



CAN YOUR NEIGHBOUR REFUSE TO ACCEPT YOUR STORM WATER DRAINAGE?

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In short the answer is yes, but the court may come to your aid.

Consider this scenario. You own land (Lot B) which has properties on either side. Lets call them Lots A and C. Since the early 1960's Lot A has drained its stormwater into a pipe which crosses your land (Lot B), collecting your stormwater and then crosses your neighbour's land (Lot C), collecting its stormwater and finally runs into an open stormwater drain owned by council. There are no easements over Lots B and C entitling Lots A and B to drain water over them. The owner of Lot C decides he no longer wishes the pipe in his property to carry your stormwater.

This is what actually happened to a client who was installing a stormwater retention tank as part of the redevelopment of his property.

Generally property owners are under no legal obligation, under statute or otherwise, to burden their land with an easement for inter-allotment stormwater drainage unless they have either consented to the easement or are required to do so by the Supreme Court pursuant to an order under section 88K of the *Conveyancing Act 1919(NSW)*.

Where no valid easement has been created the owner of the burdened property (in our example above Lot B and Lot C were burdened properties) may refuse access to repair, and additionally may apply to the Courts to have the pipes removed (*Industrial Non Wovens Pty Limited v Wieder, Supreme Court of NSW Eq Div No 4968 of 1987 unreported*). The mere fact that a landowner's service pipes, stormwater and/or sewerage, pass through a neighbouring property does not automatically give rise to an easement, and fails as a claim of an easement for necessity, with such matters being deemed a matter of convenience as opposed to that of necessity (*Pryce and Irving v McGuinness [1966] Qd R 591*).

Statutory relief may be available by making an application pursuant to section 88K for the court to impose a statutory easement on the unwilling landowner if the court is satisfied that such an order is "reasonably necessary for the effective use or development of other land that will have the benefit of the easement". In *Beekman v Gray (2002) NSW ConvR 56-016* Windeyer J clearly stated the four requirements of a successful section 88K application, namely:

1. that the easement sought is "reasonably necessary" for the effective use or development of the plaintiff's land;
2. that the use of the dominant tenement in accordance with the easement will not be inconsistent with public interest;
3. that the grant of the easement can be adequately compensated for; and
4. all reasonable attempts have been made by the plaintiff to obtain the easement but those attempts have been unsuccessful.

The term “reasonably necessary” in this context, has been interpreted as not being “absolutely necessary” (*Tregoyd Gardens v Jervis (1997) 8 BPR 15,845*) and was discussed in length in *Woodland v Manly Municipal Council (2003) 11 BPR 20,903*. In this case a section 88K easement was sought, which proposed to lay a stormwater pipe through the neighbouring property which would collect and disburse stormwater through the neighbouring property to the adjoining street front via gravitational force. The defendants to this action were in the process of developing a child care centre on the neighbouring property and opposed the application on the grounds that a pump out system was a viable alternative. The Court held in favour of the defendant in refusing the application for an easement on the grounds that there existed a “degree of real difficulty which would be caused by the easement and pipe traversing the defendant’s land” together with a viable alternative.

In our scenario above, the stormwater pipe traversing through Lot B has been in place and functioning since at least the early 1960’s, a period of over 40 years. In the case of *King v Carr-Gregg [2002] NSWSC 379* a stormwater pipe had been laid and functioning for 25 years with no valid easement registered. A section 88K application was brought seeking the granting of an easement to pipe stormwater to the stormwater pit bordering the neighbouring property. This application was opposed by the owner of the land burdened (Lot C in our scenario) who cited the viable alternative of having a pump out system installed.

The court held for the plaintiff, granting the section 88K easement stating “In the result I am completely unpersuaded that a “pump out system” provides a viable alternative to the use of the existing pipe, such that the sought for easement should be found to be not “reasonably necessary”, or not “substantially preferable”. The court went on further to state that the requirement of “reasonably necessary” was adequately demonstrated when consideration was given to the fact that the pipe in question had been in place for 25 years and had efficiently drained stormwater from three properties “without significant malfunction or the occasioning of identifiable harm to the [burdened] property”.

To the question of compensation, the court ordered compensation of \$30,000 being \$23,000 for “blot on title”, \$3,000 for any future disturbance or work and \$4,000 covering the “hope” of possible development over the easement area. Further, the plaintiff was ordered to pay the defendants costs as is stipulated under section 88K(5).

In *Khattar v Wiese (2005) NSWSC 1014* the court refused to grant an easement pursuant to S88K Conveyancing Act where council required the easement as a condition of development consent, but the proposed easement did not satisfy council’s conditions.

Some councils issue specifications for on-site stormwater management and these should be checked to see if the council prefers that stormwater drainage should follow the natural flow of the land and be discharged by a gravity system rather than use pump out systems. Where necessary, council may approve drainage against gravity, but not readily where there exists an alternative. In the case discussed above, the court gave weight to the preference of council as against a pump out system.

So when council approves your redevelopment and requires the installation of a stormwater detention tank, give some thought to what rights you have (if any) to drain or to continue to drain water across your neighbour’s land and what the cost will be and if approaching the Court, ensure that any proposed easement strictly complies with the conditions of consent..

For further discussion regarding easements, see the article by **Ben Smits** entitled “**Developing with Drainage - Just how Easy are Drainage Easements?**”

This broad summary has been provided for your general information. Clearly there are many more issues that may be relevant to your individual circumstances. Should you require any particular advice please do not hesitate to contact any member of the Property Team at The Argyle Partnership, Lawyers on (02) 8263 6600