Forcing easements for development over adjoining land – 15 years on

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UDIA NSW was one of the major lobby groups which persuaded the NSW Government back in 1995 to legislate to allow developers to impose easements over adjoining land where reasonably required for land development.

The classic problem was the situation where an adjoining owner to a development site would hold out for a king's ransom in order to allow nothing more than a crane to swing over the adjoining land site. The Government took the view that the orderly development of land is in the public interest. It should not be in the hands of private individuals to prevent a development on irrational or unreasonable grounds. We have seen similar thinking with legislative provisions to override private covenants where planning laws would allow more intense or different development then may be protected by the private covenant.

It is now 15 years since section 88K of the *Conveyancing Act 1919 (NSW)* was introduced which empowered the Supreme Court of New South Wales to grant easements over adjoining properties where reasonably necessary for the use or development of the property. Most decided cases have been concerned with easements for drainage or access/rights of way.

The first cases showed a tentative approach by the Courts. They started with the position that rights in property were primary rights which needed to be protected. If an adjoining owner was seeking to encroach on those rights then the Courts would be careful in deciding whether to grant the rights and generally the adjoining owner would be indemnified for all costs even if unsuccessful in resisting the proposed easement.

Since those early days a body of case law has been built up which demonstrates an evolving approach to the issue.

In the recent case of *Rainbowforce Pty Ltd v Skyton Holdings Pty Ltd* [2010] NSWLEC 2 (***Rainbowforce***), the Chief Judge of the Land and Environment Court, Preston CJ, considered an application under section 40(2) of the *Land and Environment Court Act 1979* (NSW) which gives that Court equivalent jurisdiction as is given to the Supreme Court under section 88K. Preston CJ seems to have viewed the case as an opportunity to explain in detail how the Land and Environment Court presently regards the provisions of the Act and their operation.

THE EASEMENT

Rainbowforce owned land fronting Windsor Road adjacent to James Ruse Drive at North Rocks, Sydney. It obtained a development consent for a high density residential development of 299 units from The Hills Shire Council. Consent was deferred, conditional upon Rainbowforce establishing it had acquired a right of carriageway over adjoining land owned by Skyton which would give the property access to North Rocks Road. Rainbowforce subsequently applied to Council for a modification to development consent. The Council refused and Rainbowforce appealed to the Land and Environment Court. The Court upheld the appeal and modified the development consent.

As the development consent was issued by the Land and Environment Court it had jurisdiction under section 40(2) to impose a right of carriageway over the Skyton land.

The Court gave a detailed judgment covering many issues relevant to these easement applications.

POWER OF THE COURT

The Court's power under section 40 of the *Land and Environment Court Act* was held to be the same as the power of the Supreme Court under section 88K of the *Conveyancing Act*. Preston CJ referred to a number of changes to the power of the Court legislated in 2008 which gave it a more extensive jurisdiction than originally conferred. The Court's power to grant an easement was dependent upon whether the easement was "reasonably necessary" for the development so that it would have effect in accordance with a development consent. Generally this would be satisfied but the detailed reasoning of the Court should be examined in any doubtful case.

IS THE EASEMENT REASONABLY NECESSARY

After examining the proposed right of carriageway the Court considered whether the easement was reasonably necessary. The Court summarised the issues relevant to this consideration:

- The power to impose an easement arises only where the easement is reasonably necessary for the effective use or development of other land which would have the benefit of the easement.
- Whilst most easements are granted for the effective development of land, they may also be granted for the effective use of land (e.g. access to an existing lot).
- Effective use or development of land can be satisfied by showing that a permitted planning purpose, such as for residential, commercial or industrial use, cannot be achieved without the creation and use of the easement.
- The easement must be reasonably necessary for the effective use of the land that has the benefit of the easement – it is not sufficient for the easement to be reasonably necessary for use by a specific person. Evidence of particular hardship of a particular individual is not therefore relevant (such as a handicapped person seeking an easement for an elevator).
- Reasonable necessity means that there needs to be "something more than mere desirability or preferability over the alternative means available".
- Regard must be had to the burden which the easement would impose on the adjoining lands. In general terms the greater the burden on adjoining land, the stronger the case needed to justify the finding of reasonable necessity.
- The proposed easement must be reasonably necessary either for all reasonable uses or developments of the land, or else for one or more proposed uses or developments which with the easement must be substantially preferable to the use or development without the easement.
- Reasonable necessity does not demand that there be no alternative land over which the easement could be equally imposed. This would lead to the absurd outcome that an easement which could be equally affectatious over two pieces of land could not be granted over either.
- Whether reasonable necessity is present is to be decided in light of the circumstances at the time of the hearing. If the reasonable necessity for an easement arose due to some previous unreasonable conduct by the applicant then that could be a discretionary factor militating against the granting of relief.
- The requirement of reasonable necessity can be satisfied notwithstanding that some action for the effective use or development of the land may be required in addition to obtaining the easement, such as obtaining some statutory consent. For example, an easement for a right of carriageway might also require a development consent for the construction of the right of carriageway.

Applying these principles the Court found that the proposed easement to permit the construction and use of an access road and foot path over adjoining land was reasonably necessary for the effective development and subsequent use of the land. It was held that "there could be no reasonable use or development of the Rainbowforce land without the easement".

