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SUPREME COURT UPHOLDS VALIDITY OF EASEMENTS

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Introduction

On 14 August 2018, in *The Owners – Strata Plan No 61233 v Arcidiacono* [2018] NSWSC 1260, the Supreme Court upheld the validity of easements over land created in 1839 and the validity of easements over the same piece of land ordered by the Supreme Court in 2003.

In doing so, the Supreme Court took an interesting journey back in time to land dealings in the early days of the British penal colony in New South Wales, and clarified one aspect of cases where easements are sought pursuant to section 88K of the Conveyancing Act 1919.

Background – hopping into the Supreme Court’s time machine and a colonial Who’s Who

In 1819, Hugh MacDonald (a quartermaster in His Majesty’s 46th Regiment) received a Crown grant of land from NSW Governor Lachlan Macquarie within the Sydney CBD block bounded by York, King, Clarence and Barrack Streets. That land included what is now 65 and 71 York Street, a 12 foot wide laneway between 65 and 71 York Street and an 8 foot laneway at the rear of 65 York Street.

MacDonald died in 1819 and by his will he appointed two high profile colonial men as executors (Henry Antill – another British officer and something of a right hand man to Governor Macquarie, and John Campbell – a colonial secretary to Governor Macquarie and a founder of the Bank of New South Wales – now Westpac) and left all his property to his wife Mary Ann and 4 children. Mary Ann went on to have two more husbands including Bernard Rochford, notorious for his involvement in the Newtown Ejectment Cases which lead to the establishment of the Torrens system of land title in New South Wales. She outlived all 3 husbands by many years and acquired more land in what is now the Sydney CBD.

In 1839, the MacDonald family sold what is now 65 York Street to Hugh Nolan and also granted to Nolan a right of way (being a type of easement) over both the 12 foot laneway and the 8 foot laneway. In 1839, the MacDonald family also sold what is now 71 York Street to Henry MacDermott and gave MacDermott a right of way over the 12 foot laneway.

In 2003, the building at 65 York Street (being the former James Hardie House) was being strata subdivided and conditions of the City of Sydney’s development approval for the strata subdivision required additional easements over the laneways to be made. The developer of the building applied to the Supreme Court for and obtained orders under section 88K of the Conveyancing Act 1919 for the imposition of those easements. The owner of the laneways could not be found so the Supreme Court

made the orders in the owner's absence (known as ex parte orders when orders are made affecting the right of a person where that person is not a party to the case). Those decisions are reported in *Pasade Holdings Pty Ltd v City of Sydney* [2003] NSWSC 515, *Pasade Holdings Pty Ltd v City of Sydney* [2003] NSWSC 584 and *Pasade Holdings Pty Ltd v City of Sydney* [2003] NSWSC 1220.

In 2008, due to unpaid rates on the laneways being in excess of \$100,000, the City of Sydney exercised its statutory power of sale and sold the laneways to Mr and Mrs Arcidiacono. The Arcidiaconos were the owners of 100 Clarence Street which bordered on the 8 foot laneway.

A challenge to the validity of the easements – and an attempt to re-write history is made, but unsuccessful

In 2017, the Arcidiaconos (for reasons not disclosed in the judgment) decided to take action in the Supreme Court to have declared invalid the easements created in 1839 in favour of the owners of 65 and 71 York Street, and the section 88K easements ordered by the Supreme Court in 2003. The Supreme Court decided against the Arcidiaconos and ordered them to pay the legal costs of the winning parties.

The Arcidiaconos alleged that the MacDonald family members in 1839 did not have the legal ownership of the laneways because they were not the executors of Hugh MacDonald's will. While it was correct that Hugh MacDonald had not appointed any member of his family to be the executor of his will in 1819, by the time of the creation of the rights of way over the laneways in 1839, the position had changed and the Supreme Court found that the original executors (Antill and Campbell) had died or renounced their executorship and that MacDonald's oldest son Stephen had subsequently been appointed by the Supreme Court as executor and had the land in question conveyed to him. The Supreme Court held that all members of the MacDonald family (whatever their legal entitlements to the land in question, whether as owners of the land, or beneficiaries under the will, or in Stephen's case, executor of the will) together had the power to sell 65 York Street to Nolan and 71 York Street to MacDermott and at the same time create the rights of way over both laneways.

The Arcidiaconos alleged that the 2003 Supreme Court decisions to impose section 88K easements should be re-visited because the owner of the laneways in 2003 should have been a party to the 2003 Supreme Court case but was not because he or she could not be found, and that as the Arcidiaconos were now the owners, they had succeeded to that owner's right to be heard. The Supreme Court decided that the right of the owner to be heard in the 2003 Supreme Court case was a right personal to that owner and did not "run with the land" meaning that any subsequent owner does not succeed to that right. Therefore, the subsequent owner cannot challenge an earlier decision to order an easement.



Lessons

The Supreme Court's decision highlights the difficulty a party will have in challenging property rights that have existed for almost two hundred years (especially Torrens title land) and challenging earlier Supreme Court decisions. In the context of section 88K easement cases, the decision confirms that a decision to grant an easement under section 88K will not be re-visited in a subsequent case.

Note

JS Mueller & Co Lawyers represented the owner of 65 York Street, Sydney in this case.

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About JS Mueller & Co

JS Mueller & Co has been servicing the strata industry across metropolitan and regional NSW for almost 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

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