NOT IN MY BACK YARD: PICKING YOUR EASEMENT BATTLE

15th Annual NSW Property Law Conference, 4 March 2021
Television Education Network

presented by *SYDNEY JACOBS*, LL M (Cam.), Barrister of

13 Wentworth and Easement Chambers

****

This session will cover the following topics

- Determining when an easement needs to be created and application requirements under the *Conveyancing Act* 1919
- Creation rights clarified: case study of *Aussie Skips Recycling Pty Ltd V Strathfield Municipal Council* [2020] NSW LEC 22 and on appeal, *Aussie Skips Recycling Pty Ltd v Strathfield Municipal Council* [2020] NSWCA 292
- Other forms of easement creation: a case study of *Campbell v Hamilton* [2019] NSWCA 22
- What is required to oppose an easement or seek removal or variation?
- Easement access, maintenance and interference-determining party rights, responsibilities, and liabilities
- Tips and traps for easement relationship management (as per accompanying power point slides).

Determining when an easement needs to be created and application requirements under the Conveyancing Act 1919

1. Determining when an easement needs to be created is perhaps the easiest part of the seminar. Typical examples would be when:

(i) a Council issues a deferred development consent, with a condition that only when a particular type of easement, is obtained can the applicant then apply for its construction certificate.

(ii) a property owner wishes to subdivide land (which could adjoin not only highways but also the harbour), and the land needs to be divided in various configurations so that all lots have pedestrian or vehicular access; or perhaps access to the harbour so that marine vessels can be moored; perhaps access to shared driveways and inclinators.

(iii) Sometimes, public authorities such as the Sydney Water, Ausgrid, RMS and Councils, need easements in their favour even though they do not have land that is contiguous to that of the proposed servient tenement. A typical example is where there is a condition of consent that once a particular road has been constructed, there will be an easement in favour of the public. That type of easement is called an easement in gross is created *without* a dominant tenement.

2. An easement in gross can be created (without a dominant tenement) where the easement is:

- in favour of a Prescribed Authority being the State or a statutory body recognised in s.88A(1), (1A) & (1B) *Conveyancing Act 1919*
- in favour of the Commonwealth or a Commonwealth Authority
- in favour of a licensee under s.61(2) *Pipelines Act 1967* or an easement for public access created under s.56(2) *Crown Lands Act 1989*."

The nuts and bolts of the requirements for the creation of registered easements under the *Conveyancing Act* NSW are matters for the LRS as per their administrative requirements as per its website.

An easement may be created by means of an appropriate dealing registered in NSW LRS or by the inclusion in a Section 88B instrument lodged with a new deposited plan.

3. The LPI/ LRS webpage dealing with "New Easements" has helpful information as follows:

An easement may be created by the registration of a Transfer Granting Easement form 01TG (PDF 592 KB), or by Lease form 07L (PDF 234 KB), National Mortgage form or Charge form 06C (PDF 163 KB). A grant of easement over Old System land must be made by a valid deed.

An easement may also be created when disposing of an estate or interest, by incorporation in a Transfer Including Easement form 01TE (PDF 648 KB), by conveyance of a grant in favour of the transferee or by a reservation for the benefit of the transferor.

The site of the easement must be indicated in either a sketch annexed to the transfer or a deposited plan. For more information see General plan requirements page.

4. The LPI/ LRS website sets out the requirements as follows:

it deals with General requirements for all easements; then in a section headed "New easements", says that they may be created by the registration of a dealing, a deposited plan or by implied grant or reservation.

5. As to Easements affecting Old System land, the RG's guidelines say that registration of a deposited plan affecting Old System land, may create new easements subject to certain provisions.

6. Also addressed are:
Easements created by statute
Easements created by Order of Court
Easements created by resumption or acquisition (by the publication of a notice of acquisition in the Government Gazette)
Easements created by prescription the courts may presume that long or continued use of a right has created an easement in law.

7. The LRS web-page which deals with "General requirements" has helpful notations such as the following:

"N**ote 1** An easement, where the dominant tenement is Torrens title land and the servient tenement is Old System land cannot be created under the *Real Property Act 1900* by lodgment in NSW LRS of a transfer granting easement. These easements may only be created by a Primary Application over the site (or over the entirety of the affected parcel) and inclusion in the section 88B instrument lodged with the deposited plan of survey accompanying the application.

Note 2 An easement, where the dominant tenement is Old System land and the servient tenement is Torrens title land, will be registered on the title for the servient tenement. It will be created by either lodgement of a transfer granting easement or by inclusion in a section 88B instrument lodged with a deposited plan of survey.

