EASEMENTS: DEVELOPMENT HICCUPS AND NEIGHBOURHOOD WARS

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THE NATURE OF AN EASEMENT AND WHERE PROBLEMS MAY ARISE

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1. The four essential features of an easement

(1) there must be a dominant tenement and a servient tenement;
(2) the easement must confer a benefit on the dominant tenement;
(3) the dominant tenement and the servient tenement must not be held and occupied by the same person; and
(4) the right must be capable of forming the subject matter of a grant.

Re Ellenborough Park [1956] Ch 131 at 163; *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1994] 1 WLR 31 at 36; *Owners of East Fremantle Shopping Centre West Strata Plan 8618 v Action Supermarkets Pty Ltd* [2008] WASCA 180 at [51].

See also Sec 88 (1), 88 NSW *Conveyancing Act* and also Sec 88 A as regards easements in gross; Sec 88 B 3; Sec 47 (7) *Real Property Act*

2. *The fourth In re Ellenborough Park characteristic*

2.1. In re Ellenborough Park Evershed MR addressed the fourth characteristic by considering three cognate questions (at 164): first, whether the rights purported to be given are expressed in terms too wide and vague in character; secondly, whether such rights would amount to rights of joint occupation or would substantially deprive the owner of proprietorship or legal possession; and thirdly, whether such rights constitute mere rights of recreation, possessing no quality of utility or benefit.

2.2. Consideration of these three cognate questions was approved by Santow JA (with whom Mason P and Beazley JA agreed) in *Clos Farming Estates Pty Ltd v Easton* [2002] NSWCA 389; (2002) 11 BPR 20,605 at [35]; 20,611 and again in para [16] of *Jea Holdings (Aust) Pty Ltd v Registrar-General of NSW* [2013] NSWSC 587 [1], para [24] of which bears citing, as follows:

"*Hence when considering the effect of a grant of easement on a servient owner's proprietorship one ought to consider its effect on the servient owner's proprietorship of the entirety of the servient tenement. This would mean that some manner of user affecting a fixed area of land might be a valid easement if that area formed part of a larger servient tenement but the same user of the same fixed area of land could be invalid as an easement if it were part of a smaller servient tenement*."

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SEC 88 K CONVEYANCING ACT NSW: REASONABLE NECESSITY AND THE PUBLIC INTEREST

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3. Introduction Section 88K(1) of the *Conveyancing Act* confers on 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"*.

In terms of Section 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*

[1] *Jae* considered the question whether there could be an easement for car parking and focused on whether the easement at hand resulted in a surrender of ownership.

applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful".

4. 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.

5. 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:*
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> *(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 Lewisat 16,210;*
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> *(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;*
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> *(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*
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> *(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 with approval in *Samy Saad v City of Canterbury* [2012] NSWSC 389 para [45]).

Primary purpose is public interest in effective land use

6 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.*

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].

7 Whether the use of the relevant 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.

"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].

"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].

8 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"

9 Though not all points are relevant to all cases, a with respect, very useful "check list" of the criteria for "reasonable necessity" under section 88(k)(1) is set out at paragraphs [67] ff of *Rainbowforce Pty Ltd v Skyton Holdings Pty Ltd* [2010] 171 LGERA 286 at [67]-[83] NSWLEC 2 by the CJ:

(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.

Compensation: principles

10 In terms of s88K (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. As 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.
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> "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.
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> 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?"

11 *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). *Wengarin Pty Ltd v Byron Shire Council* [1999] NSWSC 485; 9 BPR 16,985 at [26]; adopted by Preston CJ in *Rainbowforce* at [111]. 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

12 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."

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

Credit for any compensating advantage

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

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RULES OF CONSTRUCTIONS OF EASEMENTS: CONSTRUING EASEMENTS POST *WESTFIELD MANAGEMENT LIMITED V PERPETUAL TRUSTEE COMPANY LIMITED* [2006] NSWCA 337; [2007] HCA 45; (2007) 233 528

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14 In *Harris v Flower & Sons* (1904) 74 LJ Ch 127 ("*Harris*") at 132, it was held:

"If a right of way be granted for the enjoyment of a 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".

As it was put in *Re Ellenborough Park* [1956] Ch 131, at 170, "the easement must accommodate the dominant tenement".

