

NEW SOUTH WALES SUPREME COURT

CITATION:

Betty Campbell v Peter Douglas Baigent & Ors [2010] NSWSC 1348

JURISDICTION:

FILE NUMBER(S):

2007/258408

HEARING DATE(S):

16 November 2010, 17 November 2010, 18 November 2010

JUDGMENT DATE:

30 November 2010

PARTIES:

Plaintiff- Betty Campbell

First Defendant- Peter Douglas Baigent

Second Defendant-Karen Dale Baigent

Third Defendant- Ronald Horace William Winch

JUDGMENT OF:

Slattery J

LOWER COURT JURISDICTION:

Not Applicable

LOWER COURT FILE NUMBER(S):

Not Applicable

LOWER COURT JUDICIAL OFFICER:

Not Applicable

COUNSEL:

Plaintiff-S.M. Berveling

Defendants-A.M.Pickles

SOLICITORS:

Plaintiff-West Legal

Defendants-VA Lawyers Pty Limited

CATCHWORDS:

REAL PROPERTY

Torrens Title

easement
application to modify
Conveyancing Act 1919, s 89
right of way 30 feet (9.144 metres) wide
application to reduce easement to the approximate 20 feet (6 metres) width of the
present trafficable roadway
the non paved part of the easement may be needed for future earthworks to widen
the easement pavement
HELD - easement not modified
summons dismissed

LEGISLATION CITED:

Conveyancing Act, s 89
Real Property Act 1900

CATEGORY:

Principal judgment

CASES CITED:

Armishaw v Denby Horton (NZ) Ltd [1984] 1 NZLR 44
Bracewell v Appleby [1975] Ch 408
Bullard v Harrison (1815) 4M. &S. 387
Carter v Cole [2006] EWCA Civ 398
Castagna v Great Wall Resources Pty Ltd (2005) 12 BPR 23,363
Chiu v Healey (2003) 11 BPR 21,241
Durian (Holdings) Pty Ltd v Cavacourt Pty Ltd [2000] 10 BPR 18, 099
Finlinson v Porter (1875) LR 10 QB 188
Fraser's Lorne Pty Ltd v Joyce Goldsworthy Bracewell v Appleby [1975] Ch 408
Burke & Ors (2008) 14 BPR 26,131
Grill v Hockey (1991) 5 BPR 11,421
Hanny v Lewis (1998) 9 BPR 16,205
Harris v Flower and Sons (1907) 74 L.J. Ch. 127
Hemmes Hermitage Pty Ltd v Abdurahman (1991) 22 NSWLR 343
Heaton v Loblay (1960) SR (NSW) 332
In re Truman, Hanbury, Buxton & Company Ltd's Application [1956] 1 QB 261
Jones v Pritchard [1908] 1 Ch. 630
Liford's Case (1614) 11 Co. Rep. 46b
Markos v OR Autor Pty Ltd [2007] NSWSC 810
McKeand v Thomas [2006] NSWSC 1028
Pieper v Edwards [1982] 1 NSWLR 336
Proprietors Strata Plan No 9,968 v Proprietors Strata Plan No 11,173 [1979] 2
NSWLR 605
Re Ghey & Galton's Application [1957] 2 QB 650
Re Mason and the Conveyancing Act [1962] NSWLR 762
Re Roseblade; Re Foenander [1964 -5] NSWLR 2044
Selby v Nettleford (1873) 9 Ch App. 111
Taylor v Whitehead (1781) 2 Doug KB
Treweeke v 36 Wolseley Road Pty Ltd (1973) 128 CLR 274
Tujilo v Watts (2005) 12 BPR 23, 257
Webster v Bradac (1993) 5 BPR 12,032

Williams v Usherwood (1981) 45 P & Cr 235

TEXTS CITED:

Bradbrook & Neave "Easements and Restrictive Covenants In Australia"
Butterworths 2nd Ed, 2000 at [19.27]

DECISION:

1. Summons dismissed.
2. Direct the parties to file any written submissions on issues of costs by 5pm, 7 December 2010.
3. Grant liberty to apply.

JUDGMENT:

**IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION**

SLATTERY J

TUESDAY, 30 NOVEMBER 2010

2007/258408

BETTY CAMPBELL v PETER DOUGLAS BAIGENT & ORS

JUDGMENT

- 1 **HIS HONOUR:** Ellesmere Road runs in a north-south direction in the Sydney suburb of Gymea. Ellesmere Road follows the easternmost ridgeline of Gymea just before the land falls steeply down towards Gymea Bay. The area has spectacular views across to the Royal National Park. Since the 1930s it has attracted the attention of land subdividers.
- 2 The plaintiff, Mrs Betty Campbell and the defendants, Mr Peter Baigent, Mrs Karen Baigent and Mr Ronald Winch are neighbours on the escarpment between Ellesmere Road and Gymea Bay. Mrs Campbell is the registered proprietor of Lot 4 in Deposited Plan 145541, which is the higher generally flat ground with an address in Ellesmere Road. Further down the escarpment towards the water and immediately to the east of Lot 4 Mr and Mrs Baigent and Mr Winch own adjacent lots at or close to the water. Mr Winch owns the southern most of the two lots, Lot 18 in Deposited Plan 504587, on which stands a stone house quarried from local material. Mr and Mrs Baigent own Lot 19 in Deposited Plan 504587, the more northerly of the two waterfront lots but one with no direct access to the water.
- 3 Lots 18 and 19, share a right of way over Lot 4 and other lots to the north, which permits access for these mostly waterfront properties back to Ellesmere Road. The right of way traverses the face of the

escarpment at its approximate midpoint between the ridgeline and the waterline. It runs along the boundary of the upper ridgeline properties with the lower waterfront properties for most of its course and then turns west, making the shape of a rough “L” to connect up with Ellesmere Road. The eastern side of the easement coincides with the boundary of the upper properties and the lower properties. The easement covers a strip of land at the eastern end of the upper properties. Although many other waterfront lots have the benefit of the right of way between Lots 18 and 19 and Ellesmere Road, only the defendants, not those other lot owners, are parties to these proceedings.

- 4 Mrs Campbell as plaintiff seeks relief from the Court under *Conveyancing Act* 1919, s 89(1) to modify the right of way from its present 30 feet (9.144 metres) width to a width of approximately 20 feet (6 metres). As the owner of the servient tenement she claims that the Court should deem obsolete the westernmost 10 feet (3.144 metres) of the right of way. She also says that the defendants have abandoned that section of the right of way and that by reason of other circumstances she should be released from the burden of this part of the easement.
- 5 The defendants resist the relief that Mrs Campbell claims. Both Mr and Mrs Baigent and Mr Winch have presented a joint case to the Court that they have not abandoned the 10 feet (3.144 metres) on the western side of the easement. They submit that although massive sandstone and boulders cover these 3.144 metres of ground and although it is not presently part of the paved roadway of the easement at Lot 4, its loss would cause them substantial injury. They further submit that the existing easement should not be modified, deleting this 10 feet (3.144 metres) wide strip of land.
- 6 That is the final contest between the parties. Their original contest was wider and involved issues of the extent of regular use of the existing made pavement of the easement. Mrs Campbell appears by her tutor Mr Robert Campbell. Mr Berveling appears for the plaintiff and Mr Pickles for the defendants.
- 7 The determination of the issues arising between the plaintiff and the defendants requires a closer understanding of the development history of this easement above the GyMEA Bay waterfront.

Subdivisions between Ellesmere Road and GyMEA Bay

- 8 The subdivision of Lot 4 and the creation of the predecessor lots to Lots 18 and 19 between Ellesmere Road and GyMEA Bay commenced in October 1926 and occurred in three phases. The first phase was the initial subdivision. The second phase in November 1932 and September 1933 created a larger single common property including Lot 4 and the predecessor lots to Lots 18 and 19 all of which had access over the remaining property back to Ellesmere Road. Transfer L933926 created the easement in question in these proceedings in 1970 as part of the third phase of subdivision. The form of the initial 1926 subdivision, the way it changed and the existence of other easements created in the second phase are important background to the Court’s consideration of the issues. I will now deal with each of these three phases.

The First Phase- DP14551 – October 1926

9 The steep land between the Ellesmere Road ridgeline and Gymea Bay was first subdivided on 26 October 1926, with the registration of DP145541. This deposited plan created Lot 4 and Lots 8 and 9, which were the predecessors to Lots 18 and 19. It also provided for the later creation of the right of way. Subsequent phases of development in this area worked within the basic grid structure that DP145541 had created. An extract of the sketch plan in DP145541 is reproduced be in Figure 1 below:

Figure 1

[]

10 This Court has a policy of reducing the risk of identity theft through the Court’s published judgments. To that end this judgment does not publish any street addresses. For convenience these reasons refer throughout to the servient tenement of the easement in question as Lot 4 and to the dominant tenements as Lots 18 and 19.

