Print Page | Close Window

Easements ordered by the Court - s.88K of the Conveyancing Act 1919.

Easements ordered by the Court – s.88K of the Conveyancing Act 1919.
Justice John Bryson 11 October 2002
Paper delivered at 2002 Environmental Law Conference.

1. Although there can be many kinds of easements, those most usually encountered relate to rights of way or access for defined purposes. Under the Common Law there is no reasonable-need exception to the right of the owner of land to exclude entry by others, and no exception for ephemeral trespasses. Boundaries are absolute. City development to the boundaries requires use temporarily of space owned by someone else. Even an ephemeral event such as passage of a crane jib and load from the truck in the street over a corner of the neighbour's land, it may be many metres above his roof, to a rising construction site is a trespass; and so are momentary passages beyond the boundary as windows or cladding are fixed to the outer surface, and the projection of formwork, essential under Work Safety legislation, beyond the boundary while structure is erected up to the boundary. The common law left the developer to deal with his neighbour and make the best bargain he could to obtain licence to carry out short term or ephemeral operations; the neighbour was in a position to levy a toll or to charge whatever he could for his permission, with no legal control over what he might demand, and no regard to whether the invasion caused him any economic loss or injury, or whether he had any other opportunity to collect payment for use of his space. The neighbour could refuse to co-operate for any reason he liked: dislike of the new development, personal animosity and settling old scores, or whatever reason he thought good enough.
2. The neighbour could expect to obtain an injunction to restrain trespasses if they were likely to continue, and attempts by courts to use the discretion to grant or withhold an injunction as an opportunity to regulate access and determine the appropriate toll were not successful. The court does not have power to licence a trespass, so that if the court attempted to control the situation by withholding an injunction on terms that an amount be paid as compensation for the trespass as determined by the court, the neighbour who failed to obtain an injunction could still resist invasions in other ways, for example by imposing barriers, or tearing down formwork and throwing it back over the boundary. There was no real protection for the developer in making an agreement with the neighbour and obtaining a contractual right to access, as Australian courts would not enforce a contractual right of entry by injunction (*Cowell v. Rosehill Racecourse Co.* (1937) 56 CLR 605. English courts take a different view). Developers were left to rely on negotiations and diplomacy, and some did not find this easy; their habits were formed in a different direction and they tended to press on with operations anyway and grapple with the neighbour's injunction claim when it came. Some neighbours had just been given a lesson in obstructive behaviour by the developer himself when the neighbour built his own building. Litigation usually arose at the worst time for the economics of a development project. For an illustration of the difficulties for builders in the old state of affairs see my judgment in *Bendall Pty Ltd v. Mirvac Project Pty Ltd* (1991) 23 NSWLR 465.
3. There are now 3 pieces of legislation which completely change the scene. The first was s.88K of the Conveyancing Act 1919, which came into effect on 15 December 1995. Copy attached. There has been a steady flow of applications under s.88K to the Equity Division; about 30 or 40 of them. Some dealt with temporary access during construction. Others dealt with permanent rights of way, and with permanent rights to drainage or utility services. Typically applications relating to permanent access seek to legitimate long term but anomalous usage. It is unlikely that Equity judges would, within the confines of s.88K, be ready to make large alterations to property rights.
4. The second legislative intervention was the Access to Neighbouring Land Act 2000, which commenced on 1 January 2001. This enables Local Courts to make orders permitting access to adjoining land for the purpose of carrying out work on the applicant's own land, or for carrying out work on utility services on adjoining land. As far as I know there have been no reported cases on this legislation. Applications for access orders are made to the Local Court with appeal on questions of law to the Land and Environment Court. This legislation addresses temporary access. Most applications for access for the purpose of carrying out building work or development will be made under this relatively simpler procedure, so that it is likely that the Equity Division will hear somewhat less of s.88K from now on. This Act is directed to access for a number of purposes, not just building and development work – see s.12. Disputed applications relating to scaffolding or other temporary works or access during building operations have sometimes become the means of ventilating bad neighbourly relations. Availability of procedure in the Local Court should reduce incentive to approach access questions in the confrontational style, to seek to levy large tolls or to refuse co-operation.
5. The third legislative intervention is the new s.40 of the Land and Environment Court Act 1979, contained in Schd.1 to the Land and Environment Court Amendment Bill 2002, which passed through Parliament on 25 September and was assented to on 2 October 2002. Copy of s.40 is attached. This

