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Précis Paper

Development Consent Obligations Concerning Easements

The case of *Lowe v Kladis [2018] NSWCA 130* raised many issues concerning both civil procedure and development consent obligations concerning easements and right-of-way, which are not as straightforward as they may appear.

Discussion Includes

- 'A neighbourhood dispute writ large'
- Right-of-way, right-of-footway, right-of-carriageway
- The need for joined parties
- The principles of easements
- An attempt to mould relief
- Outcomes of *Lowe v Kladis*
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Précis Paper

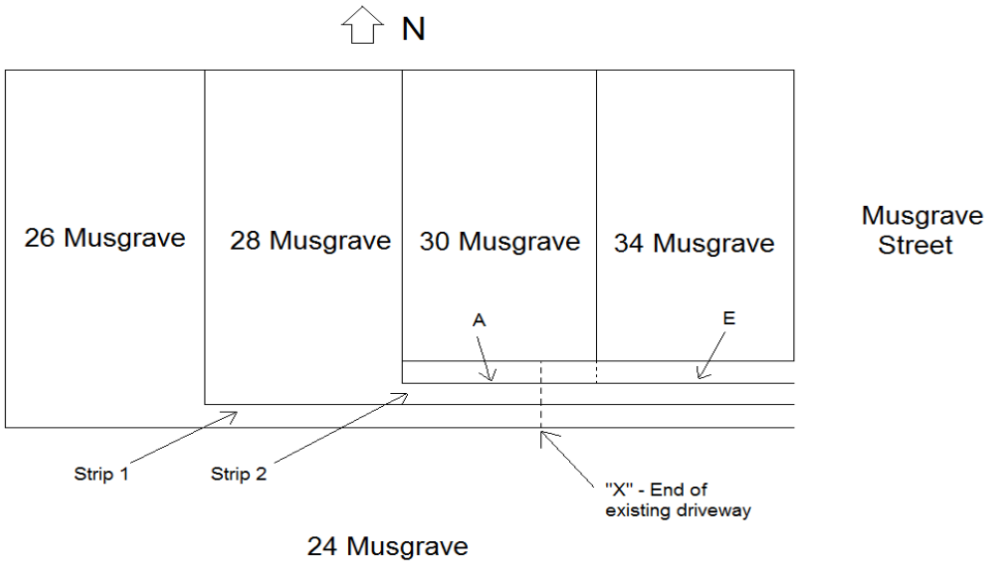
Development Consent Obligations Concerning Easements

1. In this edition of BenchTV, Peter Tomasetti SC (Martin Place Chambers) and April Reid (Law student, UTS) discuss the case of *Lowe v Kladis [2018] NSWCA 130,* described by Justice Sackville as 'a neighbourhood dispute writ large', which raised many issues concerning both civil procedure and development consent obligations concerning easements, which are not necessarily as straightforward as they may at first appear.

'A neighbourhood dispute writ large'

2. The case concerned a group of properties in Mosman on Musgrave St, Nos 26, 28, 30 and 34, leading down from the street to the waterfront. The proceedings were commenced by Mr. Kladis who owned land on the waterfront, being No 26. He could only access the waterfront via a shared right of carriageway.
3. The subdivisions of the land, which was originally one large parcel, occurred over a number of years, going back to the 1940's
4. The only access to the waterfront in 2018 was via an unformed footpath for the majority of the route, winding down falling topography from Musgrave St. down to the foreshore at Mosman Bay.
5. Part of the carriageway had been formed to provide vehicular access to two properties, and the remaining three were able to be accessed only on foot.
6. The proceedings arose out Mr. Kladis's desire to get vehicular access down to his property. He proposed a development which would comprise of a substantial concrete ramp running three-quarters of the length of the carriageway, elevated above the ground and supported by pillars, in some points up to 4 metres above the ground, in order to overcome the falling, changing topography.
7. To build this driveway required consent from Mosman Council.
8. While Mr. Kladis owned all of his land, he didn't own all of the land which was the subject of the right of way, of which there were dominant and servient tenements.
9. Mr. Kladis owned one part of the right of way, a strip about 1.5 metres wide, but he needed land which was owned by a strata plan, known as No 32 Musgrave, and he needed to rely on land which was owed by Mrs. Lowe of 28 Musgrave St.
10. In order to lodge the development for his driveway, Mr. Kladis needed to get owner's consent in writing on the form of application that went to the council, under the regulations of the *Environmental Planning and Assessment Act 1979 (NSW).*
11. The strata plan comprised of a number of units all owned by the same person, so that he was dealing with one person in respect of No 32.
12. Both Mrs. Lowe and No. 32 refused to sign the application because they said that the proposal would infringe or substantially interfere with their own property rights.

