Reported	[1999] 9 BPR 16,985
Decision :	[1999] NSW ConvR 55-903

New South Wales Supreme Court

CITATION :	**Wengarin Pty Ltd v Byron Shire Council [1999] NSWSC 485**
CURRENT JURISDICTION :	Equity Division
FILE NUMBER(S) :	3543/98
HEARING DATE(S) :	05/05/99
JUDGMENT DATE :	5 May 1999
PARTIES :	Wengarin Pty Limited, Robert Venour Dulhunty and Maret Dulhunty, Wayne and Jodi Scott, Jurgen and Ingrid Greiner, Phillip McMaster, JNL Pty Limited, John and Nita Lavigne, Miranda Mouncey, Deborah Trainor, Stewartville Pty Limited, Hammock Investments Pty Limited (Plaintiffs) Byron Shire Council (D1) Dominic Matthew Trainor (D2)
JUDGMENT OF :	Young J

COUNSEL :	Plaintiffs: B A Coles QC and C Newport Defendants: J H H Blackman
SOLICITORS :	Plaintiffs: Abbott Tout Defendants: Elliot & Sochacki
CATCHWORDS :	Real Property [409]; Easement; Creation under Conveyancing Act s 88K; How compensation assessed
ACTS CITED :	(NSW) Conveyancing Act 1919, ss 88K(2), (4), (5); s 89 (NSW) Local Government Act 1993 (Qld) Law of Property Act 1974 s 180 (Eng) Law of Property Act 1925, a 84(1)(aa)
DECISION :	See para 34

THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

YOUNG, J

WEDNESDAY 5 MAY 1999

3543/98 - WENGARIN PTY LTD & ORS V BYRON SHIRE COUNCIL & ANOR

JUDGMENT

1 **HIS HONOUR :** This is a summons for the grant of an easement under s 88K of the Conveyancing Act 1919.

2 The plaintiffs are the owners of lots 17 to 36, section 3 DP1623, which refers to land on a spit of land about two kilometres from Byron Bay, which is bordered on the north west by the Pacific Ocean and on the south west by Belongil Creek.

3 According to the deposited plan, the plaintiffs' land can be accessed from Byron Bay via Childe Street in two ways. First one may turn right into Manfred Street and then left into the Esplanade and proceed along the ocean front. Secondly one may proceed roughly north from the end of Childe Street along a right of way which borders Belongil Creek. However, the evidence shows that the Esplanade does not exist, either now being part of the Pacific Ocean or covered by sand dunes. Further, the most

southerly part of the right of way has by erosion fallen into Belongil Creek.
4 The right of way passes to the south west of each of the lots 11 through to at least 36, but to reach Childe Street the right of way on the plan passes through a corner of lot 2, section 3 DP1623 and over virtually the whole of lot 1. However, due to erosion from Belongil Creek most of the right of way on lot 1 has now fallen into the creek.
5 Many years ago, probably in the 1970s a diversion right of way appeared over lot 2 and somewhere in the 1970s it would appear that that diversion was sealed.
6 Lot 2 is owned by the defendant Council. It is operational land of the Council under the Local Government Act 1993. The main road over lot 2 connects with the paper right of way at the northern end of that bit of lot 1 that is still above water.
7 The use of the land on the spit has changed over the last ten years or so and the plaintiffs are now possessed of some quite valuable ocean front land. They thought that there was a means of access over the sealed road on lot 2 and over the right of way. However, there is in law no such access.
8 When this problem became apparent the plaintiffs or some of them contacted the council to see if some arrangement could be reached.
9 It would appear that at the meeting of the Council on 27 August 1996 the Council resolved to agree to the relocation of the paper right of way to the course of the main road, so long as all costs were met by the applicants and the Council was indemnified against action by beneficiaries of the right of way against future liability to provide access in the event erosion of the bank of Belongil creek encroached on to the right of way. It is not quite clear to me what this last condition meant, but that is by the bye
10 After that decision was announced to the solicitors for some of the plaintiffs nothing seemed to happen. This summons was taken out on 13 August 1998 for an order under s 88K in respect of a right of carriageway and easement for repairs and an easement for services.
11 The matter was expedited by me last year and the issues at that time appeared to be several. One was the problem about the easement for services. Another one was whether all the right parties had been joined. However, today most of those problems have gone away. The plaintiffs now only seek a right of carriageway in accordance with para 1 of the further further amended summons, and it is now clear that all the relevant parties are before the court. It has been conceded that all the appropriate factors necessary for the court to grant an easement under s 88K have been met and that the only questions for the court are whether there are special circumstances so as to mean that no compensation should be ordered or, if there are no special circumstances, what is the quantum of the compensation to be paid to the first defendant by the plaintiffs.
12 Section 88K of the Conveyancing Act, so far as compensation is concerned, provides in subs 2(b) that the court must be satisfied that the owner of the land to be burdened by the easement:

> "Can be adequately compensated for any loss or other disadvantage that will arise from the

> imposition of the easement."

