1014; 12 BPR 23,235 at [60] for the proposition that although the requirement of reasonable necessity does not demand that there be no alternative land over which the easement could be equally efficaciously routed, alternative routes may be relevant to the ultimate exercise of the discretion.

17. As pointed out in the sixth proposition in *Rainbowforce* at paragraph [74] the requirement that the easement be “reasonably necessary” does not mean that there must be an absolute necessity and *“This reduction in the quality of necessity to what is reasonable means that an easement may be able to be imposed although another means of right of way may exist….or possibly even when the land could be effectively used or developed without the easement…”*.

18. A NOD/DA is very significant; together with any other relevant communications with Council. If a Council has granted a development consent for a particular development , but subject to an easement for drainage or access etc, then this usually in one breath

bespeaks both "reasonable necessity" and also satisfaction of the public interest requirement :…….(*Stepanoski)*

19. Cases such as *Stepanoski* involve competing alternatives, with the defendant advancing the argument that there is a preferable alternative. Naturally, these are issues to be explored at the conclave of experts; and the issue of what questions the experts should answer looms large in the proper management of such cases. It will be a rare case indeed where the lawyers should frame the questions without input from the experts. See SC Practice Notes 10 & 11.

20. As was clarified in the *Tregoyd* headnote as follows:

> *"the court should consider whether the easement is reasonably necessary for the development, not whether the development is itself is reasonably necessary."*

21. As per headnote 2 of *Tregoyd*, *"where it is reasonably necessary that an easement pass through one of two properties and the difference between the two is not great, an easement can be granted over either property even though there is no necessity that it be granted over any particular one."*

22. Two competing routes for stormwater were in sharp focus in *Stepanoski* paras [35] ff where his Honour commented as follows (re-ordered for this lecture):

> *"The plaintiffs' proposal is the shortest and simplest and involves the least engineering work and it is unlikely to involve significant long-term expense. It will function through gravity and will not require significant use of machinery or maintenance. It will have no adverse aesthetic impact. It will have markedly less impact on the utility of the defendant's land than an easement through the land of No. 57A would have on that land."*

(and turning to the defendant's proposal, his Honour said*)*

> *"…In my judgment this proposal is remarkably clumsy and presents no advantages in terms of land use or engineering work over the plaintiffs' proposal. The potential adverse effect on further development on No. 57A of the diagonal bisection is in my judgment prohibitive, and the potential adverse effect of an easement taken round the boundaries of No. 57A is significant. The proposal*

would be more expensive. It involves intervention in the rights of the owners of two parcels of land not of one. It depends on Council approvals which are uncertain. It has nothing to commend it from any point of view except the point of view of an owner of the defendant's land who very strongly wishes to resist an easement over her land. It is not beyond the feasible to run drainage through No 57 and No. 57A, but it would be a far less satisfactory solution than the plaintiffs' proposal."

Reasonably necessary to "use"

23. The cases above have all involved consideration of whether an easement was reasonably necessary for the *development* of land. However, a good example of where an easement was deemed necessary for the use of land is *Phillip Edward Lonergan v Roy Lewis* [2011] NSWSC 1133.

24. The Lonergans' only access to their Seaforth house was via an inclinator. Their neighbours, the Lewis', allowed them informal access to stairs leading to the street in emergencies; and were happy to continue doing so, but were set against consenting to an easement, even though the impact on their property would be minimal, having regard to the fact there was an existing easement favouring other neighbours. Indeed, the only injury that the Lewis could point to, was the blot on title: para [39}, which was readily compensable.

25. Ball J held the easement was reasonably necessary for the use of land, in the event the inclinator broke down. Arguments based on emergencies were rejected, because of the emergency powers of eg the fire brigade to enter properties.

Survey evidence

26. Determining the exact location of boundaries is very important. If there is no pre existing survey, then survey evidence may well, absent dispute, be appropriate for a single expert.

The public interest

27. Under s88K(2)(a) the court must be satisfied that the use of the dominant tenement, being the land having the benefit of the easement, will not be inconsistent with the public interest.

28. It is the use of the *dominant tenement*, not the use of the easement on the servient tenement, which is the focus of the provision. *Rainbowforce* (ibid) para [94].

29. The issue of whether the use of the subject land with the proposed easement is in the public interest involves a wider question of public interest, namely the implementation of the planning and development criteria of the area for residential development.

30. "Parliament in enacting s88K recognised that the private development of land may be beneficial for the public and in the public interest. However, such development, if it requires an easement over neighbouring land, can be unreasonably frustrated or held to ransom by the neighbour not granting an easement. The Act empowers the Court to grant an easement but on condition that the party having the benefit pay reasonable compensation to the party whose land is burdened. In this way, there is a balancing of competing private interests as well as promotion of the public interest: see *Tregoyd Gardens Pty Ltd v Jervis* at 15,847 and 15,854 and Second Reading Speech, Legislative Council, 4 December 1995." *Samy Saad* (ibid) para [95].