Note 3 An easement may contain a Sunrise Clause i.e. a clause that states that the easement will commence operation only after a specified date or the occurrence of a particular event. However, a notification relating to the easement will be endorsed on the relevant folios of the register immediately upon registration of the dealing or instrument."

Implied Grant or Reservation

8. The LRS website notes *inter alia* that "An easement may have been created in cases where it was 'implied' in an Old System conveyance or deed. For example, an 'easement of necessity' will be implied against the vendor where he or she retains the surrounding land and the easement is absolutely necessary for the practical use of the dominant tenement. The easement is limited to the necessity which existed at the time of the grant and will be available only for such purposes as were necessary to make the land useable."

9. Please see the LRS website for further information in this regard.

Registration of a deposited plan

10. The LRS website notes *inter alia*: "Section 88B *Conveyancing Act 1919* (commencing 16 June 1964) provides for the creation of easements, profits à prendre, restrictions on the use of land and positive covenants by the registration of an instrument attached to the plan. The easements or restrictions may be created as part of a plan for subdivision or

consolidation purposes, or alternately, a plan lodged may be prepared for easement purposes only.

Private easements or easements in gross may be created:

- affecting or for the benefit of parcels within or outside the plan
- burdening land in the plan appurtenant to existing roads or roads created by the registration of the plan
- burdening land outside the plan benefiting roads created by the registration of the plan
- burdening roads in the plan (new or existing).

Section 88B allows for the creation of easements with the dominant and servient tenements in the same ownership…. … … …"

Easement purposes only plans

11. The LRS website notes "The site of the new easement as set out in a new deposited plan for easement purposes must either be defined by survey or comply with the Registrar General's requirements for a compiled plan. Easement Purposes Only plans must not redefine the boundaries of the parcel affected by the new easement unless those boundaries constitute the extent of the site. All standard procedures for the preparation of a deposited plan apply. Permanent and Reference Marks should comply with cl.18 *Surveying and Spatial Information Regulation 2012*. See also Placement of permanent marks page."

Creation rights clarified: case study of *Aussie Skips Recycling Pty Ltd v Strathfield Municipal Council* [2020] NSWCA 292

12. Section 88 K *Conveyancing Act* (1919) gives the Supreme Court of New South Wales the discretion to award an easement in favour of a dominant tenement in the event the owners of the dominant tenement have made reasonable efforts to obtain that easement one similar to it from the relevant neighbour\s; but have been rebuffed. There are a host of

requirements to meet for example that the easement is reasonably necessary for the effective *use* or *development* of the prospective dominant tenement. Most cases relate to development although from time to time, there are pure "use" cases.

13. A significant area which has received attention by the courts is what exactly is meant by "reasonably necessary". These words are the fulcrum whereby the courts balance the competing interests of the prospective dominant and servient tenements.

14. Other requirements are that the proposed easement is not inconsistent with the public interest, and that compensation for the imposition of the easement can be awarded.

15. This is only a thumb-nail sketch of section 88 K requirements, which I have devoted CPD papers to, are available on my 13 Wentworth website.

16. I now fast forward to a recent case under section 88K to illustrate some of the tips and traps, viz *Aussie Skips Recycling Pty Ltd V Strathfield Municipal Council [2020]* NSW LEC 22. Aussie Skips operated a waste transfer and recycling business on the land it leased from Isas Pty Ltd.

17. There is a narrow strip of land, zoned "community land", owned by Strathfield Municipal Council between Aussie Skips operations and a drainage channel.

18. Aussie Skips built a "acoustic wall" along the boundary of its land and the Council land, but in so doing, 341m2 of Council land came to be incorporated within their operations.

19. Council took enforcement action to restrain continued occupation of its land.

20. In mid - 2019, Aussie Skips filed a summons seeking section 88K relief to seek to regularise the "facts on the ground". The matter was transferred to the Land and Environment Court, which rejected the application for the easement, and Aussie Skips then appealed.

21. Extracting from the headnote of the appeal judgment, but without the citations:

HN 1:

"The proposed easements were incapable of comprising easements at law: [27]. The appellants enclosed 68% of the Council's lot, in a manner which practically excluded the Council from any use of the enclosed land: [25]. The Council's rights of access to the land were in truth illusory: [22] and the enclosure diminished the Council's enjoyment of the residue land: [26].

……."

I interpose to note that the principle of law in play over here is that a grant of joint occupation which would substantially deprive the owners of legal possession, cannot form the subject matter of an easement: *Re Ellenborough Park* [1956] Ch 131 at 164. I delve into much greater detail about *Re Ellenborough* in my CPD paper on novel easements, available on my 13 Wentworth website.