13 Subsection 4 is then as follows:

> "4. The Court is to provide in the order for payment by the applicant to specified persons of such compensation as the Court considers appropriate, unless the Court determines that compensation is not payable because of the special circumstances of the case."

14 It is unwise to attempt to define what are special circumstances because as has been said more than once on the authorities the term "special circumstances" is incapable of precise definition and delineation, but is intended to invite the court to consider the facts of each particular case; **Freeman v Stankovic** [1960] NSWR 567; **D'Amico v Shire of Swan-Guildford** [1969] WAR 183, 186.

15 It will be observed that subs 4 seems to suggest an all or nothing situation. Either the court is to grant compensation or, alternatively, is to make no order for compensation because of the special circumstances. Special circumstances do not come into play when the court is considering the quantum of compensation, that matter being governed by the words "considers appropriate", which enables all the circumstances, whether special or otherwise, to be taken into account.

16 The background to s 88K is that without it situations could develop, for instance involving closely spaced city buildings where owners of adjoining land could hold developers to ransom by not granting access during building operations and the like. The purpose of the section was that the court should grant access on the basis of just compensation, rather than allowing people to be held to ransom in those circumstances.

17 The structure of the section seems to me to recognise that ordinarily the owner of a legal right is to receive a just sum and for value for what he or she has to give over, rather than being able to demand the earth.

18 In the present case the problem has not come about by any action of the plaintiffs or of the defendants. It has come about because of the natural forces which have eroded lot 1 into the creek. That matter now calls for remedy.

19 It could be said, as it was said by Mr Coles QC, who appeared with Mr Newport for the plaintiffs, that there are special circumstances because there was no fault on behalf of the plaintiffs; there was an open and apparent road across lot 2, indeed sealed. The impression was given to everyone that this was part of the right of way, which was open to use. The Council acknowledged the problem in the resolution to which I have referred. At that stage it did not require any compensation and, accordingly, it would be appropriate to regard the present case as one of special circumstances. Added to that under subs 5 of s 88K the applicants must pay the costs of the proceedings, both their own costs and the costs of the Council, unless the court otherwise orders, and they have suffered delay in having to bring these proceedings when nothing flowed from the Council's resolution.

20 I considered those submissions very seriously because I do believe they come close to the line, but I am not prepared to find special circumstances in the instant case. Without limiting the operation of the expression, it seems to me that the court should generally only order that someone's land be used by the plaintiffs, under the statute without compensation, if that someone else has somehow or other been blameworthy. I use the word "blameworthy" in the sense of having brought about the scenario which now causes the problem, or otherwise having been completely obstructive to any reasonable attempts to solve a problem.
21 In the instant case, the worst that could be said about the Council was that there was masterly inaction. The problem was not a problem of the Council's making and I do not consider that there is sufficient for me to find that there are special circumstances.
22 Accordingly, I must direct my mind as to the quantum of the compensation.
23 Although this is a relatively new section in New South Wales, it having been inserted in 1995, the section has existed in much the same form in the State of Queensland as s 180 of the Law of Property Act 1974 for some twenty five years. There is some learning to be found in the decisions of the Supreme Court of Queensland, and in particular **Re Seaforth Land Sales Pty Ltd's Land (No 2)** [1977] Qd R 317, a decision of the Queensland Full Court.
24 There is also I believe assistance to be had in the cases decided under s 84(1)(aa) of the English Law of Property Act 1925, which corresponds to s 89 of the Conveyancing Act (NSW), save that the English Act provides for compensation to be awarded in certain circumstances; the compensation ordinarily being "a sum to make up for any loss or disadvantage suffered by (the person entitled to the benefit of the covenant) in consequence of the discharge or modification" of the covenant.
25 From the local cases, particularly **Tregoyd Gardens Pty Ltd v Jervis** (1997) 8 BPR 15845 and **Goodwin v Yee Holdings Pty Ltd** (1997) 8 BPR 15795, the cases decided in Queensland, and the cases decided on the English provision, to which I have referred, the following general propositions I think follow:
26 1. The compensation referred to in subs 4 is the same compensation as is referred to in subs 2(b), that is adequate compensation for loss or other disadvantage; see **Goodwin** at 15801.

