NEW SOUTH WALES SUPREME COURT

CITATION: Chiu v Healey [2003] NSWSC 857

CURRENT JURISDICTION: Equity Division

FILE NUMBER(S): 5728/01

HEARING DATE{S): 23, 24 July 2003

JUDGMENT DATE: 18/09/2003

PARTIES:
Phillip King Chiu (P)
Kaye Laraine Healey (D)

JUDGMENT OF: Young CJ in Eq

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:
J C Thompson (P)
M J Heath (D)

SOLICITORS:
Chris Lai & Associates (P)
Harrington Maguire & O'Brien (D)

CATCHWORDS:
REAL PROPERTY [407] [415] [434]- Easements- Right of footway- Old System land- Deed creating easement not effective at law because not created by mortgagee, who had legal estate- However, when deed recorded on register then this conferred indefeasibility- Difference in juristic natures of easements and restrictive covenants- What constitutes abandonment of an easement- How to determine a terminus ad quem- Whether easement should be extinguished.

ACTS CITED:
Access to Neighbouring Lands Act 2000, Part 2
Conveyancing Act 1919, ss 88, 89
Real Property Act 1900, s 51

DECISION:

Verdict for the plaintiff. Defendant to pay costs of proceedings, including the cross claim.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

YOUNG CJ in EQ

Thursday 18 September 2003

5728/01 – CHIU v HEALEY

JUDGMENT

1 **HIS HONOUR**: The plaintiff is the proprietor of No 228 Darling Street, Balmain. The defendant is the proprietor of the adjoining property, No 226 Darling Street. In 1966, and until recently, both parcels of land were under the Old System Title. No 228 was brought under the **Real Property Act** 1900 by primary application 65644 on 6 October 1998, and is now the land comprised in Folio Identifier 1/880222. On 7 September 1971, a qualified certificate of title issued with respect to No 226.

2 The plaintiff says that by Conveyance No 872 Book 2819, a right of footway was created over the defendant's land which is 1.865 metres wide, the entire length of No 226 along its boundary with No 228.

3 Conveyance No 872 Book 2819 is a deed dated 21 November 1966 between Kob Sal Pty Ltd, therein called "the vendor" and the plaintiff as purchaser. The conveyance provided that the vendor, as beneficial owner, convey to the plaintiff in fee simple for $9,000 No 228, "TOGETHER with a right of footway over all that piece of land within Lot 1 DP 228310."

4 The deed did not expressly contain any of the matters required by s 88 of the **Conveyancing Act** 1919 if an easement is to be enforceable against successors in title.

5 Another problem is that on 21 November 1966, the legal fee simple in No 228 had already been conveyed to Mrs Frost, a moneylender, who was the mortgagee.

6 The current Torrens Title to No 228 notes in the Second Schedule the right of footway from Conveyance No 872 Book 2819 as appurtenant to the land. The current Torrens Title of No 226 shows the same easement as burdening the land.

7 By his amended statement of claim, the plaintiff says that since about 1996 the defendant has denied that No 228 has the benefit of a right of footway over No 226 and that she replaced an existing combination lock, the combination to which was known to both the plaintiff and the defendant, with a keyed lock and has not made available to the plaintiff a key of that lock. He complains that the defendant has also declined to consent to, and has objected to, the plaintiff constructing a gate in the fence dividing Nos 226 and 228 adjacent to the footway. He seeks a declaration that there is such a footway, an injunction to prevent the defendant from hindering or obstructing his use of the footway, an order directing the defendant

to demolish part of an extension of her building on No 226 which is built above the footway and beyond the upper floor of the building on No 226 as it existed at the time of the creation of the footway, and damages.

8 In her defence, the defendant admits that the conveyance recorded a right of footway, but she says:

(1) The right of footway is not enforceable because it did not comply with s 88(1)(c) and (d) of the **Conveyancing Act.**

(2) The conveyance was not effective validly to convey the easement because Kob Sal Pty Ltd had no legal title to convey.

(3) That there was no impediment to her erecting a structure over the right of way. [This aspect of the case ceased to be an issue].