31. *Samy Saad's* involved the purchase by him of a landlocked lot, almost 940 sq m's, zoned for residential development, but being informally used as open space/recreational as an informal adjunct to land so zoned. Council refused consent to an easement for access on the basis that the public interest would be offended, invoking the (informal) land use. However, Council reports said that there was sufficient open space, and this head of objection was thus rejected: paras 35 ff, with the Court affirming that the public interest issue focuses on the land benefitted (ie the development block) not burdened (ie the informal open space).

32. Nicholas J concluded as follows:

> *"In this case, there is nothing in the proposed use or development of the dominant land which would be against the public interest. The Director General's report of 14 July 2006 to the Minister under s 69 EPA Act shows that the*

> *amendment to the Ordinance by cl 62P recognised that the land was landlocked, and any development on it should be subject to satisfactory access arrangements being made. Provision of an easement which permits vehicular access to occupiers of a dwelling on lot 1 is entirely consistent with the public interest in the use or development of the land for its designated purpose. That such use necessarily involves the creation of an easement over portions of community land in lots 7 and 13 is a use which, in my opinion, will not be inconsistent with the public interest. Accordingly, I am satisfied as to the requirement of subs (2)(a).”*

Expert evidence

33. The above extract *from Stepanoski* illustrates the type of evidence one would require from *engineers,* viz:

- will the water from the proposed drainage system, drain via gravity (a great advantage) over pump outs, which are not normally allowed by many councils);
- the cost of the drainage/electricity etc solution;
- the length of pipe/cable involved;
- whether any obstacles need to be overcome, eg trees/roots/ structures; and how they can practically be overcome for a reasonable cost;
- a “ scope of works”, costings and time estimates for the work;
- any loss of amenity to any neighbor;
- response evidence as to alternative paths for stormwater/cables etc and their relative merits/costings/impact on amenity *etc*.

Subjective factors/lay evidence

34. It is usual in contested matters for the parties to depose lay affidavits setting out, as briefly as the case allows, their reasons for purchasing the land, and their circumstances. However, the following extract from *Stepanoski* is worth bearing in mind:

> *“I have had regard to the parties' wishes and feelings which were clearly expressed on both sides and are not unreasonable. The defendant reasonably*

> *wishes to continue to have her rights undisturbed. However the wishes and feelings of both parties are* ***completely outweighed in importance by land use considerations.*** *I exercise the discretion in subsection (1) in favour of ordering an easement"*: Per Bryson J in *Stepanoski* (ibid) para [51].

35. (address types of subjective issues/ beliefs)

Compensation: principles and valuer's report

Principles

36. In terms of s 88K(4), the Court must be satisfied that the respondents can be adequately compensated for "any loss or other disadvantage that will arise from the imposition of the easement". That requires a causal connection between the imposition of the easement and the compensation: *Mitchell v Boutagy* [2001] NSWSC 1045; 118 LGERA 249 at [27]. That is a question of fact to be determined in each case.

37. Young JA said in *Tanlane Pty Ltd v Moorebank Recyclers Pty Ltd* (No 2) [2011] NSWSC 1286 (4 November 2011) paras [49] ff:

> "Assessing compensation is usually an exercise of some difficulty, not the least of which is the fact that valuation is not an exact science.
>
> Section 88K(2)(b) provides that the Court may only make an order for the grant of an easement if it is satisfied that the owner of the land to be burdened can be adequately compensated for any loss or other disadvantage that will arise from the imposition of the easement.
>
> The meaning of s88K(2)(b) has not, as far as I am aware, been fully fleshed out in the decisions on the section. Just reading the words in a natural way the Court must consider: (a) what loss; and (b) what other disadvantage *will* arise because of the easement.
>
> "Loss" appears to include loss of intangible benefits, *Khattar v Wiese* [2005] NSWSC 1014; 12 BPR 23, 235 at 23,248 [49], and to include the suffering of potential loss of privacy as a result of strangers using the easement: *Hanny v*

Lewis [1999] NSWSC 83; (1998) 9 BPR 16,205 at 16,209.

Such losses of intangible benefits are hard to value and, as Brereton J said in *Khattar*, may mean that compensation for such losses cannot be assessed so that no easement can be granted; although that problem was not present in *Khattar*.

A problem that does arise is what semantic significance should be given to the word "will" in the phrase "disadvantage that *will* arise". Does this mean that the Court does not need to consider (except as to discretion) disadvantages that might possibly arise or even those which have a 50/50 chance of occurring and only consider, under this head, those that will arise as a matter of virtual certainty?"