11 DP145541 subdivided a large block of land fronting the eastern side of Ellesmere Road on which stood a stone and weatherboard colonial cottage with commanding views from the ridgeline. At the time of the subdivision in 1926 this large block of land extended east to the Gymea Bay waterfront. DP 14551 bisected this land from north to south by a proposed right of way of 30 feet (9.144 metres) in width. Between that proposed right of way and Ellesmere Road only four allotments, Lots 1, 2, 3 and 4 were created. The largest of these, Lot 2, enclosed the original colonial residence. Lots 1, 2, 3, and 4 generally encompass a plateau which commences to fall away to Gymea Bay about 15 or 20 metres to the west of the western side of the right of way, although the precise distance of this ridgeline from the right of way and from Ellesmere Road varies in a north-south direction across the plateau. Lot 2 on which the colonial house stands is the largest of these four lots. The developer subdivided 16 smaller allotments numbered 5 to 21 on the lower side of the right of way. Lot 21 at the northern end of the subdivision was formed directly opposite Lot 1 and near the exit point for the private right of way to Ellesmere Road, where it runs back in a westerly direction at the foot of the “L”.

12 In subsequent phases Lots 8 and 9 in DP145441 became Lots 18 and 19 respectively in DP 504587. Lots 8 and 9 were not formed into Lots 18 and 19 until July 1970 in the third phase with transfer L933926.

13 DP 14556 did not itself create any easement. DP145541 foreshadows that easements will be created later in words shown on that Deposited Plan “*it is intended to grant rights of way in connection with lots 1 to 21 incl. over the Private Rights of Way shown on plan hereon*”. It further foreshadows that

building covenants, if any, would be embodied in the instruments of transfer of the lands in the subdivision. DP14556 merely subdivided the initial large block of land in the area. It was not until 1932 and 1933 that the first easements were created during the second phase.

The Second Phase – Common Ownership of Lots - the 1932-1933 Dealings

- 14 Until the second phase it appears that Lot 4 and above the proposed private right of way and Lots 7, 8 and 9 below it were in common ownership. Lots 7, 8 and 9 would have provided a convenient access down to the water for the then owners of Lot 4. This common ownership of Lots 4, 7, 8 and 9 was first severed in November 1932. The severance occurred with the transfer of Lot 7 (C154037) in November 1932. It and another transfer the following year in September 1933 (C205929) created a cluster of rights for lots at the southern end of the marked proposed private right of way over the more northerly lots in DP145541. These easements permitted the properties at the southern end of the right of way to traverse the other northerly properties so as to gain access to Ellesmere Road. The easement the subject of these proceedings was not created by either of these two transfers. But they are significant to the argument that has taken place in these proceedings. I will deal with each transfer in turn.
- 15 On 13 November 1932 transfer C154037 transferred Lot 7 on DP145541 and gave the benefit of a private right of way over the lots on the high side of the escarpment, Lots 1, 2, 3 and 4 on DP145541, in favour of Lot 7. The easternmost end of these four lots generally lies on a ledge or gentle slope at the base at the first steep fall away from the escarpment east of Ellesmere Road. The course of the excavated road takes advantage of this ledge or gentle slope. The height of the escarpment above the easement pavement varies between Lots 1 and 4, as the right of way travels down from near the ridgeline close to Lot 21. It falls quite steeply in the vicinity of Lots 21 to 14. It flattening out somewhat in the area from Lot 12 to Lot 5. As a user of the easement travels due east from Ellesmere Road at the base of the “L”, the right of way falls steeply downwards at a strong incline commencing about 30 metres from the western end of Lot 21 as the right of way proceeds over the edge of the escarpment. Shortly beyond that point it turns and travels south past Lots 1, 2, 3 and 4 in turn. As it does so the easement pavement falls closer to sea level and the plateau near Ellesmere Road rises higher above the level of the pavement. By the time the right of way reaches Lot 4, the edge of the escarpment is set back about 20 to 30 metres into Lot 4. The western excavated face of the right of way above the easement pavement contains massive sandstone and boulders, which still evidence original excavation.
- 16 A year later on 4 September 1933 transfer C205929 transferred in common ownership Lots 4, 8 and 9 in DP15541, as a single large lot extending from Ellesmere Road down to the foreshore of Gynea Bay. Transfer C205929 had three main effects. It created a right of way for the benefit of Lot 4 over Lots 1, 2 and 3 in DP145541. It also created a right of way over Lot 4. But not at this time for the benefit of Lots 8 and 9 in DP145541 (later Lots 18 and 19). That was to come later in 1970. Rather, the right of way that transfer C205929 created in September 1933 over Lot 4 was in favour of Lots 5 and 6, which lie with water frontages further to the south. Thus, the effect of transfer C205929 was to give the

owner of Lot 4 rear access along the right of way and to ensure that Lots 5 and 6, just like Lot 7, had rights of way over Lot 4 to access the easement and travel over the other Lots 1, 2, and 3 to get back to Ellesmere Road. Lots 5 and 6 have since been subdivided and amalgamated with other land and have become Lot 1152 (Lot 5) and Lot 1154 (Lot 6) in DP601960. For convenience throughout these reasons these lots will be referred to by their original lot numbers, Lot 5 and Lot 6.

- 17 Transfer C205929 had one other important effect. It also granted rights of way in favour of Lots 8 and 9 in DP145541 over Lots 1, 2 and 3 in DP145541. This allowed a theoretical access from these two lots back over Lots 1, 2 and 3 to Ellesmere Road. Lots 8 and 9's access over Lots 1, 2 and 3 was only "theoretical" because access from Lots 8 and 9 to Lot 3 was only physically possible over Lot 4. But it was not necessary at that point for an easement to be created in favour of Lots 8 and 9 over Lot 4 to access the easement. Lots 8 and 9 and Lot 4 were still in common ownership. That common ownership was not severed until 1970 during the third phase. I should note that creation of the easement in favour of Lot 4 and in favour of Lots 8 and 9 over Lots 1, 2 and 3 was achieved by using not only reference to DP145541 but another DP created specifically for the purpose, DP15316.

The Third Phase – Transfer L933926 – July 1970

- 18 The ownership of Lots 8 and 9 was finally severed from Lot 4 before July 1970. This appears to have occurred in the 1940's. Transfer L9333926 dated 2 July 1970 created the subject easement granting *"full and free rights as pertinent to the land comprised in certificate of title volume 7387 folio 184 of carriageway and footway over all that piece of land as shown on sketch plan attached [to that transfer] as 'site of proposed carriageway 30 foot wide'"*. The land comprised in certificate of title volume 7387, folio 184 is the land in Lots 8 and 9 in DP145541. The sketch plan attached to transfer L933926, which is set out in Figure 2, shows the site of the proposed right of carriageway 30 feet (9.144 metres) wide in favour of Lots 8 and 9 over Lot 4.

Figure 2

[]

- 19 Transfer L933926 only gives rights of way to Lots 8 and 9 over Lot 4 in DP145541 but not over Lots 1, 2 and 3. Lots 8 and 9 already had rights of way over Lots 1, 2 and 3 through the September 1933 transfer C205929. The rights are rights of carriageway and rights of footway although the rights of carriageway are of greater significance for these proceedings.
- 20 Two months after transfer L933926 created the subject right of way Lots 8 and 9 were subdivided to provide more convenient building blocks by the water. DP504587 re-subdivided Lots 8 and 9 and created Lots 18 and 19 in that new Deposited Plan. DP504587 was registered on 2 September 1970.

- 21 The subdivision that resulted from DP50487 gave the full water frontage of the two original lots, Lots 8 and 9, to Lot 19 and almost the full width of the two original lots near the right of way to Lot 18. But Lot 19 retained a narrow strip of land along the southern boundary connecting up to Lot 19's garages. They are able to take two motor vehicles facing the eastern side of the right of carriageway. Lot 18 also abuts the eastern side of the right of carriageway to the north of Lot 19's garage. The house on Lot 18 is built higher up the slope above the house on Lot 19. But the double garages on each of the two properties sit side by side on the eastern side of the right of carriageway.
- 22 There is one important difference in the way the northerly Lot 18's double garage faces the right of way from the more southerly Lot 19 garages. The Lot 18 garage has a small triangular concrete apron or turning area outside it between the door of the garage and the eastern edge of the right of way. The Lot 19 garage is closer to the eastern edge of the right of way with very little concrete surface between the two. This difference becomes important for traffic turning issues in the proceedings.
- 23 The subdivision of Lots 18 and 19 in September 1970 completes the account of relevant subdivision of the dominant and servient tenements and surrounding properties. As might be expected from this subdivision history the escarpment has been developed progressively from the 1930's and more rapidly from the 1970's. It is now useful to examine the course of these proceedings and to see how the issues for decision have been narrowed as a result of agreements made during the hearing.

The Course of these Proceedings

- 24 The parties were contesting a wide range of issues at the commencement of the three-day hearing of this matter on 16 November 2010. The plaintiff originally sought to make a case that the defendants or persons associated with them were excessively and unreasonably using the easement. Mrs Campbell pleaded in her statement of claim allegations of permanent parking on the easement, loading and unloading of goods on the easement and other similar conduct said to constitute excessive user of the easement. Mrs Campbell's summons claimed general declaratory relief in relation to the existence and use of easement and the *Conveyancing Act* s 89 claim already described. The defendants' pleadings resisted the grant of any relief in respect of these claims.
- 25 The defendants filed a cross claim seeking relief under *Conveyancing Act*, s 88K creating an easement for parking over the right of way in favour of the defendants and consequential orders.
- 26 Mrs Campbell's claim for excessive user and Mr and Mrs Baigent's and Mr Winch's claim for *Conveyancing Act*, s 88K relief was settled in the course of the hearing. The terms of settlement were tendered in the proceedings and are a background matter relevant to the exercise of discretion in relation to the residual *Conveyancing Act*, s 89 issues. The terms of settlement confirm the impression to be gained from the rest of the evidence that the present pavement of the easement is actively used by the defendants and other persons.

