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EASEMENTS

Knowing When to Fight and When to Surrender

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OUTLINE

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THE NATURE OF EASEMENTS AND WHERE PROBLEMS MAY ARISE

What is a private easement?

1. A *private* easement is a right, that runs with an identified lot of land, to do something:
 - (i) on the land of a specific adjoining neighbour, such as walk or drive over it; have one's electrical cabling or pipes run over or through it; deposit material on it; or create a nuisance on it;
 - (ii) in respect of the land of a specific adjoining neighbor, such as obtain lateral support from the land of the neighbor for one's own land; or have light fall on one's land through an identified aperture.

2. The essential features of a *private* easement **at common law** were summarised in *The Owners of East Fremantle Shopping Centre West Strata Plan 8618 v Action Supermarkets Pty Ltd* [2008] WASCA 180, para [51] ff.

"51. First, there must be a dominant tenement and a servient tenement. Secondly, the easement must 'accommodate' (that is, confer a benefit on) the dominant tenement. Thirdly, the dominant tenement and the servient tenement must not be held and occupied by the same person. Fourthly, the right must be capable of forming the subject matter of a grant. ..."

3. In *Re Ellenborough Park* [1956] Ch 131, one of the issues was whether the fourth characteristic of an easement had been satisfied. Evershed MR (at 164, 175–176) considered that there were three cognate questions: (a) whether the rights purported to be given by the covenant were expressed in terms that were "of too wide and vague a character"; (b) whether such rights would amount to rights of joint occupation or would substantially deprive the park owners of proprietorship or legal possession; and (c) whether the rights are mere rights of recreation without utility or benefit.

4. *Re Ellenborough Park* was applied by the NSWCA in *Clos Farming Estates Pty Ltd (Receivers and Managers Appointed) v Easton* [2001] NSWSC 525; (2001) 10 BPR 18,845, where the plaintiff was granted an easement for

vineyard.

This case exemplifies where problems arise; namely whether the rights granted really amount to occupation or sterilisation.

5. The plaintiff contended that the “easement for vineyard” entitled it to cultivate grape vines on the defendant’s servient land, to harvest the grapes, to sell and retain profits.
6. The covenant affected almost 85% of the putative servient tenement. Bryson J held that this did not, in law, constitute an easement because the scheme left the servient owner with a “*sterile or nominal ownership only*”: at [49]. HH emphasised that the servient owner had *lost all control* over the use of its land and the production of profits.¹

CONSTRUING TERMS OF EASEMENTS

7. An entire book could be written on the approach to the construction of easements and covenants, and the differences between common law and Torrens title. What follows, within the constraints of a presentation of 50 mins, is perhaps two risers from the elevator version.
8. “In the case of an easement created by express grant or reservation, the scope of the right of way is *prima facie* a matter of construction of the words of the grant, although this may be influenced by the circumstances surrounding the grant.^[49] A grantee is not confined to the user prevailing at the time of the grant, but may use the right of way for any lawful purpose within the terms of the grant;^[50] thus if the grant is in general terms, it can be used for all purposes for which the dominant tenement can lawfully be used,^[51] so far as they are compatible with the physical nature of the servient tenement.^[52]

¹ Appeal dismissed -*Clos Farming Estates v Easton* [2002] NSWCA 389

Rixon v Horseshoe Pastoral Co Pty Ltd (2017) NSWSC 1293

Where an easement has been acquired via an express grant, as distinct from a case of prescription, an easement may, on the true construction of the grant, permit user for new or additional purposes of the dominant tenement : *Perpetual Trustee Co Ltd v Westfield Management Ltd* (2007) 12 BPR 23,793; (2007) ANZ ConvR 103; (2007) NSW ConvR 56-170; [2006] NSWCA 337 at [38] (Hodgson JA; Beazley and Tobias JJA concurring).

