SECTION 88K EASEMENTS — HOW MUCH DISCRETION REALLY?[1]

Introduction

1 When I was first appointed to the Court, I asked some senior judges of my acquaintance whether there were any good books about judging that I should read before my swearing in. The most emphatic answer I got was from the Hon JJ Spigelman AC QC, who unhesitatingly directed me to a book by Lord Bingham called "The Business of Judging – Selected Essays and Speeches".[2]

2 I am grateful to our former Chief Justice because it is an excellent book. I refer to it today because in it his Lordship divides the business of judging into three: the judge as juror (determining the facts), the judge as lawmaker (identifying the law), and the judge who exercises discretions. It is that third area that I will explore in the context of s 88K of the *Conveyancing Act 1919* (NSW).

3 My remarks have been prompted by a recent article in the *Australian Law Journal* by the doyen of property law academics, Professor Peter Butt, in response to the decision of the Court of Appeal in a s 88K case where I had been the trial judge. In a contribution entitled "Compulsory Easements: A New Black Letter Syndrome?",[3] Professor Butt wrote this *cri de coeur*:

> In at least two States, courts have a statutory power to compel the grant of easements against unwilling landowners. These powers are to be found in s 180 of the *Property Law Act 1974* (Qld), and in s 88K of the *Conveyancing Act 1919* (NSW). While the legislative wording differs slightly in each State, in essence the court is able to compel the grant: where the easement is reasonably necessary for the use of the putative benefited land; where the grant would be consistent with the public interest; and where the burdened owner can be given adequate compensation. …

[1] A speech delivered by the Hon Justice François Kunc, a judge of the Equity Division of the Supreme Court of New South Wales, to the 2016 conference of the Environmental & Planning Law Association (NSW) Inc at the Hydro-Majestic, Medlow Bath on 22 October 2016. I acknowledge the assistance of my tipstaff, Ms Sarah Evans, and the Equity Division Researcher, Ms Sarah Pitney in preparing this paper. The views expressed in it and any errors are entirely my own.
[2] OUP, 2000.
[3] (2015) 89 ALJ, 753–4.

> One issue with the exercise of such powers is that courts, being constrained by precedent, feel the need to develop principles to govern their exercise. In turn, these principles, despite being forged in the facts of a particular case, tend to become hardened rules to be applied across the board. And so it has come to pass that a lawyer advising a client about seeking or opposing a court-granted easement must navigate a passage through these rules; and that requires close study of the numerous prior cases in which the courts have opined on application of the power to grant easements. …
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> It is not the purpose of this note to detail these further principles, but rather to highlight the increasing complexity of what Parliament presumably intended as a simple solution to a common problem of how to ensure that the lack of an easement does not get in the way of land development that is reasonable and consistent with the public interest.
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> Is it too late to suggest a better approach – namely, the approach taken in other areas of property law where courts have broad-brush statutory discretions, such as relief against forfeiture of leases, or the refund of deposits in land contracts? In those areas, courts take care not to bind future courts in ways to exercise the statutory powers. In the area of court-granted easements, is it too late to argue that courts should take care not to elevate to the status of universality principles that should be no more than guidelines for the exercise of discretion in particular circumstances?

4 My approach will be to look at the s 88K jurisprudence to assess the validity of Professor Butt's premise that the cases have produced guidelines that have become principles that are ignored at the peril of litigants and trial judges. Has the exercise of judicial discretion in this area become little more than a GPS style navigation system where bends and turns are guided by such ironclad accretions on the words of the statute that deviating from course will result in a voice like Justice Ward's saying "please make a U-turn as soon as possible"? In addition to looking at the law I will also rely on a rough empirical study to examine to what degree (if any) it appears that s 88K decisions are being increasingly affected by what might be called common law "guidelines".

Section 88K and appellate review

5 While the body of law pertaining to s 88K and the imposition of easements has been the subject of much literature, I will try to summarise the principles in a way that I hope will be generally useful, whatever you think about the particular issue of judicial discretion. In doing so I want to make one point that is sometimes overlooked, which is that s 88K exemplifies the protean character of statutory discretions. As Gleeson

CJ, Gaudron and Hayne JJ said in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194; [2000] HCA 47 at [19] (citations omitted):

> "Discretion" is a notion that "signifies a number of different legal concepts". In general terms, it refers to a decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result." Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made. The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject-matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment.

6 The appropriate test on appeal will be determined by the type of discretion (if it be such) being exercised. Which test is to be applied may sometimes make all the difference to the outcome.

7 Section 88K provides as follows:

> 88K Power of Court to create easements
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> (1) 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 that will have the benefit of the easement.
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> (2) Such an order may be made only if the Court is satisfied that:
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> > (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 and each other person having an estate or interest in that land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the *Real Property Act 1900* 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.
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> …

(4) The Court is to provide in the order for payment by the applicant to specified persons of such compensation as the Court considers appropriate, unless the Court determines that compensation is not payable because of the special circumstances of the case.

(5) The costs of the proceedings are payable by the applicant, subject to any order of the Court to the contrary.

…

(9) Nothing in this section prevents such an easement from being extinguished or modified under section 89 by the Court.

8 In *Khattar v Wiese*[4] Brereton J summarised the statutory test as follows:

(1) Is the proposed easement reasonably necessary for the effective use or development of the applicant's land [s 88K(1)]?

(2) Will the use of the applicant's land be not inconsistent with the public interest [s 88K(2)(a)]?

(3) Can the owner of the land to be burdened be adequately compensated for any loss or other disadvantage that would arise [s 88K(2)(b)]?

(4) Have all reasonable attempts been made by the applicant to obtain the easement or an easement having the same effect, but been unsuccessful [s 88K(2)(c)]?

(5) If yes to each of the foregoing, should the Court exercise its discretion to impose an easement [s 88K(1)]?

(6) Unless there are special circumstances, what compensation should be imposed [s 88K(4)]?

(7) Is there any reason why the costs should not be paid by the applicant [s 88K(5)]?

9 A similar taxonomy was set out by Biscoe J in *Moorebank Recyclers Pty Ltd v Liverpool City Council (No 2)* [2013] NSWLEC 93 ("*Moorebank Recyclers*") at [103] that s 88K raises five questions:

(1) Is the proposed easement "reasonably necessary for the effective use or development" of the applicant's land: s 88K(1)?