15 This principle was applied:

--in *Bracewell v Appleby* [1975] Ch 408, where the defendant, owned a house to which there was a right of way "of the fullest description". The defendant purchased an adjoining plot of land and built another house on it. The defendant was held to have no right as the owner of the dominant tenement to extend the grant of the easement to the adjoining plot.

--by the High Court in *Westfield Management Ltd v Perpetual Trustee Company Limited* (2007) 233 CLR 528; [2007] HCA 45 ("*Westfield*"); [2007] HCA 45 at [24] - [29]. The High Court approved Brereton J, the learned trial judge's statement that *Harris* stands for the proposition that "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" (at [26]).

16 The High Court in *Westfield* also accepted (at [28]) Brereton J's explanation that "It is not in excess of the grant to use a right of way to access the dominant tenement for those purposes that were contemplated at the time of the grant".

Brereton J was referring to a recognized exception to *Harris*, which applies where *at the time of the grant,* close A already forms a means of access to close B: *Nickerson v Barroughclough* [1980] Ch 325.

The exception was held not to apply in *Laris v Lin (No 2)* [2016] NSWSC 560 where there was no evidence that as at the date the easement was created in 1927, Lot A was used to access Lot B. The consequence was that the owner of

Lot B had to negotiate for the easement or bring an application under Sec 88 B *CA*.

17 In *Westfield v Perpetual Trustee* the High Court laid down some important principles in relation to the construction of easements. The land in question consisted of several parcels in the central business district of Sydney. The dominant tenement known as Skygarden had the benefit of an easement for an underground ramp from King Street to its land under the land of the servient tenement known as the Glass House which was Perpetual's land. Westfield had purchased other blocks subsequently that were on the other side of Skygarden and it wanted the ramp to service traffic to these other blocks.

The issue was whether Westfield (the registered proprietor of the dominant tenement) was entitled to use the servient tenement for the purpose of travelling across it and across the dominant tenement to land on the other side of the dominant tenement.

18 The learned trial judge granted Westfields the relief it sought, but this was reversed in the CA. The leading judgment in the Court of Appeal was delivered by Hodgson JA. In allowing the appeal his Honour wrote:

"69 ... In my opinion, the contrary decision of the primary judge was in error, the error resulting from a preparedness to look for *the intention or contemplation of the parties outside what was manifested by the grant itself, construed in the circumstances*, the admission of certain evidence for that purpose, and addressing the question of the use contemplated for the site of the easement in a general sense, rather than focusing on the use intended and contemplated by the grant itself for the benefit of the dominant tenement only.": [2006] NSWCA 337.

The HC affirmed the decision of the Court of Appeal. In sharp focus was the statement by Brereton J, "It is not in excess of the grant to use a right of way to access the dominant tenement for those purposes that were contemplated at the time of the grant."

At [18] the High Court set out the approach of Hodgson JA in the Court of Appeal:

"……if it had been intended that the grant extend to the authorisation of others to go across the dominant tenement to further properties, *the words 'and across' could readily have been added*."

19 The High Court's riposte to that was: "28. ... The difficulty is in the phrase 'that were contemplated'. Contemplated by whom? By what evidentiary means is this contemplation later to be revealed to the court? How do these steps accommodate the Torrens system? To these matters it will be necessary to

return."

Under the heading "Extrinsic material", the HC held as follows:

"35 In going on to allow the appeal, Hodgson JA (again correctly) remarked that the decision of the primary judge appeared to be the product of an error in preparedness to look for the *intention or contemplation of the parties to the grant of the Easement outside what was manifested by the terms of the grant*. Extensive evidence of that nature had been led by Westfield on affidavit with supporting documentation."

The court then went on to consider a number of cases and circumstances in which evidence of circumstances surrounding the execution of an instrument might be admissible. It concluded:

"45 [N]one of the foregoing supports the admission in this case of evidence to establish the *intention or contemplation of the parties to the grant of the Easement*."

20 The High Court, affirming the decision of the New South Wales Court of Appeal, held that such access was not permitted since it did not benefit the dominant land rather it only benefited the owner of the dominant land.

21 The High Court referred to *Thorpe v Brumfitt* (1873) LR 8 ChApp 650 in the following terms:

"First, it illustrates the importance of the legislative requirement imposed in New South Wales by section 88 of the Conveyancing Act (also introduced by 1930 Act) for identification of the lands comprising the dominant and servient tenements. Secondly, it emphasizes that the 'purposes' extensive as they may be, must be confer what the law regards as a benefit on the dominant tenement, by making it 'a better and more convenient property'; this is something more than a 'personal advantage' to the owner of tenement for the time being."

