

# ***Easement Fundamentals: Strategies and Tactics***

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## ***TOPICS COVERED BY THIS SESSION***

- Its implied.....
- "Take aways" as to wording in Sch 8 and 8B
- Examples of common and not-so-common easements
- *Sec 88 K Conveyancing Act*
- *Applicant to propose terms of the easement*
- Evidence to adduce
- Opposing an easement application
- Holding a putative dominant owner to ransom
- Mediating easements disputes

## ***ITS IMPLIED .....***

- Sec 181A *Conveyancing Act 1919* stipulates that certain wording is automatically implied , should nothing further be said other than the type of easement picked from the check-list there set out.
- Sch 8 *CA* sets out the common types of easements and the default wording per Sec 181A.

# ***COMMON TYPES OF EASEMENTS***

- Sec 196L *Conveyancing Act* as read with *Sch 8 B* sets out the rights and obligations implied in easements in a stratum lot governed by a building management statement

e.g right of vehicular access ; right of personal access;

Services ; maintenance and repair

## ***“TAKE AWAYS” AS TO WORDING IN SCH 8 AND 8B***

Its safer to stay with the types and form of words settled by the drafts person/ s  
of Sch 8 & 8 B

These are well trodden and minimise the scope for disputation.

# ***EXAMPLES OF RECOGNISED EASEMENTS (SOME ONLY REFERRED TO IN SCH 8 CONV ACT)***

- i) Right of Way
- ii) Right of Carriageway
- iii) Support
- iv) Services
- v) Access
- vi) Light and air
- vii) Batter
- viii) Rock anchors
- ix) Scaffold & crane swing
- x) Inclinator
- xi) Parking
- xii) Right to make noise/ transmit sound waves

*Stolyar* [2018] NSWCA ; *The Owners of East Fremantle Shopping Centre* [2008] WASCA 180 at [57] – [66])

# ***NOT-SO-COMMON TYPES OF EASEMENTS***

- Unformed and unmade path – no easement: *Polden v Bastard* (1865) LR 1 QB 156
- Overhanging bowsprits of ships – no sign of existence unless ship in dock – no easement: *Suffield v Brown* [1864] EngR 129; (1864) 4 DE GJ & SM 185; 46 ER 888 (Ch)
- Overflow from tank – only temporary and left no mark on the land – no easement: *Bartlett v Tottenham* [1932] 1 Ch 114
- A right to use a neighbour's kitchen: *Haywood v Richardson* (1883) 25 Ch D 357
- An easement to use a toilet on the servient tenement: *Hedley v Roberts* [1977] VR 282; *Miller v Emcer Products Ltd* [1956] Ch 304
- A right to pollute water of the adjoining land: *Kirkcaldie v Wellington City Corporation* [1933] NZLR 1101
- *RVA Australia Pty Ltd v Rosemary Elizabeth Marzouk* [2017] NSWLEC 160: easement for Asset Protection Zone

# ***SEC 88K CONVEYANCING ACT***

- The Court may make an order imposing an easement over land if the easement is *reasonably necessary* for the *effective use or development* of other land

*Relevant factors include (Shi v Abi – K)*

- the capacity of the developer's land for use or development of particular kinds
- the nature of the proposed development
- the manner in which the proposed development is to be effected
- the effect of the easement (if granted) on the servient land

The requirement for “effective” development, is met if the development of land is for some *planning purpose* such as *residential, commercial or industrial* and cannot be achieved without the creation and use of an easement for, say, drainage:

*Rainbowforce* paragraph [72]



## ***SEC 88 K(2) CONVEYANCING ACT***

(2) Such an order may be made only if the Court is satisfied that:

- (a) use of the land having the benefit of the easement will not be inconsistent with the public interest, and
- (b) the owner of the land to be burdened by the easement, can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement, and
- (c) 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.

## ***SEC 88K DISCRETION***

Even if all of Sec 88 K'S "boxes" are "ticked" by the plaintiff, the court still retains a discretion whether to make such an order.

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

*Khattar* at para [60]

# **AUSSIE SKIPS [2020] NSWCA**

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

Aussie Skips built a high "acoustic wall" along the boundary of its land and the Council land, but in so doing, 341m<sup>2</sup> of Council land came to be incorporated within their operations.

Council was not accepting of this and took enforcement action to restrain continued occupation. Aussie Skips sought an easement to regularise the situation

- Extracting from the headnote:

## **HN 1:**

"The proposed easements were incapable of comprising easements at law..... The appellants enclosed 68% of the Council's lot, in a manner which practically excluded the Council from any use of the enclosed land..... The Council's rights of access to the land were in truth illusory....

# ***AUSSIE SKIPS***

- At para [23], Basten JA commented on the illusory rights left to the Council (were Aussie Skips to prevail), as follows:

“..... 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 J 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*.

# ***THE PLAINTIFF CAN HAVE ITS PARTY - AT A COST***

- The costs of the proceedings are payable by the applicant, subject to any order of the Court to the contrary: *Sec 88 K (5)*

-- there must be “more than rejection of reasonable offers of compensation” to justify an alternative order: *Shi* at [98]

-- 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 (No 2)* at [10]. Bear in mind that Bryson AJ accepted my submissions in the first proceedings that the proposal put forward on behalf of Ms Chen at hearing that the *alternate route she propounded had nothing to commend it in terms of engineering and was indeed remarkably clumsy.*

-- making the proceedings more expensive than they need to be, and presenting false evidence constitutes disentitling conduct: *Ross Bilton* at [17]

# ALL REASONABLE ATTEMPTS: ENQUIRIES TO BE MADE

- There ought be an initial attempt to obtain the easement by negotiation with the person affected and making of some monetary offer: *Rainbowforce* at [131]
- If acting for the Plaintiff, ensure there is at least one request that is “open” and not “without prejudice”: otherwise, how can you demonstrate this aspect ?
- Seeking mediation almost certainly counts towards making reasonable efforts: para [20] of *Ross Bilton (costs)*
- Reasonable attempts includes the circumstances up to, and including, the date of the Court making the order: *Stepanoski v Chen*

# APPLICANT TO PROPOSE TERMS OF THE EASEMENT

The applicant ought propose the terms of the easement sought.