9. See the detailed analysis of the principles applicable to change of user over time, and the differences between common law and Torrens title, in *Rixon v Horseshoe Pastoral Co Pty Ltd*.
10. The grant of an easement carries with it those *ancillary rights* which are necessary for the enjoyment of the rights expressly granted, *Westfield* (supra) at 535. For example, it is an implied right of every ROW that the dominant owner enjoys the right to carry out such physical works on the ROW as may be necessary to put it to its intended use: *Pro-Vision Developments Pty Ltd v Ku-Ring-Gai Municipal Council* [2003] NSWLEC 226 para [30] ff.
11. Barwick CJ observed in *Breskvar v Wall*, (1971) 126 CLR 376, 385 - 386 in relation to Queensland Torrens legislation in similar terms to that in NSW:

“The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void.”
12. Against this backdrop, *Westfield Management Ltd v Perpetual Trustee Ltd* [2007] HCA 45, held that that extrinsic material shedding light on the

intentions and expectation of the parties as regards the wording of an easement is inadmissible; because when a third party inspects the Register so as to construe an easement registered on a title, he/she is not expected to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing.

As such, the only extrinsic evidence that may be admitted is that necessary to explain terms or expressions identified in the property register. See further at [20] of *Chick v Dockray* [2011] TASFC 1.

13. However, there is some support for the proposition, *at least at trial court level and intermediate appellate level*, that evidence of the physical state of the land as at the date of grant, is admissible as regards construction issues; see e.g. *Dillon, Kevin & Anor v Gosford City Council* [2008] NSWLEC 186; *Hare v van Brugge* [2013] NSWCA 74.

SEEKING STATUTORY EASEMENTS IN NSW

14. Other than specific grants that comply with Sec 88 CA, easements can also have their genesis in:

-- *estoppel*: *Hilton Hotels (Australia) Pty Ltd v Sunrise Resources (Australia) Pty Ltd* [2000] NSWSC 46.

In that case, I was junior counsel for Hilton Hotel, in an action against its landlord to maintain its signage on the L 44 parapet on the basis of an equitable easement or an estoppel. The lease allowed signs saying "Hilton Hotel", but contrary to the lease, 4 signs saying merely "Hilton", had been erected at some large expense by the Hotel.

-- *long user/ prescription* (if the title is common law): In *Williams v STA*[2004] NSWCA 179 (application for special leave, dismissed), it was held that the notion of acquisition of easements by long user, is inconsistent with the Torrens system of *title by registration*.

-- *in common law grants in the chain of title: Turvey v Crotti* NSWSC [2018]. In that case, I was lead counsel for the Plaintiff. The plaintiff's land was at the end of an 1800's sub divisional road, which had been sub divided in the 1800's. Roads were shown on 1800's maps leading to each of the lots, and the relevant chains of title included grants of easements for right of way.

15. *Sec 88 (k) of the Conveyancing Act*

(1) The Court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement.

(2) Such an order may be made only if the Court is satisfied that:

(a) use of the land having the benefit of the easement will not be inconsistent with the public interest, and

(b) the owner of the land to be burdened by the easement and each other person having an estate or interest in that land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the *Real Property Act 1900* can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement, and

(c) all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful.

- (3) The Court is to specify in the order the nature and terms of the easement and such of the particulars referred to in section 88 (1) (a)-(d) as are appropriate and is to identify its site by reference to a plan that is, or is capable of being, registered or recorded under Division 3 of Part 23. The terms may limit the times at which the easement applies.
- (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.
- (5) The costs of the proceedings are payable by the applicant, subject to any order of the Court to the contrary.