(4) That the right of way has been partially abandoned.

(5) That the plaintiff is estopped from asserting his title to the right of way; and

(6) Laches and acquiescence.

9 By her cross claim, the defendant seeks a declaration that the rights under the conveyance are unenforceable by any person, or in the alternative, an order under s 89(1) of the **Conveyancing Act** that the right of footway be wholly or partially extinguished.

10 The proceedings were heard by me on 23 and 24 July 2003. On 23 July I had a view of the locus with counsel. On 24 July I heard submissions from Mr J C Thompson of counsel for the plaintiff, and Mr M J Heath for the defendant. At the end of those submissions I indicated to Mr Heath that I was concerned that I needed to have more material on certain aspects of the case. He then applied to supplement the defendant's submissions in writing on the basis that the plaintiff might also serve submissions in reply, and a few weeks were set aside for this to occur. I am grateful to both counsel for their oral and written submissions. It was, however, because of the need to have further submissions that the decision in this matter has been delayed.

11 Having regard to the defences and the matters that were raised by me at the end of the oral argument and the further written submissions, in my view it is expedient to consider the issues under the following headings:

(1) **The Basic Facts**;

(2) **Has there been a non-compliance with s 88 of the Conveyancing Act 1919**?

(3) **What, if anything, is the effect of the notation of the right of footway on the respective certificates of title**?

(4) **Does any non-compliance with s 88 of the Conveyancing Act affect the enforceability of the right of footway between these parties in the circumstances of this case**?

(5) **What, if anything, is the effect of the vendor in Conveyance No 872 Book 2819 not being the legal owner of No 228**?

(6) **Is the doctrine of title by estoppel relevant to this case**?

(7) **What is the juristic nature of abandonment of an easement**?

(8) **Has there been any partial abandonment in this case**?

(9) **Does any estoppel operate against the plaintiff enforcing his rights**?

(10) **Has the plaintiff been guilty of laches and acquiescence**?

(11) **If the right of footway is enforceable:**

(a) what are:

(i) the terminus ad quem; and

(ii) the terminus a quo.

(b) can the plaintiff access the right of footway at any point along its length;

(c) can the defendant build upon the right of footway, and if so, to what extent?

(d) what is the right of the plaintiff to put ladders etc on the right of footway?

(12) **Is the defendant entitled to relief under s 89 of the Conveyancing Act 1919?**

(13) **What is the result of this case including what order for costs should be made.**

12 I will deal with these matters seriatim.

13 (1) The buildings on the two properties are on the southern side of Darling Street. From the street it would appear that they physically are attached to each other, No 226 being lower down the hill than No 228. Each, from the street, appears to be a two-storeyed dwelling with attic. At the western end of the building on No 226, one can see from the street a metal grilled gate. This has no significance in the case because both parties have access through that gate. As one proceeds through that gate, one gets into a roofed corridor, the width of four bricks laid lengthwise with the external wall of No 226 on one's left, and the external wall of No 228 on one's right. Proceeding down the end of that corridor there is another door or gate which I will call "the blue door". Just before one reaches the blue door on the right, there is a white door marked "Flat No 1" through which tenants of the plaintiff may gain access to the upstairs of No 228. If one proceeds through the blue door and, apart from the occasion of the view, the plaintiff cannot do that because he does not have a key, one gets into the garden of No 226. There is a substantial wall separating 226 and 228. That wall continues to the rear of the properties. Adjoining both properties at the rear or

southern end are the properties 21 and 23 Gladstone Street, Balmain, but those properties are at a higher level of some three to four metres than the backyards of Nos 226 and 228 Darling Street. Whilst at one stage it was said to be possible to move from 226 to 228 at the very rear of the properties, it is not now possible to do so. The defendant has erected substantial garden beds along her side of the wall.

14 21 and 23 Gladstone Street are small modern residences.