22 The Court accepted that "user" under a registered easement may change with the nature of the dominant tenement so long as the terms of the grant are sufficiently broad: see [42].

23 The Court was of the view of that extrinsic evidence to establish the evidence or contemplation of the parties to the grant of the easement was not admissible and that rules of evidence explained by authorities such as *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* [1982] HCA 24; (1982) 149 CLR 337 at pp 350-352, assisting the construction of the contracts *inter partes* did not apply:

"[39].…….The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens scheme, 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 the dispute) in the situation of the guarantee".

Hodgson JA indicated two matters which he would have included in the material circumstances: (i) the physical circumstances of the dominant and servient tenements and
(ii) the use actually being made of them at the time of the grant.

The High Court did not comment on that part of his Honour's judgment.

[Note: The summary of *Westfield* (above) is partially extracted from *Shelbina Pty Ltd v Richards* [2009] NSWSC 1449; and partially from *Currumbin Investments Pty Ltd v Body Corp Mitchell Park Parkwood CTS* [2012] QCA 9].

24 The approach of the High Court in *Westfield v Perpetual Trustee* on the question of extrinsic material was summarised in *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324 at [15] – [16]:

"... the decision in *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2007] HCA 45 has since confirmed that extrinsic material apart from the physical characteristics of the tenements, is not relevant to the construction of instruments registered under the Real Property Act 1900: paras [5], [37] - [41].

[16] This Court is therefore limited to the material in the folio identifiers, the registered instrument, the deposited plans, and the physical characteristics of the tenements."

The QCA in *Currumbin Investments Pty Ltd v Body Corp Mitchell Park Parkwood CTS* [2012] QCA 9 , after referring to possible exceptions e.g. misdescriptions of boundaries, and unregistered documents referred to in CT's, then summarised the conclusions it drew from *Westfield* as follows:

"[53] The High Court did not in Westfield attempt to define the circumstances in which extrinsic evidence could be taken into account in construing a registered instrument. We must take it, I think, that an important consideration in determining whether information or a document can be so used is whether the information or document was and remains publicly available to third parties without unreasonable effort, expense or delay."

25 See further *Crown City Council v Holin* [2016] TASSC 61 at para [63] and the first fulsome attempt that I am aware of to harness all rules of construction of

easements and covenants, in *Clare & Ors v Bedelis* [2016] VSC 381 para [31].

As to documents referred to in a dealing relating to land, see Sec 80 A RPA and also *Fermora Pty Ltd v Kelverton Pty Ltd* [2011] WASC 281.

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NOVEL EASEMENTS

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26. *Novel easements can be recognised as society changes*: *Commonwealth v Registrar of Titles (Vic)* [1918] HCA17; (1918) 24 CLR 348 (21 March 1918).

Examples of easements that have been recognized, extracted from Tasmanian Law Reform Institute Final Report No. 12, Headed Law of Easements in Tasmania – March 2010.

27. One may take their pithy summaries as a useful starting point, but do not treat them as e*x cathedra:*

(1) An easement to create noise (*Re State electricity Commission of Victoria and Joshua's Contract* [1940] VLR 121);

(2) An easement in a windbreak created by timber (*Ford v Heathwood* [1949] QWN No. 11); (banana crop protected from the wind - unlawful competition by the landlord of the property, who had leased it with the benefit of the wind break—so be careful with these pithy summaries in the otherwise useful list in the Tas LR Inst paper.

(3) A right to bring goods into a shop through the main door of another shop (*Wilcox v Richardson* (1997) 43 NSWLR 4);

(4) A right to use a neighbour's kitchen (*Haywood v Richardson* (1883) 25 Ch D 357);

(5) An easement to use a toilet on the servient tenement (*Hedley v Roberts* [1977] VR 282*; Miller v Emcer Products Ltd* [1956] Ch 304); and

(6) A right to pollute water of the adjoining land (*Kirkcaldie v Wellington City Corporation* [1933] NZLR 1101).