PUBLIC INTEREST

A further requirement for the granting of an easement is that the use of the land having the benefit of the easement will not be inconsistent with the public interest. The Court summarised usefully the intention of the legislation, as follows:

Parliament in enacting section 88K recognised that the private development of land may be beneficial for the public and in the public interest. However, such development, if it requires an easement over neighbouring land, can be unreasonably frustrated or held to ransom by the neighbour not granting an easement. The Act empowers the Court to grant an easement but on condition that the party having the benefit pay reasonable compensation to the party whose land is burdened. In this way, there is a balancing of competing private interests as well as promotion of the public interest.

The Court examined the planning schemes affecting the lands and concluded that there was nothing inconsistent with the public interest in the proposed development of the Rainbowforce land.

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The Court further held that if the easement was not granted then it was likely to render the Rainbowforce land virtually useless, which would not be in the public interest. Skyton argued that it was not in the public interest to allow a section 88K easement to be imposed on the proprietary rights of one land owner to such an unreasonable extent whilst at the same time creating considerable benefits to another land owner whose land had such limitations as no useable street frontage. The Court found that this argument

impermissibly canvases the policy decision of the Parliament to empower the Court to impose an easement, and hence impose upon the proprietary rights of the owner of the land burdened by the easement, although on the condition that the party having the benefit of the easement pay reasonable compensation to the owner whose land is burdened. Parliament has determined that the legislation which so permits this result is in the public interest.

CAN THE ADJOINING OWNER BE COMPENSATED?

If the Court decides to impose an easement it is also a requirement that the adjoining owner be "adequately compensated for any loss or other disadvantage that would arise from imposition of the easement".

The Court found that compensation ordinarily will have three elements:

- the diminished market value of the affected land;
- associated costs that would be caused to the owner of the affected land: and
- an assessment of compensation for insecurity and loss of amenities, such as loss of peace and quiet, less any compensating advantage.

The Court, after considering various objections from Skyton, came to the conclusion that the losses and other disadvantages that might be suffered by Skyton as a result of the imposition of the easement are able to be readily identified and estimated in monetary terms. The Court held that the owners of the adjoining land therefore could be adequately compensated for any loss or disadvantage arising from the imposition of the easement.

REASONABLE NEGOTIATIONS

A further condition precedent to the imposition of the easement is that the Court must be satisfied that the land owner seeking the easement has made reasonable attempts to negotiate with the adjoining owner for the grant of an easement. In this case the Court reviewed the correspondence from the solicitors for Rainbowforce unsuccessfully seeking to negotiate for the easement with the adjoining owner and its solicitors. It was not necessary to demonstrate that every possible effort had been made. The Court was satisfied that sufficient efforts had been made to negotiate agreement.

FINAL DISCRETION

Even when all other conditions are satisfied the Court retains a final discretion as to whether to grant or withhold the granting of the easement. The discretion is to be exercised having regard to the purpose of section 40(2). A person's simple reluctance to agree to the grant of the easement cannot be considered.

DETERMINATION OF COMPENSATION

As is usual in these cases determining the quantum of compensation was a duel between two valuers at ten paces.

The valuer for Rainbowforce used a piecemeal approach to valuation which involved assessing compensation for:

- the loss of proprietary rights by imposition of the easement;
- disturbance caused by the initial construction works and subsequent maintenance repair; and
- injurious affection, being the loss in value to the residue area as a result of imposition of the easement, less any benefit or increment in value as a result of the imposition of the easement.

The valuer for Skyton approached the assessment of compensation by determining the value of the Skyton land before and after the imposition of the easement and subtracting one from the other to determine the difference in value. This before and after approach captures not only the loss of proprietary rights but also injurious affectation and some items of disturbance. The Court found that both approaches were acceptable valuation methods. It depended on the particular circumstances as to which one was more appropriate.

The Court found that in the context of the imposition of a permanent easement the piecemeal approach was to be preferred. In this case, however, although there was no easement in the form of a right of carriageway on title, the Skyton land was nevertheless burdened by planning restrictions which required the creation of an easement in the form of the right of carriageway as a condition of any redevelopment of its own land and would restrict to the use of the land on which the right of carriageway would be located.

The Court then examined in detail the valuation processes. The Rainbowforce valuer assessed the diminution in value by imposition of the easement on the affected land to be 15% of its unencumbered value. The Court held that the diminution of 15% was too low and that 20% should be the appropriate diminution effect on value over the main affected land. As to disturbance the Court accepted a virtually nominal figure of $5000.

As to injurious affectation the Court accepted the Rainbowforce valuer's estimate to diminish the valuer of the remainder of the land owned by Skyton at 5%.

COSTS

Section 88K provides for the costs of the proceedings to be paid by an applicant for the easement unless the Court orders to the contrary. The Court held that 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.

So the early Court practice of awarding indemnity costs to the adjoining landowner, whatever the outcome, is now displaced by awarding only party costs, which are usually considerably less than the costs actually incurred. This has reduced the value of the one real bargaining tool which an adjoining landowner has had - namely the cost of defending proceedings for an easement.

SUMMARY

The many decided cases since 1995 show the value to the land development industry of the legislative provisions allowing Courts to grant easements over adjoining land where required for development. This case is a useful starting point for anyone in a dispute with an adjoining owner as it settles the principles as they would be applied in the Land and Environment Court.

Anyone seeking to resist the grant of easement needs also to examine this case. The Courts will not tolerate adjoining owners who, in effect, argue against the concept of the legislation, and in any event it appears will now only award costs to the adjoining owner on a party party basis so that in any proceedings it is likely that the adjoining owner will have to pay some of its costs. This is an added incentive for the adjoining owner to negotiate in good faith and to agree upon an easement proposal.