[4] (2005) 12 BPR 23,235; [2005] NSWSC 1014 [2].

(2) Is the Court satisfied that the use of the applicant's land "will not be inconsistent with the public interest": s 88K(2)(a)?

(3) Is the Court satisfied that the owner of the servient tenement can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement: s 88K(2)(b)?

(4) Is the Court satisfied that the applicant has made all reasonable attempts without success to obtain the easement or an easement having the same effect: s 88K(2)(c)?

5) If the above four preconditions are established, should the Court exercise its discretion to impose an easement: s 88K(1)?

10 At [104], Biscoe J stated that questions 1–4 are "conditions precedent" to question 5, classified the first question as an objective jurisdictional fact and questions 2–4 as subjective jurisdictional facts (such that the question on appeal is whether no reasonable body could have had that state of satisfaction*: Notaras v Waverley Council* [2007] NSWCA 333, 161 LGERA 230 at [124]).

11 Biscoe J's observation invites acknowledgment of the fact that s 88K involves different types of discretions, which in turn has an impact on the appellate tests to be applied.

12 There can be no doubt that the overall power to make the order in s 88K(1) ("the Court may") is a discretion of the kind which falls for review by reference to the two limb test in *House v The King* (1936) 55 CLR 499; [1936] HCA 40 (per Dixon, Evatt and McTiernan JJ at 504–5):

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the

> law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

13 However, at the risk of excessive analysis, the same cannot be said of the constituent parts of s 88K.

14 Biscoes J's description of the first question — whether the proposed easement is reasonably necessary — as an objective jurisdictional fact accords with earlier authority that the requirement of reasonable necessity involves the making of a value judgment but not the exercise of a discretion.[5] It is really a finding of fact. As such, appellate consideration of this question is not governed by *House v The King* but rather by *Warren v Coombes* (1979) 142 CLR 531; [1979] HCA 9, in which Gibbs ACJ, Jacobs and Murphy JJ said (at 551):

> Shortly expressed, the established principles are, we think, that in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it. These principles, we venture to think, are not only sound in law, but beneficial in their operation.

15 In *Perpetual Trustee Co Ltd v Khoshaba* (2006) 14 BPR 26, 639; [2006] NSWCA 41, Spigelman CJ (with whom Handley JA agreed) explained the effect of *Warren v Coombes* as follows:

> [34] The structure of s 7(1) involves a two-stage inquiry: first, was the contract unjust; secondly what, if any, orders should be made. The second stage is clearly discretionary. The first stage may more accurately be described as a judgment …
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> [37] However, in *Singer v Berghouse* supra the majority judgment emphasised at 210–211 that, notwithstanding the evaluative character of the first stage it remained a finding of fact. In *Coal & Allied v AIRC* supra at [2], the majority judgment referred to the degree of subjectivity involved in making the first stage judgment and said that it could be "described as a discretionary decision" albeit "in a broad sense".

[5] *Woodland v Manly Municipal Council* [2003] NSWSC 392; (2003) 127 LGERA 120; 11 BPR 20,903 [19].

> [38] That what is involved in the first stage of s7(1) of the Act under consideration is a finding of fact is suggested by the text:
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> - Note s7(1) states: "… the Court *finds* a contract … to have been unjust."
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> - Subsections 9(1) and (4) use the language of fact when they state: "In determining whether a contract … *is* unjust …"
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> [39] This contrasts with other language, e.g. a requirement that the Court must be "satisfied" of the relevant matter, as was the case in *Norbis v Norbis, Singer v Berghouse* (208) and *Coal & Allied v AIRC* (199). Such a statutory provision can be accurately described as conferring "a very wide discretion". (See *Buck v Bavone* (1976) 135 CLR 110 at 119.)
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> [40] Where, as here, the first statutory step is clearly a finding of fact, albeit one involving a broadly based value judgment, it may be that the Court should invoke the principles reflected in *Warren v Coombes* (1979) 142 CLR 531 rather than in *House v The King*. Nevertheless, in most cases it is unlikely that the different tests will lead to different results.
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> [41] It is not necessary to resolve this issue as, in my opinion, the trial judge has committed an appellable error.[6]

16 In *Port Stephens Council v Jeffrey Sansom* (2007) 156 LGERA 125; [2007] NSWCA 299, Spigelman CJ (with whom Mason P, Beazley, Giles, Ipp JJA agreed) said at [51]:

> Although it would be more accurate to describe the formulation – "fair and reasonable" – as calling for a judgment to be made, rather than as a discretion to be exercised, the evaluative process can be accurately described as conferring a wide discretion. (See the authorities discussed in *Perpetual Trustee Co Ltd v Khoshaba* [2006] NSWCA 41 at [34]–[39].) Nevertheless, subject to restrictions such as s57(1) of the *L&E Court Act*, it is a judgment reviewable in terms of *Warren v Coombes* (1979) 142 CLR 531, rather than *House v The King* (1936) 55 CLR 499. (See *Khoshaba* at [100], [107].)

17 But what then of the appellate test to be applied to those parts of s 88K where the Court must be satisfied of certain things? It does not appear that this question has been definitively settled for s 88K.

[6] Basten JA at [107] did decide that the evaluative judgment was to be assessed by reference to *Warren v Coombes.*

18 The reference in *Khoshaba* at [39] to the requirement that the Court must be "satisfied" of a relevant matter conferring a wide discretion would suggest that *House v The King* is the relevant test. However, in *Moorebank Recyclers* (at [104], see paragraph [10] above) Biscoe J said that the question on appeal was whether no reasonable body could have had the requisite state of satisfaction. His Honour cited *Notaras v Waverley Council* (2007) 161 LGERA 230; [2007] NSWCA 333 at [124]. However, I am not sure how far that case takes matters because it was a challenge to the grant of a development consent as being *Wednesbury* unreasonable.

