17 May 1971

PROPERTY LAW & EQUITY REFORM COMMITTEE

REDUNDANT EASEMENTS

WORKING PAPER NUMBER 1

1. Subject matter

The committee has been asked to consider whether redundant easements affecting land registered under the Land Transfer Act 1952 should be removed from the Register and, if so, how this should be done.

By the term "redundant easements" in this paper is meant those easements which are of no further practical use either now or in the future.

2. Existing law in New Zealand

Easements may be extinguished in one of the following ways:

(a) By merger;
(b) By release;
(c) By satisfying the Registrar under s.70 of the Land Transfer Act 1952 that the easement has been determined or extinguished; or
(d) By order of the Supreme Court under s.127 of the Property Law Act 1952.

(a) Merger

When the dominant and servient tenements come into the same ownership, there is unity of seisin and (usually) the easement is merged and extinguished. There are, however, circumstances in which unity of seisin will merely suspend the easement and not extinguish it.

(b) Release

An easement may be released by the dominant owner by means of a registered memorandum of transfer.

(c) Removal of easements by the District Land Registrar

Under s.70 of the Land Transfer Act 1952, an easement may be removed from the Land Transfer Register upon proof to the satisfaction of the Registrar that it has been determined or extinguished. Except where the determination or extinguishment was by effluxion of time, the Registrar must, before making the entry in the Register, either give notice of his intention so to do

to all persons appearing to him to be entitled to any interest under the easement, or give at least one month's notice in the Gazette and in some newspaper in the district where the land over which the easement was granted is situated. The estate or interest of the registered proprietor of the easement, and of every person claiming through or under him, absolutely ceases and determines upon the making of the entry in the Register, but without releasing any person from any liability to which he may be subject at the time of the entry.

(d) Modification or extinguishment of easements by the Supreme Court

Section 127(1) of the Property Law Act 1952 provides:

"1. Where land is subject to an easement or to a restriction arising under covenant or otherwise as to the user thereof, the Court may from time to time, on the application of any person interested in the land, by order modify or wholly or partially extinguish the easement or restriction upon being satisfied -

(a) that by reason of any change in the user of any land to which the easement or the benefit of the restriction is annexed, or in the character of the neighbourhood or other circumstances of the case which the Court may deem material, the easement or restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land subject to the easement or restriction without securing practical benefit to the persons entitled to the easement or to the benefit of the restriction, or would, unless modified, so impede any such user; or

(b) that the persons of full age and capacity for the time being or from time to time entitled to the easement or to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the land to which the easement or the benefit of the restriction is annexed, have agreed to the easement or restriction being modified or wholly or partially extinguished, or by their acts or omissions may reasonably be considered to have abandoned the easement wholly or in part; or

(c) that the proposed modification or extinguishment will not substantially injure the persons entitled to the benefit of the restriction."

The Court may also, on the application of any person interested, make an order declaring whether or not in any particular case any land is affected by an easement or restriction and the nature and extent thereof, and whether the same is enforceable, and, if so, by whom: section 127(3).

3. Law of Victoria

Section 73 of the Transfer of Land Act 1954 (Victoria) provides as follows:

> "73(1) A registered proprietor may apply to the Registrar for the removal from the Register Book of any easement in whole or in part where it has been abandoned or extinguished.
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> (2) The Registrar shall give to every person who appears by the Register Book to have an estate or interest in the land to which the easement is appurtenant notice of the application and if he is of the opinion that any such easement has been abandoned or extinguished in whole or in part shall make appropriate entries and amendments in the Register Book.
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> (3) Where it is proved to the satisfaction of the Registrar that any such easement has not been used or enjoyed for a period of not less than 30 years, such proof shall constitute sufficient evidence that such easement has been abandoned.
>
> (4) Any person claiming an estate or interest in the land to which the easement is appurtenant may before the removal thereof lodge a caveat with the Registrar forbidding the removal, which caveat shall be in the same form and subject to the same provisions and have the same effect with respect to the application for removal as a caveat against bringing land under the operation of this Act."

4. Defects of existing law in New Zealand

The basic problem as the law stands at present is that it is difficult to get redundant easements removed from the Register. As a result the Register becomes increasingly cluttered, and, at the same time, the complexity of conveyancing is increased in that each easement has to be noted in every instrument. These difficulties are, of course, considerably magnified in the case of subdivisions, whether of the dominant or the servient tenement.

(a) Substantive difficulties

This problem has to be considered against the background of the multiplicity of easements recognised by law and the mutuality which may exist in some of these types. While rights of way and drainage easements are probably the commonest types, there may be registered easements protecting water rights, contractual rights to light, for support of land or buildings, for party walls, for airstrips for top-dressing aircraft, for jus spatiandi (the right of wandering around), for telephone and other wires and cables, and other miscellaneous types. Some of these may exist above or below the surface of the land.

While a dominant and a servient tenement are generally both present and each is distinct, many forms of rights of way involve cross and mutual easements. Moreover, a tenement may be dominant in relation to land on a higher level but also servient in relation

to lower land. An example would be where there is a spring in the hills which is piped through intervening land to a beach settlement with each landowner entitled to draw water, and obliged to permit the piped water to pass on through his land. Also some easements, e.g. rights of way, or water and sluicing rights are incidental only to the grant of another right.