gives the Land and Environment Court generally similar powers to powers under s.88K; clearly s.88K was the drafting model. There is nothing in the nature of cross-vesting of jurisdiction or reducing the jurisdiction of the Supreme Court. Subsection 40(1) means that the Land and Environment Court can only act in very limited circumstances, where it has determined to grant development consent on an appeal. The application may not be made unless and until the LEC has determined to grant development consent on the appeal; it will not be possible to consider the question whether the development consent should be granted and the question whether the easement should be imposed in the same hearing or otherwise concurrently. Section 40 contains some procedural provisions not found in s.88K. Under subs.(3) jurisdiction is exercisable only by a Judge. Under subs.(4) the Court is required to notify the owner of the land affected and (subs.(5)) consider any objection. This will create difficulties where, as has occasionally happened under s.88K, the owner of the land cannot be located; in that case the best course is to apply to the Supreme Court.

6. Some attention needs to be given to identifying the appropriate defendants to an application under s.88K. The owner of the burdened land obviously must be a defendant if the owner can be identified. Each other person with a registered interest, such as a mortgagee or lessee, should ordinarily be a defendant because that person's compensation must be considered by the Court. (However the Court may not require a person who consents, or has made an agreement on compensation, to be joined as a defendant). In s.40 subs.(4) and (5) deal with notification to owners and consideration of their objections. There may be other persons interested in the servient land, such as mortgagees and lessees, whose interests should be considered.

7. Applications for easements are unlikely to be simple or routine applications. There have to be reasonable attempts to obtain the easement – all reasonable attempts – so the proceedings cannot be opened by serving a Summons with an early return date. The situation does not lend itself to urgent handling. The structure of s.88K points to the principal issues. These are:

(1) Reasonably Necessary – whether the easement is reasonably necessary for the effective use or development of the benefited land – subs.88K(1)

(2) Discretion – the impact of making the order on the burdened land, its owner or other persons is not mentioned but is relevant because the power is discretionary – subs 88K(1).

(3) Public Interest – the Court must be satisfied that use of the land in accordance with the easement will not be inconsistent with the public interest – subs.88K(2)(a).

(4) Adequately Compensated – the Court must be satisfied that the persons interested in the burdened land can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement – subs.88K(2)(b). Power to order payment of compensation appears in subs.88K(4).

(5) Reasonable Attempts – all reasonable attempts have been made to obtain the easement but have been unsuccessful – subs.88K(2)(c).

(6) Form of Order – The plaintiff must bring forward a form of order defining the easement with particulars – subs.88K(3) and subs.88(1). The order is to provide for payment of compensation (to persons who may or may not all be parties).

8. I will review, on the basis of the cases known to me, the way in which these issues have been approached and problems which they have exposed. Section 88K authorises the compulsory imposition of an easement; diminution of property rights, and not in favour of the public but for the owner of other property rights. The court is careful to act within the limits of its powers, and no less careful when asked to alter property rights. This affects the court's approach to the Reasonably Necessary issue and the Discretion issue, which are frequently contested. The proposed easement has to be reasonably necessary, not absolutely necessary. The necessity has to be sufficient to outweigh the proprietary rights of the servient owner, and to outweigh any disadvantages created by imposing the easement. In an early case, *Tregoyd Gardens Pty Ltd v. Jervis* (1997) 8BPR 97688 Hamilton J referred to the need for firm proofs of reasonable necessity. Hamilton J described subs.(1) as the governing subsection. Hamilton J approached reasonable necessity as a factual matter and appraised the alternatives to an easement which had been referred to in evidence. In *Hanny v. Lewis* (1999) 9BPR [97782] Conv.R 55879 Young J referred to the need to bear in mind that "… the court should not lightly interfere with the property rights of the defendants." There are similar references in most judgments under s.88K. This does not mean however that the court overstates the test of reasonable necessity.

9. In *117 York Street Pty Ltd v. Proprietor Strata Plan 16123* (1998) 43 NSWLR 504 at 508-509 Hodgson CJ in Eq stated:

In my opinion: (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.*

10. These tests are not highly concrete, but what they express will probably be followed and applied. His Honour also said "… what is reasonably necessary is use or development of the land itself, not the

enjoyment of the land by any of the persons who, for the time being, are the proprietors." Personal tastes of the applicant have no weight.

11. In *Hanny v. Lewis* Young J said "… the Act does not require that there be absolute necessity, as with an easement of necessity, but the need must go beyond merely desirability …" and "It is to be noted that what is reasonably necessary is use or development of the land itself, not the enjoyment of the land by any of the persons who, for the time being, are the proprietors."

