COLLEGE OF LAW LECTURE

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Recent developments in Easements – Stormwater and Carriage

"The claim is a perpetuation of a running dispute between these highly litigious parties bound to each other for 122 long years under a lease …": *Sargeant v Macepark (Whittlebury)* [2008] EWCA Civ 1482, per Lord Justice Ward

STORMWATER

1. The yardstick in s 88K(1) of the *Conveyancing Act 1919* (NSW) 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 s 88K(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 (i.e. events after summons are relevant and admissible on this aspect): *Coles Myer NSW Ltd v Dymocks Book Arcade Ltd* (Unreported, Supreme Court of New South Wales, Simos J, 19 March 1996); and *Goodwin v Yee Holdings Pty Ltd* (1997) BPR 15,795; *Stepanoski* v *Chen* [2011] NSWSC 1573 ('*Stepanoski*').

4. An order must specify matter 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).

5. It is for the plaintiff/applicant to propose the nature and terms of the easement 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 that are eminently reasonable; and

   (c) a **generous** offer for compensation to traverse blot on title, disturbance and loss of amenity.

6. The letter should, in my view, be on an open basis and not "without prejudice"- otherwise how can it be tendered "on the merits"?

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

8. "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* [2011] NSWSC 1573 at [14], in his Honour's final judicial act.

9. As pointed out in *Rainbowforce* Pty Limited v Skyton Holdings Pty Limited and Ors [2010] 171 LGERA 286 at [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.

10. Though not all points are relevant to all cases, a with respect very useful "check list" as the exercise of the discretion as to "reasonable necessity" under s 88K(1) is set

out by his Honour, Chief Justice Preston, in *Rainbowforce Pty Ltd v Skyton Holdings Pty Ltd* (2010) 171 LGERA 286; [2010] NSWLEC 2 at [67] – [83] (‘*Rainbowforce*’):

(1) The power to impose an easement is made conditional upon satisfaction of the requirement in s 88K(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: s 88K(3).

(3) The inquiry directed by s 88K(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.

11. These requirements are now regarded as a very useful "check list" by the Supreme and Land & Environment 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) ('*Clarebridge*'); *Stepanoski* [2011] NSWSC 1573 (where Bryson J at [16] characterised the Chief Judge's list as a meticulous restatement); and *Wren Investments Pty Ltd v Willoughby City Council* [2011] NSWLEC 1167.

12. 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 [155].

13. 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* (2010) 171 LGERA 286; [2010] NSWLEC 2 at [72].

14. As such, putting into evidence the NOD/ DA is very significant; together with any other relevant communications with Council (see for example *Stepanoski* [2011] NSWSC 1573; *Clarebridge* [2011] NSWLEC 56 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).

15. As pointed out in the sixth proposition in *Rainbowforce* (2010) 171 LGERA 286; [2010] NSWLEC 2 at [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…".

16. Cases such as *Stepanoski* [2011] NSWSC 1573 involve competing alternatives, with the defendant advancing the argument that there is a preferable alternative. Naturally, these are issued to be explored at the conclave; and the issue of what questions the experts should answer looms large in the proper management of such cases.

17. 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.

18. Single experts—surveys?

19. 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.

20. 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.

21. Two competing routes for stormwater were in sharp focus in *Stepanoski* [2011] NSWSC 1573 at [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.
>
> …
>
> …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."

Subjective factors

22. "I have 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* [2011] NSWSC 1573 at [51]

23. (address types of subjective issues/ beliefs)

Compensation

24. 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.

25. Young JA said in *Tanlane Pty Ltd v Moorebank Recyclers Pty Ltd* (No 2) [2011] NSWSC 1286 (4 November 2011).

26. Assessing compensation is usually an exercise of some difficulty, not the least of which is the fact that valuation is not an exact science.

27. 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.

28. The meaning of s 88K(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.

29. "Loss" appears to include loss of intangible benefits, *Khattar v Wiese* [2005] NSWSC 1014; 12 BPR 23, 235 at 23,248 [49] (‘*Khattar*’), 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.

30. Such losses of intangible benefits are hard to value and, as Brereton J said in *Khattar* [2005] NSWSC 1014, may mean that compensation for such losses cannot be assessed so that no easement can be granted.

31. That problem is not present in the instant case.

32. 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?

33. This point was not argued. However, it seems to me 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.

34. 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].

Practical matters –form of order to be sought

35. “(1) Order pursuant to s 88K (1) of the *Conveyancing Act 1919* (NSW) that an easement be imposed over the land of the defendant in favour of the land of the

plaintiffs referred to in the summons according to the terms of an order to be made by an Associate Judge under the referral in order (2).

