

RUMOURS OF MY DEMISE ARE GREATLY OVERSTATED

*the difficulties in seeking declarations that easements and covenants
have been abandoned or are obsolete*

LegalWise 6th Annual Property Law Conference

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TOPICS COVERED BY THIS SESSION

1. Navigating section 89 of the *Conveyancing Act 1919* and the related *Sec 49 Real Property Act 1900*
2. Modifying or extinguishing covenants & easements
3. Practice and procedure: applications, notice and orders
4. Case examples and the practical takeaways for your practice

SEC 49 REAL PROPERTY ACT 1900

1. The Registrar-General may cancel a recording relating to an easement in the Register if the easement has been *abandoned*.

(1A) [omitted]

(2) An easement may be treated as abandoned if the Registrar-General is *satisfied* it has not been used for at least 20 years before the application

.....

[Secs [3] – [6] omitted]

Sec 89 (1) Conveyancing Act NSW

(1) Where land is subject to an easement or a profit prendre or to a restriction or an obligation arising under covenant or otherwise as to the user thereof, the Court may from time to time, *on the application* of any person interested in the land, by order modify or wholly or partially extinguish the easement *etc.* upon being satisfied:

(a) that by reason of *change in the user of any land having the benefit of the easement, etc.* or in the *character of the neighbourhood or other circumstances of the case which the Court may deem material*, the easement *etc* ought to be deemed *obsolete*, or that the continued existence thereof would impede the reasonable user of the land subject to the easement *etc.* without securing practical benefit to the persons entitled to the easement *etc.*, or would, unless modified, so impede such user,

or

Sec 89 (1) Conveyancing Act NSW

- (b) [[certain persons]] have

“....agreed to the easement *etc* being *modified or wholly or partially extinguished*, or by their acts or omissions may reasonably be considered to have *abandoned* the easement *etc wholly or in part* or *waived the benefit* of the restriction wholly or in part....”

- (b1) [omitted]

Sec 89 (1) Conveyancing Act NSW

- (c) that the proposed modification or extinguishment will not substantially injure the persons entitled to the easement *etc.*
- (1A) For the purposes of subsection (1) (b), an easement may be treated as abandoned if the Court *is satisfied that the easement has not been used for at least 20 years before the application under subsection (1) is made.*

Second Reading Speech for Sec 49 RPA

-As it has proven almost impossible to establish abandonment according to the *complex rules that apply at common law this provision provides a simplified statutory basis for abandonment of easements.*

.....

Second Reading Speech for Sec 49 RPA

- However should someone dispute an application to the Registrar General for abandonment of easement then this issue is dealt with by the Supreme Court under *section 89 of the Conveyancing Act 1919* and not *section 49 of the Real Property Act 1900*.

Principles regarding the proof of abandonment of an easement

- An easement can be abandoned both at common law and under the *Conveyancing Act: Grill v Hockey* (1991) 5 BPR 11421

Abandonment occurs when “the dominant owner has made it clear that neither he nor his successors in title will make any use of the easement *though it is not to be lightly inferred*. what one must look for is evidence that there has been an implied (or lost modern deed of) release of the easement. *Long non-user will be good evidence, but will not necessarily be sufficient to establish abandonment.....*”

at [36] of *Chiu v Healey* [2003] NSWSC 857

Principles regarding the proof of abandonment of an easement

- mere non-user without more, *however long*, cannot amount to abandonment" and "such non-user is evidence from which abandonment may be inferred but must be regarded in the context of the circumstances as a whole"

para [85] of *Effeney v Millar Investments Pty Ltd* [2011] NSWSC 708

Principles regarding the proof of abandonment of an easement

- abandonment depends on the intention of the person alleged to be abandoning the right of way as perceived by the reasonable owner of the servient tenement;

abandonment is not to be lightly inferred; owners of property do not normally wish to divest themselves of it unless it is to their advantage to do so, *notwithstanding that they may have no present use for it.*

