

Easement essentials: Step by Step Guide to Obtaining an Easement: Exploring Alternatives

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TOPICS COVERED BY THIS SESSION

- Knocking on the right door in the house of justice
- Legislative alternatives to obtaining or opposing easements
- *Encroachment of Buildings Act 1922 (NSW) (“EBA”)*
- Encroachments: Case Example
- *Access to Neighbouring Land Act 2000 (NSW) (“ANLA”)*
- Application under the *ANLA* or *Sec 88K Conveyancing Act?*

KNOCKING ON THE RIGHT DOOR IN THE HOUSE OF JUSTICE

- Understanding the relevant legislation
 - Identifying all legislative avenues and alternatives to obtaining (or opposing) an easement
 - Comparing and contrasting alternatives to obtaining orders of the court for the imposition of a temporary statutory easements such as easements for access / scaffold / crane swing / rock anchors, viz applications under the *Access to Neighbouring Land* legislation

KNOCKING ON THE RIGHT DOOR IN THE HOUSE OF JUSTICE

- Comparing and contrasting tactical considerations such as:
 - Legal costs
 - Level of compensation payable
 - General procedural aspects of each legislative alternative / 'gateway'

LEGISLATIVE ALTERNATIVES TO OBTAINING OR OPPOSING EASEMENTS

- *Sec 88K Conveyancing Act 1919 (NSW)*
- *Access to Neighbouring Land Act 2000 (NSW)*
- *Encroachment of Buildings Act 1922 (NSW)*
- *Real Property Act Sec 45 D (2) etc. (adverse possession)*

The focus here is not on consensual methods of obtaining an easement e.g. *Sec 88 B Conveyancing Act & transfers*; nor on seeking declarations that easements already exist by virtue of say estoppel: *Trentelman [2021] NSWCA*; or that an encroachment can remain by virtue of an estoppel or by adverse possession: *Byron Shire Council v Vaughan [2002] NSWCA 158*

ENCROACHMENT OF BUILDINGS ACT (“EBA”)

- Unlike Sec 88 K, the *EBA* is engaged where an encroachment has already occurred.

Pursuant to the *EBA*, a rearguard action can be fought if, after work is done, it is discovered that an "encroaching neighbour" has caused their work to be constructed in such a manner that it encroaches on the land of the "adjacent owner".

There are a host of definitions that one needs to come to terms with e.g. '*Encroaching owner*' is defined as meaning "the owner of land contiguous beyond which an encroachment extends."

The court may make such orders as it deems just with respect to a range of matters including:

- payment of compensation to the adjacent owner
- the transfer et cetera of the subject land to the encroaching owner
- the grant to the encroaching owner of rights or privileges including an easement
- the removal of the encroachment

ENCROACHMENTS: THE TACTICAL CALL

- Applications under the *EBA* are made to the *Land and Environment Court* of NSW, in Class 3 proceedings;
- The tactical call is whether to seek:
 - (i) an *easement for encroachment under Sec 88 K Conveyancing Act in the SC* (easements for overhang and encroachment are listed in Sch 8 B to the Act, in Pts 10 and 13 respectively);
 - OR
 - (ii) relief under the *EBA* in the *L & E Court*

ENCROACHMENTS: THE TACTICAL CALL

- Where the encroachment cannot be explained away as an innocent mistake and where the size of encroachment is large, the encroaching party ought strongly consider an application under *Sec 88 K* by reason of the potentially penal nature of compensation under the *EBA* (3 X land value).
- However, against that one weighs other considerations, e.g. the structured conciliation process in the *L & E Court* before a Commissioner, which can be effective at resolving disputes at an early stage.

EBA: CASE EXAMPLE

- *Preston* [2020] NSWLEC, where the relief granted in respect of part of a retaining wall, whose footings encroached onto the neighbour's land, was an easement. The terms of the relief *included* as follows:
 - 1) An easement for support 0.4 wide is granted in favour of X in accordance with the survey by Y and shown in Annexure (A) to these orders.
 - 2) The terms of the easement are to be in accordance with the easement terms recorded in Annexure (B) to these orders.
 - 3) To pay the applicants compensation for the grant of the easement in the sum of \$3,500.
 - 4) To pay the costs of registration of the easement including mortgagee's fees and PEXA fees.
 - 5) To pay the applicants' costs to the sum of \$4,000 plus GST.