27 Under the settlement the parties agreed that the easement did not contain rights to park vehicles permanently on the easement but that the defendants were allowed a licence during the period of their ownership of Lots 18 and 19 to use the area of the easement for that purpose. The defendants/cross claimants abandoned their *Conveyancing Act*, s 88K claim. The parties agreed to bear their own costs of the settled portion of the proceedings. Costs in respect of the extant part of the proceedings were left at large. The terms of the settlement are set out in full below:-

“THE COURT NOTES THAT THE PARTIES AGREE:

1. The only Right of Way or other easement over Lot 4 DP14551 from which the Defendants benefit is pursuant to Dealing L933926;
2. Dealing L933926 does not permit the Defendants to utilize the land the subject of the Right of Way pursuant to Dealing L933926 (“the Right of Way”) for any purpose other than to go, pass and repossess at all times and for all purposes with or without animals or vehicles or both, or on foot, to and from the said dominant tenement or any such part thereof;
3. Without limiting the generality of paragraph 2 above, the Defendants are not entitled to, pursuant to Dealing L933926, and will not park vehicles upon, store or leave equipment, articles or objects upon or otherwise utilise the land the subject of the Right of Way, other than to go, pass and repossess at all times and for all purposes with or without animals or vehicles or both, or on foot, to and from the said dominant tenement or any such part thereof; and
4. The Defendants will not pursue their Cross Claim filed in these proceedings, and will not seek an easement similar to the terms of the easement sought therein.
5. Notwithstanding paragraph 3, the Plaintiff agrees to grant to the First Defendants, for the term of their ownership of Lot 18 DP 540587 (“Lot 18”) by the First Defendants, a licence to park 2 vehicles on the part of the Right of Way immediately alongside the boundary between the Plaintiff’s Land and Lot 18, as well as to load and unload materials, and to place such loaded or unloaded materials on that part of the Right of Way temporarily only for such period so that they are removed off the Right of Way temporarily only for such period so that they are removed off the Right of Way as soon as practicable;
6. Notwithstanding paragraph 3, the plaintiff agrees to grant to the Second Defendant, for the term of his ownership of Lot 19 DP 540587 (“Lot 19”) by the Second Defendant, a licence to park 2 vehicles on the part of the Right of Way immediately alongside the boundary between the Plaintiff’s Land and Lot 19, as well as to load and unload materials, and to place such loaded or unloaded materials on that part of the Right of Way temporarily only for such period so that they are removed off the Right of Way as soon as practicable;
7. The licences referred to herein shall contain a provision o the effect that the Defendants will use or cause to be used firstly the parking spaces on their own for the parking of motor cars and to utilise the parking spaces granted pursuant to the licences referred to herein as overflow parking for tradesmen and visitors only; and
8. The licences referred to herein shall otherwise contain such reasonable terms as the parties may require.
- 8A. Each party pay his or her own costs of the subject matter of this agreement and these legal proceedings relating thereto.”

28 Most of the hearing had already been occupied with *Conveyancing Act*, s 89 issues by the time the excessive user claim and *Conveyancing Act*, s 88K claim settled. In the end the only lay and expert evidence read on both sides related to *Conveyancing Act*, s89 issues. It is this evidence to which I now turn.

29 The plaintiff's claim for modification of the easement was contested in three main areas. The first was a contest in relation to traffic on the easement and the possible need for wider turning circles for cars turning in and out of Lots 18 and 19. The second was a contest about the geotechnical characteristics of the area and the likely geotechnical engineering work that would be physically required within the easement if the easement pavement were to be expanded in the future. The third area of contest related to the situation of the easement in the broader context of the DP145541 subdivision. It is on this latter issue that the history of the subdivision is of relevance. I will deal with each of these areas of contest in turn.

Traffic Issues

30 The defendants' case was that they might need to widen the easement in the future to accommodate the turning of their motor vehicles upon entry to and exit from their garages on Lots 18 and 19. The plaintiff contended that no more turning circle area was necessary under any circumstances and that the easement would never need to be widened beyond 20 feet (6 metres). Both expert and lay evidence was contested on this issue.

31 Mrs Campbell adduced evidence from an experienced traffic engineer and transport planner, Mr Terrence Keith Lawrence. His evidence was that both Lot 18 (the Baigents' property) and Lot 19 (Mr Winch's property) had double garages facing onto the easement. His evidence was that manoeuvrability out of the garage of Lot 18 was significantly higher than that in relation to Lot 19. He used "Autoturn" computer software to verify vehicle manoeuvring in and out of the garages for both lots. The turn paths were based on what he described in evidence as "the 85th percentile vehicle". This is equivalent to a Holden or Ford passenger vehicle 4.91 metres long and 1.87 metres wide with a wheelbase of 2.8 metres. This "85th percentile vehicle" is so called because 85 percent of all vehicles manufactured in Australia and using Australian roads are smaller than it. Other vehicles such as long wheel based sedans and some trucks and vans are larger than the 85th percentile vehicle.

Manoeuvring in and out of Lot 18

32 Mr Lawrence's computer generated "swept paths" for vehicles using the garage for Lot 18 showing the manoeuvrability of vehicles coming south along the easement into the Lot 18 garage and out again. Mr Lawrence used reverse in/drive out manoeuvres for his projections, as they are the safest way of using these garages. His projections showed that vehicles could satisfactorily manoeuvre into and out of the garage for Lot 18 using just one movement. He found that one reverse movement for the entry into the

Lot 18 garage was all that was required within the available width of the private right of way. This single movement was sufficient to reverse into the garage upon stopping after travelling down the easement in a southerly direction.

- 33 According to Mr Lawrence even a car parked on the driveway of Lot 18 can manoeuvre satisfactorily using one movement within the existing width of the easement.

Manoeuvrability in and out of Lot 19

- 34 Manoeuvrability on and off the easement is generally tighter for Lot 19, according to Mr Lawrence. There are a number of reasons for this. The southernmost car space within the Lot 19 double garage describes quite an acute southeasterly angle with the eastern boundary of the easement. This makes stopping and reversing back into the garage very difficult. The northernmost of the two cars in the Lot 19 garage can manoeuvre in and out with just one turn. The southern vehicle position for Lot 19 is more difficult for manoeuvring because of the acute angle of this car space to the front of the garage. There is also reduced manoeuvring room available for cars on Lot 19 because of a 5-metre garage door opening for two cars. Although the northernmost car space on Lot 19 will permit entry and exit using one movement, the southernmost car parking in the garage on Lot 19 will require a three-point turn movement according to Mr Lawrence. He says that the three point movements are acceptable for low volume traffic movements associated with residential uses and are accepted by planning authorities including Sutherland Shire Council. His overall conclusion is that the existing width of the private road is adequate for manoeuvring into and out of the garages for Lots 18 and 19, as well as for a vehicle parked on the driveway of Lot 18.

- 35 Mr Winch confirmed Mr Lawrence's evidence about the difficulty of manoeuvring in and out of the southern garage car spot on Lot 19. But Mr Winch's evidence went further. Mr Winch said, and I accept, he drives an XJ Jaguar, which is right at the 85th percentile of motor vehicles. Mr Winch says and I accept he must manoeuvre several times before getting in and out of the southern car position on Lot 19, the position in which he parks his XJ Jaguar. He says more than a three-point turn is required to do this. I entirely accept his evidence on the number of turns he requires in practice to enter and exit the garage of Lot 19. He says he must often do 4 of 5 turns and I accept that evidence despite Mr Lawrence's expert opinion. Entering and exiting the garage with the driveway at the current width with his current vehicle is very inconvenient for Mr Winch. The possibility of future expansion of the easement on its western side therefore is a real benefit to him. No party contended that expansion of the easement pavement on its eastern side was possible. It already stands on the boundary of Lot 4 with Lots 18 and 19.

- 36 Whilst Mr Lawrence's calculations appeared to be valid as far as they went I prefer Mr Winch's evidence of his direct experience of trying to manoeuvre his XJ Jaguar in and out of the Lot 19 garage space. His evidence was direct and credible. The swept paths of Mr Lawrence's Autoturn computer

software were only guides to the real world situation a user of the Lot 19 garage would encounter. Mr Winch's credible evidence is the best account of the actual difficulties on the ground.

37 Future owners of Lot 19 also may wish to have the option of garaging a vehicle in the 99th percentile on Lot 19. That would magnify the existing manoeuvring problems on Lot 19. Manoeuvrability for a 99th percentile vehicle (sometimes referred to as "B99") would be more difficult than for a 85th percentile vehicle (sometimes referred to as "B85").

38 There are limitations in Mr Lawrence's scientific work, which may account for why actual manoeuvring problems are greater than the expert prediction. Mr Lawrence's work assumes the vehicle moves in and out of the garage in "one sweep", which means that no steering wheel adjustments are made as the person turns in or out of the garage. That is not always how people drive cars. It is understandable how the computer-generated models may differ from what Mr Winch says happens in practice. Also there are differences between the manoeuvrability of cars driving into a garage or reversing into one, which are not fully taken into account in his model.