In this regard, Basten JA at [21] of *Aussie Skips* quoted with approval what the learned trial judge had said, as follows:

"[70] Clearly, the purpose for which the Council Land is capable of being used, namely for amenity and passive purposes in conjunction with some formal or informal planting, is incompatible with the use as a waste recovery and recycling facility. The effect is not even the case of a joint occupation where two uses may co-exist. It is a wholesale occupation of the Easement Land to the exclusion of the Council. To the extent that the Council may presently physically access the Easement Land, such access serves no purpose consistent with the ownership and occupation of the Council of its Land, as the present occupier's use with the wall and the concrete slab lend itself only to the occupier's use and not the Council's."

At para [23], Basten JA commented on the illusory rights left to the Council (were Aussie Skips to prevail), in the following terms:

"….. The rights conferred on the dominant tenement may be extensive and provide for exclusive occupation of the land, but must be compatible with the continued beneficial ownership of the servient tenement."

Basten JA then gave the example from a 1949 KB case, *Wright v Macadam*, where a tenant of an upper flat in a house, had been given the right to use a coal shed in the garden of a house, and which had held that that this was valid as an easement *as it was a right of a kind that could readily be included in a lease or conveyance*.

HN 3 "The trial judge correctly rejected the asserted factual basis that underpinned the claimed necessity related to the manoeuvring of trucks at the site: [35], and the submission on the cost of removing or replacing the acoustic wall: [36]."

Whether the Council had power to grant the easements over community land because the appellants were running a public utility.

HN 4 The Council had no power to grant the easement sought by the appellants over land designated community land, and the submissions in this Court that the appellants were running a public utility rather than a private business for profit must be rejected: [41]-[45].

Query: the Court's power to grant an easement over community land

HN 5 The court may not have a power to grant an easement over community land: For the court to do what the council cannot do may undermine the purpose and operation of the *Local Government Act 1993*. Section 88K may assume that the owner has the legal power to grant and modify the easement, which operates as if it were a deed: [48]-[52].

22. To extract from the judgment, delivered by Basten JA for the plurality, as follows:

"[14] No one appears to have questioned how the grantor, which was not the Council (it had no power to make such a grant), could exercise these powers on community land, given the controls imposed by the *Local Government Act* which did not extend to the conferral of such powers. The effect of the imposition of an easement in these terms by the court would have involved the conferral of powers on the Council by the court; it is not clear that s 88K vests any such power in the court."

[15] It may be added that if, as the Council contended, none of the development consents for the operation of the waste facility extended to the operations on Council land, that operation, sought to be the subject of the easement, was and remains presently unlawful. There was no explanation as to how the Court, by the imposition of an easement, could render lawful that which under the *Environmental Planning and Assessment Act 1979* (NSW) was unlawful."

At paragraph [17], Basten JA opined that the absence of development consents legalising the operations on the Council strip, was a "fatal flaw in the underlying premise of the application."

23. Another problem in the applicant's case, was that it had not adduced evidence to support its contention that at least with the current configuration of the buildings and placement of

stockpiles on its own land, there was difficulty in 19 metre trucks with trailers manoeuvring on the hardstand. To the extent that reconfiguration was required *the evidence did not permit the judge to determine that reconfiguration was not reasonably possible, at a reasonable expense:* para [35]

"[36] The second issue was the cost of removing and reconstructing the present wall on the appellants' own land. That would, as the judge noted, involve both inconvenience and cost. However, the judge rejected a submission that "an easement was reasonably necessary, in part, because it was regularising a pre-existing circumstance". The judge correctly noted, in that respect:

"[140] As to the cost consequence of having to relocate the acoustic wall versus being able to utilise it, this cost has arisen as a consequence of the predecessors to Aussie Skips having constructed the wall in a location and to a height that was not approved in any development consent or expressly authorised by Council in any other capacity. ..."

OTHER FORMS OF EASEMENT CREATION

24. ***Sec 88*** *Conveyancing Act*

Requirements for easements and restrictions on use of land

(1) Except to the extent that this Division otherwise provides, an easement expressed to be created by an instrument coming into operation after the commencement of the *Conveyancing (Amendment) Act 1930*, and a restriction arising under covenant or otherwise as to the user of any land the benefit of which is intended to be annexed to other land, contained in an instrument coming into operation after such commencement, *shall not be enforceable against a person interested in the land claimed to be subject to the easement or restriction, and not being a party to its creation unless the instrument clearly indicates*:

(a) the land to which the benefit of the easement or restriction is appurtenant,
..."