19 I suggest the answer to the question of the appropriate appellate test for s 88K(2) is to be found in Spigelman CJ's reference in *Khoshaba* (see paragraph [15] above) to the decision of Gibbs J (as his Honour then was) in *Buck v Bavone* (1976) 135 CLR 110; [1976] HCA 24 ("*Buck*") at 118–119 (emphasis added):

> It is not uncommon for statutes to provide that a board or other authority shall or may take certain action if it is satisfied of the existence of certain matters specified in the statute. Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases *the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it.* However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts.

20 It could be said that Gibbs J's formulation looks very much like the two limbs of *House v The King*. However, I think the better view is that of Biscoe J — supported by the decision of Gibbs J in *Buck* — that the appellate test in relation to the "satisfaction" elements of s 88K is the "no reasonable tribunal test". The distinction between the two tests may be important in some cases because, depending on the facts, the "no reasonable tribunal test" may set a higher bar — at least subconsciously — for appellate intervention than *House v The King*.

Reasonably necessary

21 Something does not need to be "absolutely necessary" to be considered "reasonably necessary" within the meaning of the statutory framework. This requirement can still be satisfied if the land could be utilised without the granting of the easement sought. It has been said with approval that the necessity ought go beyond mere desirability and that the use of the development with the proposed easement must be substantially preferable to its use without.[7]

22 The proposed easement must be reasonably necessary either for all the reasonable uses or developments on the land, or for some one or more proposed uses or developments which are reasonable when compared with the possible alternative uses and developments.[8]

23 In assessing what is reasonably necessary for a commercial development, it will be sufficient to show that the development is appropriate for the land sought to be developed and that it is economically rational.[9]

24 The test is an objective one.[10]

25 The Court will consider the impact to all relevant parties including the servient tenement in determining what is reasonably necessary.[11] The more burdensome a proposed easement to the servient tenement, the more onerous it will be for the party seeking the easement to discharge their burden of satisfying the court that the easement is reasonably necessary.[12]

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[7] *Durack v De Winton* (1998) 9 BPR 16,403, 16,448–9; *117 York Street Pty Ltd v Proprietors of Strata Plan 16123* (1998) 43 NSWLR 504; 8 BPR 15,917 per Hodgson CJ; *Katakouzinos v Roufir Pty Ltd* (2000) 9 BPR 17,303; BC9906866; [1999] NSWSC 1045 per Hodgson CJ; *Grattan v Simpson* (1998) 9 BPR 16,649 per Young J.
[8] *Durack v De Winton* (1998) 9 BPR 16,403, 16,448–9.
[9] *ABI-K Pty Ltd v Frank Shi* [2014] NSWSC 551 applying *Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd* (2012) 16 BPR 31,257; [2012] NSWCA 445.
[10] *Sodhi v Stanes* [2007] NSWSC 177.
[11] *ING Bank (Australia) Ltd v O'Shea* (2010) 14 BPR 27,317; [2010] NSWCA 71.
[12] *Moorebank Recyclers Pty Limited v Tanlane Pty Limited* (2012) 16 BPR 31,257; [2012] NSWCA 445 ("*Moorebank Recyclers*").

26 The extent to which alternative development methods have been explored, if they exist, will be relevant to the exercise of the Court's discretion.[13]

27 The approach to be taken is a holistic one. None of the above factors will be considered alone.[14]

28 A full summary of the fundamentals of the principle of "reasonably necessary", can be found in the decision of Preston CJ in *Rainbowforce Pty Ltd v Skyton Holdings Pty Ltd*[15] ("*Rainbowforce*"):

> [68] First, the power to impose an easement is made conditional upon satisfaction of the requirement in s 88K(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: *Tregoyd Gardens Pty Ltd v Jervis* (1997) 8 BPR 15,845 at 15,854. It is "a precondition of the exercise of the jurisdiction" that "there must be a finding that the easement sought is reasonably necessary for the effective use or development of the land which will have the benefit of it": *Woodland v Manly Municipal Council* [2003] NSWSC 392 ; (2003) 127 LGERA 120 ; (2004) NSW ConvR 56–071 at [19](1). A finding that the pre-condition in s 88K(1) is met is to be determined objectively: *Tregoyd Gardens Pty Ltd v Jervis* at 15,854. That finding "involves the making of a value judgment, but not the exercise of a discretion": *Woodland v Manly Municipal Council* at [19](2).
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> [69] Secondly, the requirement in s 88K(1) is to be satisfied with respect to the particular easement that the court is considering ordering to be imposed. The reference to the "easement" in the beginning of the conditional phrase in s 88K(1) is a reference to the easement the court orders to be imposed. Section 88K(3) requires the court to specify in the order, the nature and terms of the easement. The applicant for an order imposing an easement will propose the nature and terms of the easement sought. The proposed easement will accord with the easement which the applicant has made all reasonable attempts to obtain, or have the same effect as that easement, so as to satisfy s 88K(2)(c). The court's power to impose an easement under s 88K(1) would extend to amending the proposed easement of the applicant, including so as to ensure the easement which the court orders to be imposed satisfies the requirement in s 88K(1) of being reasonably necessary for the effective use or development of other land that will have the benefit of the easement.
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> [70] Thirdly, the inquiry directed by the requirement in s 88K(1) is whether the easement is reasonably necessary "for the effective use or development of

[13] *Govindan-Lee v Sawkins; Sawkins v Govindan-Lee* (2016) 18 BPR 35,883; [2016] NSWSC 328.
[14] *Moorebank Recyclers* [159].
[15] (2010) 171 LGERA 286; [2010] NSWLEC 2 [67]–[83] However, it is important to note that some aspects of Preston CJ's analysis were qualified by the Court of Appeal in *Moorebank Recyclers*.

other land that will have the benefit of the easement". This other land will be the land of the applicant for the order. The easement may be reasonably necessary for either the effective use or the effective development or both of the applicant's land. Most of the cases in which an easement has been sought have involved the carrying out of development on land and the subsequent use of the development, but some have involved only use of the land. An example of the latter is *Owners Strata Plan 13635 v Ryan* [2006] NSWSC 221.

[71] The inclusion of "development" as well as "use" means that the court's power to impose an easement is enlivened not only if the easement is reasonably necessary for a particular development or use proposed by the applicant but also if the easement is reasonably necessary for any development or use of the applicant's land, which is within the law: *Tregoyd Gardens Pty Ltd v Jervis* at 15,854.