All reasonable attempts

16. Section 88K(2)(c) requires the court to be satisfied that "*all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful*". The easement referred to is that which the applicant asks the court to impose.
17. The reasonableness of attempts includes the circumstances up to, and including, the date of the Court making the order: *Tony Stepanoski v Zhimin Chen* 16/12/11, per Bryson AJ (a case in which I was counsel for the plaintiff, who was awarded an easement for storm water).
18. In *Rainbowforce Pty Ltd v Skyton Holdings Pty Ltd* [2010] 171 LGERA 286, the principles were stated as follows:

“131 In order for an applicant for an order to make all reasonable attempts to obtain an easement:

- (a) the applicant for the order must make an initial attempt to obtain the easement by negotiation with the person affected and some monetary offer should be made.....
- (b) the applicant for the order should sufficiently inform the person affected of what is being sought and provide for the person affected an opportunity to consider his or her position and requirements in relation thereto.....
- (c) the applicant for the order is not required to continue to negotiate with a person affected by making more and more concessions until consensus is reached to the satisfaction of the person affected.....; and
- (d) the whole of the circumstances are to be considered from an objective point of view.....”

19. Cases such as *Stepanoski* involve competing alternatives, with the defendant advancing the argument that there is a preferable alternative. Naturally, these are issues to be explored at the conclave of experts; and the issue of what questions the experts should answer looms large in the proper management of such cases.

20. Two competing routes for storm water were in sharp focus in *Stepanoski* paras [35] ff where his Honour commented as follows (re-ordered for this lecture):

“The plaintiffs’ proposal is the shortest and simplest and involves the least engineering work and it is unlikely to involve significant long-term expense. It will function through gravity and will not require significant use of machinery or maintenance. It will have no adverse aesthetic impact. It will have markedly less impact on the utility of the defendant’s land than an easement through the land of No. 57A would have on that land.”

21. And turning to the defendant's proposal, his Honour said:

"...In my judgment this proposal is remarkably clumsy and presents no advantages in terms of land use or engineering work over the plaintiffs' proposal. The potential adverse effect on further development on No. 57A of the diagonal bisection is in my judgment prohibitive, and the potential adverse effect of an easement taken round the boundaries of No. 57A is significant. The proposal would be more expensive. It involves intervention in the rights of the owners of two parcels of land not of one. It depends on Council approvals which are uncertain. It has nothing to commend it from any point of view except the point of view of an owner of the defendant's land who very strongly wishes to resist an easement over her land. It is not beyond the feasible to run drainage through No 57 and No. 57A, but it would be a far less satisfactory solution than the plaintiffs' proposal."

Reasonably necessary to "use"

22. The cases above have all involved consideration of whether an easement was reasonably necessary for the *development* of land. However, an example of where an easement was deemed necessary for the *use* of land is *Phillip Edward Lonergan v Roy Lewis* [2011] NSWSC 1133.

Discretion

23. Even if all of Sec 88 K'S "boxes" are "ticked" by the plaintiff, the court still retains a discretion whether to make such an order. In *Khattar v Wiese* at 23,250 [60], the Court said that the Court's discretion:

"...is to be exercised having regard to the purpose of the section, which might be summarised as facilitating the reasonable development of land while ensuring that just compensation be paid for any erosion of private property rights... .."

COMPENSATION ISSUES

24. In *Wengarin Pty Ltd v Byron Shire Council* [1999] NSWSC 485; 9 BPR 16, 985 at [26], the Court set out the heads of compensation. These were adopted by Preston CJ in *Rainbowforce* at [111], as follows:

“*Ordinarily*, compensation will have three elements: (a) the diminished market value of the affected land; (b) associated costs that would be caused to the owner of the affected land; and (c) an assessment of compensation for insecurity and loss of amenities, such as loss of peace and quiet. Against these losses and disadvantages should be allowed, as an offset, compensating advantages (if any). See also *Owners Strata Plan 13635 v Ryan* [2006] NSWSC 221; 12 BPR 23,485 at [85].”

Compensation by reference to the Plaintiff’s gain

25. Justice Young’s fifth proposition in *Wengarin Pty Ltd v Byron Shire Council* (1999) 9 BPR 16,985, p 26, was as follows:

“*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.*”

26. The above exception was engaged in *Loneragan’s* case (ibid): see paras 52 ff. However, in *Tenacity Investments v Ku-Ring-Gai Council and Ors* [2008] NSWLEC 27 the Judge observed at para [112] “I have not been provided with any case where that approach identified in *Wengarin* has been applied.”