Campbell v Hamilton **[2019] NSWCA 22**

25. Central question: did Mr Campbell (the appellant) agree to grant an easement for services and carriageway 3 m's wide over a part of his land that would bind his successors in title?

26. The parties had entered into a Heads of Agreement, intended to be immediately binding, whereby Mr Campbell had agreed to grant an easement for services and carriageway in favour of the Hamiltons upon future execution of a Deed of Settlement.

27. The Deed of Settlement was then executed, with terms as follows:

"2.6 On the execution Date of this Deed, RC will give to CH and PH a signed Transfer Granting Easement for services and carriageway of three (3) metres in width from the eastern boundary of Lot 4 (as set out at Schedule B of this Deed)."

Cl. 14.1 of the Deed provided that the parties had to co-operate to deliver all further documents and instruments necessary to implement their primary obligations.

28. The easement Mr Campbell agreed to grant in favour of the respondents ("the Hamiltons") afforded access from the Hamiltons' land to a nearby public road. Mr Campbell duly provided a form of transfer which was then lodged by the Hamiltons for registration. However LPI raised requisitions, the certificate of title was produced, and a plan of survey prepared on Mr Hamilton's behalf to satisfy the LPI's requirements.

29. Hand notations were then made to the instrument by Mr Hamilton. The changes said "being part designated (X) on plan attached" and there was attached a plan prepared by the surveyor. There was some other change as well. The judgment suggests the changes were minor and done in the good faith in the belief they were entitled to do that: see e.g. para [44].

30. Mr Campbell did not point to any difference between the area identified on the survey plan attached to the instrument as registered as the area to which the benefit of the easement is appurtenant and the plan attached to the Deed: para [47].

31. Mr Campbell however had not consented to the making of the alteration and he sought an order under section 138 of the *Real Property Act* 1900 cancelling the recording.

32. Mr Campbell accepted that the rights he granted were benefitted the Hamiltons' successors in title, but said that they did *not* bind *his* successors in title. His reasoning was that the instrument he signed creating the easement did not "clearly indicate" the land to which the easement was appurtenant and was thus unenforceable against his successors in title by reason of s 88(1)(a) CA.

33. At paragraph [9], it was observed that even if there were some defect in the form, then having regard to cl. 14 of the deed, Mr Campbell would be obliged to deliver a fresh form that complied with all due requirements.

34. There was some debate at paras [13] to [14[as to what evidence was admissible in aid of construing the rights granted to the Hamiltons. It will be recalled that the High Court in the *Westfield* case (2007) 233 CLR 528; [2007] HCA 45 at 531 [5]; 539 [39]), concerning the Glasshouse building in the Sydney CBD, said that when it came to Torrens easements, the only material that was admissible in aid of their construction, were documents available to 3rd parties inspecting the register; and evidence of the topography. At paragraph [14], the Honourable Mr Justice White held that *Westfield* reasoning is confined to the construction of registered easements and since the relevant easement in this case had not been registered, the court could look to the objective fact known to both parties which provide the context in which the settlement deed was entered into and its commercial purpose.

35. After considering context and text, HH concluded on this score as follows:

"[35] The instrument refers at paragraphs [10] - [12] to "the owner of the lot burdened". If it were intended that the burden of the rights granted should not run with the land, that language would be inapt. Nor would it be apt to describe Lot 4 as the servient tenement in Schedule B. Thus the terms of Transfer Granting Easement confirm that objectively considered the parties intended to create easements that would run with the land: both the dominant and servient tenement."

36. The case contains a useful discussion of the test for what level of detail is required to "clearly indicate" the burdened land, for the purposes of s 88(1), by reference to *Papadopoulos v Goodwin* [1982] 1 NSWLR 413 per Wootten J at 417 and on appeal *Goodwin v Papadopoulos* (1985) NSW ConvR 55-256).

37. In *Destri Enterprises Pty Ltd & Ors v Donald James Maxwel* [2012] NSWSC 295, the owners of historic Lochinvar House successfully resisted a challenge on the basis of

obsolescence to the 20 m wide “Luskintyre easement” (a right of carriageway) that connected their property to Luskintyre Rd, by running through their neighbours. There was alternative access for the dominant tenement (i.e. Lochinvar House) to the main highway.