13. Mr. Kladis's only alternative was to go to the Supreme Court of New South Wales to seek an order compelling them to sign the development application.
14. If he could obtain their consent in writing to the making application, it would then fall on the Mosman Council to determine the merits of the application in accordance with the considerations required under the *Environmental Planning and Assessment Act 1979 (NSW)*.
15. No 24 was not party to the proceedings, as the owners lived in the USA.
16. The case became important because of principles of joinder of necessary parties to litigation, and there was discussion in the judgment of the need to join the owners of No 26, as they also had rights to use the right-of-way in question.
17. Nos 26, 28 and 30 were effectively battle-axe allotments, in that they each had an access handle, being a strip approximately 1.5 metres wide.
18. No 26's strip was referred to as Strip 1. No 28's was referred to as Strip 2. There was an existing driveway at the street end which extended to a point known as Point X. There were also two areas of land referred to as Strip A and Strip E.
19. Cars could come off Musgrave St. and enter No 34's garage using Strips E, 1 and 2. No 30 had basement access too and used the driveway up to Point X in order to access and egress from the garage for No 30.
20. Strip A was a piece of land over which, according to the registry, No 28 had dominant rights.
21. Nos 26 and 28 had dominant rights over each other's strips of the carriageway. No 30 had dominant rights over both of them, and was also subject to and easement in favour of No 28, which gives that proprietor the right to use that strip of land for access up to Musgrave St.



<u>Right-of-way, right-of-footway, right-of-carriageway</u>

22. All of the transfers creating these easements use the expression 'right-of-carriageway', except for No 24's 'right-of-way' over Strip 1.

23. A right-of-footway excludes the right to take vehicles, a right-of-carriageway includes both vehicles and persons on foot, and a right-of-way, which is an older form of expression, embraces both. There are defined meanings to the expressions in s 181A of the *Conveyancing Act 1919 (NSW)*
24. The differences had no relevance in this case, as Nos 26, 28 and 30 all had rights which enabled the potential use of the land for use by vehicles as well as people on foot

The need for joined parties

25. One of the issues of this case was that the proprietors of Nos 24 and 34 were not joined as parties to the proceedings.
26. The Uniform Civil Procedure Rules in NSW requires that anybody whose rights are potentially affected by the outcomes of proceedings must be joined as parties to the proceedings.
27. It's for the person having been served with a process to decide whether or not they wish to take an active part. They can enter a submitting appearance, which means that they take no active part in the proceedings except potentially in relation to any orders that might be made in relation to costs.
28. The rights of No 34 were not affected by anything that Mr. Kladis did or wanted to do, but nevertheless the proceedings involved the use of the right-of-carriageway,
29. No 34 was not joined as a party, and the Court of Appeal said it should have been because its rights were potentially affected by the outcome in the proceedings where work was involved upon the right-of-carriageway.
30. No 24 had right-of-carriageway down to its land, however it also access from a different street so rarely, if ever, used the right of-carriageway. However, the construction of the driveway as proposed was going to potentially impact upon their ability to access and use the existing footway. The proprietors of No 24 could open a gate onto the right-of-carriageway, over which they had dominant rights, to walk up to Musgrave St. If the driveway was constructed, it would be elevated above the level of the ground so that they could no longer access it. The only way they would be able to access the driveway would be to build stairs on their land so that they could get up to it.
31. The Court of Appeal said that the proprietors of 24 and 34 had to be joined, as they wanted to be satisfied that both were fully aware of the proceedings and that neither wished to take any further active part in them
32. With No 24, this was satisfied by correspondence obtained at the last minute from the USA. With No 34, the owner of that property was also the owner of the strata plan at No 30 and so he was already fully aware of the proceedings.
33. The Court of Appeal reinforced its decision in *Ross v Lane Cove Council [2014] NSWCA 50,* warning people that it is essential, when commencing proceedings, to make sure that the proceedings are properly constituted by having before the court all interested parties.

34. It is the obligation of the plaintiff to make sure that the proceedings are properly constituted. If they are not and they cannot be corrected, it could well be fatal to the proceedings. It is very important for plaintiffs to consider that matter and to make sure that when the proceedings are commenced, everybody with a relevant interest is joined.