27. But see also *Antipas v Kutcher* [2006] NSWLEC 42 where the court observed that the fifth principle adopted by Young J in *Wengarin*, viz that it “...

seems to me to be a principle of last resort, where it is “*extremely difficult to assess the compensation*”.

EXTINGUISHMENT - *Extinguishing and modifying easements*

28. Section 89(1) of the *Conveyancing Act* confers power on the Court to modify or extinguish an easement,

-- by reason of *change in the user of any land* having the benefit of the easement, profit 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 prendre, restriction or *obligation ought to be deemed obsolete*,

or

where the continued existence thereof would *impede the reasonable user* of the land subject to the easement, profit prendre, restriction or obligation *without securing practical benefit* to the persons entitled to the etc.,

or

where a person may be considered to have abandoned an easement by conduct,

or

where the proposed modification or extinguishment *will not substantially injure* the persons entitled to the easement or profit prendre, or to the benefit of the

restriction or obligation.

29. 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].

30. In considering the exercise of power under s 89 of the Act, "the widest field of evidentiary material" is admissible: *Re Roseblade; Re Foenander* [1964-5] NSW 2044 Else Mitchell J (at p 2046); *Markos v OR Autor Pty Ltd* [2007] NSWSC 81 per Austin J at [90]).

Change in character of neighbourhood

31. Major public works associated with building a road can constitute a change in the character of the neighbourhood (and also ground a conclusion that the easement is obsolete). This is shown from an extract from *Rosedale Farm (NSW) Pty Limited* [2010] NSWSC 1321, paras [76] ff.

Abandonment/ impeding reasonable user

32. In *Odey v Barber* [2006] EWHC 3109 (Ch) at [103], Silber J summarised the principles to be applied when considering whether (at common law) a right of way has been abandoned. A number of principles are listed, but the ones I emphasise are that the test is *objective* and is not to be *lightly inferred*.

33. To establish that a covenant *impedes the reasonable user* of the servient land, it must be shown 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] NSWSC 743 per Brereton J at [14].

Obsolete

34. When it is contended an easement or covenant has fallen in obsolescence, the question devolves to whether the original purpose of the easement can no longer be served or whether the object of the easement is no longer capable of fulfilment *or serves no presently useful purpose*: Para [36] of *Mamfredas Investment Group Pty Limited (formerly known as MAM Marketing Pty Ltd) v PropertyIT and Consulting Pty Limited & Ors* [2013] NSWSC 929.

Mamfredas is one of the few cases where the court declared a restriction obsolete.

SUBSTANTIAL INTERFERENCE - What does “substantially injure” mean?

35. The interference with easement rights, where “substantial”, is actionable by way of a claim in nuisance. This cause of action supports relief by way of injunction (e.g. to compel a gate being taken down – see *Turvey v Crotti* NSWSC [2018]); or to compel positive action being taken, such as in the piggery cases where the nuisance is by way of smell.

36. The cause of action also supports a claim in damages for economic loss (an example would be where the olfactory assault from a piggery causes a country B & B to cease operations; or where a gate across a right of way prevents a factory from operating); and also for general damages, including aggravated damages for hurt and upset (see *Turvey v Crotti*).

37. The first significant Australian case in this area is *Powell v Langdon* [1944] NSWStRp 35; (1944) 45 SR (NSW) 136, where it was held that the narrowing

of a 20 feet wide ROW so that only 8 feet 2 inches remained passable, was considered a substantial interference. *Intangible interests* such as views, can also be protected by an action in nuisance if protected by an easement:

Hanny v Lewis [1998] NSWSC 385, per Young J.