If it were thought that the problem of redundancy could be regarded as limited to certain types of easement where redundancy most commonly occurs (e.g. rights of way and surface water drainage easements) the question of definition arises, and some vaguely worded easements will be difficult to classify. For this reason it seems preferable to consider redundancy with reference to all types of easement.

(b) Practical difficulties

The difficulty of removing redundant easements from the Register becomes apparent on a closer examination of the means of extinguishing an easement. As far as release by way of memorandum of transfer is concerned, this is limited in its practical application and can only be used where the parties are ascertainable, few in number, and in agreement.

The statutory procedure under s.70 of the Land Transfer Act 1952 can be used where an agreement cannot be readily obtained, but this procedure is not entirely satisfactory, particularly where a large number of tenements are involved, as in the case of a subdivision. Further, s.70 does not really cover easements which are redundant in the way defined in paragraph 1; it is confined simply to cases where an easement has been determined or extinguished. Finally, even if s.70 did cover redundant easements in the wider sense, it is doubtful whether the prodedure to be followed is equitable. For example, we regard the machinery for advertising the intention to remove an easement as inadequate as far as notice is concerned. In such a matter as this, adequate personal notice, served on the person who will lose his rights, is essential. There are many cases where people own land considerable distances from where they normally reside, and may not read the newspaper circulating in the district in which the land is situated. Moreover, advertising is a bad second best at any time.

Finally, the procedure of having easements extinguished by the Supreme Court is unsatisfactory in that it is expensive and time-consuming.

5. Remedies proposed by the Committee

(1) Existing redundant easements

(a) General

We feel that a simplified method of removing easements from the Register is desirable, and that whatever new method is adopted it should cover not only those easements which have been extinguished or determined; but also those which are redundant as defined in paragraph 1.

(b) Notice

We consider it essential that notice should be served on all those who may be affected by the removal of an easement from the Register. An easement creates a legal interest in land and a person in whom it is vested should not be deprived of it without his sanction. Any legislation so depriving him would be confiscatory and would not be justified.

Form of Notice

We recommend that the notice should state that it is the Registrar's intention to remove the easement concerned from the Register within a given period (say, one month) and that if the addressee wishes to object, he must give appropriate notice to the Registrar within that period. If no notices of objection are received within the period allowed, the Registrar should forthwith remove the easement from the Register. If, however, a notice of objection is received, each objector should be joined as defendant in a court action by the person seeking to remove the easement. The virtue of the proposed scheme, as opposed to the present procedure under s.127 of the Property Law Act 1952, would be that only such persons who give notice of objection will have to be joined, whereas under the present procedure all those affected must be made a party.

(c) Applicants for removal of easements

Although there is a widely held view that the benefit of an easement running with the dominant tenement brings only advantage to the owner of that tenement, in fact in many cases rights attaching to a dominant easement also bring with them burdensome contractual obligations of maintenance. The servient tenement, on the other hand, may receive the benefit of a line of water pipes, or the use of a dam, or a practical roadway provided or maintained by the person entitled to the benefit of the easement.

For this reason, we consider that the right to apply for the removal of a redundant easement should extend not only to the servient owner, but to the dominant owner as well.

(d) Persons to whom notice should be given

Notice should, in our opinion, be given to all those affected or likely to be affected, by the removal of the easement from the Register.

In the case of subdivisions, we considered whether the District Land Registrar should be required to serve notice on different persons according to whether it was the dominant or servient tenement which was to be subdivided. As far as servient tenements are concerned, we think that in nearly all conceivable cases, only sections adjacent to the easement would be affected. In the case of dominant tenements, on the other hand, sections might be affected, even though not adjacent to the easement. For example, in the case of a drainage easement, a section forming part of the subdivision might have access to a drain, even though not adjacent to it.

In view of this distinction between dominant and servient tenements, it appeared that all owners of sections in a subdivided dominant tenement would have to be served with a notice whereas, in the case of a servient tenement, only those owners of sections adjacent to the easement would have to be served.

On consideration, however, we feel that those persons to be served should be the same in both cases, even if only to avoid confusion. We, therefore, recommend that whether it is the dominant or the servient owner who is intending to subdivide his property, notice should be given to all persons affected by the subdivision, whether their sections are adjacent to the easement or not.

(e) The Land Transfer Office

We appreciate that if our proposals are adopted, a considerable burden of work will be thrown on to District Land Registrars. We can see no way to avoid this because even if the applicant supplies a list of those considered likely to be affected by the removal of the easement, this list will still require to be checked by the District Land Registrar. On the other hand, one can assume that the Register will gradually be cleared and that the work load will therefore gradually decrease also.

We would recommend that regulations, covering the question of Registrars' charges, be amended to provide for a special charge for the removal of easements. This would have to be based in any given case on the number of persons on whom notice is to be served.

(2) Future redundant easements

Under this heading we are concerned with future subdivisions. In such a case, an applicant wishing to subdivide, should be encouraged to apply for the removal of redundant easements before proceeding with the subdivision. We believe that our proposals, if adopted, will provide such encouragement, in that there would be fewer notices to serve (and therefore less fees to pay) before subdivision than afterwards.

SUBMISSIONS

The views expressed in this paper are tentative only, and the Committee would welcome any criticisms and alternative suggestions. It requests that comments be sent to the following address:

The Secretary,
Property Law & Equity Reform Committee,
Private Bag 1,
Government Buildings,
Wellington,

on or before the 1st day of September 1971.