Examples of alleged easements which the courts have not accepted include:

(1) In *Hunter v Canary Wharf* [1997] AC 655 the right to an easement pertaining to television reception was refused – it had been blocked by the development of a large building, arguably similar arguments could be used in terms of solar and wind access that has been blocked or diminished by developments to deny their recognition;

(2) The right to hit cricket balls onto neighbouring properties (*Miller v Jackson* [1977] QB 966];

(3) The easement for protection from the weather (*Phipps v Pears* [1965] 1 QB 76); Quite at odds with *Ford v Heathwood* thus careful analysis required of the facts of the cases, and what they actually held;

(4) The right to a flow of air (*Harris v DePinna* (1885) 33 Ch D 238);

(5) An easement to overhang branches of a tree (*Lemon v Webb* [1895] AC 1);

(6) The easement for a vineyard (*Clos Farming Estates v Easton* [2002] NSWCA 389);

(7) Right to view. The right claimed in order to establish a valid easement must not be too vague or indefinite in nature, a right to view is considered to fall into this category. In *Phipps v Pears* [1964] 2 All ER 35, the court took the view that there is no easement known to law as a right to view. Such rights can be more aptly protected by a restrictive covenant, restricting the height of neighbouring buildings.

Facts and findings in Clos Farming Estates Pty Ltd v Easton [2002] NSWCA 389

28. In *Clos Farming,* the respondents had purchased land from the appellant and entered into a number of contracts concerning potential viticulture enterprises to be carried out on part of the land. One restriction, referred to as the 'Easement for Vineyard', purported to give the appellant, as dominant tenement owner, the right to enter the burdened land and carry out and manage viticulture work. After a number of years, the respondents took steps to remove this easement and applied to the court for a declaration that the easement was not valid. The NSW Court of Appeal agreed that the easement was not valid as it breached two of the four fundamental conditions for an easement as established in *Re Ellenborough Park*, specifically the second and fourth requirements. The rights purportedly

conferred by the easement deprived the servient tenement from any real proprietorship over the land, thus making it invalid. The Court also found that the easement did not sufficiently accommodate the dominant tenement.

Of further relevance is the fact that their Honours commented that it was not the novelty of this easement that was detrimental to the claim, as novelty alone is insufficient as a bar to the recognition of the creation of an easement.

Thus confirming that the list of easements is not closed.

Other recent cases regarding novel easements:

***Jea Holdings (Aust) Pty Ltd v Registrar-General of NSW* [2013] NSWSC 587**

29. Application brought by plaintiff seeking to prevent first defendant (Registrar General) from recording on the register corresponding to its land the burden of a covenant allowing the second defendant (Awar Pty Ltd) to use the substantial part of the surface of the land as a car park for its hotel business.

The purported covenant was recorded on the land that it benefited but it had not been recorded on the plaintiff's land. The plaintiff argued that it held the land free of any encumbrances by virtue of its indefeasibility as registered proprietor. The court held that although the wording in the Memorandum of Transfer at the relevant time *could on registration give rise to an easement*, an exception to indefeasibility of title was not enlivened, in light of the absence of registration on the servient tenement.

30. The plaintiff submitted that the fourth characteristic was absent from this purported easement as the right in respect of its land was incapable of forming the subject matter of a grant. In *In re Ellenborough Park* Evershed MR addressed this characteristic by considering three cognate questions (at 164): first, whether the rights purported to be given are expressed in terms too wide and vague in character; secondly, whether such rights would amount to rights of joint occupation or would substantially deprive the owner of proprietorship or legal possession; and thirdly, whether such rights constitute mere rights of recreation, possessing no quality of utility or benefit.

Consideration of these three cognate questions was approved by Santow JA (with whom Mason P and Beazley JA agreed) in *Clos Farming Estates Pty Ltd v*

Easton [2002] NSWCA 389; (2002) 11 BPR 20,605 at [35]; 20,611. The plaintiff submitted that the second of these was to be answered affirmatively as the rights given to the owner of the dominant tenement by Memorandum of Transfer J493622 in respect of the plaintiff's land were so extensive as to substantially deprive the plaintiff of proprietorship or legal possession.

White v Betalli **[2007] NSWCA 243; (2007) 71 NSWLR 381**

31. A strata plan divided land into two lots. Lot 1 faced the street, while Lot 2 was behind Lot 1 and faced Port Hacking. A strata by-law purported to provide access for Lot 1 to use a specified watercraft storage area on the adjoining Lot 2.