12. Several applications have been lost on the reasonable necessity issue. See *O'Mara v. Gascoigne*, *Gratton v. Simpson* [1998] 9BPR [97741], *Hanny v. Lewis*. The discretionary ground was acted on in *O'Mara v. Gascoigne* [1996] 9BPR [97718]. The considerations acted on appear also to have been relevant to the reasonable necessity issue; see 16358. The impact of the proposed easement on the use and value of the servient land was a discretionary consideration addressed in *Blulock Pty Ltd v. Majic* [2002] NSW ConvR 56102.

13. The claim of reasonable necessity may be related to a particular development for which development consent has not yet been obtained; the order under s.88K may be conditional on obtaining consent; this happened in *117 York Street.* Naturally enough there is often a close relation between conditions of a development consent and the need to obtain an easement. It may be necessary to impose detailed controls on the manner in which the work is carried out. This may be done by incorporating appropriate conditions in the easement itself, or by requiring undertakings or imposing terms in the court's order. Foster AJ required undertakings in *King v. Carr-Grreg* [2002] NSWSC 379. However an application under s.40 will be closely related to the consent which the LEC has just granted on appeal. It seems unfortunate that s.40 will not enable consideration of development consent and the easement to be closely integrated.

14. I have not identified any case which has turned on the Public Interest issue, although it has been referred to several times. Public Interest would be involved if a proposed use or development was illegal. Public interest was debated in relation to fire safety and health of occupants in *Katakouzinos v. Roufir* [1999] 9BPR [97796]. Public Interest could be involved if the proposed easement would sterilize the servient land by preventing it from being used or developed or by seriously compromising its use or development. There is a public interest in land being used in an effectual way and not sterilized; this is reflected in the provisions of s.88K overall. Public interest in use of both dominant land and servient land seems to be referred to by 88K(2)(a); however there are conflicting dicta. In *117 York Street* Hodgson CJ in Eq said that subs.88K(2)(a) referred to the dominant land; this differed from Windeyer J in *Goodwin v. Yee Holdings Pty Ltd* (1997) 8BPR 15795 who referred to the servient land. No case has turned on the distinction, and it seems well possible that the reference is to both. The question will become important when a substantial argument about public interest is presented.

15. Adequately Compensated is the second major issue. Compensation questions have not usually involved very large amounts. They often pass without detailed consideration of the valuing principles involved, although it is usual to produce a valuer's report. Arguments about compensation can get out of hand. In *117 York Street* a five day hearing led to an order for $23,000. Without s.88K the servient owner could be expected to negotiate for what the traffic would bear, for however much the dominant owner would pay for an easement rather than give up his ideas about use of his own land. This can be characterised as levying tolls, or rent-seeking. The issue under s.88K is completely different. In *117 York Street* one argument was that the loss of the bargaining position which the servient owner would have had if s.88K had not been enacted was a disadvantage which should be compensated for; the Court rejected this argument, and rejected a claim based on the reduced cost to the plaintiff of working with the crane the easement would authorise instead of an internally located crane. It is necessary to identify any loss or other disadvantage that would arise from imposition of the easement, and then to address how that loss or disadvantage can be adequately compensated for. Temporary easements to allow access, or the passage of cranes through airspace during building work, may not in the future be dealt with under s.88K or s.40, but if they are, compensation may require more than just assessment and payment of a lump sum. Adequate compensation may require provision of insurance, or of a fund or performance bond to make sure that if risks are realised the damage can be paid for. I have not encountered any detailed consideration other than assessment of a lump sum. In principle it seems possible that there may be a need to provide for compensation to be paid in the future for loss or disadvantage which is contingent on future events.

16. Special circumstances in which compensation is not payable, referred to in subs.88K(4), were considered in *Wengaran Pty Ltd v. Byron Shire Council* [1999] 9BPR [97768]. Special circumstances are not elements in determination of quantum; they are reasons why the quantum should not be paid. Young J did not define special circumstances and a definition does not seem possible, but in relation to what was put forward in that case his Honour's decision was based on the view that the defendant was not blameworthy and there were not special circumstances. Young J was of the view that "the compensation is not a substitute for the price that could have been exacted if the section did not exist: *SJC Construction Co. Ltd v. Sutton London Borough Council* [1975] 29 P&CR 322 at 326, a decision of the English Court of Appeal."

17. Young J said (p16989) to the effect that ordinarily the compensation will be:

(a) Diminished value of the affected land.