ENCROACHMENTS: WHEN IT ALL GOES WRONG

Break Fast Investments [2007] VSCA

- Attitude in dealing with one's neighbour as to the encroachment is very important:
see e.g. 119 – 124
- Importance of party seeking indulgence to establish its state of knowledge: para 1 – 9

ANLA 2002 (NSW)

- The ANLA allows for orders to be made by the *Local Court* that give access to neighbouring land without the need for an interest to be recorded on the land's title. Such orders are only temporary, however can be easier to obtain due to their reduced invasiveness when compared with, s 88 K.

Two such orders are available under the *ANLA*.

- ❖ '*Neighbouring Land Access Orders*' which allow for general trespass on the land.
- ❖ '*Utility Service Orders*', used in order to access a neighbouring block in order to repair services such as sewerage lines.

ANLA 2002 (NSW): SECOND READING SPEECH

- The *ANLA*, as described by the Minister in the Second Reading Speech, is intended to be "wide ranging in its operation"; "may be utilised to solve commercial disputes as well as neighbourhood problems"; and "provides a practical and speedy resolution to problems which have up until now been insoluble".

ANLA 2002 (NSW): TACTICAL CALL

- The tactical call that needs to be made is whether one applies to:
 - (i) the Supreme Court (or perhaps the *NSW Land and Environment Court*), or
 - (ii) the NSW Local Court pursuant to the *Access to Neighbouring Land Act 2000*.

APPLICATION UNDER THE ANLA or Sec 88 K CONVEYANCING ACT ?

- Temporary easements can be sought via a *Sec 88 K* application. For example:
 - (i) temporary easement for rock anchors: *Twelve Walker Street* [2017] NSWSC
 - (ii) temporary easement for scaffolding: *Katakouzinou* [1999] NSWSC
- However, there is no reason why analogous relief cannot be granted under the *ANLA* – at least as regards scaffolding.
- Easements can also be sought for crane swing: *Bligh Consulting Pty Ltd v Ausgrid* [2017] NSWCA

A RACE TO THE POLE

- In my experience, an application under the *ANLA* in the Local Court can take significantly longer than a *Sec 88 K Conveyancing Act* application in the Supreme Court.

That is because in the SC, Equity Division, there is an expedition list.

The Local Court has no such formal set up and much will depend on the circumstances in the registry where action is commenced.

Hence, proceedings ought only be instituted in a Local Court if one has sufficient lead time. Otherwise, seek expedition in the SC (whether formally or via a tight time-table).

ANLA v Sec 88 K CA

- **ANLA:** Compensation may be given under this Act for “loss, damage or injury, including damage to personal property, financial loss and personal injury arising from the access”: s 26(1).

This compensation may *not* be for loss of privacy or inconvenience, however (s 26(2)).

Compare and contrast compensation under *Sec 88 K*

“*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 [1999] NSWSC at [26]

ANLA v Sec 88 K

- ***ANLA:** Owner and builder can apply cf Sec 88 K – no provision for the builder to apply*
- ***Costs:** Sec 88 K (5): applicant to pay costs unless the court otherwise orders.*
- ***Expedition:** formal process in Supreme Court and LEC. No formal process in the Local Court*

ANLA v Sec 88 K CA

- Threshold criteria:

“The Local Court may make a neighbouring land access order if it is satisfied that, for the purpose of carrying out work on land, access to adjoining or adjacent land is required and it is satisfied that it is appropriate to make the order in the circumstances of the case”

cf Sec 88 K

“reasonably necessary for the effective use or development of other land”

- An applicant under both Acts needs to make reasonable efforts to negotiate access
- Appeal channels: SC to NSWCA; LC to LEC but only on a *question of law*

AUTHORITIES

- *Katakouzinou v Roufir Pty Ltd* [1999] NSWSC 1045, Hodgson CJ in Eq
- *Wengarin Pty Ltd v Byron Shire Council* [1999] NSWSC 485; 9 BPR 16, 985 at [26]
- *Byron Shire Council v Vaughan* [2002] NSWCA 158
- *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd* [2007] VSCA 311
- *Twelve Walker Street Pty Ltd v Lee* [2017] NSWSC 1807, Darke J
- *Bligh Consulting Pty Ltd v Ausgrid* [2017] NSWCA 95
- *Preston v Baker* [2020] NSWLEC 1038
- *Trentelman v The Owners – Strata Plan No 76700* [2021] NSWCA 242

ARTICLE

Assessing Compensation in Applications for Easements by Sydney Jacobs on 13 Wentworth Chambers website

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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