15 The defendant has obviously spent a lot of money on modernising the rear of her property. One can go up to the third floor up a modern, but narrow, stairway, through newly built rooms and one can, from the top of the defendant's building, have a good view of the two backyards. On the other hand, the plaintiff's property is not in as luxurious a condition. It would seem that the plaintiff uses the front downstairs part as a shop, though it was empty when I saw it, and the rest of the building as one or two flats. It can be seen that he or his predecessor, have built various additions from time to time. There currently appears to be what might be called a detached bathroom and shower block at the very rear of the plaintiff's yard. The plaintiff would like to build an office in the yard.

16 There does not seem to be any dispute between the parties that the plaintiff and his tenants and licensees can use the passage way from the front gate to the blue door. This case concerns whether the plaintiff is entitled to be able to use anything further.

17 I very much suspect that the right of footway was originally in place so that before sewerage the night sewer operator could get access to outside toilets in the backyards. There is no evidence of this: this is mere speculation and it would seem, in any event, that such purpose must have ceased at least 60 years ago.

18 The plaintiff appears particularly to want to use the right of way so tradesmen can bring building materials into his rear garden, and he also seems to want to be able to have his tenants get access through the right of way into his backyard through a gate that he intends to build in the wall. He also would like to build an office at the rear section of the house and to gain access to that office via the back garden.

19 Of course, apart from considerations of abandonment and rights under s 89 of the **Conveyancing Act**, if the plaintiff has legal rights than it does not matter for what purpose he requires to use the right of way.

20 (2) There is no doubt that the conveyance did not comply with s 88 of the **Conveyancing Act.** There is no attempt to comply with the Act.

21 Section 88 of the **Conveyancing Act**, so far as is relevant, provides as follows:

> "(1) Except as to the extent that this Division otherwise provides, an easement expressed to be created … shall not be enforceable against a person interested in the land claimed to be subject to the easement … and not being a party to its creation unless the instrument clearly indicates -
>
> (a) the land to which the benefit of the easement or restriction is appurtenant;
>
> (b) the land which is subject to the burden of the easement …
>
> (c) the persons (if any) having the right to release, vary, or modify the restriction …; and

(d) the persons (if any) whose consent to a release, variation or modification of the easement or restriction is stipulated for.

(3) This section applies to land under the provisions of the *Real Property Act 1900* and in respect thereof:

(a) the Registrar-General shall have … power to record a restriction referred to in subsection (1), in such manner as the Registrar-General considers appropriate, in the folio of the Register kept under that Act that relates to the land subject to the burden of the restriction …

(b) a recording in the Register kept under that Act of any such restriction shall not give the restriction any greater operation than it has under the dealing creating it; and

(c) a restriction so recorded is an interest within the meaning of s 42 of that Act."

22 Although it is common conveyancing practice specifically to set out the matters which have to be specified under s 88 of the Act, this is not mandatory so long as there is a clear indication of the relevant matters in either the instrument itself or some other instrument to which the first instrument refers: **Papadopoulos v Goodwin** [1982] 1 NSWLR 413. This decision was reversed on the facts by the Court of Appeal on 31 May 1985, but this does not affect the test. In particular, if there is no person having rights within subsection (1)(c) or (d), then the instrument need not deal with them: **Vaneris v Kemeny** (1977) 1 BPR 9655.

23 Mr Heath says in the instant case there is clearly no compliance with s 88(1)(c) and (1)(d) and thus the easement is unenforceable. Mr Thompson's riposte is that (c) only seems to refer to a "restriction", that is, a restrictive covenant and not an easement, and in any event, **Vaneris v Kemeny** is a complete answer. This second submission must be correct. The consequences are considered in [28].

24 (3) Mr Heath says that noting an easement on a certificate of title does not make the easement indefeasible. He says s 51 of the **Real Property Act** means that a transfer operates to assign the transferor's estate or interest "with all rights, powers and privileges thereto belonging or appertaining". He says that the judgment of Isaacs J in **Dabbs v Seaman** (1925) 36 CLR 538 shows that these words do not include easements over other land. I believe that Mr Heath is referring to the dissenting judgment of Higgins J at 560. However, the thought really takes us nowhere. The easement existed prior to 7 September 1971 when a qualified certificate of title issued for the servient tenement, No 226 Darling Street. Generally speaking, where an easement is registered on the servient title, it is indefeasible: **Parramore v Duggan** (1995) 183 CLR 633, aliter if it is only registered on the certificate of title of the dominant tenement as an appurtenant easement.

