TREWEEKE v. 36 WOLSELEY ROAD PTY LTD[1]

Easements—Right of way—Abandonment—Non-user—Acquiescence in construction of obstructions—Availability of alternative route by trespass—Conveyancing Act 1919 (N.S.W.), section 89.

The High Court, by majority,[2] declined to infer from the non-user of a right of way by the occupiers of the dominant tenement, and from the acquiescence of those occupiers in various acts of obstruction of the right of way, that the right of way had been abandoned.

The case concerned a block of land with a waterfront to Double Bay, Sydney, which was in 1927 divided into two lots, know as No. 34 and No. 36 Wolseley Road. No. 34 had the waterfrontage. The transfer to the occupier of No. 36 contained a grant of a right of way to him and to any subsequent occupiers to pass along a strip of land three feet wide inside, and adjacent to, the boundary fence of No. 34, so that the occupier might be enabled to reach Double Bay. This easement was noted on the certificate of title of each lot. Mrs Treweeke, the present occupier of No. 34, became registered in 1928, and the respondent Company (the shareholders in which are the owners of the home units built on the lot) in 1959.

The right of way has never been used in its entirety. It had always been impassable because of two vertical rock faces, one four feet high and the other seven. In 1928, a four-foot high, stone retaining wall was built, which appears to mask another rock face. Since 1928, the right of way has been blocked by an impenetrable bamboo plantation. In 1933, a chain wire fence was erected across the top end of the way, but a couple of feet inside the respondent's land; although it appears likely that it was intended to be put on the boundary between the two lots. The husband of the respondent's predecessor in title had fallen down the slope at the top end of the way, and the evidence suggests that the fence was put up to prevent the re-occurrence of such a mishap. This fence was repaired in 1967, and the cost of both the original construction and the repair was shared by the occupiers for the time being of each lot. Then, in 1956, Mrs Treweeke had a swimming pool installed which cut across the right of way at the bottom end near the waterfront. In 1958, she erected an iron fence across the way.

Evidence was given that the occupiers of No. 36 Wolseley Road had used a path through No. 34 adjacent to the right of way (some of which coincided with the right of way) and from there had gone through No. 38 Wolseley Road to get to the waterfront. However, in 1967, the owner of No. 38 constructed a fence between his property and No. 34, making this route unavailable. Also in 1967, one of the occupiers of No. 36 obtained a survey of the right of way, which disclosed for the first time to the other occupiers the precise location of the easement. In 1968, the respondent Company lodged a complaint with Mrs Treweeke about the obstruction of the way by the swimming pool. No other complaint had been lodged by any occupier of No. 36 about any of the obstructions.

In 1971, Mrs Treweeke applied to the Supreme Court of New South Wales in its Equitable Jurisdiction for an order under section 89 of the Conveyanc-

[1] (1973) 47 A.L.J.R. 394. High Court of Australia; McTiernan, Walsh and Mason JJ.

[2] McTiernan and Mason JJ., Walsh J. dissenting.

ing Act 1919 (N.S.W.) that: (i) No. 34 was not affected by the easement in question; or alternatively, (ii) the easement was not enforceable by any person; or alternatively, (iii) the easement was extinguished. No provision similar to section 89 of the Conveyancing Act is in force in Victoria. The merits or otherwise of the introduction of such a provision are discussed below.

Section 89(3) of the Conveyancing Act 1919 (N.S.W.), under which is brought the application for the first two orders sought, provides that the Supreme Court may declare whether or not any land is affected by an easement, the nature and extent of such easement, and by whom (if anyone) it is enforceable. The section states no grounds on which the order may be made: the Court's jurisdiction under section 89(3) is discretionary.[3]

On the other hand, section 89(1), under which is brought the application for the third order sought, does state grounds on which the Court may exercise the power which this sub-section gives it to extinguish an easement on the application of a person who has an interest in the land subject to the easement. Sub-section (1)(b), upon which the appellant relied, provides that the Court may make such an order upon being satisfied that the persons for the time being entitled to the easement may reasonably be considered, by their conduct, to have abandoned the easement.