38. Para 1 of the judgment sets the scene:

“In 1808, the novelist, playwright and poet, Sir Walter Scott, published his poem about the romantic knight, Lochinvar. Scott's work had contemporary influence in Australia. In 1823 Leslie Duguid, one of the founding directors of the Commercial Bank of Sydney, received a land grant of 2000 acres in the lower Hunter Valley. The grant was bounded by the Hunter River in the north and straddled what is now the New England Highway. Duguid called the estate and its village "Lochinvar", between Branxton and Maitland. By 1840 Duguid had constructed the first major residence in the area, "Lochinvar House", situated north-west of the village of Lochinvar, but south of the Hunter River. That same year, 1840 Duguid subdivided and sold his 2000 acres into smaller lots. Lochinvar House stands on one of these original subdivided lots.....”

The resistance, accepted by Slattery J, was on the grounds that it still could be used as an emergency evacuation route for cattle in times of flood “to avoid erratic stock behaviour”” (at [43]) and also for horse riding purposes: para [95]. Lochinvar House was on land that had been the 251 ha. Kaludah Estate, which had been sub divided over time. The evidence of the neighbours who brought the challenge was that it was no longer being used, and affected their ability to develop their properties.

“This potential use of the easement is rare. But is nevertheless of real importance in time of flood.....”, observed Slattery J at [111].

39. In *Betty Campbell v Peter Douglas Baigent & Ors* [2010] NSWSC 1348, it was contended that an easement was obsolete because it was not required for traffic reasons. This shows that an argument of this nature is open at law; although it failed on the facts of that case.

40. *Vrakas v Registrar of Titles* [2008] VSC 281 emphasised that if a covenant continues to have *any value* for the persons entitled to the benefit of it, then it will rarely, if ever, be obsolete. And see further my CPD papers “Rumours of my demise are greatly over-stated”. Hence, pick your battles carefully!

Easement access, maintenance and interference - determining party rights, responsibilities and liabilities

41. "...ordinarily, in the absence of a specific provision in the terms of the easement, and except where the circumstances otherwise indicate, the servient owner is entitled to fence the right of way, provided that sufficient points of access through gates are allowed to permit reasonable use of the right of way; that the dominant owner is not entitled to have the right of way remain unfenced; and that the dominant owner is not limited to a single point of access and does not irrevocably elect to use only one point of access by initially determining to do so, but may from time to time vary the points at which access is exercised to and from the right of way. Further, the servient owner may gate the right of way, provided that the gate does not unreasonably obstruct use of the right of way."

Trewin v Felton [2007] NSWSC 851, appl by Boddice J in *Brown v Jackson* [2015] QSC 355

42. In relation to a simple right of way, the owner of the dominant tenement does not have a right of access to, and use of the right of way wholly unobstructed by any limitation placed upon such use by the owner of the servient tenement. Only "a real, substantial interference with the enjoyment of the right of way is actionable" *Kettleton v Murray & Anor* [2017] QDC 64. Hence, be careful what your client complains of!

43. Whether there is substantial interference with the enjoyment of the right of way depends on the facts of each case.[1]

44. In *Finlayson v Campbell* (1997) 8 PBR 15, Young J, in holding that physical obstructions amounting to more than mere dissuasions were necessary to constitute a breach of the grant said at p 15, 711:

"Mr Coles QC insisted in his submissions that a non-physical interference could of itself amount to a substantial interference with a right of way. He instanced obstruction of view of a driver of a vehicle using a right of way creating a situation where the driver had to use greater skill and care in manoeuvring the motor vehicle. He mainly relied on *Cross's case.*

[1] *Stewart v Cooper* [1986] TASSC 3; [1986] Tas R. (NC) N1 at 9-10, quoted with approval by Boddice J in *Brown v Jackson* [2015] QSC 355 at [18].

With respect, I cannot see how this proposition can be correct, though in most cases, including this case, it really does not make any difference. This is because when one is looking at substantial interference this type of question really merges into the problems caused by physical obstructions.

To take an example, however, suppose that to dissuade a neighbour from using a right of way the servient owner painted horror pictures of people being massacred or skeletons hanging in a visible place on the right of way. This would be a non-physical interference in the sense that it might make the right of way less attractive, but I cannot see how it would be a substantial interference with the right of way."

45. But there are a growing number of cases where judges accept that offensive signs, in context, can constitute unreasonable interference. See eg *Shailer v Buckley & Anor* [2019] QDC 161, where the sign read:

WARNING

-NO-
TRESPASSING
VIOLATORS
WILL BE SHOT
SURVIVORS
WILL BE SHOT
AGAIN!

esp para [20] ff

YOUR FEEDBACK & CRITIQUE WELCOMED

If you have any war stories to share, feedback or criticism you'd like to offer, please email:

sjacobsassistant@13wentworth.com.au