(b) Associated costs caused to the owner;
(c) Compensation for insecurity, loss of amenities, such as loss of peace and quiet; and
(d) Compensating advantages if any are to be deducted.
This table was followed and applied in *Mitchell v. Boutagy* [2001] 118 LG ERA 249 at 256. Austin J reviewed the legal principles in case law to date on compensation; 256 to 258. Among other things he said "It is well-established that the loss or disadvantage for which compensation is provided in s.88K does not include the loss of the bargaining position that the owner of the servient tenement would have had if s.88K had not been enacted …".
18. Reasonable Attempts. The principal issue in the first case under s.88K*, Coles Myer NSW v. Dymocks Book Arcade* (1996) 7BPR [97585] was Reasonable Attempts. Simos J showed that in his view it was not necessary for the plaintiff to show willingness to meet any demand which was not exorbitant or to show that failure of negotiation was caused by the intransigence of the defendant, or that the plaintiff had shown willingness to negotiate exhaustively to consensus, or that the court should have regard to everything that the plaintiff could possibly have done to achieve consensus. Simos J's view was that the court should consider what had happened in the negotiation and then make a judgment on the basis of the whole of the circumstances of the case as to whether or not the court was satisfied that the plaintiff had made all reasonable attempts to obtain the easement. When finding the facts he said that as the date of commencement of the proceedings "… it was extremely unlikely that consensus would be reached in the foreseeable future in respect of all those differences …" and this was the key finding. Since then appraisal of the plaintiff's reasonable attempts has not usually been a prominent issue in s.88K applications.
19. Applications under s.88K have exposed various incidental problems. Depending on its terms, express or implied, an easement may entitle the dominant owner to carry out works on the servient land, with a need to apply for some consent for those works, and to obtain the authority of the servient owner to make the application. In *117 York Street* an obligation to give a consent for a development application was made a term of the easement.
20. *In Re Permanent Trustee Australia* (1997) 8BPR [97659] an easement was claimed to erect fire stairs over Queens Lane, a City laneway for which there was no identifiable owner; the last owner identifiable in the General Register of Deeds was a long-vanished bank which received the land in 1843. The court ordered the easement and accepted an undertaking to pay adequate compensation to the owner of the burdened land, and any owner who ever emerges was given leave to apply. This kind of problem has recurred: *Kent Street Pty Ltd v. Council of the City of Sydney* [2001] 10 BPR [97889]. The unidentifiable owner of the lane is not the only person to be considered; other persons having registered easements over the lane may be entitled to notice under s.40(4).
21. *In Hanny v. Lewis* (1998) 9BPR [97702] the plaintiff had a right of foot way which could only be used by erecting stairs or building an inclinator; Young J did not regard the inclinator as reasonably necessary. He also said "It is in the public's interest that land-locked land be utilised" and "In almost every case the court would expect some monetary offer to be made …".
22. *Marshall v. Wollongong City Council* [2000] 10 BPR [97836] had some unusual aspects. The plaintiff's housing lot had frontage to a plan road which was too steep to be usable. The plaintiff sought a right of way over a strip of land which had actually been used for access for over 50 years. The land was zoned 6(a) Public Recreation, and was community land so the Council had no power to dispose of it. This limited the Reasonable Attempts issue because it was not possible for the Council to grant the easement sought. The limits in s.s45 and 46 of the Local Government Act 1993 on the powers of the Council to deal with land did not limit powers of court under s.88K; but they were an important consideration. I ordered the easement, in effect ratifying access which had actually been used for over 50 years, but I tried to discourage the idea that pieces of park land can readily be made available for grant of easements to assist development projects.
23. Costs. Subsection 88K(5) makes a special provision about costs, echoed in subs.40(8). This creates a position markedly different to the general discretionary power to order costs under s.76 of the Supreme Court Act 1970. Where easements and restrictive covenants are modified under s.89 of the Conveyancing Act 1919 the practice has been strongly in favour of ordering plaintiffs to pay the costs of other parties. Under s.88K a defendant can say there is a statutory right to an order for costs, which a plaintiff must displace. Even where defendants have fought long and hard without success they have almost always recovered costs orders. The way the case was conducted led to a qualified costs order in *Goodwin.* In *117 York Street* Hodgson CJ in Eq. said "… unless one can characterise the defendant's conduct as unreasonable, and in particular as unreasonably bringing about legal costs or increased legal costs, then the prima facie result contemplated by the statute would follow." Short of active misconduct by defendants, plaintiffs can expect to have to pay the costs of all parties. It would be difficult to show that the defendant acted unreasonably in resisting the application: the defendant is always seeking to uphold his legal rights.