The access was not registered as a statutory easement under s88B of the *Conveyancing Act 1919* (NSW).

Santow JA said that even if the by-law *were required to give rise to a valid easement then he would have found it to create such a valid easement*.

His Honour said (at 389) that the area affected was a small one and that the by-law allowed "*the continued use by the* [servient owner] *of the affected area, though subject to the* [dominant owner's] *right to store a small watercraft in the designated area*" and therefore it was compatible with the servient owner's right of possession.

The reference to the area burdened by the easement being a small one and the different language used in the extracted quote in referring to the servient owner's use of the "affected area" compared with the dominant owner's use of the "designated area" suggest that his Honour was thinking of a test akin to that in *London and Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* in which one looked to the effect of the burden of the easement on the servient owner's proprietorship of the entirety of the servient tenement. *However, the statement was obiter dicta and his Honour only briefly considered the point.*

On the other hand, McColl JA dissented.

Hence it is difficult to extract from this case a clear statement as to what portion of the servient tenement one ought to consider when evaluating the validity of an easement.

32. The approached advocated in *Moncrieff v Jamieson* by Lord Scott and generally approved by Lord Neuberger differs substantively from that taken by the Court of

Appeal in *Clos Farming Estates Pty Ltd v Easton* (and also the approach in *London and Blenheim Estates Pty Ltd v Ladbroke Retail Parks Ltd*). Two issues clearly emerge. The first issue is whether one examines the impact of the purported easement on the servient owner's proprietorship of only that part of the servient tenement that is actually affected by the easement or if instead one looks to the effect on the entirety of the servient tenement. The second is whether it is enough for a valid easement that the servient owner maintains possession and control or if this requires the servient owner to retain some substantive or reasonable use of the land.

***Brydall Pty Ltd v Owners of Strata Plan 66794* [2009] NSWSC 819**

33. In *Brydall Pty Ltd v Owners of Strata Plan 66794* [2009] NSWSC 819; (2009) 14 BPR 26,831 McDougall J upheld the validity of a claim for an easement for car parking.

His Honour said that the right of parking claimed was not so extensive as to deprive the servient owner of its proprietorship. The area claimed to be subject to the easement was less than 15 per cent of the overall area of the servient tenement.

One of the issues in dispute was whether the rights given to the dominant owner were exclusive rights over the relevant land. His Honour said that even if the rights did endow to the dominant owner exclusive user of the part of the servient tenement affected by the easement and that as a result the servient owner was deprived of the whole beneficial use of the land subject to the easement this was not necessarily a relevant consideration (at [15]; 26,833).

34. His Honour said that the trend in Australian authorities was to ask whether the rights asserted by the dominant owner under the easement impeded the reasonable use of the servient tenement as a whole. The fact that the easement burdened less than 15 per cent of the servient tenement meant that it would not impede the reasonable use of the servient tenement as a whole.

“If the applicable test is whether there remains to the servient owner a reasonable use of the servient tenement in its entirety then I think that the purported easement under consideration here must be capable of being validly granted. It is true that the vast majority of the surface area of the land is affected by the easement. However, the plaintiff is permitted to build above the surface area into the airspace and also to use the subterranean space. The plaintiff thereby enjoys a very substantial user of the land.

35. Moreover, even limiting consideration to the use of the surface of the land, the plaintiff is not excluded from the land but remains able to use the land in conjunction with the second defendant. The plaintiff can do as it pleases with the surface of the land insofar as this does not disturb the rights of the second defendant to park on the land. The plaintiff, its agents and its invitees and so on can park on the land. It is true that the second defendant and its patrons could entirely fill the car park and leave the plaintiff without any car spaces. This would no doubt substantially detract from the plaintiff's user of the land if this were to occur. But the practical reality is that both parties will use the car park simultaneously to a greater or lesser extent. An easement inherently involves tempering the servient owner's user of the servient tenement so as to accommodate the dominant owner's user. In a case such as this where the purported easement enables both the dominant and servient owners to share a resource, it is necessary to have regard to how the easement will be used as a matter of practice rather than focus unduly on the rights available to one party should the other exercise its rights to the maximum extent available if such an event is unlikely to occur. The plaintiff is able to use the car park and from a practical perspective the extent of its user is substantial in that there are 198 car spaces available for the patrons of both the plaintiff's and the second defendant's businesses to share. The plaintiff has far more than nominal proprietorship.