The principles of easements

35. Although the concept of an easement is quite straightforward, the application of the law pertaining to them can be quite complex.
36. The law of easements comes from England and was developed often in respect to land under the old system title. Most land in Australia is now controlled and regulated pursuant to the Torrens title system, and so although one would hope that the law pertaining to easements was a little more straightforward, that's not necessarily the case.
37. When the subdivision was created, the sub-divider chose to create battle-axe handles where strips of land were retained as part of the lots which were effectively created, giving access up to the street, but that access needed to be complemented by easement rights over the adjoining strips so as to make it accessible for motorcars.
38. This gave rise to complexities. The essential question was whether or not what was proposed by Mr. Kladis would constitute a substantial interference upon the rights of Nos 24, 28 and 30, and also to some extent No 34 That is, a substantial interference in the use and enjoyment of their land - the land which was outside the area of the easements and also the land over which they had dominant rights.
39. The problem that Mr. Kladis faced was that whilst his easement gave a *prima facie* right-of-carriageway, it's not always the case that the easement can be physically enjoyed to the full extent of the legal grant, and if his proposal operated to take away the rights in any relevant respect over land which the other properties had dominant rights, then his scheme could not succeed, even if it meant that he would never get vehicular access down to his property on the waterfront.
40. The recent decision of the High Court in the case of *Westfield Management Ltd v Perpetual Trustee Company Ltd [2007] HCA 45. 233 CLR 528* goes to show how the law in relation to Torrens title interests can be fundamentally misunderstood, notwithstanding that the system has been in place for 100 years or more. In this case, the primary judge tried to apply the law of contract and the principles of construction of contracts to the construction of an easement, and the High Court said that that was not permissible.
41. Whilst one can have regard in the construction of easements to such things as the physical nature of the land over which the easement runs, one does not try to discern the intention of the parties when they came to create these interests, you just look at the words in the ground registered on title and you construe those words.
42. Mr. Kladis had a right-of-carriageway and it said in the terms that he was entitled to take vehicles to and from his property at No 26 along these rights-of-carriageway and on his own

land, but his plans were frustrated unless he could get the signature of Mrs. Lowe and the proprietor of the No 30 strata plan.

43. The primary judge in the first instance agreed with Mr. Kladis that Mrs. Lowe and the proprietor of No 30 were under a legal obligation to sign the development application, because otherwise Mr. Kladis could not get vehicle access to his property.

44. Both No 24 and Mrs. Lowe at No 28 would have had to of built stairs in order to access the concrete driveway. Mr. Kladis was prepared to provide a gated opening along the boundary of No 28 so that Mrs. Lowe could have that access, but as the driveway ascended towards Musgrave St. it became very much elevated above the existing ground level and the amenity of her property would have become seriously affected because her views of Mosman Bay and Sydney Harbour would have been obstructed by the massive concrete structure.

45. The land of No 30 had an upper level and a lower level. With the construction of the driveway, access to the upper level of the land would still be available from the end of the existing driveway, Point X, but the lower level of the land would become inaccessible.

46. On the lower level of No 30 these were services : sewage, water, telecommunications; there were physical structures, such as a retaining wall, and in order to get underneath the building, one had to enter the underfloor area from the lower part of the land.

47. Therefore Nos 28 and 30 said that this construction would be an unreasonable interference with their rights to enjoy the balance of their land. They also said that they had dominant rights over Mr. Kladis's land, Strip A, and they would no longer be able to exploit those dominant rights because the driveway elevated above the land and meeting at point X would preclude them from accessing onto Strip A, except onto the driveway

48. The primary judge noted and accepted those things, but he said they didn't matter, because without the driveway Mr. Kladis could not exploit his right of carriageway.

49. The Court of Appeal found that the primary judge had made an error in this regard and accepted that there was a substantial interference with the rights of Nos 28 and 30 to use their own land both where it was not affected by right-of-carriageway, and more particularly, where it was

50. Because of this, Mr. Kladis was exceeding the rights he was otherwise granted, as he had to accommodate their dominant rights as well as exploit his own dominant rights.

51. Applying *Westfield* with regards to the physical nature of the land to which one is entitled to, it may well be that Mr. Kladis can never get vehicular access to No 26, because his rights just aren't capable of being fully exploited in the physical circumstances of the land and with regard to the interest which he was granted.

52. The consequence of the Court of Appeal's decision was that neither 28 nor 30 were required by law to sign a development application for work which would result in a substantial interference of their legal rights

An attempt to mould relief

53. The primary judge, Justice Beech-Jones, attempted to mould relief in a manner that would try and ameliorate this substantial interference with the appellants' properties. He saw that it was unreasonable for Nos 28 and 30 to have to build staircases on their own property to access the new concrete ramp, but the way he sought to mould relief was state that while Mr. Kladis couldn't compel Nos 28 and 30 to make their land available for the construction of stairs, he did say that if they asked Mr. Kladis to do that work, then he must do so and he must also pay for it. The judge set up a system whereby under the orders of the court both 28 and 30 were given the right to call upon Mr. Kladis to do work on their land, and if he was so called upon then he was obliged to do it, but at the same time there were time limits involved, so that if the appellants did not require him to do the work within a certain time frame they lost those rights.
54. The Court of Appeal said that the judge had no business moulding relief, as the case involved the strict application of property rights. You either had a right or you didn't, and couldn't be made to give part of the right away in the ways contemplated by the primary judge, because that would effectively operate in contravention of the principles of title by registration. If Mr. Kladis had no rights over 28 or 30 Musgrave St. to enter their land and construct stairs or do any other work to overcome the impacts of the driveway, then it was unlawful to set up a moulding regime whereby 28 and 30 Musgrave St. effectively had to surrender their valuable property rights in order to allow Mr. Kladis to get vehicular access down to his land.
55. Therefore the Court swept away these option arrangements which the primary judge had attempted with care to mould and put in place.