The precise terms may well need to be known before compensation can be considered and assessed: see e.g. *Gordon v Lever*.

*Practical tip:* attach to the Summons:

(i) a sketch summarizing all salient points, will let the court know what you seek. Colours help. A bespoke survey sketch is even better.

(ii) proposed terms.

The orders you seek are then signaled; and minds focused on necessary evidence.

# ***EVIDENCE TO ADDUCE***

- Naturally, this depends on i.a.
  - (i) the type of the easement being sought (e.g. stormwater? carriageway? batter?)
  - (ii) the topography of the land in issue
- The usual types of evidence one would consider adducing include:
  - (i) valuation — so as to assess compensation;
  - (ii) building/engineering: e.g. compare the easement route you propose and the alternatives/s;  
compare costs/ time to implement/relative impact on those concerned including loss of amenity and privacy etc;
  - (iii) town planning / architect e.g. will the proposed work for a stormwater easement impact on the future “developability” of the servient tenement;
  - (iv) surveyor.



# ***OPPOSING AN EASEMENT APPLICATION***

- There is no obligation (at least in NSW) of a person to consent to an easement over their land. Cases like *Stepanoski v Chen* (where I acted for the Plaintiff seeking an easement for stormwater, which was granted ) shows the wide latitude a putative servient owner has to resist an easement without being labelled as unreasonable. Bryson AJ emphasised that ownership confers important and historic rights that are not be lightly interfered with.
- Sec 88 K (5) as interpreted by cases like *Abi-K v Shi*, underscores this: the default position is that the applicant pays costs unless the court “otherwise orders”; & persuading a court to “otherwise order” is a Sisyphian task.

## ***HOLDING A PUTATIVE DOMINANT OWNER TO RANSOM***

- The difficulty in displacing Sec 88 K (5), gives a defendant in a Sec 88 K application, a wide latitude as to the basis on which to defend.
- Couple this with the recognition of the right of land owners to commercialise their e.g. airspace as they see fit. If developers swing their crane over a neighbour's property, without first coming to terms, the neighbour is generally entitled to an injunction as of right: *Anchor Brewhouse*, foll'd in *Janney v Steller*.

# The QUEENSLAND POSITION

- In Qld, pursuant to similar legislation to Sec 88 K , the courts have developed a “check list” of when a putative servient owner is acting unreasonably in rejecting entreaties for an easement

eg :

- whether a dispute existed between the parties, not relevant to the issues pertaining to the easement
- historic use ;
- refusal of reasonable offers
- poor attitude of the applicant to the respondent

See *Ward v Hull* [2019] QSC 32

# ***MEDIATING EASEMENTS DISPUTES***

- Landowners can get more upset by a perceived trespass than if someone enticed away their spouse. So its best to adopt an approach that lowers tensions.
- Some landowners fear negative consequences if an easements for e.g. services, might be imposed. E.g. they may fear their footing will be undermined. In this situation, the person seeking the easement may wish to consider offering an *indemnity*, so they get on with their development.
- If one is seeking an easement for carriageway, then come armed with an A3 sketch of what you want, with copies for the opponents so they can make practical suggestions.

# ***MEDIATING EASEMENTS DISPUTES***

- Exchange boiler plate clauses in advance with your opponent e.g. full and final settlement; waivers; non disparagement; confidentiality etc; seek to agree on these; as it lessens the gradient of the hill that needs to be ascended—especially after 5 pm !
- Have relevant experts on standby, at least at the end of a phone e.g. ones' planner; or engineer: technical issues often arise in mediation, and if the mediation is stood over to another day to allow technical aspects to be finalised, the motivation to settle sometimes evaporates.

# ***AUTHORITIES***

*Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments) Ltd (1987 ) Ch D 38 BLR 82*

*Aussie Skips Recycling Pty Ltd v Strathfield Municipal Council [2020] NSWCA 292*

*Gordon v Lever [2018] NSWCA 43*

*Janney v Steller Works Pty Ltd [2017] VSC 363*

*The Owners of East Fremantle Shopping Centre West Strata Plan 8618 v Action Supermarkets Pty Ltd [2008] WASCA 180*

*Pro-Vision Developments [2003] NSWLEC 226*

*Khattar v Wiese [2005] NSWSC 1014*

# ***AUTHORITIES***

*Rainbowforce* [2010] 171 LGERA 286

*Ross Bilton v Georgia Ligdas (costs)* [2016] NSWSC 1585

*Sertari Pty Ltd v Nirimba Development Pty Ltd* [2007] NSWCA 324

*Stolyar v Towers* [2018] NSWCA 6

*Stepanoski v Chen* NSWSC [2011]; & *(No 2)* [2012] NSWSC 1037

*Shi v Abi –K Pty Ltd* (2014) 87 NSWLR 568

*Turvey v Crotti* NSWSC [2018])

*Westfield Management Ltd* [2007] HCA 45

# ***YOUR FEEDBACK & CRITIQUE WELCOMED***

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

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