25 The Registrar General is empowered to record all interest in the land when creating a new folio of the register. A qualified folio is a folio of the register; see s 3(1). There is special provision in s 88(3) of the **Conveyancing Act** limiting the value of recording a restrictive covenant on the register, but the recording of an estate or interest in land, such as an easement on the title of the servient tenement, is fully operative to confer an indefeasible title.

26 There has been some suggestion made in submissions that not all matters that are recorded on the certificate of title are indefeasible interests. Again, I would agree, but all estates which are registered or recorded on the title are indefeasible and an easement is an estate.

27 Of course there is a technical problem when land gets converted to the Torrens System or a qualified certificate of title issues. A legal fee simple in a mortgagee becomes changed or transmogrified into a statutory legal interest by way of hypothecation. The former holder of the equity of redemption ends up holding a legal estate in fee simple. Likewise, any equitable easements which exist only because the grantor had but an equitable estate at the time of their grant may very well be converted into a statutory legal interest by way of easement. However, it does not seem to me that these transmogrifications are of anything more than academic interest.

28 (4) It follows from what I have said in (2) and (3) that the answer to this question must be "No". Even if I were wrong in my answer to question 2, the recording on the register would confer indefeasibility.

29 (5) It is quite true to say that as at the date when the easement was purportedly created the grantor did not have a legal estate. That estate was vested in its mortgagee, Mrs Frost. However, where a person who has an equity of redemption in such circumstances purports to grant an easement, that easement will have exactly the same effect in equity as the grant by a legal owner has at law, save and except that it may be defeated by a bona fide purchaser for value without notice; see Bradbrook & Neave **Easements and Restrictive Covenants in Australia** 2nd ed (Butterworths, Sydney, 2000) [2.13]. It may be that the mortgagee, Mrs Frost, might not have been affected by the equitable easement created by her mortgagor. Whether that be so or not is quite irrelevant as to the rights between the grantor and the grantee of the easement. As the easement is recorded on the title and as there is no suggestion that the present proprietor of No 226 did not have notice of it, the equitable easement (now converted into a statutory legal easement) would be binding on the defendant.

30 (6) It is really unnecessary to deal with this issue in the light of my previous findings. However, in deference to counsel I will briefly deal with it. The doctrine of title by estoppel is that if A who has no title at law, or a defective title at law, purports to convey an estate to B and then later on A gets in the full legal title, the estoppel will be fed and B will be held to have been granted the full title by A. Most usually one strikes this doctrine with leases and in that connection, the discussion with counsel in **Green v James** (1840) 6 M & W 656; 151 ER 575, suggests that it was common for there to be an estoppel by title where an equitable lessor later got in the legal estate. The doctrine applies because, as a general rule a person is barred from invalidating his or her own solemn act (see **Woodfall on Landlord and Tenant** 28th ed (Sweet & Maxwell, London, 1978) para 1-0026.

31 Mr Heath quotes from **Stonham on Vendor and Purchaser** (LBC, Sydney, 1964) where a footnote says that:

> "The doctrine of estate by estoppel does not apply, however, where the conveying party has some interest, and merely purports to convey a greater interest than he has. In such a case, the other party does not hold an estate by estoppel, but, as an interest actually passes, he takes whatever that interest actually is."

The learned author cites from **Coke on Littleton** 45a and D**oe d Strode v Seaton** (1835) 2 CM & R 728; 150 ER 308.

32 This note does not, of course, give the full picture. As I understand it, where A has a particular estate at law and purports to convey a fee simple, that operated at law by way of tortious feoffment until tortious feoffment was abolished by s 22 of the **Conveyancing Act**. Where A had only an equitable estate, but purported to grant a legal estate, then the title operated by way of estoppel when A got in the legal estate. When A's title was defective and the defect was later cured, again the doctrine applied. However, if A had a particular estate at law and granted a lease which lasted after that particular estate determined, then

the lease came to an end when the particular estate determined notwithstanding that A may later have acquired the reversion. This last situation was **Strode's case** and does not govern the present situation.