I conclude that the wording in the document could on registration give rise to an easement."

***Ryan v Sutherland* [2011] NSWSC 1397**

36. Is a restriction as to user valid as an easement? The Court held that it could be valid as an easement and as a restrictive covenant

Lot 2 owned by plaintiff was burdened by a restriction as to user created under s 88B of the *Conveyancing Act 1919* (NSW). Lot 1, owned by defendant, had the benefit of that restriction as to user.

Restriction: full and free use by the dominant tenement (lot 1 – defendant) and every person authorised by the RP of the dominant tenement to go, repass and utilise the area for recreation and the maintenance and establishment of plantings and gardens and/or for the establishment of or erection of facilities to the benefit of the dominant tenement.

Plaintiff sought a declaration that the restriction as to user is void, or in the alternative that her land was not affected by the restriction, or that the restriction

is an easement or a positive covenant or that the restriction is not enforceable by the defendant.

It was argued by the plaintiff that the restriction as to user could not be categorised as an easement because the right of exclusive and unrestricted use of a piece of land would not satisfy the fourth requirement in *Re Ellenborough Park*.

37. It was held that the restriction as user only affected *a relatively minor part of the plaintiff's land*, and did not confer *exclusive or unrestricted use of the whole of the plaintiff's land on the defendant*, as such it satisfied the test in *London & Blenheim Estates*. Further, the restriction as to user still allowed the plaintiff to retain possession and control of her land, while allowing the reasonable exercise of the defendant's right to use that part of the plaintiff's land for the specified purposes, hence the test in *Moncrieff v Jamieson* was also satisfied.

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SIDE OF ROAD EASEMENTS: ACCESS

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38. Tipifying the petty disputes that flare up between neighbours , is *Shelbina Pty Ltd v Richards* [2009] NSWSC 1449. The plaintiff had a ROW referred to as "the western easement ", in terms of Sec 181 CA, viz:

"Full and free right for every person who is at any time entitled to an estate or interest in possession in the land herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment, and every person authorised by that person, to go, pass and repass at all times and for all purposes with or without animals or vehicles or both to and from the said dominant tenement or any such part thereof."

The dominant owners (Richards) wanted to be able to use that easement to not only get to and form their property, but also to access their neighbours , the Taylors, with whom they were on friendly terms. Shelbina objected to this, and it was clear that the deviation to the Taylors would save the Richards serious inconvenience and cost Shelbina very little.

Shelbina prevailed.

39. The essential reasoning is in para [33] as follows:

"The view that I have come to is that Shelbina's contentions should be upheld and for the following reasons:

(1) I accept Shelbina's contention that the right of the defendants is to pass to and from and along the western easement and the eastern easement but that there is no express right to use the western easement to access the Taylor property.

(2) In the absence of express words of the kind identified by Ms Lane the owner of the dominant tenement has a right to enter and exit the right of way at its two ends but does not have the right to enter and exit the right of way at any point along its length to access (or provide access from) another property. That is not mentioned expressly or impliedly in the easement. I do not accept Mr Sirtes' contention that absent the Transgrid easement Shelbina would not be free to fence the boundary of its property or that such fencing would inhibit the defendant's enjoyment of the right of way. As at the time of the creation of the western easement there was no Transgrid easement and no reason to think that access to or from the Taylor property would be of any use or purpose relevant to the enjoyment of the western easement. The subsequent ownership of the land by the Taylors and the defendants and their friendship is entirely irrelevant and cannot make the construction contended for by Shelbina an unreasonable one. In my view the approach taken in **Westfield v Perpetual Trustee** is pertinent here; just as in **Westfield v Perpetual Trustee** was not permitted to utilise the easement to access the land other than the dominant tenement, here the defendants have no right to use the easement to access the Taylor property.

(3) The cases which consider what is reasonable access to the dominant land are not in my opinion relevant here. The defendants are seeking access to the Taylor property from the easement and the Taylor property is not benefited by the easement. There is no dispute as to the right of the defendants to access their property, Lot 11, from the right of way and there is no issue about the reasonableness or sufficiency of the access point for them to do so.

(4) I do not accept the defendants' argument that the western easement has no exit or entrance point."