(2) Order pursuant to Schedule D Part 3 Rule 4(b) of the *Supreme Court Rules 1970* that it be referred to an Associate Judge of the Court:

(a) to settle the terms of and to make an order giving effect to this order in accordance with the reasons stated on 16 December 2011 and in accordance with the terms of section 88K of the *Conveyancing Act 1919* (NSW) particularly subparagraphs (1), (3) and (4) thereof;

(b) to hear and determine questions relating to costs of the proceedings and to make an order for costs in pursuance of section 88K(5)."

EASEMENTS FOR CARRIAGE: Incidental user

Introduction

36. It is well recognised that the grant of an easement carries with it those ancillary rights which are necessary for the enjoyment of the rights expressly granted, *Westfield* [2007] HCA 45; (2007) 233 CLR 528 at 535 ('*Westfield*'). An early recognition that this is so is the decision in *Pomfret v Ricroft* 1 Saunders 321 [1845] EngR 185; 85 ER 454 (KB) where it was said, at 323, that when the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use.

37. Cases dealing with the contention that users of a right of way to obtain access to the dominant tenement are at liberty to use it to pass beyond the dominant tenement to other land have consistently rejected that proposition. This is because the use of an **easement** cannot be extended, beyond the scope of the grant, to impose a burden greater than that which the servient owner agreed to accept, *Harris v Flower* (1904) 74 LJ Ch 127 at 132 and *Westfield* [2007] HCA 45; (2007) 233 CLR 528 at 536.

38. A construction which would deprive the grant of any effective operation ought to be avoided if possible: *Paterson and Barr Ltd v Otago University* [1925] NZLR 119 at 120.

39. In the absence of any clear indication of the intention of the parties, a grant must be construed more strongly against the grantor: *William v James* (1867) LR 2 CP 577 at 581 and *Paterson and Barr Ltd v Otago University* (supra) at 120.

40. The dominant tenement and the servient tenement need not be contiguous: *Todrick v Western National Omnibus Company Ltd* [1934] Ch 561.

41. There is a narrower and wider view in Commonwealth courts as to the extent of legitimate incidental user.

42. *The wider view* would have it that use that benefits the dominant land may be legitimately incidental, for example wandering across an easement to have a picnic now and again on non-dominant land or using an office connected to dominant land.

43. *A narrower view* is that any incidental user must be for the benefit of the easement itself, for example a car park added on non-dominant land to facilitate traffic on the right of way.

44. The cases are complex and nuanced and, as has been commented on in *Wilkins v Lewis* [2005] EWHC 1710 at [21], are not easy to reconcile

Legislation

45. *Conveyancing Act 1919* (NSW) s 181 A, Sch 8 (and the analogues of other States for example *Transfer of Land Act 1958* (Vic), Sch 12).

Some introductory principles about easements

46. To interpret an express grant of a right of way, *the language of the instru*ment must be referred to. The court *w*ill have regard to the conveyance as a whole, including any plan that forms part of it: *Scott v Martin* [1987] 1 WLR 841.

47. The High Court of Australia has spoken forcefully, in *Westfield* [2007] HCA 45; (2007) 233 CLR 528, as to what documents may be called in aid of the construction of easement rights. What the High Court said is summarised in *Berryman* [2008] NSWSC 213 at [28], viz a court is limited to:

    (a) the material in the folio identifiers;
    (b) the registered instrument;
    (c) the deposited plan; and
    (d) the physical characteristics of the land,

    to construe instruments registered under the *Real Property Act 1900* (NSW).

48. In other words, the rules of evidence regarding the construction of contracts do not apply to the construction of an easement This is because the establishment of the

intention or contemplation of the parties to an instrument registered under a relevant Torrens system (eg Tasmanian *Land Titles Act*) by reference to material extrinsic to the instrument would be contrary to the principles of the Torrens system of title by registration : *Westfield* [2007] HCA 45; (2007) 233 CLR 528 at 538 – 541. As explained in that unanimous decision at 539, the logic that underpins this proposition is:

> The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee.

49. The meaning and effect of an easement conferred by a deed of grant is determined by reference to the language of the grant, *construed in the light of the circumstances existing at the time of the execution of the deed.* The same principles apply to easements over Torrens System land: *The Owners of Corinne Court 290 Stirling Street Perth Strata Plan 12821 v Shean Pty Ltd* [2000] WASC 181 (20 July 2000) at [80].