33 Because of the **Real Property Act** there is no need to invoke the doctrine of title by estoppel, but if it needed to be invoked it would be applicable in my view.

34 (7) I now turn to a completely different matter, and that is, the juristic nature of abandonment of an easement.

35 Although easements and restrictive covenants tend to be dealt with together in textbooks and in the courses at law schools, they are of completely different juristic natures. An easement is an interest at law and is an estate in land. It is an incorporeal hereditament. A restrictive covenant, on the other hand, is an interest in equity and is not properly described as an estate. It is easy to see how such an equitable interest can be abandoned: it is not so easy to see how one can abandon an estate in land at law.

36 However, it is clear that one can abandon an easement; see **Grill v Hockey** (1991) 5 BPR 11421, where M McLelland J held that under both the common law and the **Conveyancing Act** an abandonment occurs when the dominant owner has made it clear that neither he nor his successors in title will make any use of the easement though it is not to be lightly inferred. His Honour was following the decision of the English Court of Appeal in **Williams v Usherwood** (1983) 45 P & CR 235, 256, which quoted from a judgment of Buckley LJ in **Gotobed v Pridmore** noted in (1970) 115 SJ 78, what one must look for is evidence that there has been an implied (or lost modern deed of) release of the easement. Long non-user will be good evidence, but will not necessarily be sufficient to establish abandonment: **Swan v Sinclair** [1925] AC 227; **Treweeke v 36 Wolseley Road Pty Ltd** (1973) 128 CLR 274 and **PSP 9968 v PSP 11173** [1979] 2 NSWLR 605.

37 Mr Heath relied on a decision of Ipp J in **Keene v Carter** (1994) 12 WAR 20 at 26-27, which approved a decision of the Ontario Court of Appeal in **Simpson v Gowers** (1981) 121 DLR (3d) 709, giving a definition of abandonment. However, that was in connection with abandonment of a chattel to the law of larceny and, with great respect, cannot assist in the present case especially as there are cases in our own courts right on point.

38 (8) I now turn from matters of law to matters of fact.

39 Mr Heath says that in the present case the evidence of the physical act of abandonment was the plaintiff allowing, consenting or otherwise acquiescing in the construction of:

(i) the brick wall with no access or egress to or from his property from at least 1969 to the period in 1998 when the brick fence was replaced by the wooden fence; and

(ii) the stone walls on the southern boundaries of 226 and 228 Darling Street.

These acts or omissions, he says, evidenced a positive intention to abandon or relinquish at least that part of the footway from the blue door to the rear boundary to access and egress his property.

40 In my view this comes nowhere near the evidence needed to show abandonment. All it indicates is that for a period of time the plaintiff was prepared not to use his backyard or at least not to use it except by getting access through his own property. There have been continuous improvements of both properties over the years and I would think it would be quite unsafe to infer abandonment.

41 However, I have taken the defendant's version of the facts. The plaintiff's version, for which there is a lot to support it, is that whilst in 1969 the then owner of 226 erected a brick wall along the boundary with 228 and installed a gate with a lock across the footway at a point a short distance beyond the blue door, the plaintiff was provided with a key to the lock. From that time onwards until the defendant purchased 226 in 1994, the plaintiff had access. He used this access, inter alia, for trimming a willow tree and doing various bits of building work. His dog used the footway. His children were photographed on it. When the Clothiers purchased 226 in 1987, the lock on the second gate was changed to a combination lock, but the plaintiff knew the combination. He continued to use the footway. In 1990 he renovated an attic and passed timber along the footway for that purpose. The alternative access via the rock steps at the rear of 21 Gladstone Street only became closed off when works were done at the rear of 21 Gladstone Street in 1990.

42 Even after the defendant purchased 226 in 1994, the plaintiff used the right of way, inter alia, for access for plumbing works and carrying in and out building materials. When the defendant changed the lock on the second gate, the plaintiff found a key which opened it and used that for some time.