Walsh and Mason JJ. raised, but did not decide, the question whether, if the grounds mentioned in sub-section (1)(b) are made out, the Court is obliged to make the order sought, or whether the Court retains a discretion in the matter. There is some authority for the former view.[4] But, as Mason J. points out,[5] the Court of Appeal has adopted the latter view in relation to the similar provisions of section 84(1) of the Law of Property Act 1925 (Eng.). It is submitted that the latter view is preferable, because it allows the Court to take into account the interest of a purchaser of the dominant tenement who relied on the register.[6] To find that an easement is extinguished where the conduct of a purchaser's predecessors in title has been such as to require the drawing of an inference of abandonment by them, notwithstanding that the easement was still noted on the register at the time of purchase, would be to go against the general concept of certainty of registration, a concept which has been upheld in such cases as *Frazer v. Walker*[7] and *Breskvar v. Wall*,[8] and a concept which, it is respectfully suggested, should not lightly be ignored. But in the opinion of Walsh J.,[9] even if the Court were to have a discretion to refuse to grant an order under section 89(1), the mere fact that a purchaser of the dominant tenement relied on the register would not be sufficient reason for exercising that discretion.

All three Justices approved the case of *Ward v. Ward*[10] in so far as it stands for the propositions that non-user of a right of way is not by itself

[3] (1973) 47 A.L.J.R. 394, 405.
[4] *Re Rose Bay Bowling and Recreation Club Ltd* (1935) 52 W.N. (N.S.W.) 77.
[5] (1973) 47 A.L.J.R. 394, 405. His Honour cites *Driscoll v. Church Commissioners for England* [1957] 1 Q.B. 330; *In Re Ghey and Galton's Application* [1957] 2 Q.B. 650, 659-60, *per* Lord Evershed M.R.
[6] Section 89(8) of the Conveyancing Act 1919 (N.S.W.) provides that s. 89 will apply to land under the Real Property Act.
[7] [1967] 1 A.C. 569.
[8] (1972) 46 A.L.J.R. 68.
[9] (1973) 47 A.L.J.R. 394, 399.
[10] (1852) 7 Exch. 838; 155 E.R. 1189.

sufficient to raise a presumption of abandonment, and that non-user of a right of way may be satisfactorily explained by showing that another convenient way was available. But Walsh J. argued[11] that, while such an explanation may be sufficient to prevent a presumption of abandonment, it is a very different thing for an occupier of the dominant tenement to seek to justify his acquiescence in acts which go to make any future use of the easement more and more difficult by suggesting that his intention was merely to give up the use of the easement for a temporary period. In other words, acquiescence in the obstruction of a right of way is very different from mere non-user of the way.

The particular acts of acquiescence to which Walsh J. refers are the construction and repair of the chain wire fence at the top end of the way.[12] But McTiernan J. did not see these acts as leading to a presumption of abandonment.[13] The fence was inexpensive and moveable, and was built on the dominant tenement itself; a gate could easily have been inserted in it to allow passage more freely; and there was evidence that after 1933 (the date of construction) there was some user of the first part of the right of way, so the fence clearly did not block off all passage. Mason J. likewise felt that any acts of acquiescence in the obstruction of the easement were insufficient to warrant a presumption of abandonment. The failure on the part of the various occupiers of No. 36 to clear the path of the right of way of its natural obstructions could not reasonably be put down to an intention to abandon the right of way, but rather to a combination of the great cost of such a clearance and the availability of an alternative route.[14] The fact that the alternative route, through No. 38, was not available as of right does not alter this proposition.[15] As far as the artificial obstructions are concerned, they all, except the swimming pool, involved minimal expense and could be removed without great difficulty. Walsh J. relied on the installation of the swimming pool in 1956, and the subsequent lack of complaint by the occupiers of No. 36, as being the culmination of a series of events which, when considered not individually but in its entirety, required a presumption of abandonment.[16] But a complaint was lodged when the survey of the right of way showed that the swimming pool cut right across it. Mason J. sums up the position well:[17]

> the inference that should be drawn is that the persons having the benefit of the easement preferred to resort to the alternative means of access to the waterfront so long as it remained available and that, during that time, they had no objection to the use by the appellant of the site of the easement for her own purposes.

At the least, such an inference is as consistent an explanation of the non-user and other acts on the part of the occupiers of No. 36 as is the inference of an intention to abandon the right of way altogether.[18] As McTiernan J. notes:[19] '[i]t is not reasonable to attribute non-user to the renunciation of such a pleasant amenity as a path to the beach at Double Bay'.