39 Accepting Mr Winch's evidence as I do it is a desirable option for the owner of Lot 19 to be able to expand the trafficable paved area of the easement beyond its current area and in a westerly direction into what is now natural sandstone. This leads to a consideration of what earthworks will need to be done to achieve even a 0.5 of a metre widening of the easement pavement, should either of the owners of Lots 18 and 19 desire it.

40 Widening the easement directly opposite Lot 19 is not the only solution to Mr Winch's manoeuvring problems. Despite Mr Lawrence's computer modelling of reversing into the Lot 19 garage for safety reasons, Mr Winch usually drives nose first into his garage. That is the most convenient way for him to park. I accept that this is what he actually does. That means he exits from his garage in reverse. As a result he has to find a place somewhere further north on either side of the easement where he can convert his rear-first movement with a 180-degree turn, into a forward-first movement. His evidence is that he does that in practice by reversing the back of his motor vehicle into the front of Lot 18 or into one of several niches at the side of the pavement on either the western or eastern side of the easement but north of Lot 4. There are several of these. Some are driveways. Others are niches in the rock. One better option for him in the future, to guarantee flexibility of movement, is to reverse straight out of his garage and then place the back of his vehicle into an expanded car space on the western side of the easement directly opposite Lot 18. This is presently an area of massive sandstone. Thus, although Lot 18 does not immediately seek an expansion in the width of the easement opposite Lot 18 such an expansion would certainly benefit Lot 19. The extra turning area opposite Lot 18 would also undoubtedly assist visitors to Lot 18 with larger vehicles and any future owner of Lot 18 using a larger vehicle.

The Redman- Young Geotechnical Conclusions

41 Can the western face of the easement be excavated to allow a greater area of pavement for traffic on the easement? The geotechnical experts Dr Redman and Mr Young agreed about some of the difficulties in excavating the western face of the easement over Lot 4. They gave joint geotechnical evidence to the effect that even a minor increase in the pavement of the easement may require substantial civil engineering and earthworks within the easement. This evidence raises important considerations in relation to any grant of relief. The geotechnical challenges of the site follow from a close understanding of the features of the western face of the easement along its western boundary in Lot 4.

The Western face of the Easement crossing Lot 4

42 The western face of the easement towers above a pedestrian standing in the easement between Lot 4 and Lots 18/19 and facing west. Within Lot 4 this western face covers a distance of approximately 50 metres. But throughout this distance the western face exhibits a range of obviously different ground conditions. The geotechnical engineers have divided the western face into three sections. Each section exhibits different geotechnical features. Their joint plan, SK1 (Exhibit E), which is set out below in these reasons as Figure 3, shows these three sections between four reference points A, B, C and D. The three sections are sections A-B, B-C, and C-D. The geology of sections A-B and B-C presents particular difficulties in excavating to the western side of the easement pavement. These difficulties arise even when attempting to widen the pavement just a little. But section C-D does not present such problems because of its special geological features. It is convenient to describe section C-D, the northernmost of the three sections first because it presents the least excavation difficulty.

Figure 3

[]

Section C-D- Massive Sandstone

43 Section C-D is at the northern end of Lot 4. It consists predominantly of massive sandstone of sub-horizontal bedding. There is minor colluvium overlaying the sandstone. Colluvium can best be described as loose and incoherent deposits of any organic or inorganic matter usually found at the foot of a slope or cliff and brought there by gravity.

44 The joint geotechnical findings about section C-D are that: it does not display any defects which could restrain how it might be cut; it can be cut largely vertically and wholly support itself after cutting; and, it does not require any form of reinforcement because of the massive sandstone's internal strength and integrity. Because section C-D comprises massive sandstone it can be cut vertically and will still provide a stable support for the material above it in Lot 4, without the need for any supplementary artificial support structures. The principal expense in excavating section C-D is that of cutting into the rock itself but no more. Sections A-B and B-C have more troublesome excavation and support characteristics.

Sections A-B and B-C – Sandstone and Boulders

- 45 Sections A-B and B-C raise similar excavation hazards. They both consist of lower massive sandstone with overlaying detached boulders and colluvium. In both cases excavation of the lower massive sandstone is straightforward, as it is in section C-D. But difficulties arise in excavating because of the presence of the boulders and colluvium.
- 46 A special feature of section B-C is a large detached block of stone or a boulder up to 2 metres thick and approximately 10 metres in length and sitting opposite Lot 19. This large boulder is supported within section B-C by lower massive sandstone, which varies in height from 1.2 to 1.5 metres. Detached boulders and colluvium overlie this massive sandstone. Apart from this large boulder, smaller boulders are located in section B-C. A further detached block about 4 metres long and about 1.5 metres in thickness sits slightly to the north of the large boulder and opposite the northern end of Lot 19.
- 47 Looking west into Lot 4 another feature of section B-C is densely packed colluvium extending west up the slope of the hill of Lot 4 leading towards the Ellesmere Road plateau. Weathered sub-vertical joints of largely soil-strength material are present, trending back into the slope. The colluvium here is about 45-60 degrees to the horizontal and contains material that ranges from soil to boulders of varying size and continues uphill to the west. This sloping area is covered with vegetation consisting of small cover and occasional large trees.
- 48 Section A-B exhibits similar features to section B-C but without the large boulder. Section A-B consists of lower massive sandstone 1-2 metres in height overlain by colluvium and by boulders. It includes an above ground boulder up to 3-4 metres in size relying upon lower detached boulders for support at about the southern boundary of the right of way. The differing geology of these three sections requires a different approach to excavating them.

Excavation Techniques

- 49 In section A-B and section B-C two kinds of excavation problems arise that do not exist in section C-D. The first problem is that the loose boulders represent a significant excavation hazard. The second is that special measures must be undertaken to support the ground uphill in Lot 4 during and after any excavation.
- 50 Four excavation techniques are theoretically available for sections A-B and B-C, battering of the slope, gravity retaining walls, a cantilevered retaining wall and a contiguous piled wall. Both geotechnical experts, Dr Redman and Mr Young agree that of all these options a contiguous piled wall is the best solution for these two sections to prevent disturbance of the soil in Lot 4.

- 51 But the other options are important. Battering of the slope, gravity retaining walls (such as a crib wall or a gabion wall) all use gravity to provide support to the material being supported uphill. For a mass of material held in place only by its own weight to then support the western face of the easement, that mass of material would have to extend back within the easement itself. This would defeat the purpose of the excavation, which is to create more trafficable pavement space on the easement.
- 52 *Gravity structures.* Battering of the slope, crib walls and gabion walls all act as gravity structures which utilise their own weight to hold and keep stable the ground behind and above them. Being structures that support due to their own weight, the horizontal extension of the structure from the retaining point into the easement is a similar distance to the height being retained. If battered slopes, crib walls or gabion walls were to support the westernmost excavated side of the easement they would extend back into the easement by the same distance as their height. This extension of the structures back into the easement neutralises any advantages from excavating into the western side of the easement. The geotechnical experts rejected these gravity-based structures for this reason.
- 53 *Cantilevered walls.* The only remaining support solutions are a reinforced cantilevered retaining wall or a contiguous piled wall. Both Dr Redman and Mr Young prefer a contiguous piled wall as the solution. A cantilevered wall is an L-shape concrete retaining structure in which the upright part of the L supports the ground behind the wall and the horizontal and pavement-level part of the L can be incorporated into the pavement. But there are limitations on the efficiency of cantilevered walls, which cannot be raised to too great a height. Both experts agree that the cantilevered retaining wall will not work efficiently here because of the height of the material to be supported.
- 54 *Contiguous piled wall.* A contiguous piled wall is constituted by a series of bored piles of particular diameter, which are bored side by side or close to one another. These piles form the vertical wall. They act essentially as a cantilever and need to be bedded deep into the rock below to provide stable restraint. The piles would need to be reasonably large in diameter here because they would support quite a high elevation of ground in Lot 4. Both experts agree that each pile may need to be of the order of 0.75 to 1 metre in diameter to support this ground.
- 55 A limitation on contiguous piling in this area is that the massive boulder in section B-C might move during drilling and excavation, as might the small boulders in section A-B. Were these boulders to move there is a risk of significant damage to the piling being carried out and even a risk of injury and loss of life, if the slippage were catastrophic. The experts agree this hazard would be dealt in one of two ways. The boulders could be removed before work commenced. Both experts preferred this solution and agreed that in any event piling contractors may insist upon this given the nature of the hazard. Excavation may become quite expensive as a result.
- 56 The other solution is to use less force and only to excavate the massive sandstone to the most limited extent possible. Both experts agreed that if any of the lower level massive sandstone in this A-B and

B-C area were to be cut back, even to a distance of a half metre, that it would still be necessary: to examine the material above the excavation and work out how to support what is above; and, to ensure there is no destabilisation of the large boulder in section B-C. Whilst boulder-anchoring techniques are possible they have their own hazards.