43 The defendant only came on site in 1994 so that she was not able to contradict the plaintiff's evidence that I have just set out. However, evidence was called by the defendant from a former owner Ms Jerram, which indicated that Mr Chiu was very much mistaken in what he said about the use of the right of way. Ms Jerram said that the second gate was padlocked regularly for security purposes; it needed to be.

44 The defendant also sought to rely on evidence from Mr Clothier. However Mr Clothier is a resident of Alice Springs. He did not come to court to be cross examined and I did not read his affidavit. However, no inference can be drawn from the fact that Mr Clothier did not give evidence.

45 Mr Heath severely cross examined Mr Chiu about the matter and Mr Chiu did not always come through with flying colours. I would accept Ms Jerram's affidavit evidence to that of Mr Chiu. However, it seems to me that even accepting Ms Jerram's evidence, Mr Chiu did make at least intermittent use of the right of way for the period 1969 to 1998 but even if he did not, the material is not strong enough, even accepting all the defendant's case, to show abandonment.

46 (9) The amended defence and cross claim pleads that the facts put up with respect to abandonment alternatively amount to an estoppel in that the plaintiff has impliedly acknowledged that he has no intention of ever using the right of way. This claim fails for the same reason as abandonment fails.

47 (10) Much the same facts were put forward on the suggestion that there had been laches and acquiescence. The factual basis for this does not appear to exist, but even if it did, as Mr Thompson says in his submissions, even if the plaintiff had objected to the erection of the wall he would have failed in that objection because, so long as some access was allowed, the servient owner can put up whatever building she likes on her own land.

48 (11) (a) Mr Thompson for the plaintiff says that the plaintiff says, adapting the words of Campbell J in **Lolakis v Konitsas** (2002) 11 BPR 20, 449, 20, 504 [18], the plaintiff has "a registered easement, and that unless that easement is held invalid, extinguished or modified, he is entitled to a court order confirming that he has the benefit of it." However, it is still necessary to look a little more closely into the rights of the parties with respect to that easement.

49 In **Zenere v Leate** (1980) 1 BPR 9300 at 9306-7, M McLelland J said:

> "A right of way connotes a right of passage between two places separated by the servient tenement. In the words of Middleton J in the High Court of Ontario: 'A right of way must have a terminus a quo as well as a terminus ad quem.': Grant v Lerner (1914) 7 OWN 564 at 566. This does not exclude the possibility of two

> or more termini a quo where such were clearly intended. Each of the termini may be sufficiently identified in the grant but 'if the deed is silent as to the place of entry, surrounding circumstances must be taken into consideration to throw light on the intention of the parties': see Goddard – The Law of Easements 8th ed p 382."

I have followed this decision on many occasions; see eg **Butler v Muddle** (1995) 6 BPR 13,984 at 13,986.

50 Mr Thompson submits that because of s 181A and Part 2 of Schedule 8 of the **Conveyancing Act** which mean that one must flesh out the words "right of footway" to mean "full and free right to the body in whose favour this easement is created, and every person authorised by it, to go, pass and repass on foot at all times and for all purposes with or without animals or vehicles or both over the land indicated herein as the servient tenement" the right of footway runs in favour of the dominant land and each and every part of it. However, this submission which derives from the note 33820.35 in Butterworth's Annotated Conveyancing Act and which is dependent on **Jennison v Traficante** (1980) 1 BPR 9657 relates to another situation entirely. It does not mean that one should not have a terminus a quo and a terminus ad quem.

51 The terminus a quo was obviously Darling Street, but where is the terminus ad quem? Mr Thompson says that if it is necessary to find a terminus ad quem it is at the very rear of the property adjoining the boundary of 23 Gladstone Street. There was no viable contrary submission, and I consider that what Mr Thompson says is correct.

52 Mr Heath says that this is a right of way that leads nowhere: it leads to an almost sheer wall at the rear of the property. Whilst that is true in one sense, the value of the right of way is to parts of the plaintiff's land to which he has an additional access.

53 (b) The more important question, perhaps, for the parties, is what access points are allowed. Normally, one would not expect that a person can have access from all points of the right of way. In the case of the standard right of way leading from point A to point B, it is quite clear that access can only be had at A and B. However, where a right of way runs alongside the dominant tenement, then the question of access can become awkward.