EASEMENTS AND ACCESS ORDERS - where the neighbour won't give you access

38. The NSW Local Court allows for orders to be made that give access to neighbouring land without the need for an interest to be recorded on the land's title. Such orders are only temporary, however can be considered far easier to obtain due to their reduced invasiveness when compared with, for example, s 88K. These orders are available under the *Access to Neighbouring Lands Act 2000* (NSW). Two such orders are available under this Act. The first are '*Neighbouring Land Access Orders*', which allow for general access to the land. Second, '*Utility Service Orders*', are used in order to access a neighbouring block in order to repair services such as sewerage lines. Compensation may be given under this Act for "loss, damage or injury, including damage to personal property, financial loss and personal injury arising from the access": s 26(1).

39. This compensation may *not* be for loss of privacy or inconvenience, however (s 26(2)).

40. There is NO analogue of Sec 88 K (5), which when coupled with the narrower compensation provisions, makes the Local Court a fantastic alternative to Sec 88 K to those few who can manage their affairs to give them enough lead time to use the Local Court's procedure.

41. Sections 7 and 18 of the Act list the persons who may apply for an Access to Neighbouring Lands Order and the effect of such an order respectively:

Sec 7. Persons who may apply for a neighbouring land access order

- (1) A person who, for the purpose of carrying out work on land owned by the person, requires access to adjoining or adjacent land may apply to the Local Court for a neighbouring land access order.
- (2) A person who, for the purpose of carrying out work on land owned by another person, requires access to adjoining or adjacent land may apply to the Local Court for a neighbouring land access order with the consent of the person on whose behalf the work is to be carried out.
- (3) The Local Court may waive the requirement for consent under subsection (2) if it thinks it appropriate to do so in the circumstances.
- (4) A person may apply for a neighbouring land access order even if access to the land concerned, for the purposes for which access is required, may be obtained by way of an easement imposed by an order under section 88K of the *Conveyancing Act* 1919. However, a person may not apply for a neighbouring land access order if access to the land concerned, for the purposes for which access is required, may be obtained or granted under any other provision of an Act.

Sec 18. General effect of neighbouring land access order

- (1) A neighbouring land access order authorises, for the purpose of carrying out work on land, a person to have access to adjoining or adjacent land in accordance with the order.
- (2) Unless the Local Court varies or dispenses with any or all of the authorities and obligations set out in sections 20-22, a neighbouring land access

order also authorises the actions, and imposes the obligations, set out in those sections.

42. Similarly, sections 8 and 19 give the list the persons who may apply for a Utility Service Order and the effect of such an order:

Sec 8. Persons who may apply for a utility service access order

(1) A person who, either solely or jointly, is entitled to the use of a utility service or a proposed utility service but who is not the owner of the whole or part of the land on which it is located or proposed to be located and who requires access to that land for the purpose of carrying out work on or in connection with the utility service may apply to the Local Court for a utility service access order.

(2) A person may apply for a utility service access order even if:

(a) there is an easement or other right of access to the land concerned to carry out the work,

or

(b) access to the land concerned, for the purposes for which access is required, may be obtained by way of an easement imposed by an order under section 88K of the *Conveyancing Act 1919*.

However, a person may not apply for a utility access order if access to the land concerned, for the purposes for which access is required, may be obtained or granted under any other provision of an Act.

A Utility Service Access order authorises a person to have access to land to carry out work on or in connection with a utility service on the land concerned in accordance with the order (sec 19).

43. The test for the granting of an Access to Neighbouring Land Order is given in section 11(1) of the Act. The Court must be satisfied that reasonable efforts have been taken by applicant to obtain access, that the order is “required” and also that it is “appropriate” to make the order in the circumstances of the case.

44. Similarly, the test for a Utility Service Order is given in section 13(1).

45. To summarise: these sections say that the order sought must be ‘required’ for the given purpose and ‘appropriate’ in the given context. It should be noted that these tests are far less demanding than those required under s 88K of the *Conveyancing Act*.