- 57 The experts identify a construction method, which would expand the pavement area of the easement, and accommodate large boulders removed before piling. One to two metres of the large detached boulders and colluvium could be left in place with more of their width remaining in some places. The large above ground boulder in section A-B would have to be removed. The contiguous piled wall support would then be constructed in front of the Lot 4 slope upon the assumption that there is approximately 3.5 metres of ground available between the present western most edge of the existing pavement and the western boundary of the right of way. The constraints on the extent of excavation are determined by the pile diameter required to support the slope and the practicalities of the excavation work due to the conditions encountered. The pile diameter required for this work would be in the order of 0.75 –1.0 metres. The extent of possible extra pavement space created would therefore vary between 0.5 metres (3.5 metres less 1 metre for piles and less 2 metres for boulder support) and 1.75 metres (being 3.5 metres less 0.75 metres for piles and less 1 metre for boulder support). The precise pile diameter would have to be assessed as part of the design process. This methodology would in the experts' view fully protect the adjacent remaining ground on Lot 4 from slippage.

Turning Circle Issues

- 58 There is surprisingly little difference between the excavation techniques necessary to attempt a general widening of the pavement of the right of way as distinct from increasing the width of the right of way just to expand the turning circle of vehicles entering and exiting Lots 18 and 19. The same issues arise in relation to sections A-B and B-C. The experts agree that to increase the available turning circle in sections A-B and B-C there will be a maximum increase in pavement space in the range 0.5 metres to 0.75 metres using the contiguous piled wall construction technique. But in relation to section C-D stable excavation for a road or a turning circle right up to the western boundary of the easement is possible.
- 59 Seeking even a minor increase in the width of the trafficable pavement of the right of way in sections A-B and B-C to increase the available turning circle is difficult; far more difficult than for section C-D. In the experts' opinion the full contiguous piled excavation and support technique already described are needed even just to add a further 0.5m to the pavement and the turning circle for vehicles on the easement. The earthworks for the contiguous piled excavation technique will extend right to the western boundary of the easement.

Other Lots in DP145541

- 60 The Court's discretion to grant *Conveyancing Act*, s 89 relief is influenced in this case by the existence of other easements in DP145541, especially the easements over Lot 4 in favour of Lots 5 and 6 and the successor titles to those lots. These successor titles can be seen in the present cadastral plan. This issue represents the third main area of contest between the parties in addition to traffic and geotechnical issues.
- 61 The Court is entitled to take into account a wide range of circumstances in exercising its discretion to grant *Conveyancing Act* s 89 relief, including the existence of the other easements.
- 62 Mrs Campbell's application has not been served on the owner's of the successor lots to Lots 5 and 6. The Court can infer that the interests of those owners are likely to be affected by the application. The easements over Lot 4 in favour of Lots 5 and 6 subsist over exactly the same area on Lot 4 as does the subject easement. If the easement in favour of Lots 18 and 19 are modified in the manner the plaintiff now proposes the plaintiff says that the rights of the owners of Lots 5 and 6 will remain unaffected. That is strictly true but it raises a question as to the utility of the plaintiff's present application as a discretionary matter. Even if the plaintiff succeeds in obtaining *Conveyancing Act*, s 89 orders to modify the easement in the manner proposed, she could still be required in future proceedings to widen the easement pavement opposite Lots 18 and 19 at the suit of the owners' of Lots 5 and 6. Mrs Campbell says that she can deal with such issues later. But the unresolved nature of these questions raises the question of whether the relief sought should be granted now.
- 63 It is neither useful nor necessary to speculate what the unserved owners of Lots 5 and 6 might have done had they been served with this application. Their precise needs at this point on the right of way are unknown. All that can be said is that it is possible that they may wish at some stage in the future to make use of their easements over the identical strip of land which Mrs Campbell now seeks to return wholly into Lot 4's ownership as against Lots 18 and 19. The way to cure this problem would have been to join the other lot owners. Mrs Campbell's failure to do so creates one discretionary obstacle against her. But it is far less significant than the major obstacles of the traffic and geotechnical issues.

Applicable Principles of Law

- 64 The principles that apply to the exercise of the power conferred by *Conveyancing Act* s 89(1) to modify or extinguish an easement may be clearly stated. The power conferred in *Conveyancing Act* s 89(1) creates an important statutory qualification to the common law rights of the owner of an easement. Section 89(1) relevantly provides:

“89 Power of Court to modify or extinguish easements, profits à prendre and certain covenants

(1) Where land is subject to an easement or a profit à prendre or to a restriction or an obligation arising under covenant or otherwise as to the user thereof, the Court may from time to time, on the application of any person interested in the land, by order modify or wholly or partially extinguish the easement, profit à prendre, restriction or obligation upon being satisfied:

(a) that by reason of change in the user of any land having the benefit of the easement, profit à prendre, restriction or obligation, or in the character of the neighbourhood or other circumstances of the case which the Court may deem material, the easement, profit à prendre, restriction or obligation ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land subject to the easement, profit à prendre, restriction or obligation without securing practical benefit to the persons entitled to the easement or profit à prendre or to the benefit of the restriction or obligation, or would, unless modified, so impede such user, or

(b) that the persons of the age of eighteen years or upwards and of full capacity for the time being or from time to time entitled to the easement or profit à prendre or to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the land to which the easement, the profit à prendre or the benefit of the restriction is annexed, have agreed to the easement, profit à prendre, restriction or obligation being modified or wholly or partially extinguished, or by their acts or omissions may reasonably be considered to have abandoned the easement or profit à prendre wholly or in part or waived the benefit of the restriction wholly or in part,

(b1) in the case of an obligation:

(i) that the prescribed authority entitled to the benefit of the obligation has agreed to the obligation's being modified or wholly or partially extinguished or by its acts or omissions may reasonably be considered to have waived the benefit of the obligation wholly or in part, or

(ii) that the obligation has become unreasonably expensive or unreasonably onerous to perform when compared with the benefit of its performance to the authority, or

(c) that the proposed modification or extinguishment will not substantially injure the persons entitled to the easement or profit à prendre, or to the benefit of the restriction or obligation. “

65 *Conveyancing Act* s 89(1) is to be applied according to its terms, read fairly and without disregarding the conventional approach to legislation affecting common law property rights. The starting point for the Court's consideration is the easement itself, its terms and its objects derived from construing those terms in context and bearing in mind that the easement was created for an indefinite future and destined to endure in a changing environment: *Armishaw v Denby Horton (NZ) Ltd* [1984] 1 NZLR 44 at [47]; *Durian (Holdings) Pty Ltd v Cavacourt Pty Ltd* [2000] 10 BPR 18, 099; [2000] NSWCA 28 per Mason P at [4].

66 The power to modify or extinguish an easement conferred by s 89(1) requires proof of one or more circumstances to the Court's satisfaction coupled with the favourable exercise of judicial discretion: *Durian (Holdings) Pty Ltd v Cavacourt Pty Ltd* [2000] 10 BPR 18, 099; [2000] NSWCA 28 per Mason P at [2]. The circumstances required to be proved are set out in *Conveyancing Act* s 89(1)(a) and (b).

Modification Pursuant to s 89(1)(a)

67 *Conveyancing Act* s 89(1)(a) grounds the exercise of the power to modify an easement on two independent bases connected with changing circumstances. The first basis is that by reason of the

change in use of the land having the benefit of the easement or by reason of change in the character of the neighbourhood, the easement ought to be deemed obsolete. The second is that the continued existence of the easement would impede the reasonable user of the land subject to the easement without securing any practical benefit to the persons entitled to the easement.

68 In relation to the first basis, to determine whether there has been a change in the neighbourhood, the Court identifies what the neighbourhood is in any given case and then analyses the evidence to see if there has been change between the date of grant and the date of the application: *Cavacourt Pty Ltd v Durian (Holdings) Pty Ltd* (1998) 9 BPR 16,833; [2000] ANZ ConvR 22; (1999) NSW ConvR 55-891 per Young J.

69 The term “obsolete” has been explained in a number of authorities. Indeed obsolescence:

(a) can be established in the sense that the original purpose of the easement can no longer be served: *In re Truman, Hanbury, Buxton & Company Ltd's Application* [1956] 1 QB 261 at [272]; and

(b) can also mean that the object of the easement is incapable of fulfilment any longer or perhaps serves no presently useful purpose: *Re Mason and the Conveyancing Act* (1960) 78 WN (NSW) 925 at [927]; *Durian (Holdings) Pty Ltd v Cavacourt Pty Ltd* [2000] 10 BPR 18,099; [2000] NSWCA 28 at [3]-[6].

70 The second basis involves an assessment of whether or not the continued existence of the easement would impede the reasonable user of the servient tenement without securing practical benefit to the persons entitled.

71 To establish that a covenant impedes the reasonable user of the servient land, requires it to be established that no reasonable use of the land is possible unless the easement is modified or extinguished: *Frasers Lorne Pty Ltd v Joyce Goldsworthy Burke & Ors* (2008) 14 BPR 26,131; [2008] NSWSC 743 per Brereton J at [14].

72 It is insufficient for a *Conveyancing Act* s 89(1) applicant to establish that its own proposal is a reasonable use of the servient land. The applicant must show that no reasonable use of the land is possible unless the easement is extinguished or modified: *Heaton v Loblay* (1960) SR (NSW) 332, at 335 per Myers J. The applicant must also show that the continuance of the easement unmodified “hinders, to a real and sensible degree, the land being reasonably used, having due regard to the situation it occupies, to the surrounding property, and the purpose of the [easement]”: *Re Ghey & Galton's Application* [1957] 2 QB 650 at 663. The question as to whether the continued existence of the right of way secures a practical benefit to the beneficiaries is one that does not require extensive analysis. But what is a “practical benefit” is capable of ready assessment.