54 In **Butler v Muddle** (supra) at 13,986 I said that in such a case:

> "It is rather artificial … to say that parties intended that there should only be access at one spot. After all, land is developed perhaps every 50 or 60 years and dependent on the development the dominant owner for the time being wants access even if there is only a single point of access at various points over the centuries. … One must look at the reasonableness of it all when construing the grant and, in my view the defendants are entitled to access from more than one point, but only such access as is reasonable."

I cited **Petty v Parsons** [1914] 2 Ch 653 and **Hose v Cobden** [1921] VLR 617. I then went on to say that ordinarily it cannot be reasonable to have access points for 13 metres along a 23 metre frontage.

55 One has got to look at what is reasonable in all the circumstances. The plaintiff is not entitled to access at every point along the way so as to forbid the construction of a wall. However, he is entitled to reasonable access at points for him to determine from time to time. Apart from having access through the blue door, he is entitled to at least one, I would say at least two, points of access in the backyard. These can

change from time to time. However, where the plaintiff wants access at the moment is illustrated on the drawings he has put to the Leichhardt Council in support of his development application for a proposed office in the backyard.

56 (c) The right is a right of footway and so it is limited in height to a reasonable height above ground level for people and the sort of animal that could accompany a person along such a passage way to pass along it carrying reasonable loads.

57 It would seem that as at the time of the grant, there was a roof over the passage way before one gets to the blue door. That height must be the maximum height of the right of footway. Prima facie that would be the maximum height of the footway as it extends past the blue door into the backyard.

58 Initially the plaintiff claimed order F that the defendant demolish part of the extension to 226 which is built above the footway and beyond the upper floor of the building on 226 as it existed at the time of creation of the right of footway. This claim was withdrawn at the commencement of the hearing and accordingly I need say nothing further about it. I think what I have already said about the height of the right of footway will deal with any other problem.

59 (d) Mr Heath puts that any right to pass and repass does not allow the use of ladders to be placed on the footway so that the plaintiff can paint and clean the buildings of the dominant tenement from the right of footway. Mr Heath cites **Brunton v Hall** (1841) 1 QB 792; 113 ER 1334. Unfortunately, Mr Heath has relied on what I think, with respect, is a misleading note of that case in Bradbrook and Neave at 6.4. Mr Heath says the case decided that for the right of footway one cannot carry manure in a wheelbarrow. However, the case says that the plaintiffs could have carried manure along the right of way in a wheelbarrow; however, the declaration claimed the right to "lead" and carry away any part of the manure and the word "lead" connoted leading a horse with a carriage which was beyond the right.

60 There is no objection to a person who has a right of footway carrying material along the right of footway, bringing his or her dog along or wheeling a wheelbarrow or carrying building material.

61 A problem does, however, occur where a person wants not just to pass along the right of way but to stop. Stopping for a short moment incidental to passage is unobjectionable. However, staying on the right of way for a period of time to erect a ladder to paint is, in my view, an excessive user. The right to put the ladder up and paint must be obtained either by licence of the servient holder, by an order made by a magistrate under the relevant legislation passed to allow access for painting and repair to buildings that are closely spaced together (see Part 2 of **Access to Neighbouring Lands Act** 2000) or alternatively by an order under s 88K of the **Conveyancing Act**.

62 It follows that the plaintiff is entitled to succeed except in so far as he has claimed a right to put up ladders on the right of way for the purpose of painting the exterior of his building.

63 (12) The defendant, by her cross claim, says that in that eventuality an order should be made partially extinguishing the easement by extinguishing that part which is south of the blue door under s 89 of the **Conveyancing Act**.

64 Section 89 empowers the court to modify or wholly or partially extinguish an easement if:

> (1) by reason of change in the user of the land or in the character of the neighbourhood or otherwise the easement ought to be deemed obsolete;

(2) if for the same reason the continued existence of the easement would impede the reasonable user of the servient tenement without securing practical benefit to the persons entitled to the easement;

(3) the persons entitled to the benefit of the easement have agreed to it being modified or wholly or partly extinguished;

(4) such persons have by their acts or omissions must be reasonably considered to have abandoned the easement wholly or in part;

(5) that the proposed modification or extinguishment will not substantially injure the persons entitled to the easement.