[72] Fourthly, the easement is to be reasonably necessary for the "effective" use or development of the land that will have the benefit of the easement. The adjective "effective" bears its ordinary meaning of "serving to effect the purpose; producing the intended or expected result": Macquarie Dictionary and see *Woodland v Manly Municipal Council* at [7], (5). In context, therefore, the easement is to be reasonably necessary in order for the use or development of the land benefited by the easement to effect the purpose or produce the intended or expected result of the use or development. Thus, if use or development of land for some planning purpose, such as residential, commercial or industrial purposes, cannot be achieved without the creation and use of an easement for, say, access to the land or services to the land or for drainage of the land, the easement is reasonably necessary for such use or development to be effective: see *King v Carr-Gregg* [2002] NSWSC 379 at [47] and *Khattar v Wiese* at [30].

[73] Fifthly, the easement is to be reasonably necessary for the effective use or development of the land itself, namely the land that will have the benefit of the easement; it is not sufficient for the easement to be reasonably necessary for the enjoyment of the land by any of the persons who, for the time being, are the proprietors: *Hanny v Lewis* (1998) 9 BPR 16,205 at 16,209; (1999) NSW ConvR 55–879; *Woodland v Manly Municipal Council* at [19](5). Accordingly, evidence as to the particular problems that one of the existing proprietors may have, or the hardship suffered as a result of those problems, would not be relevant: *Hanny v Lewis* at 16,209; *Owners Strata Plan 13635 v Ryan* at [28], [33].

[74] Sixthly, the requirement in s 88K(1) is that the easement be "reasonably necessary". This has two components: first, "reasonably" and second, "necessary". The requirement that the easement be "reasonably" necessary for the effective use or development of the applicant's land does not mean that there must be an absolute necessity for the easement: *Tregoyd Gardens Pty Ltd v Jervis* at 15,854; *117 York St. Pty Ltd v Proprietors of Strata Plan No 16123* (1998) 43 NSWLR 504 at 508; *Woodland v Manly Municipal Council* at [7], [19](6).

[75] This reduction in the quality of necessity to what is reasonable means that an easement may be able to be imposed although another means of right of way may exist (*Re Seaforth Land Sales Pty Ltd's Land (No 2)* [1977] Qd R 317 at 320–321; *In the matter of an application by Kindervater* (1996) ANZ ConvR 331 at 333; *Tregoyd Gardens Pty Ltd v Jervis* at 15,854 and *Grattan v Simpson* (1998) 9 BPR 16,649 at 16,651; (1999) NSW ConvR 55–880) or possibly even when the land could be effectively used or developed without the easement (*117 York St. Pty Ltd v Proprietors of Strata Plan No 16123* at 508; *Durack v de Winton* (1998) 9 BPR 16,403 at 16,447; *Khattar v Wiese* at [24]).

[76] The requirement that the easement be reasonably "necessary" for the effective use or development of the applicant's land means that there needs to be "something more than mere desirability or preferability over the alternative means available": *In the matter of an application by Kindervater* at 333; *Tregoyd Gardens Pty Ltd v Jervis* at 15,854; *Hanny v Lewis* at 16,209 and *Woodland v Manly Municipal Council* at [7], [19]. Indeed, it has been suggested, "the tone of the word 'necessary' is getting close to something which is a vital requirement": *Hanny v Lewis* at 16,209.

[77] Reasonable necessity has to be assessed having regard to the burden which the easement would impose. Hence "[i]n general terms, the greater the burden the stronger the case needed to justify a finding of reasonable necessity": *Katakouzinos v Roufir Pty Ltd* [1999] NSWSC 1045 ; (1999) 9 BPR 17,303 at [42]; *Woodland v Manly Municipal Council* at [12], [19](8); *Khattar v Wiese* at [27].

[78] Seventhly, applying the test of reasonable necessity to the effective use or development of the land that will have the benefit of the easement has the consequence that:

> (1) the proposed easement must be reasonably necessary either for *all* reasonable uses or developments of the land, or else for some one or more proposed uses or developments which are (at least) *reasonable* as compared with the possible alternative uses and developments; and (2) in order that an easement be reasonably necessary for a use or development, that use or development *with* the easement must be (at least) substantially preferable to the use or development *without* the easement": *117 York St. Pty Ltd v Proprietors of Strata Plan No 16123* at 508–509.

[79] This passage has been cited with approval in many subsequent cases, including *Durack v de Winton* at 16,447–16,448; *Hanny v Lewis* at 16,209; *Khattar v Wiese* at [25]; *Owners Strata Plan 13635 v Ryan* at [50], [57] and *Tanlane Pty Ltd v Moorebank Recyclers Pty Ltd* [2008] NSWSC 1341 at [92]. However, Hamilton J in *Woodland v Manly Municipal Council* at [9] expressed concern as to the use in the second proposition of the words "(at least) substantially" saying:

> But what I am most troubled by is that the proposition may be taken to constitute a general and inflexible rule and to provide a criterion or precondition that must be met in every case. No doubt the alternatives will

> require to be considered and there is unlikely to be a finding of reasonable necessity (or, indeed, an exercise of discretion in favour of a grant) if there is a viable alternative. But to lay down as invariable an additional precondition (if this be what his Honour intended) will in effect create a gloss upon the statute and distract the court from carrying out its function in accordance with the terms of the statute; and see [19](7) below.

[80] Hamilton J summarised his position in *Woodland v Manly Municipal Council* at [19](7) as:

> In considering that reasonable necessity, the court will take into account whether and to what extent use with the easement is preferable to use or development without the easement. That use with the easement is preferable or, a fortiori, substantially preferable to use or development without the easement, will conduce to a finding of reasonable necessity, but is not a necessary precondition to that finding …

[81] Eighthly, the requirement of reasonable necessity does not demand that there be no alternative land over which an easement could be equally efficaciously imposed. Hamilton J noted in *Tregoyd Gardens Pty Ltd v Jervis* at 15,854 that "[i]t cannot be the intention of the Act that if an easement would be equally efficacious over two pieces of land it cannot be granted over either because it cannot be said that it is necessary for it to be granted over *that* piece of land as opposed to the other": see also *Durack v de Winton* at 16,445; *Khattar v Wiese* at [31], [32].