73 Finally, *Conveyancing Act* s 89(1)(a) allows the Court to take into account such “other circumstances of the case which the Court may deem material”. These words permit the Court to take into account “the widest field of evidentiary material”: *Re Roseblade; Re Foenander* [1964 –5] NSWLR 2044 at [2046] and *Markos v OR Autor Pty Ltd* [2007] NSWSC 810 per Austin J at [90].

Modification Pursuant to s 89 (1)(b) - Abandonment

74 Lots 18 and 19 and Lot 4 are all Torrens title land. It is clear that rights of way created by registered easements over Torrens system land can be abandoned so as to attract the jurisdiction of the Court under *Conveyancing Act* s 89(1): *Grill v Hockey* (1991) 5 BPR 11,421; *Chiu v Healey* (2003) 11 BPR 21,241; (2003) NSWSC 857 at [36]; Bradbrook & Neave “Easements and Restrictive Covenants In Australia” Butterworths 2nd Ed, 2000 at [19.27] and following. *Conveyancing Act* s 89 is applicable to land under the *Real Property Act* 1900: *Conveyancing Act* s 89(8). The mere circumstance that an easement was noted on the register when land under the *Real Property Act* passed to a new registered proprietor would not furnish a reason for refusing as a matter of discretion to make an order under s 89(1) or s 89(3): *Treweeke v 36 Wolseley Road Pty Ltd* (1973) 128 CLR 274. The relevant principles in relation to abandonment of easements in relation to the exercise of *Conveyancing Act* s 89 jurisdiction are:

- (a) abandonment occurs both at common law and under the *Conveyancing Act* 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: *Grill v Hockey* (1991) 5 BPR 11,421 and *Williams v Usherwood* (1981) 45 P & Cr 235;
- (b) one must look for evidence that there has been an implied (or lost) modern deed of release of the easement – long non-use would be good evidence but would 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 *Proprietors Strata Plan No 9,968 v Proprietors Strata Plan No 11,173* [1979] 2 NSWLR 605; and,
- (c) the longer the period of non-user, the more readily the conclusion will be reached that the beneficiaries of the rights of way may be deemed to have abandoned it: *Treweeke v 36 Wolseley Road Pty Ltd* (1973) 128 CLR 274, per Walsh J at 288.

s 89(1)(c) – Lack of Substantial Injury to Beneficiaries

75 The power to modify an easement is also conferred by *Conveyancing Act* s 89(1) on the basis that the proposed modification will not substantially injure the persons entitled to the easement. Mrs Campbell also claims that the Court can exercise the power to extinguish in the present case based upon this ground. As with the heads of relevant power to extinguish, judicial exposition has assisted in

explaining how this power should be exercised. The relevant principles in relation to *Conveyancing Act* s 89(1)(c), are the following:

- (a) a “substantial injury” is one that has real and present substance but need not be large or considerable: *Re Mason and the Conveyancing Act* [1962] NSW 762 and *Tujilo v Watts* (2005) 12 BPR 23, 257, especially at [37]; *Frasers Lorne Pty Ltd v Joyce Goldsworthy Burke & Ors* (2008) 14 BPR 26,131 at [24];
- (b) a wide variety of tangible and intangible potential injuries are encompassed by the expression “substantial injury” in s 89(1)(c): *Webster v Bradac* (1993) 5 BPR 12,032; *Frasers Lorne Pty Ltd v Joyce Goldsworthy Burke & Ors* (2008) 14 BPR 26,131 at [27]; and
- (c) the need for an injury of “real and present substance” and examples of how this had been applied are usefully summarised by Young CJ in Eq, (as His Honour then was) in *Castagna v Great Wall Resources Pty Ltd* (2005) 12 BPR 23,363 at [42]-[43].

Exercise of the Conveyancing Act s 89(1) Discretion

76 The grant of relief under established s 89 grounds is discretionary: *Pieper v Edwards* [1982] 1 NSWLR 336. The facts relevant to the exercise of this discretion include matters such as the history of the property, the conduct of the owners of both the dominant and servient tenements, the acts of a prior registered proprietor and the state of the register. No one factor is decisive: *Pieper v Edwards* (1982) 1 NSWLR 336 at 340D-E.

77 The question of who has the burden of showing that the discretion ought be exercised once jurisdiction is established will itself depend upon the circumstances. This is explained by Hutley JA in *Pieper v Edwards* (1982) 1 NSWLR 336 at 340 as follows:

“the burden may not always be on one side or the other. Where the acts of abandonment relied on are those of the dominant owner the burden of showing the order should not be made could reasonably be laid on him. Whereas here, the acts relied on are of a predecessor in title of the applicant, of which the respondent had no notice, the burden could well be thrown on the applicant.”

78 The Court will normally exercise caution in acceding to an application for the extinguishment or modification of an easement, which is a proprietary right: *Frasers Lorne Pty Ltd v Joyce Goldsworthy Burke & Ors* [2008] NSWSC 743 per Brereton J at [29].

Applying *Conveyancing Act*, s 89

79 Mrs Campbell seeks modification of the easement under the powers of each of the sub paragraphs *Conveyancing Act*, s 89(1)(a), (b) and (c). The defendants contest that grant of relief saying that none

of these grounds are made out and in any event the Court should not grant a discretionary remedy in this case. The Court now considers each of these grounds in turn.

The Modification Requested

80 A degree of imprecision was embedded within Mrs Campbell's claim for relief under *Conveyancing Act*, s 89 making a grant of relief difficult. This is not to be taken as a criticism of her legal advisors. Rather the form of the relief sought highlights an inherent difficulty in the case that she makes. Mrs Campbell's statement of claim sought easement modification defined in the following terms:

“1. An order under s 89 of the *Conveyancing Act (NSW) 1919* that the width of the right of way be reduced to 6 metres or some other width as the Court determined appropriate.”

81 As it now passes across Lot 4 the pavement of the easement varies in width from 5.25 to 5.75 metres. The survey evidence shows that easement averages approximately 5.5 metres in width throughout Lot 4. Thus, the modification would allow on average a further 0.5 metres for the dominant owner to use for road pavement or for other easement related purposes.

82 A slightly different form of modification request was put in final submissions. At the conclusion of the evidence the plaintiff sought modification to “between 0.5 and 1.75 metres” additional to the existing pavement area. This variation sought to confine the “other width as the Court determined appropriate” to the difference between 0.5 metres and 1.75 metres, namely a further 1.25 metres.

83 The plaintiff did not explain exactly where along the western face of the easement throughout the geotechnical sections A-B, B-C, C-D that the easement should be reduced to 0.5 metres. Nor did she identify what points should be reduced to 1.75 metres. For geotechnical reasons, greater penetration into the sandstone might be possible in section C-D. But just what was appropriate in that area and whether it should at that point go up to the full possible 1.75 metres was not explained.

84 If the precise form of the modification of the easement cannot be clearly defined, a threshold problem arises for a Court granting relief. If the precise modification cannot be defined the case for modifying the easement becomes somewhat weaker. This can be overcome by the Court deciding upon the precise modification for the parties. I have approached this matter as practically as possible. I have assessed that the plaintiff seeks a modification to at or close to 6 metres in sections A-B and B-C but allowing more width in section C-D.

Modification under Conveyancing Act, s 89 (1)(a) – Easement Obsolete

85 The combination of the traffic evidence and the geotechnical evidence provides an insuperable difficulty to the plaintiff establishing that the unformed 3.144 metre portion of the easement should be deemed obsolete. My findings on the traffic evidence show an existing need for more turning area for

Lot 19 on the easement. My findings also show that Lot 18 would be advantaged by more turning area on the paved easement. Extending the formed area pavement by a further 0.5 metres in parts of Lot 4 would provide a practical benefit to both Lots 18 and 19. The geotechnical evidence makes clear that using an additional 0.5 metres of pavement across sections A-B and B-C in figure 3 requires supplementary earthworks back in a westerly direction throughout much of the rest of the width of the easement up to its western boundary. It makes no sense to give the defendants the extra 0.5 metres of pavement that they seek without also providing the necessary means to build that additional pavement. Those necessary means involve contiguous piling and related earthworks for up to another 3 metres back towards the western boundary of the easement. In short a finding that the defendants may need another 0.5 metres of pavement for traffic purposes necessarily infers that in addition they need the rest of the unformed 3.144 metre width of the existing easement for supporting earthworks and piling. This also infers that the easement is capable of fulfilment over this unformed 3.144 metre width. The plaintiff was not able to overcome this answer to her claim for relief based on obsolescence.