38. This point was not argued in *Tanlane*. However, it seemed to HH that the word "will" means that "the Court is only prevented from making an order under the section where the alleged disadvantage is one which is going to occur as a matter of virtual certainty if the easement is granted. Possible disadvantages that may occur will be properly considered as matters going to discretion."

39. There were a large number of uncertainties bedevilling the quantification of compensation in *Tanlane.* The defendant, Moorebank, submitted that compensation should, accordingly, be on the basis that the full value of the development potential of its land ought be awarded, because of the impact of the imposition of the easement for road access to Tanlane's site was simply not knowable at the time of the trial; and its own proposals to Council for access ramps. Young JA rejected that submission, holding at paras [61] ff:

> "In many cases where a court has to assess damages or compensation, the Court is faced with an almost impossible task. As Menzies J said in *Petroleum and Chemical Corporation (Aust) Ltd v Morris* (1973) 1 ALR 269, 271, "Damages cannot, however, be perfect compensation." All a court is expected to do is to fix a fair estimate, even though it is recognized that it is not a perfect assessment: *Sharman v Evans* [1977] HCA 8; 138 CLR 563, 585.
>
> At common law that fair estimate is legitimately obtained by a combination of fact, deduction, estimation and discount for contingencies. Likewise

compensation under s 88K may be assessed as adequate if a fair result can be produced by these methods.

Further, it is not uncommon in cases dealing with the valuation of land that a court has to make assumptions as to the capacity for land to be rezoned by the grant of a development application, see the classic case of *Spencer v Commonwealth* [1907] HCA 82; 5 CLR 418.

Thus, determining whether the potential servient owner can be adequately compensated is not stymied by the court's ordinary difficulties in the assessment process. The focus is on whether the person on the Bondi bus would recognize that, as a matter of fairness, there has been adequate compensation.

I need then to ask myself what disadvantages must, as a matter of virtual certainty, flow to Moorebank if the easement is granted. In my view, the answer is "none". Moorebank 's vast hectares can be used for whatever it wants to use them for and access is available.

It should also be borne in mind, as Ball J said in *Lonergan v Lewis* [2011] NSWSC 1133 at [50], that there is a real distinction between the question in s 88K(2)(b) - can there be adequate compensation and the question in s 88K(4), assuming there can be adequate compensation, what is the fair assessment of it.

I will make a conditional order below which removes the effect of most of the uncertainties. If the local authorities kybosh the ramps, etc (preventing access to the Moorebank Land), then the easement will be extinguished and compensation refunded. Thus, compensation can be assessed on the basis that the ramp proposal, discussed in detail under E, is viable……."

40. In *Wengarin Pty Ltd v Byron Shire Council* [1999] NSWSC 485; 9 BPR 16,985 at [26], I set out the heads of compensation. These were adopted by Preston CJ in *Rainbowforce* at [111]. *Ordinarily*, compensation will have three elements: (a) the diminished market value of the affected land; (b) associated costs that would be caused to the owner of the affected land; and (c) an assessment of compensation for insecurity and loss of amenities, such as loss of peace and quiet. Against these losses and disadvantages should be allowed, as an offset, compensating advantages (if any). See also *Owners*

Strata Plan 13635 v Ryan [2006] NSWSC 221; 12 BPR 23,485 at [85].

Compensation by reference to the Plaintiff's gain

41. Justice Young's fifth proposition in *Wengarin Pty Ltd v Byron Shire Council* (1999) 9 BPR 16,985, p 26, was as follows:

> "There may be some exceptional cases which fall outside the net of s 88K(2)(b) yet are cases where it is extremely difficult to assess the compensation, but it is clear that the applicant is to derive a considerable benefit from the application. In such circumstances it may be appropriate to assess the compensation on a percentage of the profits that would be made."

42. The above exception was engaged in *Lonergan's* case (ibid): see paras 52 ff.

Credit for any compensating advantage

43. Credit must be given by the defendant for any compensating advantage of the easement: *Wengarin* (ibid); *Lonergan* (ibid).

The report

44. It is usual to have a valuer's report on *at least* blot on title/ value of the strip of land taken for the easement. A valuer who comes in too low in the initial report is doing the client no favours, as no rational Calderbanks or offers can be pitched, unless there is rational input from the valuer.

45. Also, until the valuers have seen the *engineer's report*/s , they are really in no position to perform their role; anything they say will simply be informed guesswork; because they cannot know with any precision the details of the easement corridor being resumed

46. Putting the cart before the horse and rushing to obtain a valuer's report prior to input from an engineer, in a good natured wish to try to persuade a recalcitrant neighbor to consent, would generally be an expensive waste of time.