[82] Ninthly, the requirement of reasonable necessity is to be decided in light of the present circumstances at the time of the hearing of the application for an order: *117 York St. Pty Ltd v Proprietors of Strata Plan No 16123* at 511; *Durack v de Winton at 16,448; Katakouzinos v Roufir Pty Ltd* at [39]; and *Tanlane Pty Ltd v Moorebank Recyclers Pty Ltd* at [92]. Hence, it would not matter for the purposes of deciding whether the easement is reasonably necessary that the present circumstances were due to the applicant for the order taking a gamble: *117 York St. Pty Ltd v Proprietors of Strata Plan No 16123* at 511. However, if such reasonable necessity for an easement as presently exists arose from previous unreasonable conduct from the applicant, that could be a discretionary factor counting against the granting of relief: *117 York St. Pty Ltd v Proprietors of Strata Plan No 16123* at 511.

[83] Tenthly, 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. For example, if an easement in the form of a right of carriageway is created, it may be necessary to obtain development consent under the EPA Act to construct the road in the right of carriageway. The requirement in s 88K(1) does not require that all other obstacles to the proposed use or development of the land that will have the benefit of the easement must have been overcome before the court has power to grant an easement: *117 York St. Pty Ltd v Proprietors of Strata Plan No 16123* at 512. Only if use of the proposed easement would be absolutely illegal and there was no chance of obtaining a consent necessary to make it other than illegal,

would the court be precluded from finding that the easement was reasonably necessary: *117 York St. Pty Ltd v Proprietors of Strata Plan No 16123* at 511–512.

29 It perhaps says something about the law's capacity for exposition — and supports Professor Butt's concerns — that the 34 straightforward words of s 88K(1) are now summarised in 15 dense paragraphs of legal analysis.

Not inconsistent with public interest

30 This inquiry invites the Court's attention to the use of the dominant tenement (the land acquiring the benefit of the easement) to ensure that the proposed use is not inconsistent with public interest. The inquiry is not directed to the impact of the easement on the servient tenement.[16]

31 However, an easement will not be inconsistent with public interest when the impact on the burdened community is minimal.[17]

32 While this kind of determination will turn on the facts of each case, the granting of a development consent will strongly suggest that the proposed easement is consistent with public interest. Details of the relevant environmental planning instrument, planning standards and development controls will be highly material.[18]

Compensation

33 Section 88K(2)(b) requires the Court to be satisfied that parties having an interest in the burdened land can be adequately compensated for any loss or other disadvantage that will arise from the imposition of an easement. Subsection (4) provides that the Court is to determine what compensation is appropriate and enumerate such details in its order unless it is determined that compensation is not payable because of the existence of special circumstances.

[16] *Rainbowforce* [94].
[17] *City of Canterbury v Saad* (2013) 195 LGERA 329; 17 BPR 32,207; [2013] NSWCA 251.
[18] *Shi v ABI-K Pty Ltd* (2014) 87 NSWLR 568; 17 BPR 33,173; [2014] NSWCA 293 [75] per Basten JA.

34 There has been a recent development in this area of s 88K jurisprudence that I will come to later in this paper.

35 One point to note, particularly in urgent applications, is that the requirement for compensation to be ordered in "the order" (for the easement) means, I suggest (there being no authority of which I am aware), that an easement cannot be ordered under s 88K while the question of compensation is split off for later determination by recourse to UCPR Pt 28 r 28.2 or otherwise.

All reasonable attempts

36 Section 88K(2)(c) requires that all reasonable attempts need to have been made by the applicant for the order to obtain the easement or an easement having the same effect, those attempts having been unsuccessful.

37 The rationale of this requirement was set out by Brereton J in *Khattar v Wiese*:[19]

> [54]…compulsory imposition of an easement and expropriation of proprietary rights should be a last resort, and an applicant should first be required to take all reasonable steps to obtain an alternative solution.

38 In making this determination, the Court can have regard to the facts as they are at the time of hearing the application and need not be constrained by the filing date of that application.[20]

39 Reasonable attempts to negotiate will be considered to have been made when it becomes unlikely that further negotiations will produce an agreement between the parties.[21] The issue was addressed in *Rainbowforce* (citations omitted):

> [131] In order for an applicant for an order to make all reasonable attempts to obtain an easement:

[19] (2005) 12 BPR 23,235; [2005] NSWSC 1014.
[20] *Govindan-Lee v Sawkins; Sawkins v Govindan-Lee* (2016) 18 BPR 35,883; [2016] NSWSC 328.
[21] *Coles Myer NSW Ltd v Dymocks Book Arcade Ltd* (1996) 9 BPR 16,939.

(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.

(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.

(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.

(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.

The Court's ultimate discretion

40 The fifth question formulated by Brereton J (see paragraph [8] above) is:

(5) If yes to each of the foregoing, should the Court exercise its discretion to impose an easement [s 88K(1)]?

41 Even if all the elements prescribed by s 88K are fulfilled, there is no certainty that the Court will exercise its discretion to grant the easement sought.[22]

42 Brereton J described the consideration in *Khattar v Wiese*:

> [59] The granting of relief under s 88K is discretionary: s 88(1) is expressed in terms which confer a discretion to make an order imposing an easement when the relevant considerations are satisfied. Thus, notwithstanding satisfaction of all the requirements of s 88K(1) and (2), it still remains in the discretion of the court to grant or withhold relief [cf *Tregoyd Gardens*; *117 York St*, 517–518; *Blulock* , [20]].
>
> [60] That discretion is to be exercised having regard to the purpose of the section, which might be summarised as facilitating the reasonable development of land whilst ensuring that just compensation be paid for any erosion of private property rights [Second Reading Speech, Legislative Council, 4 December 1995]. Consideration of exercise of the discretion will only arise once the court is satisfied that the servient owner can be adequately compensated, but will often be informed, if not determined, by a finding that

[22] *Blulock Pty Ltd v Majic* (2001) 10 BPR 19,143; [2001] NSWSC 1063.

there can be adequate compensation [*Blulock*, [20]]. 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 [*Tregoyd Gardens*]. The existence of a superior alternative might well remain at least a relevant discretionary consideration, if it is not determinative of "reasonable necessity".