50. In *Gallagher v Rainbow* [1994] HCA 24; (1994) 179 CLR 624 at [63], having referred to these general principles, McHugh J went on to observe, in the course of a dissenting judgment, that in construing the grant of an easement - whether at common law or under the Torrens System - the court will consider the *locus in quo* over which the way is granted, the nature of the *terminus ad quem* and the purpose for which the way is used. In the absence of a contrary indication, the grant is construed against the grantor. *Nonetheless, the court will not construe the grant in a way that would enable an easement to be used in a manner that goes beyond the use contemplated by the parties at the time of the grant.* The reason for this rule is that every easement is a restriction on the property rights of the owner of the servient tenement. Speaking generally, where there is an alteration to the use of the dominant tenement, the grantee has no right to use the easement for any new and additional purpose of the dominant tenement.

51. But of course, there are countervailing cases on this point: see *Bradbrook & Neave's Easements and Restrictive Covenants* (3rd ed-2011) paras 6.20 et seq.

52. The essential features of an easement were summarised recently in *The Owners of East Fremantle Shopping Centre West Strata Plan 8618 v Action Supermarkets Pty Ltd* [2008] WASCA 180 at [51] ff.

> 51. First, there must be a dominant tenement and a servient tenement. Secondly, the easement must 'accommodate' (that is, confer a benefit on) the dominant tenement. Thirdly, the dominant tenement and the servient tenement must not be held and occupied by the same person. Fourthly, the right must be capable of forming the subject matter of a grant. ...

PRINCIPLES AS TO INCIDENTAL USE

53. The general rule is that a right of way may only be used for gaining access to the land identified as the dominant tenement in the grant. . It was expressed as follows in *Harris v Flower & Sons* (1904) 74 LJ Ch 127 (‘*Harris v Flower*’):

> If a right of way be granted for the enjoyment of close A, the grantee, because he owns or acquires close B, cannot use the way in substance for passing over close A to close B.

54. *Bracewell* v *Appleby* [1975] 1 Ch 408 reiterated this basic principle.

55. *Harris v Flower* (1904) 74 LJ Ch 127 is the most oft cited case in this area of the law, and illustrates how easements are construed so as not to allow excessive use to burden the servient owner’s land. The defendant having a right of way over the plaintiff's land, to land coloured pink on a plan, and being also the owner of certain adjoining land coloured white, had by his own acts landlocked the white land so that the only access thereto was now over the pink land, and had built a factory partly on the pink and partly on the white land. The factory was all one building and a substantial part of it was on the pink land. The only access to it from the highway was by means of the right of way. The plaintiff brought an action claiming that the defendants had lost their right of way by abandonment, and also claiming an injunction to restrain the defendants from using the right of way as a means of access to the factory and related premises. The Court of Appeal held that the acts of the defendant did not amount to an abandonment or extinction of the right of way, *but that the proposed user for the purposes of the part of the building erected on the white land was in excess of the gran*t.

56. Vaughan Williams LJ endorsed these dicta from a previous case : ” …where a person has a right of way over one piece of land to another piece of land , he can

only use such right in order to reach the latter place . He cannot use it for the purposes of going elsewhere. In most cases of this sort, the question has been whether there was a *bona fide* or a mere colourable use of the right of way."

57. It was also admitted by the defendant that it could not use the right of way to the pink land, so as to access that part of the property partly on the white and partly on the pink land (p 130 Col 1, last 5 lines and over to Col 2).

58. The rationale behind the rule is that the dominant owner may not increase the burden without the servient owner's consent (p 132, Col 1, last 10 lines or so).

59. Vaughan Williams LJ said this at page 132:

> I cannot help thinking that there not only may be, but there must be, many things done in respect of the buildings on the white land which cannot be said to be *mere adjuncts* to the honest user of the right of way for the purposes of the pink land .... under these circumstances it seems to me that, notwithstanding the fact that the buildings on the white and on the pink lands are intended to be used jointly for one purpose, yet that consideration does not exclude the inference that the use of the way is for the purpose of giving access to land to which the right of way is not appurtenant.

60. The learned Lord Justice then explained that the use of the factory would increase the volume of traffic on the way beyond the level permitted by the grant and said this:

> This particular burden could not have arisen without the user of the white land as well as of the pink. It is not a mere case of user of the pink land, with *some usual offices on the white land connected with the buildings on the pink land*. The whole of object of this scheme is to include the profitable user of the white land as well as the pink, and I think access is to be used for the very purpose of enabling the white land to be used profitably as well as the pink, and I think we ought under these circumstances to restrain this user.

61. Where an important part of the case is the use of a right of way for a *mixed or joint purpose*, namely for the purpose of gaining access both to the dominant tenement and the neighbouring land, a more instructive case is the relatively recent UK Court of Appeal decision in *Peacock* v *Custins* [2001] 2 All ER 827 ('*Peacock*') which dealt with this issue.