2. The compensation is not a substitute for the price that could have been exacted if the section did not exist; **SJC Construction Co Ltd v Sutton LBC** (1975) 29 P & CR 322, 326, a decision of the English Court of Appeal.

3. The compensation is not just the diminished value of the affected land; **Seaforth Land Sales** at 334.

4. Ordinarily the compensation will be:

(a) the diminished market value of the affected land

(including what is sometimes called the hope value, that is the potential use to which the subject land could have been put **; Re Bowden's Application** (1983) 47 P&CR 455, 457);
(b) associated costs that would be caused to the owner of the affected land; **Tregoyd** at 15856;
(c) an assessment of the compensation for insecurity, loss of amenities such as loss of peace and quiet; **Tregoyd** at 15856; **SJC** at 326; and see Preston and Newsom **Restrictive Covenants Affecting Freehold Land** 8th ed (Sweet & Maxwell, London, 1991) p 284;
(d) the compensation is to be less compensating advantages, if any.
5. There may be some exceptional cases which fall outside the net of s 88K(2)(b) yet are cases where it is extremely difficult to assess the compensation, but it is clear that the applicant is to derive a considerable benefit from the application. In such circumstances it may be appropriate to assess the compensation on a percentage of the profits that would be made.

27 In the instant case there are no other factors than the value of the land because nothing needs to be done to the land. The road is already on it and, accordingly, the enquiry appears to be simply what is the diminished value of the land in question.
28 The only evidence is that of a valuer, Mr Peter James Bennett, who is experienced in valuing land on the far north coast of New South Wales. Mr Bennett opines that the value of the diminution of lot 2 was $2,500. However, he said that there were other ways of looking at the matter. He under cross-examination indicated that from comparable sales the value of lot 2 as a building block would be $120,000. However, he says at the moment there are sewer pipes 2.6 metres below the surface and that would have a profound effect on the ability to erect a dwelling on the land. His valuation contains at page 17 a diagram showing what would be able to be built on the land. Accordingly a prospective purchaser would need to involve himself or herself in substantial time and cost in arguing with the Council about putting a dwelling on the land (under the zoning in question permission is needed for any building of a house on this land) and it would cost a considerable amount of money to do the physical work of relocating the pipes, probably at least $25,000. Accordingly, a reasonable arm's length purchaser would only pay $50,000 for the land.
29 Miss Blackman for the Council cross-examined Mr Bennett at some length about these matters. She submitted to me that there was no evidence as to the status of these pipes or whether they could be removed without anyone's permission; whether they were trespassing pipes, or what have you. She put that without some sort of evidence it would be

inappropriate to discount the value of the land because of the pipes being in the soil. Thus she put to Mr Bennett and again to me that the value is really $120,000.

30 It does not seem to me to matter whether the pipes are there legally or not. They have been there for some little time and a reasonable purchaser would apply a presumption of regularity. A reasonable purchaser, accordingly, buying the block would be very reluctant to pay anywhere near its full value as a building block. This is even disregarding the problems there might be in getting permission to build on the block in any event.

31 In my view the figure of $50,000 should be taken as the value of the block.

32 This is really to my mind the value of the block considered as being used to its maximum potential, that is as a building block. (To avoid future problems I should state that a site’s maximum potential is not necessarily the basis for assessing compensation, but it suffices in this case as only relatively small sums are involved).

33 If it were a building block, and if it has a road over a third of its surface, as would appear to be the case, it might be said to be virtually useless so that the compensation should be close to the whole $50,000. However, that would mean that there would be virtually a compulsory purchase. The Council retains the block after the easement is granted. All that it has is the same land that it has now, with the same road that it has now, save that there is a legal entitlement of the plaintiffs to use it. Bearing in mind that the road only covers one-third, two-thirds of the land is available to the Council to do whatever it is doing with the land now. However, in view of the resolution to which I have referred and the general circumstances of this case, this should be further discounted. It seems to me that a fair compensation would be a quarter of the value, namely $12,500.

34 Accordingly, I make order 1 in the summons. I order the plaintiffs to provide to the defendant Council the sum of $12,500 upon the easement in order 1 being registered, and unless anyone wishes to say anything I will order that the costs of the proceedings be paid by the plaintiffs.

35 The exhibits can be returned except where they are annexures to affidavits.

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Last Modified: 05/25/1999