43 Bryson AJ described the nature of the Court's discretion in *Stepanoski v Chen*[23]:

> [14] …The purpose of s 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 s 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 s 88K(1); There is discretion, and the effect on the servient land is also relevant and important.
>
> [15] The power in subs (1) is discretionary, and in my opinion the discretionary considerations include consideration of matters personal to the owners of pieces of land, which may extend more widely than considerations affecting land use. Such considerations are likely to be less cogent than considerations which bear on effective use or development of land, and on the subjects expressly mentioned in subs (1) and (2). As subs (2) shows, satisfaction of each of the matters in subparas (a), (b) and (c) is a necessary precondition for the making of an order imposing an easement. It is an important consideration that an order imposing an easement is an invasion of property rights made without the consent (and in this case against the wish) of the owner of property; those rights require respect and protection; and an order should not be made unless grounds clearly exist within statutory authorisation.
>
> [16] There are many first instance decisions on applications under s 88K, each strongly influenced by the facts of the instant case. What can be gathered from the case law was meticulously restated in *Rainbowforce Pty Ltd v Skyton Holdings Pty Ltd* [2010] NSWLEC 2 (Preston CJ at [67]–[83]).

44 The discretion extends to the imposition of conditions as part of the order for the easement, but not as part of an undertaking or order independent of the easement.[24]

The two most recent Court of Appeal decisions

[23] [2011] NSWSC 1573 [14].
[24] *Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd* (2012) 16 BPR 31,257; [2012] NSWCA 445 [99].

45 I will now turn to the two most recent Court of Appeal decisions. Interestingly, neither of them considers what appellate test is applicable.

Arinson Pty Ltd and Others v City of Canada Bay Council

46 The most recent case to be considered on appeal was *Arinson Pty Ltd and Others v City of Canada Bay Council.*[25]

47 The decision, on appeal from the Land and Environment Court, concerned what were "special circumstances" for the purpose of determining whether or not compensation was payable.

48 In summary, the Court of Appeal dismissed the appeal finding that the trial judge did not err in applying the test set out in s 88K. In doing so, the discretion exercised by the trial judge was not disturbed. The easement was, in essence, granted with compensation payable as the beneficiary of that easement was a potential purchaser of the servient land which, with the easement, might have attracted a lower selling price resulting in a windfall gain for the owner of the dominant tenement.

49 The relevant excerpts from the judgment of JC Campbell AJA (Basten and Meagher JJA agreeing) in respect of the compensation argument are:

> [38] Senior counsel for the appellant's, Mr Coles QC, submits, by reference to cases drawn from areas of discourse far removed from s 88K, that "special circumstances" are ones that are out of the ordinary, or unusual. He submits that the primary judge failed to follow the reasoning process required by the statute namely first identifying whether there were special circumstances, and then, if there were, deciding whether those circumstances produced the consequence that compensation should not be ordered. Rather, Mr Coles submits, in the first sentence of [73] the judge bundled the two steps of the process together.
>
> [39] I do not accept the statute requires any such two-step process of reasoning. Circumstances can be "special", in the sense that they are factually out of the ordinary, but for the purpose of s 88K circumstances are only relevantly "special" if they arguably justify a conclusion that compensation is not payable. The statute does not require a judge to undertake the exercise of identifying respects in which the circumstances are out of the ordinary, if

[25] (2015) 208 LGERA 418; 18 BPR 35,163; [2015] NSWCA 199.

those circumstances have no fairly arguable bearing on whether compensation should be paid.

[40] In any event, a decision under s 88K(4) of the Conveyancing Act 1919 that compensation is not payable is inevitably made in a forensic context in which it is the party that contends that no compensation is payable who has the onus of identifying the special circumstances by reason of which it contends that no compensation is payable. In the present case the judge was dealing with a particular submission that the appellants had made, that particular circumstances surrounding the closure of 1A Chapman were relevantly "special". In [9] of his judgment the judge said:

> At the heart of the case are the following circumstances in which the plaintiffs' properties became landlocked, on which the plaintiffs rely to argue that they should have the easements without compensation.

[41] The judgment then went on to list those circumstances. The opening sentence of [73] of the judgment expresses the primary judge's conclusion that the circumstances that he had already listed at [9] did not justify not awarding compensation. In my view this method of reasoning is in accord with the statute.

[42] The appellants' written submissions contended that the first sentence of [73] misstated the statutory test because there is no anterior presumption that compensation must be awarded unless not doing so can be "justified". However in oral argument Mr Coles accepted that, once the court had decided, pursuant to s 88K(2)(b) that the owner could be adequately compensated, the effect of s 88(4) was that the default position was that compensation is payable, but there was a persuasive burden on someone who sought to assert that compensation should not be paid. I cannot see any difference of substance between the proposition that Mr Coles accepted, and what the primary judge said in the first sentence of [73].

50 The appellant's other arguments in support of the appeal also failed for reasons unrelated to the exercise of the primary judge's discretion.

Shi v ABI-K Pty Ltd

51 *Shi v ABI-K Pty Ltd*[26] was a decision of the Court of Appeal in an appeal from orders made by me.

52 ABI-K had a development consent which had been granted subject to a deferred commencement condition requiring it to acquire a one metre wide drainage easement

[26] (2014) 87 NSWLR 568; 17 BPR 33,173; [2014] NSWCA 293.

on an adjacent, downhill property. Mr Shi, the owner of that property, withheld his consent. I granted the one metre easement, considering it to be reasonably necessary for the effective use and development of ABI-K's land. I also ordered Mr Shi to pay costs.

53 Mr Shi appealed on three bases: denial of procedural fairness; that the requirements of s 88K had not been satisfied because the granting of the easement would sterilise any future redevelopment of his own property; and that he should not have had to pay the costs of the proceedings. He failed on the first ground, had partial success as to 10cm on the second ground and succeeded on the third.

54 Mr Shi argued that an easement one metre wide exceeded the usual 90cm setback from the boundary that was required by the council (the area within which no building would be approved). It was his case that, although the council would permit him to erect a building with eaves hanging over the setback, it would not permit such an overhang above an easement.