Should there be expert evidence on compensation for injurious affection & loss of amenity?

47. In *Stepanoski*, Bryson J held these were matters for him; whereas in *Samy Saad* at paras [42] ff, Nicholas J opined there ought be evidence on same, which should not be left to speculation, otherwise no order might be made for compensation.

48. In the end, it's a fact-driven matter of judgment as to whether to lead evidence on account of loss of amenity and injurious affection; and who will lead same. For example, there may be a need for replacement trees for privacy screening ; in which case, the Plaintiff ought fairly place this evidence, properly costed, before the Court.

Discretion; easement upon conditions

49. Even if all the statutory criteria are met, the Court still has a discretion. In *Khattar v Wiese* at 23,250 [60], the Court said this on discretion:

> "That discretion is to be exercised having regard to the purpose of the section, which might be summarised as facilitating the reasonable development of land while ensuring that just compensation be paid for any erosion of private property rights... While the confiscatory nature of the section may be relevant, and likewise the extent of the burden which would be imposed on the servient land, the mere reluctance of the servient owner to accept an easement is not relevant... The existence of a superior alternative might well remain at least a relevant discretionary consideration, if it is not determinative of 'reasonable necessity"

50. Young JA endorsed these sentiments in *Tanlane* at para [71], where his Honour noted that if the easement was not granted, then Tanlane's land would be sterilized (it proposed a residential development). His Honour also noted that whilst there was uncertainty, an application to Council by Moorebank for access ramps to its property was not "hopeless" and thus it could not be said at that time that its land was certain to be sterilized.

51. His Honour pointed out at para [102] that:

> "[102] First, the Council could change its mind, secondly, the defendant could make an application under s 88K against the Council and thirdly, there may be a

right to review in respect of what the Council has done by using administrative law remedies. This third matter was briefly discussed in argument without consensus or resolution."

"[105] The question arose in my mind as to whether it would be possible to frame a conditional order in such a way as to allow both parties to make as much economic use of their land as possible without overly impinging on the use of the other party's land.

[106] However, I initially had doubt as to whether the Court could make a conditional order for the grant of an easement under s 88K.

[107] In *117 York Street Pty Ltd* at 522, Hodgson CJ in Eq, as his Honour then was, pointed to s 88K(3), which tells the court to specify the terms of the easement in its order, as thus permitting the court to impose conditions in the order.

[108] Again in *Khattar v Wiese* , Brereton J assumed that he had power to impose conditions. I propose to follow those decisions.

[109] I have come to the view that it is possible to frame a conditional order in such a way that the possibility of either party's land being sterilized is minimised. Thus, in accordance with the policy behind s 88K I am in favour of granting an easement."

52. It has been held that the power to extinguish and easement pursuant to Sec 89 (1) (c) of the Conveyancing act is likewise able to be made upon conditions (in particular, that a new easement be created such that (using the words of sec 89 *CA*):

> "….the proposed modification or extinguishment will not substantially injure the persons entitled to the easement..."

Staging the proceedings

53. Sometimes it is appropriate to stage the proceedings, eg where there are intervening on concurrent applications to the Land & Environment Court regarding planning aspects. In that event, the question is, having regard to what factors are in issue, whether the additional material, taken together with what was before the court on the first occasion,

means that the plaintiff has established its case : *Tanlane Pty Ltd v Moorebank Recyclers Pty Ltd (No 2)* [2011] NSWSC 1286 citing by analogy *Shercliff v Engadine Acceptance Corporation Pty Ltd* [1978] 1 NSWLR 729.

54. *Saad Samy* is another example of staged proceedings, with liberty to relist once the Council's decision on certain matters was known.

Practical matters –form of order to be sought

55. The form of order will be moulded by the facts of the case and to an extent, the approach of the individual judge. Some judges may be prepared to grant an order for an easement in general terms, allowing the parties to seek to agree precise terms as required by Sec 88K(3) (see eg *Samy Saad v City of Canterbury* [2012] NSWSC 389 para [56]; with liberty to relist before an Associate Justice.

56. Other judges may wish assurance that the form of order, if made, will pass muster at LPI.

57. In a straightforward case, little more might be required than tendering the form transfer of an interest in property, in registrable form , supported as may be required by required by a surveyor's sketch.

Which neighbours are necessary parties?

58. If there is a realistic prospect that a neighbour may be affected by the grant of an easement eg where there are continuous easements for access (*Lonergan's* case) or stormwater (*Kocagil v Chen*), then the neighbour ought be formally put on notice of the proceedings and invited to state their position to the Court.

Comments and constructive criticism welcomed to:

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