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SEC 28 ENVIRONMENTAL PLANNING AND ASSESSMENT ACT
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40. Suspension of laws etc. by environmental planning instruments

(1) In this section, **"regulatory instrument"** means any Act (other than this Act), rule, regulation, by-law, ordinance, proclamation, *agreement*, *covenant or instrument by* or under whatever authority made.

(2) For the purpose of enabling development to be carried out in accordance with an environmental planning instrument or in accordance with a consent granted under this Act, an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a regulatory instrument specified in that environmental planning instrument shall not apply to any such development or shall apply subject to the modifications specified in that environmental planning instrument.

(3) A provision referred to in subsection (2) shall have effect according to its tenor, but only if the Governor has, before the making of the environmental planning instrument, approved of the provision. ……

……..
(6) The provisions of this section have effect despite anything contained in section 42 of the *Real Property Act 1900* .

42 Estate of registered proprietor paramount

(1) Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded except:

> (a) the estate or interest recorded in a prior folio of the Register by reason of which another proprietor claims the same land,
>
> (a1) in the case of the omission or misdescription of an easement subsisting immediately before the land was brought under the provisions of this Act or validly created at or after that time under this or any other Act or a Commonwealth Act,

(b) in the case of the omission or misdescription of any profit à prendre created in or existing upon any land,

(c) as to any portion of land that may by wrong description of parcels or of boundaries be included in the folio of the Register or registered dealing evidencing the title of such registered proprietor, not being a purchaser or mortgagee thereof for value, or deriving from or through a purchaser or mortgagee thereof for value, and

(d) a tenancy whereunder the tenant is in possession or entitled to immediate possession, and an agreement or option for the acquisition by such a tenant of a further term to commence at the expiration of such a tenancy, of which in either case the registered proprietor before he or she became registered as proprietor had notice against which he or she was not protected:

Provided that:

(i) The term for which the tenancy was created does not exceed three years, and

(ii) in the case of such an agreement or option, the additional term for which it provides would not, when added to the original term, exceed three years.

(2) In subsection (1), a reference to an estate or interest in land recorded in a folio of the Register includes a reference to an estate or interest recorded in a registered mortgage, charge or lease that may be directly or indirectly identified from a distinctive reference in that folio.

(3) This section prevails over any inconsistent provision of any other Act or law unless the inconsistent provision expressly provides that it is to have effect despite anything contained in this section.

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SHI V ABI-K PTY LTD [2014] NSWSC 551; reversed as regards inter alia costs [2014] NSWCA 293

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41. The question that is being addressed here is : how can one put the proposed servient tenement's owner at risks of costs , in the event they unreasonably reject a proposal for an easement? This is in context of offers of compromise (including

Calderbank offers) only being able to be served AFTER litigation commences.

Section 88K(5) of the Conveyancing Act provides that the costs of the proceedings are payable by the applicant for the order unless the Court orders to the contrary. This creates an entitlement in the person affected by imposition of the easement "to have the costs of having it determined by the Court whether the circumstances appropriate for the grant of an easement are established, and the costs of assessing appropriate compensation": *117 York Street Pty Ltd v Proprietors of Strata Plan No 16123* at 523.

This is because what is being sought is an indulgence: a judicially endorsed trespass onto that bundle of rights most protected at law—real property rights.

42. ABI-K Pty Ltd obtained a deferred development approval from Council for the development of its land, subject to it obtaining a one metre wide drainage easement over a downhill property. It sought to negotiate an easement over the land owned by Mr Shi, and made not ungenerous offers, including one of $40,000 and also a Calderbank of $30,000 shortly after proceedings commenced. These were substantially more than the circa $21,000 ultimately awarded.

Mr Shi had various concerns, including that his plans to develop his own property would be crimped: he had plans to build up to his "set back", with eaves overhanging his "set back" (a set back is line parallel to one's boundary but set back form it , usually by a metre, that Councils require cannot be built beyond).

ABI-K commenced proceedings under s 88K of the *Conveyancing Act 1919* (NSW), seeking an order imposing an easement over Mr Shi's property. Kunc J, the trial judge, granted the easement, but found that Mr Shi had been unreasonable in his opposition and awarded costs against him i.e. HH made one of the rare "otherwise orders" under Sec 88 K (5). HH also allowed the easement to be a full 1 metre, thus potentially crimping Mr Shi's future development by 100 mm, although there was no certainty one way or another whether it would or would not.

On appeal, Mr Shi challenged the orders made by the judge on various bases.