55 The Court of Appeal held that the easement was "reasonably necessary" but not in the form in which I had ordered it. One metre was found to be too wide and, instead, it was determined that the easement should not exceed 90cm, which was the width of the setback area.

56 From the point of view of practitioners, it is the third ground of appeal that is of enduring importance. As part of making reasonable attempts to obtain the easement, ABI-K made offers to Mr Shi of compensation. It had valuation evidence that $21,500 was adequate compensation and shared that conclusion with Mr Shi. It ultimately offered $40,000. Mr Shi's counter-offers included a request for compensation of $250,000 or that ABI-K purchase his property. I described Mr Shi's counter-offers as variously unrealistic, uncommercial and not reasonable.

57 Exercising the power under s 88K(5) I ordered Mr Shi to pay the costs of the application. I did so because I accepted a submission that the power under s 88K(5) could be exercised in an appropriate case by analogy with the *Calderbank* principles.

The Court of Appeal disagreed. Basten JA (with whom Barrett and Ward JJA agreed) said (emphasis added):

> [98] The analogy proposed by counsel should not have been accepted. 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.

58 Putting a party at risk of their costs is a legitimate means of trying to avoid or resolve litigation, an outcome encouraged by public policy. This aspect of the Court's decision opens up interesting questions about what, if anything, an applicant for an easement can do to put the defendant owner of the servient tenement at risk as to costs (as opposed to relying on other unreasonable conduct of the defendant)?

59 What if ABI-K had made parallel *Calderbank* offers with their letters of offer and had made an offer of compromise under the rules when proceedings were commenced offering more compensation than what was supported by their valuation evidence? Does s 88K(5), by implied repeal or otherwise, cover the field for costs in this area so that, for example, the offer of compromise regime under the rules does not apply?

60 I am grateful to Justice Rein for drawing to my attention his decision in *Owners Strata Plan 13636 v Ryan* [2006] NSWSC 342 ("*Ryan*"), in which his Honour made a costs order against a defendant in a s 88K application for both unreasonable conduct in the litigation (including presenting evidence that was "spurious and in large

measure manufactured for the purpose of the case") and in reliance on an offer of compromise. His Honour sought to harmonise s 88K(5) and the rules in relation to offers of compromise:

> [32] There is a strong policy content to the rules relating to offers of compromise, namely to encourage parties to make and accept realistic and reasonable offers. I do not think, however, that Rule 42.14 (or its predecessor Part 52A Rule 22) should be viewed as "trumping" s 88K(5). Rather the Court is required to have regard to both the offer of compromise (if effective) and s 88K(5) in determining what order should be made. When the defendant's conduct has been entirely appropriate (other than in failing to accept the offer made) that would be very relevant and may well lead to a significantly reduced burden of costs, although generally speaking a defendant who failed to accept a reasonable offer of compromise would I think be unlikely to obtain an order for costs in his or her favour.

61 There does seem now to be a real question whether what Rein J said in the paragraph just quoted remains good law in the light of the Court of Appeal's decision in *ABI-K*, especially the passages which I have emphasised in paragraph [57] above. As that is a question which may come before the Court, I refrain from saying anything more about it. I do, however, express my respectful agreement with another observation of his Honour in *Ryan*:

> [3] Quite apart from the issue of the offer of compromise and even bearing in mind the statutory approach, it would be most undesirable if parties over whose land an easement is sought were to approach the matter on the basis that there was nothing that they and their legal advisors could do in resisting the easement that would deprive them of their costs. Such a result would not be conducive to settlement or, where appropriate, to determination only of the appropriate amount of compensation….

62 The decision in *ABI-K* also invites consideration of what must a property owner do "more than reject reasonable offers of compromise" so as to entitle the applicant to costs? The law on that question remains conveniently stated in *Rainbowforce*:[27]

> [181] 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

[27] See also Rein J's summary in *Owners Strata Plan 13636 v Ryan* [2006] NSWSC 342 [7]–[14].

> grant of an easement are established, and the costs of assessing appropriate compensation": *117 York St. Pty Ltd v Proprietors of Strata Plan No 16123* at 523.
>
> [182] This entitlement will only be lost if and in so far as the person affected has engaged in unreasonable conduct, such as making the proceedings more expensive: *117 York St. Pty Ltd v Proprietors of Strata Plan No 16123* at 523; *Mitchell v Boutagy* at [60]; *King v Carr-Gregg* at [71]; Khattar v Wiese at [77].
>
> [183] The basis on which costs should be paid is the ordinary basis and not an indemnity basis, unless the conduct of the applicant for the order has been such as to justify an order for indemnity costs: *117 York St. Pty Ltd v Proprietors of Strata Plan No 16123* at 523, 524; *Katakouzinos v Roufir Pty Ltd* at [82]; *Mitchell v Boutagy* at [68]; *King v Carr-Gregg* at [71]; *Khattar v Wiese* at [78]; *Property Partnerships Pacific Pty Ltd v The Owners of Strata Plan 58482* at [89].

63 There may, however, now be an argument available that the strict application of the view of the statutory scheme taken in *ABI-K* (see Basten JA's observation that the "property owner is entitled to refuse to consent to the easement") means that unreasonable conduct which will justify reversing the *prima facie* costs regime must be in the conduct of the litigation, rather than any steps outside of the conduct of the litigation itself but which have no impact on the proceedings.

Empiricial Study

The method

64 The decisions used for the study were sourced by searching across Lexis Nexis, NSW Caselaw and Westlaw for decisions within the relevant date period citing the "*Conveyancing Act 1919* (NSW)" and "s 88K". Results were then narrowed manually to exclude cases unrelated to applications brought under s 88K, for example, cases referring to a s 88K application that was brought historically but unrelated to the current matter. Searches were conducted from 1 January to 31 December inclusive for each calendar year.

65 To determine the average number of cases cited in each jurisdiction, each database was searched for every five year period to ensure that all relevant cases were captured. The number of decisions cited was drawn from the front page of each relevant judgment as it appeared on NSW Caselaw. The total number of cases cited was then aggregated over five year periods and divided by the number of subject cases. The data was rounded to one decimal place.

66 To calculate the most popularly cited cases, the cases cited in each s 88K judgment were listed and manually tallied to produce the statistical outcomes below.

