

Easement for Support – Not Unlimited in Height

Easements

In October 2025, the Supreme Court handed down a decision regarding an easement for support of a garage on the defendant's land (Easement), *Thomas v Pearson* [2025] NSWSC1127.

The easement was created in 1980s for a garage structure constructed on the defendant's property to allow the plaintiff to park motor vehicles. Two other easements, being a carriage way and footway were created along with the Easement. The term of the Easement is:

“to permit and allow at all times the Transferees to maintain on the boundaries of and within that part of the Servient Tenement marked ‘Y’ on the plan annexed hereto a structure suitable for the garaging of motor vehicles”.

After the grant, the owner of the burdened land installed decking and a fence on the above the garage.

In 2016, the current defendant bought the burdened land. In 2023, the defendant lodged a DA with the local Council to install a pavilion above the garage and replace the existing decking and fence, and other works. The plaintiff objected to the DA, but Council nevertheless granted the DA.

With several exchange of letters being fruitless, the plaintiff commenced proceedings in the Supreme Court of NSW for orders to declare that the works constituted substantial interference with the plaintiff's enjoyment of the Easement, and injunction to stop the works. The defendant also sought to restrain the plaintiff from carrying out any future works above the garage and remove the existing decking and fencing.

The Court held that in deciding whether there is substantial interference, all circumstances must be considered, and is ultimately a common sense judgement on each particular case. It involves the

determination of the intention of the parties at the time of grant, it is also permissible to take into account the physical characteristics of both parties and the surrounding land.

The Court was in the view that the term of the Easement only grants a negative right to the defendant as to not have the structure removed. It cannot be interpreted as granting any greater or positive right on the plaintiff. The argument from the plaintiff that the Easement was granted with unlimited in height cannot be maintained. At the time of the grant, from a reasonable person's perspective, the intention was only to have the plaintiff park motor vehicles on the garage. Therefore, the Court dismissed the proceedings.

The key takeaway is that all circumstances should be considered in determining whether there is substantial interference with the enjoyment of an easement. The Court will look at the positive and negative rights according to the easement terms at the time of the grant from a reasonable person's perspective.

We have considerable experience with these issues and could assist you with any practical challenges you may be experiencing or expect. Please contact us on 02 9929 0226 or enquiries@bannermans.com.au.

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