43. Mr Shi successfully challenged the finding of the trial judge that a 1 metre strip was "reasonably necessary" . He submitted that the one metre wide easement exceeded the usual "set back" from the boundary, required by Council, and thus sterilised redevelopment of his own property. He also complained that although the Council would permit him to erect a building with eaves over the "set back" it would not permit eaves over an easement. Thus, the CA varied the trial judge's order.

The effect of this variation was presumably that ABI-K could not satisfy the condition in the deferred development consent; and one can infer it had to apply to Council to modify the consent. It may be that ABI-K would have been better off commencing in the Land and Environment Court (as opposed to the SC); as the L & E Court has the power under Sec 40 of the L & E Court Act to modify conditions in consents, where the matter relates to easements of necessity (i.e. under Sec 88 K CA).

44. Mr Shi also submitted that he should not have been ordered to pay the costs of the application to the Court, merely because he had not accepted offers of compensation.

The essential findings were in para [98], as follows:

"…… This proceeding was not a claim for damages, or any analogous form of compensation: it was a claim for an interest in property, for which appropriate compensation was required to be paid. The ordinary rule, that the applicant pay the costs of any proceeding, reflects the fact that an applicant for such an order has no right to the grant of an easement over the property of another. Further, the rule that the applicant pay the costs relates to proceedings which could only be brought after all reasonable attempts had been made (presumably by seeking agreement) but have been unsuccessful. *The statutory scheme is not consistent with the proposition that an applicant can obtain a right to costs by offering more than the compensation ultimately ordered to be paid as a condition of the easement. The property owner is entitled to refuse to consent to the easement, thereby requiring the applicant to satisfy a court as to the various preconditions*, including questions of the public interest, and that the grant of the easement is reasonably necessary in the sense provided by the section. Unless it has done more than reject reasonable offers of compensation, the property owner should not be put at risk of an adverse costs order in those circumstances. The proper order was to require the applicant to pay Mr Shi's costs of the proceedings, limited to the costs recoverable by a litigant in person. *Those costs would not extend to the legal costs incurred prior to the commencement of the proceedings*."

***Ross Bilton & Ors v Georgia Ligdas (Costs)* [2016] NSWSC 1585, per Rein J**

45. "[17] There may be cases in which the person against whom the easement is sought has engaged in conduct disentitling him or her from having the benefit of the usual order, such as *making the proceedings more expensive*……*The presentation of patently false evidence or manufacturing of a case may be sufficient as well*……. As I have previously noted in *Ryan* at [14], the discretion under s.88K(5) in respect of "unreasonableness" may be compared to

the discretion of the Court to award indemnity costs against a party.

"…… there may be situations in which the case for an easement is so strong and the claim for compensation sought so extravagant that the owner's failure to accede to the application should displace the ordinary rule in s.88K(5). However as the Court of Appeal has recently emphasised, the ordinary rule "relates to proceedings which could only be brought after all reasonable attempts had been made (presumably by seeking agreement) but have been unsuccessful", such that there must be "more than rejection of reasonable offers of compensation" to justify an alternative order…….Similarly, it has been said that it is not enough that the plaintiffs' case was a "strong one", where the defendant's position was not "so untenable as to deprive it of the character of a reasonable defence": Stepanoski v Chen (No 2) [2012] NSWSC 1037 at [10] (Lindsay J)."

"[21] In circumstances where there was a reasonable basis to resist the easement, and not solely on the ground of the amount sought or assessed, I think these aspects have less significance than they might otherwise have (see in contrast Goodwin v Yee Holdings Pty Ltd (1997) 8 BPR 15,795 and see also Mitchell v Boutagy [2001] NSWSC 1045; (2001) 118 LGERA 249; [2001] NSWSC 1045 per Austin J [60]-[67]. ……"

46. In para [28], Rein J concluded by saying that s.88K(5) may well be in need of being revisited by the relevant Committees "if its operation is unconducive to encouraging settlement of these types of cases". In so doing, HH referred to the recent paper by Kunc J "S.88K Easements - How Much Discretion Really?" delivered 22 October 2016 particularly at [51] to [63]. This paper is accessible on the Supreme Court website.

The basis on which costs should be paid is the ordinary basis, unless the conduct of the applicant for the order has been such as to justify an order for indemnity costs: *Rainbowforce* para [183].

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