Unless the case comes under one of those five heads, the court is not empowered to take away someone's property under the section. The NSW section, unlike the English section, makes no provision for the court to make an order for compensation.

65 The defendant did not in this case call any evidence as to change of the nature of the neighbourhood or of the use of the properties. This was unusual as in almost every case where a party intends to invoke s 89(1)(a) this evidence is before the court. I have earlier speculated that this right of footway was originally in situ to facilitate the necessary tasks of the night soil operator, but this is pure speculation and in any event, as I have said earlier, this has not been the purpose of the easement for the last 60 years or so.

66 The defendant's principal case is that because of the circumstances of which she has led evidence, and which I have considered under the head of abandonment, the easement should be deemed obsolete. She also asserts that its continued existence impedes her reasonable use of No 226 without securing any practical benefit to the plaintiff. The head of power that the court can modify an easement if it is deemed obsolete, is limited by the preliminary words in s 89(1)(a) that the obsolescence is by reason of a change in the user of the land or in the character of the neighbourhood or other material circumstances. Although "other material circumstances" are fairly wide words, it seems to me that to a great extent they are limited by what has gone before. Especially when one considers that abandonment comes under s 89(1)(b) obsolescence must relate to some change in either the user of the premises or the neighbourhood or of some similar change.

67 "Obsolete" in this connection as Jacobs J said in **Re Mason** (1960) 78 WN (NSW) 925, 927, means that the object of the easement is now incapable of fulfilment or that it serves no present useful purpose. In the light of the evidence given as to Mr Chiu's present user of the property and his evidence as to what he has used the easement for in the past, this has not been established.

68 In **Re Alexandra** [1980] VR 55, the Supreme Court of Victoria held that the second head, that is, that the continued existence of the easement would impede the reasonable user of the servient tenement without securing practical benefit to the persons entitled to the easement is not dependent on the opening words of s 89(1)(a). Here, however, one has got to balance the use of the servient land on the one hand, with the practical benefit, not to the dominant land, but to the persons entitled to the use of the easement. Again, the evidence shows there is practical benefit to those persons.

69 As I indicated at the commencement of these reasons, the plaintiff's premises consist of a shop at the front and one or more flats at the rear and he proposes to build an office in the backyard. It is possible to get building material through the shop, but one could well foresee that the shop might be let and it might be extremely inconvenient for people to move building materials through a shop which was trading. In any event, there is a very awkward right hand bend to get the materials out of the rear entrance to the shop into the rear yard of the plaintiff's property. The plaintiff says that he has used the right of way for that purpose. Although Mr Heath's cross examination was effective up to a point, I accept that the plaintiff has used the easement over the years. I am not satisfied that this gateway has been made out.

70 The same considerations that I have already noted apply to the fifth head.

71 Accordingly, in my view the cross claim fails. However, it may be that the definition I have made as to the rights of the plaintiff may give the defendant some comfort.

72 (13) Accordingly, the plaintiff is entitled to orders A to E in his amended statement of claim.

73 The plaintiff also claims damages for obstruction. I believe that he has demonstrated that there is some claim to damages. I will give him leave to file a notice of motion returnable before the Master to assess such damages. However, as I consider that the probabilities are that the damages will only be very small, it seems to me that I should merely make an order for damages in the nominal sum of $1,000 but give the plaintiff the option of pursuing an account before the Master at his own risk as to costs if the damages do not exceed a certain figure.

74 I have noted that the plaintiff does not press the order sought in para F of the statement of claim. The cross claim must be dismissed. The defendant must pay the plaintiff's costs of the claim and the cross claim.

75 It may be tidier for short minutes to be brought in. If either party wishes to do this, they should fax my Associate with a request within the next seven days. I will not be sitting again in Equity until mid-October, but a date can be arranged for the short minutes to be brought in.

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