CONVEYANCING ACT 1900 – S.88K

88K Power of Court to create easements

(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.

(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 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.

(3) The Court is to specify in the order the nature and terms of the easement and such of the particulars referred to in section 88 (1) (a)–(d) as are appropriate and is to identify its site by reference to a plan that is, or is capable of being, registered or recorded under Division 3 of Part 23. The terms may limit the times at which the easement applies.

(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.

(6) Such an easement may be:

(a) released by the owner of the land having the benefit of it, or

(b) modified by a deed made between the owner of the land having the benefit of it and the persons for the time being having the burden of it or (in the case of land under the provisions of the *Real Property Act 1900*) by a dealing in the form approved under that Act giving effect to the modification.

(7) An easement imposed under this section, a release of such an easement or any modification of such an easement by a deed or dealing takes effect:

(a) if the land burdened is under the *Real Property Act 1900*, when the Registrar-General registers a dealing in the form approved under that Act setting out particulars of the easement, or of the release or modification, by making such recordings in the Register kept under that Act as the Registrar-General considers appropriate, or

(b) in any other case, when a minute of the order imposing the easement or the deed of release or modification is registered in the General Register of Deeds.

(8) An easement imposed under this section has effect (for the purposes of this Act and the *Real Property Act 1900*) as if it was contained in a deed.

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

LAND AND ENVIRONMENT COURT ACT

[10] Section 40

Omit the section. Insert instead:

40 Additional powers of Court-provision of easements

(1) If the Court has determined to grant development consent on an appeal under section 97 of the Environmental Planning and Assessment Act 1979, the appellant may apply to the Court for an order imposing an easement over land.

(2) The Court, on application under subsection (1), may make an order imposing an easement over land if it is satisfied that:

(a) the easement is reasonably necessary for the development to have effect in accordance with the consent, and

(b) use of the land having the benefit of the easement will not be inconsistent with the public interest, and

(c) 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

(d) 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.

(3) The jurisdiction of the Court to make an order under this section is exercisable only by a Judge, whether or not sitting alone.

(4) Before making an order under this section, the Court must notify the owner of the land affected by the proposed easement (other than an owner who is a party to the proceedings before the Court), and the owner of any land on which it may be necessary for works to be carried out in connection with the easement (other than such a party), of the proposed easement or works, or both.

(5) An owner of land affected by the proposed easement and an owner of land on which it may be necessary for works to be carried out in connection with the easement:

(a) may object to the proposed easement or works, and

(b) is entitled to appear before the Court in support of the objection.

The Court must consider each objection.

(6) The Court:

(a) is to specify in the order the nature and terms of the easement and such of the particulars referred to in section 88 (1) (a)-(d) of the Conveyancing Act 1919 as are appropriate, and

(b) is to identify its site by reference to a plan that is, or is capable of being, registered or recorded under Division 3 of Part 23 of the Conveyancing Act 1919.

The terms may limit the times at which the easement applies.

(7) The Court is to provide in the order for payment by the applicant for the order to such persons as the Court specifies 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.

(8) The costs of the proceedings, in so far as they relate to an order sought or made under this section, are payable by the applicant for the order, subject to any order of the Court to the contrary.

(9) An easement imposed under this section:

(a) may be released by the owner of the land having the benefit of it, or

(b) may be modified by a deed made between the owner of the land having the benefit of it and the persons for the time being having the burden of it (or in the case of land under the provisions of the Real Property Act 1900) by a dealing in the form approved under that Act giving effect to the modification.

(10) An easement imposed under this section, a release of such an easement or any modification of such an easement by a deed or dealing takes effect:

(a) if the land burdened is under the Real Property Act 1900, when the Registrar-General registers a dealing in the form approved under that Act setting out particulars of the easement, or of the release or modification, by making such recordings in the Register kept under that Act as the Registrar-General considers appropriate, or

(b) in any other case, when a minute of the order imposing the easement, or the deed of release or modification, is registered in the General Register of Deeds.

(11) An easement imposed under this section has effect (for the purposes of the Conveyancing Act 1919 and the Real Property Act 1900) as if it were contained in a deed.

(12) Nothing in this section prevents such an easement from being extinguished or modified under section 89 of the Conveyancing Act 1919.

(13) In this section, ***owner*** of land includes a person having an estate or interest in the land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the Real Property Act 1900.