[11] (1973) 47 A.L.J.R. 394, 400.
[12] *Ibid.*
[13] *Ibid.* 397.
[14] *Ibid.* 405.
[15] *Ibid.*
[16] *Ibid.* 401.
[17] *Ibid.* 405-6.
[18] *Ibid.* 406.
[19] *Ibid.* 398.

It was mentioned above that there is in force in Victoria no similar provision to section 89 of the Conveyancing Act 1919 (N.S.W.). Whereas section 89 applies to both easements and restrictive covenants, section 84 of the Property Law Act 1958 applies only to restrictive covenants, although the language of the two sections is almost identical. Should section 84 of the Property Law Act be widened so as to apply also to easements?

The present Victorian position in regard to land under the general law is relatively simple. An easement may be extinguished by abandonment if there is a period of non-user coupled with other circumstances, but whether or not an inference of abandonment is warranted is in each case a question of fact: see *Ward v. Ward,*[20] *James v. Stevenson,*[21] *Swan v. Sinclair,*[22] *Crossley & Sons Ltd v. Lightowler.*[23]

In relation to land under the Transfer of Land Act 1958, however, the position is more complex. Mason J. expresses some doubt that the doctrine of abandonment applies at all to land under the Torrens System.[24] In particular, His Honour's judgment would appear to imply that, where the easement is noted on each certificate of title, a purchaser of the dominant tenement who relies on the register will be protected if it is at all possible; and as has been argued above, it is submitted, with respect, that such a purchaser should be protected. Walsh J. relies on the provisions of section 89(8) of the Conveyancing Act 1919 (N.S.W.) for his proposition that an easement which is noted on the certificates of title of both the dominant and servient tenements is liable to be extinguished. This sub-section, he says, contemplates an order for such extinguishment being made.[25] It might, therefore, be reasonable to assume that where no provision such as section 89(8) is in force, His Honour's proposition would not apply. But, in Victoria, section 73 of the Transfer of Land Act provides for the Registrar to remove from the Register-Book any abandoned or extinguished easement, so the proposition probably would apply here, since the section implies that it is possible for such easements to be abandoned or extinguished. However, unlike section 89(1) of the Conveyancing Act 1919 (N.S.W.) section 73 of the Transfer of Land Act does not specify any grounds on which the easement should be extinguished, so the argument cannot arise that the Court has no discretion in the matter. Therefore, there is nothing to prevent a purchaser who has relied on the register from being protected, if the Court decides that he should be protected.

What would be the difference if provisions similar to section 89 of the Conveyancing Act 1919 (N.S.W.) were introduced in Victoria? The Court would be specifically empowered to declare that an easement had been extinguished. Section 73 of the Transfer of Land Act does not do this, but merely empowers the Registrar to make alterations to the Register-Book if any easement noted therein is extinguished. It would be an advantage for the Court to have this discretionary power, but some people would doubt that it would ever be used. They would say that it would be hard to imagine greater acts of acquiescence in the obstruction of an easement than were the case here. But it is suggested that if no alternative route had been available in the present case to the occupiers of No. 36, and if the same acts of

[20] (1852) 7 Exch. 838; 155 E.R. 1189.
[21] [1893] A.C. 162.
[22] [1924] 1 Ch. 254; affd [1925] A.C. 227.
[23] (1867) L.R. 2 Ch. App. 478.
[24] (1973) 47 A.L.J.R. 394, 405. Accord *Riley v. Penttila* [1974] V.R. 547, 574 *per* Gillard J.
[25] *Ibid.* 398.

acquiescence had still occurred, the Court would then have had little option but to infer an intention to abandon the easement. One would hope that the Court would then have gone on to consider the surrounding circumstances (such as whether a purchaser of the dominant tenement had relied on the register) when deciding whether to grant an order that the easement was extinguished.

But the danger of a provision in terms of section 89(1) of the Conveyancing Act 1919 (N.S.W.) is that the Court, when called upon to decide the matter, may well conclude that it does not have a discretion to refuse to grant an order that the easement is extinguished if the applicant has established the circumstances mentioned in the sub-section. Such a conclusion, as Mason J. pointed out,[26] would prevent the Court from giving effect to the concept of certainty of registration, by preventing a purchaser who had relied on the register from being protected. For the reasons given above, this would be an undesirable result. Is the risk of such a conclusion being reached one which is worth taking?

J. P. FIELD

[26] *Ibid.* 405.