Odey v Barber [2006] EWHC 3109 (Ch) at [103], per Silber J in dicta

Principles regarding the proof of abandonment of an easement

- It is insufficient to show abandonment merely that the owner of the dominant tenement is unable to use the easement, *particularly if the inability to use it is not permanent*

Ecclesiastical Commissioners for England v Kino (1880) 14 Ch D 213

CASE EXAMPLE: Chiu v Healey [2003] NSWSC 857

- The defendant contended for abandonment, on the ground *inter alia* that the easement had been *bricked up by a wall for about 30 years*. Young CJ in Eq gave short shrift to this position at para [40], as follows:

“In my view this comes nowhere near the evidence needed to show abandonment. All it indicates is that for a period of time the plaintiff was prepared not to use his backyard or at least not to use it except by getting access through his own property. *There have been continuous improvements of both properties over the years* and I would think it would be quite unsafe to infer abandonment.”

OBSOLESCENCE: From use to disuse

- “Obsolescence is not established merely by demonstrating that removal of an easement of right of way will not prevent alternative, practical access and egress to and from the dominant tenement. The concept of obsolescence.....involves a *change from usefulness at the time of creation of the easement to lack thereof at the time of the application for extinguishment or, perhaps, from use to disuse.* A relevant enquiry is whether "the original object of the covenant can be achieved, or, possibly, whether the covenant is "no longer relevant to the circumstances presently obtaining...".

Averono & Anor v Mbuzi & Anor [2005] QSC 6 [25] & [26]

OBSOLESCENCE: Mamfredas Investment Group Pty Limited (formerly known as MAM Marketing Pty Ltd) v PropertyIT and Consulting Pty Limited [2013] NSWSC 929

- *Mamfredas* is one of the few cases where the court declared a restriction obsolete.

Its use of the burdened land (car parks) was impeded because it could not sell it; and the restriction did not secure a practical benefit to the persons supposedly benefitted.

NO SUBSTANTIAL INJURY: Laris v Lin (No. 2) [2016] NSWSC 560 para [74]

- (a) a “substantial injury” is one that has real and present substance but need not be large or considerable;
- (b) a wide variety of tangible and intangible potential injuries are encompassed by the expression “substantial injury” in s 89(1)(c);
- (c) there must be an injury of “real and present substance” .Examples are summarised by Young CJ in Eq, (as His Honour then was) in *Castagna v Great Wall Resources Pty Ltd* [2005] NSWSC 942; (2005) 12 BPR 23,363 at [42] – [43].

CHANGE IN CHARACTER OF NEIGHBOURHOOD

- Major public works associated with building a road can constitute a change in the character of the neighbourhood (and also ground a conclusion that the easement is obsolete).

Rosedale Farm (NSW) Pty Limited [2010] NSWSC 1321, paras [76] ff

PROCEDURE AND PRACTICAL TIPS

- Application to the Court in NSW is by Summons supported by affidavit.
- Application to the RG is by filling in the prescribed forms; and there can be some degree of liaising via letter.
- Applications to Court ought be preceded by a letter of demand, to lay the foundation for seeking costs (at least of the Summons and supporting affidavit as required under the NSW Equity Division Practice Note).
- Any application to Court ought identify what exact *declaration* is sought: that there has been abandonment? waiver? That the easement etc. is obsolete?; that there's been change in character of neighbourhood ? *etc.*
- Weigh up costs implications and avenues for appeal and or judicial review of whichever path is taken.

PROCEDURE AND PRACTICAL TIPS

- A picture paints 1000 words. Support the Summons by a sketch setting out all salient facts e.g. street names, lot no's, names of parties, situation of the right of way or other easement or restriction etc.

The DP almost never achieves this purpose; though may provide a good base.

- This area is discretionary. It is thus best that letters are written with that in mind: reasonableness between neighbours; give and take; live and let live: keep the pendulum in the middle.