

## ***Easements: Imposing an Easement pursuant to Section 88K of the Conveyancing Act (NSW)***

**This article is a discussion of the operation of Section 88K of the *Conveyancing Act (NSW) 1919* which came into operation in 1996.**

### **1. Background**

Enacted in 1995, s.88K of the *Conveyancing Act (NSW) 1919* (õs.88Kö) gives the Supreme Court of New South Wales (õthe Courtö) power to make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of the other land that will have the benefit of the easement.

An example of the type of situation which s.88K is designed to address was given when the Bill containing the section received its second reading in Parliament:

õA multi-storey building was being erected in the city. During the course of construction... scaffolding [would sometimes] encroach into the airspace of the neighbouring land or impeded its useí  
Nevertheless, the owner of the neighbouring land was able to obtain an injunction preventing the building activities from encroaching into the owner's airspaceí  
It may well be that in cases like these the real motivation in seeking an injunction is not so much to prevent an actual trespass í but rather to force other parties to pay an exorbitant amount for the use of that airspaceí . Clearly, there is a need in such a case for a court to be able to grant an easement for the encroaching activityí ..ö

Since s.88K came into operation, there has been a considerable number of cases on the operation and the meaning of the section. S.88K orders have been made in favour of builders or developers, to enable buildings to be erected; as well as in favour of existing owners to enable the land to be used effectively.<sup>1</sup> It overcomes the inability to obtain such easements under the general law otherwise than by agreement; and the possible extortionate behaviour by the owner of the neighbouring land.

In applications for a grant of an easement under s.88K, the Courts have approached their decisions by recognising the confiscatory nature of s.88K ó that the provision makes an intrusion into the proprietary rights of a land owner. In *Hanny v Lewis*<sup>2</sup>, Justice Young stated that:

õAs a general approach to applications under this section, the court must bear in mind that property rights are valuable rights and the court should not lightly interfere with the property rights of the defendants.ö

### **2. What are the requirements of s.88K?**

Under s.88K, the Court can make an order for the grant of the easement only if it is satisfied that:

- (a) the easement is reasonably necessary for the effective use or development of the other land that will have the benefit of the easement;
- (b) use of the land in accordance with the easement will not be inconsistent with the public interest;
- (c) the owner of the land to be burdened by the easement and each other person having an estate or interest in the land can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement; and

<sup>1</sup> See for instance, *Grant Alfred King v John Francis Cromwell Carr-Gregg & Anor* [2002] NSWSC 379

<sup>2</sup> *Hanny v Lewis* (1999) NSW Conv R 55-879 at 56,875

- (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.

When making the order imposing the easement, the Court will specify the nature and terms of the easement, and identify the site of the easement by reference to a plan suitable for lodgment. The Court must also provide in the order for the payment of compensation, unless the Court considers that compensation is not payable because of the special circumstances of the case.

### 3. Reasonable Necessity

The primary issue in the cases before the Courts is whether the applicant can satisfy the Court that the easement was *reasonably necessary* for the *effective use or development* of the benefited land.

The Courts have held that the phrase *reasonably necessary* does not mean *absolutely necessary*; but it should be more than merely desirable or preferable to other alternatives.<sup>3</sup> The applicant must show necessity, not preference; and personal, idiosyncratic needs are irrelevant.<sup>4</sup> The requirement is to be established objectively, in light of the circumstances of the case.

### 4. Public Interest

The requirement of *public interest* has not been the subject of extensive discussions by the Courts in a s.88K application. The Courts have implied in the cases that the requirement of *public interest* relates to the legality of the use or development of the land.<sup>5</sup>

### 5. Compensation

In relation to the issue of compensation, the Courts have awarded defendants compensation for the disturbance suffered in addition to the loss of the actual value of the land.<sup>6</sup> Compensation could

include the associated costs that would be caused to the owner of the affected land; and loss of amenities such as loss of peace and quiet. The amount of compensation is generally determined by reference to valuation evidence. The Courts have stressed that the applicant must at least make an initial attempt to obtain the easement by negotiation; and although there may be some cases where it might be quite clear [there is no monetary value, in almost all other cases], the Court would expect some monetary offer.<sup>7</sup> Thus, it is incumbent on the applicant to make an offer of compensation when seeking an easement from its neighbour.

### 6. All Reasonable Attempts to Obtain the Easement or Easement having the same Effect

Under s.88K, the Court is required to evaluate all the circumstances and make a judgment as to whether it is satisfied that the applicant had made all reasonable attempts through negotiations and exploring different alternatives to obtain the easement or easement having the same effect.<sup>8</sup> The requirement is to be determined objectively having regard to the circumstances of the case.

*Comasters, experienced in this type of transactions, is able to advise and act for clients in s.88K 'grant of easement' applications.*

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**Important:** This is not advice. Clients should not act solely on the basis of the material contained in this paper. Our formal advice should be sought before acting on any aspect of the above information.

**Comasters** Law Firm and Notary Public  
Suite 101, Level 1, Capitol Terrace  
743-755 George Street  
Sydney NSW 2000, Australia  
Phone: (612) 9288 0300 Fax: (612) 9288 0399  
Email: comasters@comasters.com.au  
Website: www.comasters.com.au

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<sup>3</sup> See *Tregoyd Gardens Pty Limited v Jervis* (1997) 8 BPR 15845, 117 York Street Pty Limited v Proprietors of Strata Plan 16123 (1998) 43 NSWLR 504, *Grattan v Simpson* (1999) NSW Conv R 55-880;

*Woodland v Manly Municipal Council* [2003] NSWSC 392

<sup>4</sup> See *Hanny v Lewis* (1999) NSW Conv R 55-879

<sup>5</sup> See *117 York Street Pty Limited v Proprietors of Strata Plan 16123* (1998) 43 NSWLR 504

<sup>6</sup> See *Tregoyd Gardens Pty Limited v Jervis* (1997) 8 BPR 15845 3 NSWLR 504; <sup>7</sup> *Hanny v Lewis* (1999) NSW Conv R 55-879 per Young J at 56,876

<sup>8</sup> See *Coles Myer NSW Ltd v Dymocks Book Arcade Limited* (1996) 7 BPR 97585