62. In *Peacock* [2001] 2 All ER 827, the claimants owned two parcels of land, the red land and the blue land, which were adjoining fields. They had a right of way over the defendants' land for all purposes in connection with the use and enjoyment of the red land. The red land and the blue land were farmed by the claimants' tenant as a single unit, and he used the right of way to gain access to it. At page 830h Scheimann LJ said this:

> [the tenant] did not claim to use the yellow roadway for the purpose of accessing the red land and then, as an incidental activity, picnic or stroll on the blue land. The defendants rightly do not contend that *incidental activity of this nature* would involve any excess of the grant. But [the tenant] was using the access for the *joint purpose of cultivating both properties,* the red and the blue.

63. At page 835, Scheimann LJ summarised the issue in the following terms:

> The law is clear at the extremes. To use the track for the sole purpose of accessing the blue land is outside the scope of the grant. However, in some circumstances a person who uses the right of way to access the dominant land but then goes off the dominant land, for instance *to picnic on the neighbouring land*, is not going outside the scope of the grant. The crucial question in the present case is whether those circumstances include a case where one of the essential purposes of the use of the right of way is to cultivate land other than the dominant land for whose benefit the grant was made.

64. After an extensive review of the authorities, Scheimann LJ, giving the judgment of the Court said this at page 835j:

> The right to use a right of way is determined by the terms of the grant, specifying the dominant tenement for the purpose of which the right is created. Trespass is whatever is not permitted by the grant. The right is not to use the way for the purposes of benefiting any property provided that the total user does not exceed some notional maximum user which the beneficiary might have been entitled to make for the purposes of the dominant tenement. ... The right is to use the way for the purposes of the dominant tenement only.

65. He went on to hold (at page 836g) that the grantor did not authorise the use of the way for the purpose of cultivating the blue land, which could not sensibly be described as ancillary to the cultivation of the red land.

66. In *National Trust v White* [1987] 1 WLR 907, Ferris J held that the use of a right of way to a historic site permitted the use of the way to gain access to an nearby car park, even though the car park was not on the dominant tenement. The only purpose of going to the car park was to enable visitors to visit the site, and that use was merely ancillary to the enjoyment of the dominant tenement.

67. However, underscoring the room for divergence of opinion in this area between different courts on the same facts:

    (a) the High Court in New Zealand in *Freestyle Enterprises Ltd v Starfin Group Ltd* [2008] 1 NZLR 266 considered the *National Trust* case to be an "expansive example of the ancillary use approach. In my judgment, courts need to exercise considerable care before permitting a somewhat slippery concept such as "ancillary use" to become a platform for expanding a right-of-way easement far beyond what the grant originally contemplated."

    (b) *Shean Pty Ltd v The Owners of Corinne Court 290 Stirling Street, Perth* [2001] WASCA 311 ('*Shean*') in turn distinguished *Harris v Flower* (1904) 74 LJ Ch 127: para [39]; and endorsed the *National Trust* case: para [42].

68. However, in *Shean* [2001] WASCA 311, the words of the easement were more expansive as well , than those to hand, viz "for all purposes connected with the use and enjoyment of ….[the dominant tenement]."

69. In *Massey* v *Boulden* [2003] All ER 87, the Court of Appeal held that use of a right of way for the benefit of a cottage could still be used even though the cottage had been extended so that two rooms now stood on land not part of the dominant tenement. Access to the additional rooms was merely ancillary to access to the cottage.

70. On the other hand, in *Das v Linden Mews* [2003] 2 P&CR 58, the UK Court of Appeal took a *much more restrictive view* of what constitutes permissible ancillary use.

71. The owners of two houses in a London mews, which enjoyed rights of way over the mews, acquired plots at the end of the mews where they *proposed* to park their cars. The court rejected the argument that parking at the end of the mews was ancillary to enjoyment of the easement.

72. The learned authors in a leading text, *Gale on Easements*, say the principle seems to be that *access to land that is ancillary to the use of the way for the purposes of the grant is permissible; but access to land which is ancillary to the enjoyment of the dominant tenement is not*.

73. In *Wilkins v Lewis* [2005] EWHC 1710 (Ch), a right of way benefitted a core estate but the Court could not see that using the way for the further purpose of gaining access to 800 additional acres of land forming the neighbouring land was merely ancillary to the use of the core estate.

74. These decisions are not easy to reconcile.

Ancillary rights –turning circles

75. In *Berryman & Anor v Robert Sommenschein & Anor* [2008] NSWSC 213, the issue was whether an easement co joined with a portion of the dominant tenement, permitted turning. It was held that (on the facts of that case) turning was permitted on the co-joined easement.

Ancillary rights –other scenarios

76. For attendees convenience to accumulate practice –relevant.

Comments and constructive criticism welcomed to:
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