The Plaintiff's Case for Modification

- 86 Mrs Campbell's case did not rely upon all the tests in *Conveyancing Act*, s 89 (1)(a). Through her counsel Mr Berveling, she disclaimed reliance on changing user of the land having the benefit of the easement. She disclaimed reliance upon change of the character of her neighbourhood. Her case avoided reliance on these particular *Conveyancing Act*, s 89(1)(a) grounds in part because Mrs Campbell's own town planning witness, Mr Geoffrey Mead, gave evidence that there has been no change in the character of the neighbourhood and no change in user.
- 87 Mr Berveling's withdrawal from this ground was well justified. The subject easement was only created in 1970. The principal change that seems to have occurred since then is a slight increase in traffic on the easement due to the development of the properties to the south of Lot 4. Furthermore in about 1986 what had previously been a gravel-surfaced easement was changed to become a formed concrete pavement. The character of the neighbourhood has remained residential throughout this period. The actual change in user of the easement has only been marginal.
- 88 However Mrs Campbell relied on the two other tests within *Conveyancing Act*, s 89(1)(a). She identified "other circumstances of the case which the Court may deem material" for the purposes of *Conveyancing Act*, s 89(1)(a). She also contended that the unformed 3.144 metres of the easement would impede the reasonable user of the land the subject of the easement "without securing a practical benefit to the persons entitled to the easement..."
- 89 Mrs Campbell identified five separate factors, which warranted a grant of s 89(1)(a) relief. These factors were said to be both "other circumstances" inferring obsolescence and to show "no reasonable user/no practical benefit". She relied upon those factors as relevant to the Court's exercise of discretion to modify the right of way.

90 The factors Mrs Campbell relied upon to show that the unformed 3.144 metres of the right of way is not reasonably necessary for the effective and reasonable exercise and enjoyment of the easement and ought be deemed obsolete were:

- (a) Historically, the unformed 3.144 metres has not been required for use by any dominant owner;
- (b) The unformed 3.144 metres of the right of way is not required for traffic reasons so an increase in width of the pavement of the right of way is not necessary;
- (c) There are practical difficulties in excavation such that an additional width of 0.5 metres only can be assured;
- (d) A grant of development consent to excavate the area is unlikely;
- (e) The reduction in width of the easement as it crosses Lot 4 from 9.144 metres to 6 metres would not negatively impact upon the value of the dominant tenements.

91 Considering all the factors, which Mrs Campbell advances, they do not; taken either individually or together, show that the unformed 3.144 metres of the easement is obsolete. Analysis of each of the five factors shows this. I will now deal with each of these factors. Before doing so, one observation is necessary.

92 The plaintiff alleges that the continued existence of the unmodified easement would also within *Conveyancing Act*, s 89(1)(a) “impede the reasonable user of the land [namely the additional 3.144 metres] the subject of the easement” without securing “practical benefit to the persons entitled to the easement”. The plaintiff did not establish that the continued existence of the easement in respect of this unformed 3.144 metre portion of the easement would impede the plaintiff’s reasonable user of the land. The plaintiff’s burden on this issue was great, in effect to show that no reasonable use of the land is possible unless the easement is modified. Consideration of the plaintiff’s five factors shows that threshold was not met. The defendants submit that the Court need not further consider on this test the lack of practical benefit to the persons entitled to the easement. I accept the correctness of this submission but I have considered the practical benefit to the defendants in any event.

Historically, the unformed 3.144 metres has not been used

93 The plaintiff says that historically since the first dealing (C154037) in November 1932 creating an easement over Lot 4, in that case in favour of Lot 7, that no dominant owner has required to use the unformed 3.144 metres of the easement. Since November 1932 no one has sought to excavate or otherwise use it. This lack of use is said to be evidence of the obsolescence of the unformed 3.144 metres of the easement beyond a conceded 6 metres for the easement pavement. The plaintiff says that the reason this unformed portion has not been required is because of difficulties of excavation.

94 The correct measure of the period of non-use of the unformed portion of the subject easement is from July 1970 when the easement was created. Lot 7 has had the benefit of an easement since 1932 but that

is not the easement the subject of the present application. The period in question here is forty years not seventy years.

95 The lack of use to date of the unformed 3.144 metre portion of the easement does not of itself demonstrate that this portion of the easement “ought to be deemed obsolete”. The dominant owner, Mr Peter Baigent, sought to widen the easement in September 2006 although he did not persist with that application. The difficulties and costs of excavation explain why the defendants have not so far taken advantage of the unformed 3.144 metres of the easement. But neither the traffic nor the geotechnical evidence supports the conclusion that the defendants and other future owners of Lots 18 and 19 will not use this area or that their future use of it is precluded. Indeed section C-D could be excavated beyond a 6 metre pavement width without great difficulty.

Not required for traffic reasons

96 The plaintiff’s next contention is that the unformed 3.144 metre portion of the easement, beyond a conceded 6 metres for the easement pavement, is not required for traffic reasons. This submission is answered by the findings that I have already made on the traffic and geotechnical evidence. In my view there is a need for traffic reasons for a further 0.5 metre expansion of the pavement of the right of way from its average 5.5 metres, out to a width of 6 metres. But to achieve that 0.5 metre expansion the remaining 3.144 metres of the easement presently reserved may need to be used for earthworks.

97 The plaintiffs rely upon Mr Lawrence’s evidence to the effect that reasonable ingress and egress from lots 18 and 19 is already possible for a B85 car and so further expansion of the easement is not required. Mr Berveling submitted that the Court should prefer Mr Lawrence’s evidence over Mr Winch’s evidence on this issue. But I found Mr Winch’s evidence convincing and he was not cross-examined on the point.

98 Mr Berveling further submitted that Mr Winch owns a large Jaguar motor vehicle, which causes any problems that he has with his manoeuvring. This Mr Berverling submits is a matter personal to Mr Winch and the Court should not take it into account. Mr Winch’s car ownership is clearly personal to him. But it does illustrate that other future owners of Lots 18 and 19 may well drive larger B99 sized vehicles. B85 vehicles represent 85 percent of the vehicles manufactured and driven in Australia. There is a sufficiently large number of people in the community who drive cars greater in size than a B85 that they cannot be ignored.

99 The plaintiff then put its traffic case more acutely. She points to the proximity between section B-C and the point of egress from Mr Winch’s Lot 19 garage. Section B-C is the area of greatest excavation difficulty. The southern end of Lot 19 directly opposite B-C is also where the plaintiff says that the greatest need for increased turning area exists. Mr Lawrence identifies it as the most difficult traffic location. The plaintiff submits that on Mr Lawrence’s evidence the current traffic turning situation is acceptable and that it is difficult to enlarge the pavement at that most difficult point. The plaintiff

submits that the joint action of these factors should cause the Court to conclude in a practical sense that the unformed 3.144 metre portion of the easement is obsolete.

100 In my view this argument does not give sufficient credit to Mr Winch's evidence that his turning difficulties can be reduced by having turning niche available space somewhere on the western side of the easement. But this space is not necessarily just directly opposite Lot 19. He could for example use some of the space in section C-D. A degree of flexibility is required in approaching how the western wall of the easement can be utilised for the benefit of Lots 18 and 19.

Difficulties in excavation

101 The plaintiff submits that the difficulties in excavation demonstrated by the geotechnical engineers' joint report allow the Court to conclude that the defendants could only in fact make use of the further 0.5 metres of the unformed part of the easement out to the total width that the plaintiff concedes for the pavement of 6 metres. To use the plaintiff's words "an additional width of 0.5 metres only *can be assured*" (emphasis added). The plaintiff's point is that so much civil engineering work is required merely to achieve an additional maximum pavement width of 0.5 metres, that the defendants would never undertake the exercise.

102 There are several answers to this argument. First, it is not supported by quantity surveyor's evidence that the costs of doing the civil engineering works is so prohibitive that it would not be undertaken by an owner of Lots 18 or 19. Although I can infer from the expert evidence that the civil earthworks would be expensive, just how prohibitive that expense might be was left unclear on the evidence.

103 Second, the argument does not take into account the possibility that future or indeed the present owners of Lots 18 and 19 on the one hand and Lot 4 on the other may wish to share the costs of the excavation. Lot 4 has a right of way over Lots 1, 2 and 3. A future owner of Lot 4 may wish to subdivide the lot and utilise the right of way to access the subdivided lots. It would be logical for the owners of Lots 4, 18 and 19 to share excavation and road making costs in those circumstances, because of the common benefit from doing so. Despite Mr Mead's evidence that such a development scenario was unlikely, in my view it should not be discounted.

104 Third, the costs of excavation may possibly be shared with the owners of other lots derived from the original Lots 5 and 6. Nothing was heard from any of these lot owners in these proceedings. There is some evidence (Exhibit J) that in October 2002 the then owners of the successor lots to Lots 5 and 6, Lots 1152 and 1154 unsuccessfully sought to gain development approval for a car hardstand area on the easement just south of Lot 4. The plaintiff has not sought to exclude the possibility that cost sharing from this source could reduce excavation costs. The technical difficulties in excavation are clear. The real issue is whether those difficulties would lead to so much expense that the excavation would not be undertaken. On this question the evidence is left in an unsatisfactory state, which does not enable me to draw an inference that the dominant owners would not undertake such work and incur

such expense. Neither the Baigents nor Mr Winch were cross-examined to suggest that they were not prepared to incur this expenditure.