The shortcomings of the data

67 The data is limited to showing trends through four, five year periods. It also excludes matters handed down in the 2016 calendar year.

68 The averages extracted include authorities cited on points ancillary to the substantive determination of the s 88K application in those cases deemed relevant to the test batch. For example, cases cited in relation to interlocutory matters. To the extent that this is true, the numbers may be artificially raised.

69 The numerical results might also not accurately reflect the degree to which a judge's discretion had regard to prior cases. For example, the judge might have needed to cite a large number of cases in relation to an ancillary question in the matter which ultimately had no impact on his or her discretion in relation to the substantive s 88K application.

70 Citations were not broken down into those that were applied, distinguished or overruled. As such, the portion of citations binding the court with an impact on discretion is unclear. The extent to which it is possible to measure the impact that each case might have on a decision-maker's discretion is beyond the scope of this study.

71 While a subjective data driven analysis might yield more accurate results, whereby citations were only included if they were thought by the collator to have impacted the decision-maker's discretion on the s 88K application, establishing a threshold by

which to include those citations is too subjective to produce reliable results for the purposes of this study.

72 It should also be noted that s 40 of the *Land and Environment Court Act1979* (NSW) is beyond the scope of this paper and searches have not been conducted for applications brought under that section. This may explain a reduced number of citations in the Land and Environment Court.

Trends at trial level

73 Unexpectedly, primary decision-makers cite fewer cases overall than their appellate counterparts. The reasons for this could be varied but I suspect the answer is that trial judges are citing popularly approved Supreme Court decisions setting out the law quite thoroughly whereas the Court of Appeal is drawing authority more widely to examine the relevant universe of discourse.

74 From 1995 to 2015, the average number of cases cited by the Supreme Court in each case has almost doubled from approximately five to ten cases. This confirms that the body of relevant case law — the common law "guidelines" — to which a judge considers he or she must turn his or her mind has increased.

75 The trends in the Land and Environment Court are less clear. From the first relevant period to have a s 88K case, 2000–2005, the average number of citations decreased from approximately twelve to six. A spike of thirty-six in the period from 2005 to 2010 corresponds to a spike in the Supreme Court data during this time but more than that cannot be deduced. There is a decline after 2010 which might be explained by *Rainbowforce* providing an oft-cited compendium.

The average number of authorities considered, applied and distinguished over the past twenty years		
Average number of authorities cited in cases	**Supreme Court of New**	**New South Wales Land and**

dealing with applications under s 88K	**South Wales**	**Environment Court**
2010–2015	9.8	5.8
2005–2010	13.2	36.2
2000–2005	9.8	12.2
1995–2000	5.3	N/A

Trends on appeal

76 With the passage of time, the Court of Appeal has gradually increased the number of cases cited per decision from fourteen to twenty-one. This corresponds to a growing body of law which that Court must consider in the s 88K jurisdiction and suggests trial courts may have to expand the scope of their citations to capture the entire learning in this area.

77 A s 88K application is yet to be considered by the High Court.

The average number of authorities considered, applied and distinguished over the past twenty years		
Average number of authorities cited in cases dealing with applications	**New South Wales Court of Appeal**	**High Court of Australia**

under s 88K		
2010–2015	21	N/A
2005–2010	12.5	N/A
2000–2005	14	N/A
1995–2000	N/A	N/A

Conclusion

77 So was Professor Butt right? The answer is "yes, but it was ever thus".

78 I think that many of the considerations that have been identified in the cases have been, to use his words, "elevated to the status of universality". We should not be surprised because that is not unusual in the case of statutory discretions. Returning to the judgment of Spigelman CJ in *Port Stephens Council v Jeffrey Sansom*, his Honour said:

> [53] The formulation of principles or guidelines for the exercise of such a discretion, or the formation of such an evaluative judgment, is permissible. As Mason CJ put it in the context of an award of costs, in *Latoudis v Casey* supra at 541:
>
> " … [I]t does not follow that any attempt to formulate a principle or a guideline according to which the discretion should be exercised would constitute a fetter upon the discretion not intended by the legislature. Indeed, a refusal to formulate a principle or guideline can only lead to exercises of discretion which are seen to be inconsistent, a result which would not have been contemplated by the legislature with any degree of equanimity." …
>
> [55] … Principles or guidelines for the process of formulating such a statutory judgment may be developed, particularly in order to promote consistency of

> decision-making, so long as those principles or guidelines are not treated as rules and accepted to be indicative only. (See e.g. *Norbis v Norbis* (1986) 161 CLR 513 esp at 519–520, 537–538; *Latoudis v Casey* supra 541–542, 558–559, 562–563; *R v Henry* (1999) 46 NSWLR 346 at [12]–[29]; *Wong v The Queen* (2001) 207 CLR 584 at [45], [56], [58], [65], [83], [137], [139]; *R v Whyte* (2002) 55 NSWLR 252 at [68]–[87].)

79 In his book to which I referred at the outset of this paper, Lord Bingham refers to "the accelerating tendency towards a narrowing of discretion".[28] However, like Mason CJ in *Latoudis v Casey*, his Lordship justifies this by reference to the need for consistency, saying:

> It is, I think, a deeply rooted instinct of any responsible body, whether a company, a college, a club, a body of trustees, a trade union or anything else, however wide its powers, to endeavour to act with a reasonable measure of consistency. So the tendency to subject a wide discretion to more or less restrictive rules is not a specifically legal phenomenon.[29]

80 So it would appear that the development of common law guidelines is an inevitable feature of this area. There are now a lot of them. I respectfully suggest that it is neither cost effective nor sensible for litigants and the Court that we continue with a situation which, again to borrow from Professor Butt, requires "close study of the numerous prior cases in which the courts have opined on application of the power to grant easements".

81 The challenge is to maintain consistency of decision making while reducing the citations. For that reason I conclude with the observation that the time has come for s 88K to be amended to consolidate those common law guidelines in one place. This should be done by including in the section, as has been done in s 60(2) of the *Succession Act 2006* (NSW) in relation to the Court's wide discretion in family provision, a list of matters which *may* (but not *must*) be considered by the Court when exercising its power under s 88K.

[28] Bingham, op.cit, 45.
[29] Ibid, 50.