The applicant must:

(a) restore the land concerned to the same condition it was in before the access, so far as is reasonably practicable,

(b) indemnify the owner of the land to which access is granted against damage to the land or personal property arising from the access.

Compare & contrast the Local Court procedure to the NSWSC procedure

46. SC: Summons plus affidavits; ability to seek expedition in the Expedition List.

LC: Statement of Claim; no procedure whereby expedition can be sought.

Much more planning required. Much less “space” for the developer to consider that neighbours will be co-operative just because the developer thinks it’s a jolly good idea.

47. In other words, if the matter has become urgent because the developer has not planned properly and has failed to get consent from neighbours in a timely fashion (which is hardly uncommon), then the Local Court is not really going to be of much use.
48. Also one needs to consider the length of court lists, in weighing up the relative economics of the procedures. Local Court lists can be much longer, and thus the client needs to pay for time spent waiting for the matter to be reached.
49. The Local Court is of much greater utility when one's lead-time is longer or perhaps when the scale of what is sought is relatively minor e.g. the need to access the neighbour's property to clear a pipe affecting your property, and they are just being bloody minded.

CASE REPORT - STOLYAR V TOWERS [2018] NSWCA 6

50. As noted in paras [41] ff of *Stolyar v Towers* [2018] NSWCA 6, a right to park can be the subject of a valid easement. The authorities were reviewed by Buss JA in *The Owners of East Fremantle Shopping Centre West Strata Plan 8618 v Action Supermarkets Pty Ltd* [2008] WASCA 180 at [57] – [66].
51. Buss JA also referred to the first instance decision of Bryson J in *Clos Farming Estates Pty Ltd (Receivers and Managers Appointed) v Easton* [2001] NSWSC 525; (2001) 10 BPR 18,845, in which his Honour made the following observations in relation to rights to park motor vehicles (at [39]):
- “Rights to park motor vehicles have been upheld in *London & Blenheim Estates Ltd v Ladbrooke Retail Parks Ltd* [1992] 1 WLR 1278 and held invalid in *Copeland v Greenhalf* [1952] Ch 488. Parking vehicles and storing goods are probably older activities than creating easements. In my view these cases were well explained by Judge Paul Baker QC in the Chancery Division in *London & Blenheim Estates*. (Judge Baker's views were not disapproved

when his decision was affirmed on other grounds [1994] 1 WLR 31). Judge Baker dealt with the right to use a car park at 1284–1288 and in doing so reviewed case law on storage of goods and car parking.

Of *Copeland v Greenhalf* his Honour said at 1286: *'The matter must be one of degree. A small coal shed in a large property is one thing. The exclusive use of a large part of the alleged servient tenement is another.'*

At 1288 his Honour said:

"That leaves the main point under this head, whether the right to park cars can exist at all as an easement ... The essential question is one of degree. If the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of his land, whether for parking or anything else, it could not be an easement though it might be some larger or different grant. The rights sought in the present case do not appear to approach anywhere near that degree of invasion of the servient land. If that is so ... I would regard the right claimed as a valid easement"

52. Stolyar applied the above settled principles to a parking dispute. Mrs Stolyar owned the servient land – a driveway, which allowed parking and associated rights to the neighbours, the Towers, including the rights to have a garage or carport.

53. There was an out of use and ill maintained turn table on the land, that if maintained, would have been able to be used by some vehicles, although whether that included Mr Stolyar's Mercedes 500, was not established.

54. Mr Stolyar's complaint included that he could not perform a 3 pt turn on the land.

55. The right of vehicle parking and garaging in its nature interfered with Mrs Stolyar's possession of the easement strip. However, it was held that the

rights granted did *not* amount to joint ownership of the easement strip, nor did they substantially deprive Mrs Stolyar of her proprietorship or possession of the area actually affected by the easement.

56. The NSWCA emphasised that the Stolyar's bore the onus of proof, but the evidence did not establish their inability to turn motor vehicles around in the area in front of the double garage or along the driveway by making more than three turns.

**Feedback welcomed to:
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