Development consent unlikely

105 The plaintiff's next point is that the Sutherland Shire Council was unlikely on its current planning policies to grant development consent to excavate the unformed 3.144 metre portion of Lot 4. The plaintiffs supported this argument with Mr Mead's evidence that the environmental objectives of the Local planning controls that would apply to a proposal for additional excavation within the right of way could not be met. He said the objectives of Zone 1-Environmental Housing (Environmentally Sensitive Land) would not be met as such a proposal would exceed the limits of the scale of development that are designed to protect and conserve existing vegetation and other natural features of the zone, namely the rock shelf. Mr Mead also said that clause 51 of the LEP relating to the ecological sustainable development could not be met because the proposal would adversely affect a significant natural land form including the rocky outcrops and would involve the loss of several trees. Finally he said that such a proposal would be inconsistent with the Sutherland Shire Council's *Greenweb Strategy*, articulated in Chapter 4 of the Sutherland Shire Development Control Plan (SSDCP) 2006, due to its impact on vegetation and the natural rock shelf. Mr Mead further said that the existing width of driveway was likely to continue because excavating the unformed 3.144 metres of the right of way was so inconsistent with relevant planning objectives that Council would not grant development consent.

106 Town planning considerations are not irrelevant to the Court's exercise of discretion. But here they are not decisive. Mr Mead was cross-examined to show that a joint proposal for the excavation of the right of way as part of the development and subdivision of Lot 4 would be likely to receive a more favourable response from Council. Mr Mead did not disagree that a more favourable response from Council would be likely in those circumstances. Moreover, Mr Mead's evidence was principally directed to the fate in Council of a larger scale excavation. It did not preclude the possibility of consent being obtained to excavate a limited turning niche at one point in Lot 4, perhaps in section C-D.

107 Again the absence of the owners of the more southerly lots was of some importance in relation to this factor. Mr Mead was asked to address the scenario in which only the defendants were applying to excavate Lot 4. The plaintiff did not address the possibility that the defendants and the owners of the more southerly lots would all be applying together to widen the 3.144 metre unformed portion of Lot 4 based upon their various collective easement rights over Lot 4. Exhibit J demonstrates that some of these owners have had an interest in traffic issues close to this part of the easement.

No Impact on the value of Dominant Tenements

108 Finally the plaintiff relies on valuation evidence that modifying the easement by eliminating its 3.144 metre unformed portion would not result in any loss of value to the dominant tenement. The plaintiffs'

valuation expert, Mr J.F Adams bases his valuation on an assumption, which is not made out on the evidence. This assumption is that “the existing width [of the pavement] already accommodates all possible needs”. In my view the existing width of the right of way does not accommodate “all possible needs”. It does not accommodate the traffic needs of the present and future owners of Lots 18 and 19.

An Underlying Issue

- 109 There is a way that the plaintiff could displace the inference that a further 3.144 metres of servient land would be needed to permit construction of a further 0.5 metres of easement paving. She could attempt to establish that the earthworks that would be required for a 0.5 metre expansion of the pavement to a width of 6 metres could be as readily performed on the plaintiff’s unburdened land as on servient land. Nothing said by the plaintiff suggests that she would permit earthworks on parts of her land that are unburdened by the easement. It has not been offered as a condition of the relief being sought. But on this the plaintiff comes up against the general law, which does not give any right to the defendants to enter the plaintiff’s unburdened land to do earthworks to support the construction of a pavement on the easement.
- 110 *Right to Upgrade an Easement.* The law is reluctant to allow deviation from the original grant of an easement. Generally a right of way may only be used for granting access to the land identified as the dominant tenement in a grant. An alteration to provide for a mode of enjoyment by the dominant tenement with the effect of increasing the restriction beyond its legitimate limit will not be allowed: *Harris v Flower and Sons* (1904) 74 LJ Ch 127 and *Bracewell v Appleby* [1975] Ch 408.
- 111 *Right to Deviate.* There is generally no right to deviate from an easement. One exception to this rule is the right to deviate around an obstacle: *Selby v Nettleford* (1873) 9 Ch App. 111. The other is the right to enter the servient owner’s land but only to do necessary work in a reasonable manner. Aside from this use there is no other right to deviate: *Bullard v Harrison* (1815) 4M. &S. 387; (1815) 105 ER 877, *Taylor v Whitehead* (1781) 2 Doug KB 745.
- 112 *Right of Repair.* The dominant owner may enter the servient owner’s land to do necessary repair work in a reasonable manner: *Liford’s Case* (1614) 11 Co. Rep. 46b; (1614) 77 ER 1260, *Jones v Pritchard* [1908] 1 Ch. 630; [1908-10] All ER Rep 80, *Carter v Cole* [2006] EWCA Civ 398. This may include alteration to meet altered conditions: *Finlinson v Porter* (1875) LR 10 QB 188. It may include altering the surface of servient land to accommodate the right granted such as building a made road, spreading gravel on the easement or if the right of way is steeply inclined, a staircase can be constructed: *Hanny v Lewis* (1998) 9 BPR 16,205; (1999) NSW ConvR 55-879 and *Hemmes Hermitage Pty Ltd v Abdurahman* (1991) 22 NSWLR 343.
- 113 The plaintiff submitted that *Hemmes Hermitage Pty Ltd v Abdurahman* (1991) 22 NSWLR 343 and *McKeand v Thomas* [2006] NSWSC 1028 supported the contention that the defendants could do

earthworks on the plaintiff's land, outside the servient tenement. In my view these cases only affirm the less controversial conclusion that the defendants may do earthworks within the servient tenement.

114 If the plaintiff succeeds in modifying the easement as requested, the defendants may in the future seek to extend the right of way by half a metre onto the remaining servient area on the plaintiff's property which would still be reserved by the modified easement to a total width of 6 metres. To achieve a widening of the easement by half a metre, significantly more than half a metre width would need to be excavated from the plaintiff's unburdened land in sections A-B and B-C. This would be no mere upgrading or repair of the easement. It would amount to a significant extension of the proposed easement onto her land that would (if she succeeded in these proceedings) not be servient land. Further there would be no legitimate deviation from an obstacle on the easement that would permit this kind of encroachment onto the plaintiff's land. Thus the plaintiff's proposed modification would disadvantage the defendants when they come to expand the easement's pavement to 6 metres.

Modification under Conveyancing Act, s 89 (1)(b) – Abandonment

115 There is no evidence sufficient to establish abandonment here. Indeed, the history of contact between the plaintiff and the defendants suggests quite the reverse.

116 In September 2006 Mr Baigent together with the owners of other properties on the easement prepared an application for development consent for lodgement with Sutherland Shire Council. The application was to excavate the unformed 3.144 metres of the right of way. Mr Baigent sent the application to the plaintiff to seek endorsement of her consent to his application. But the plaintiff did not return the application. Mr Baigent's development application described the proposal as being to widen the sealed section of the right of way "to its full width for safety and convenience". Mr Baigent did not proceed with this development application.

117 But despite Mr Baigent not proceeding further, the steps he actually took in furtherance of this application are inconsistent with the conclusion that he has abandoned the easement. The plaintiff now says that Mr Baigent's failure to press on with the development application in September 2003 counts against the defendants. In my view it does not. There has been a history of dispute between these parties from before 2006. Not pressing the development application further into an atmosphere of conflict was reasonable. The onus that lies upon a plaintiff in establishing abandonment has not been made out in this case.

118 The Court was referred in submissions in reply on the issue of abandonment to *Conveyancing Act, s 89(1A)*. I do not think this provision, introduced in May 2009, makes any difference to my reasoning.

Modification under Conveyancing Act, s 89 (1)(c) – No Substantial Injury

119 The evidence already analysed also shows that the *Conveyancing Act*, s 89 (1)(c) ground that “the proposed modification...will not substantially injure the persons entitled to the easement” cannot be made out. There is potential for injury to the defendants demonstrated here, which has “real and present substance”: *Costagna v Great Wall Resources Pty Ltd* (2005) 12 BPR 23,363 at [42] – [43]. The analysis in respect of both *Conveyancing Act*, s 89(1)(a) and (b) equally compels the conclusion that there will be substantial injury arising from the modification to the persons entitled to the easement if the modification takes place.

Exercising the Discretion

120 Even if the *Conveyancing Act*, s 89(1)(a), (b) and (c) grounds were made out this would not be an appropriate case for the exercise of the discretion. In the absence of the joinder of the other persons having the practical benefit of right of way over Lot 4 to its south (Lot 5 and 6) the present application lacks utility.

Conclusion and Orders

121 I have found in these reasons that Mrs Campbell has not made out a case for relief under any of subparagraphs *Conveyancing Act*, s 89(1)(a), (b) or (c). Even if one of these grounds were made out I would not be prepared to exercise the Court’s discretion to grant relief in this case. The westernmost 3.144 metres of the easement is not obsolete. Nor has the dominant owner abandoned it. Modification to reduce the width of the easement to 6 metres or even a slightly wider distance would cause substantial injury to the dominant owner. Moreover, the failure to join other dominant owners with the benefit of easements over the identical part of Lot 4, seeking similar relief against them, means a grant of relief in this case would lack utility.

122 For these reasons I decline to make the orders sought under *Conveyancing Act*, s 89. I will dismiss what now remains of the summons after the settlement agreement. I indicated to the parties that I would hear any argument about costs after delivery of these reasons. Costs would usually follow the event but it may be contended that a different order should be made. Should either party wish to make a submission on costs it should be filed and served within 7 days of today. Otherwise I will make a costs order in chambers in favour of the defendants. Accordingly the Court orders:-

1. Summons dismissed.
2. Direct the parties to file any written submissions on issues of costs by 5pm, 7 December 2010.
3. Grant liberty to apply.

LAST UPDATED:
30 November 2010