Outcomes of Lowe v Kladis

56. The outcome of the case involved three important issues. The first issue was the need to join parties correctly, with the obligation being on the plaintiff to do so, and impacts upon the whole of litigation if that is not done.
57. The second issue is that where people have land which is burdened by obligations in favour of other land, they have to do all things necessary to allow the owner of the dominant interest to enjoy their rights. For example, you cannot park a car in a right-of-way if you obstruct the use of it by the dominant tenement, even though you may park the car on your own land.
58. When an owner of land is presented with a development application so that a dominant tenement can do work on the right-of-way, it doesn't necessarily follow that they have to sign. If there is an unreasonable interference caused by reason of the proposed works, there is no obligation to sign.
59. Practitioners need to be aware that you can't take it for granted that just because you have your land burdened by relevant interest, you have to give owner's consent to the making of any development application over it by the dominant owner. Care must be taken to examine

exactly what is proposed is not going to adversely affect not only the land, the subject of the easement, but also the balance of your land which is unaffected by the easement.

60. Mrs. Lowe's view of the harbor from the balance of her land were going to be obstructed by a massive concrete driveway, and the use of her land which was subject to the easement by Mr. Kladis in this way may have proposed an unreasonable interference with the use and enjoyment of her balance of the land

61. The third issue is that because the case involved an examination of the rights and interests of these particular parties under the easements which were granted under the Torrens system, the whole notion of reasonable user was explored. This was made very plain by the Court of Appeal's decision that, in the circumstances of this case, you cannot exploit your rights over the land of your neighbor where you have similar obligations in favour of them over your own land, so that you essentially consume all their rights by your own conduct.

62. There has to be mutuality and there has to be mutual respect for the rights and interests which each party enjoys, and one party can't exploit his rights to the disadvantage of another.

63. Mr. Kladis's land may never be capable of being serviced by vehicles accessing and egressing the land, notwithstanding the legal rights that are created under the easement, because of the physical circumstances of the land and the rights and interests which are being created over his land in favour of others.

<u>Notes for practitioners</u>

64. Practitioners must be alive to these circumstances where ultimately significant costs orders were made against the losing party.

65. The case of *Sertari Pty Limited v Quakers Hill SPV Pty Ltd [2013] NSWLEC 208* is a leading authority for the proposition that an owner of land burdened by an easement has an implied obligation enforceable at law to sign a development application to allow the dominant owner to fully exploit his rights under an easement. However *Lowe v Kladis* shows that this is not always so clear and is essential reading for whenever these circumstances arise.

66. Very careful consideration has to be given to the facts of each case, and practitioners need to be careful how they advise, otherwise people can have circumstances visited upon them which substantially devalue the amenity, use and enjoyment their land, and also its value.

BIOGRAPHY

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Peter was called to the Bar in 1979. He was appointed Senior Counsel in 2007. He practices mainly in Administrative Law, Compulsory Land Acquisition and Compensation; Equity; Negligence (excluding cases for personal injury); Building and Construction Law; and Property Law. He specialises in environmental and planning law disputes and continues to work for the Roads and Traffic Authority of New South Wales, councils and applicants in relation to compulsory land acquisition and other issues related to environmental and planning law.

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April is currently in her third year of a Bachelor of Laws at the University of Technology, Sydney. April currently works in client relationship management and business development at Checked, a venture-backed technology platform. April engages in a variety of academic competitions focusing on the relationship between technology and the law, and has recently completed a research project on law reform with Zhicheng Public Interest Law Firm in Beijing, China.

BIBLIOGRAPHY

Focus Case

Lowe v Kladis [2018] NSWCA 130

Benchmark Link

https://benchmarkinc.com.au/benchmark/insurance/benchmark_21-06-2018_insurance.pdf

Judgment Link

https://www.caselaw.nsw.gov.au/decision/5b22fc77e4b09e9963070156

Cases

Westfield Management Ltd v Perpetual Trustee Company Ltd [2007] HCA 45. 233 CLR 528
Sertari Pty Limited v Quakers Hill SPV Pty Ltd [2013] NSWLEC 208
Ross v Lane Cove Council [2014] NSWCA 50

Legislation

Environmental Planning and Assessment Act 1979 (NSW)

Conveyancing Act 1919 (NSW)

Diagram

Kladis v Lowe [2016] NSWSC 1834 at [5]