

SUPREME COURT OF QUEENSLAND

CITATION: *Re Trask Development Corporation (No 3) Pty Ltd* [2003]
QSC 115

PARTIES: **TRASK DEVELOPMENT CORPORATION (No 3) Pty Ltd (ACN 098 744 533)**
(applicant)

FILE NO/S: SC 2671 of 2003

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 9 May 2003

DELIVERED AT: Brisbane

HEARING DATE: 22, 30 April 2003

JUDGE: McMurdo J

ORDER: **Upon the undertaking by the applicant that it will pay to any person who within twelve months of the making of this order, satisfies the court that such person at the date of this order has the necessary capacity to agree to accept the imposition of the obligation of user imposed by this order, such amount by way of compensation or consideration for the imposition of the obligation (if an amount is not agreed) as appears to the court to be just, it is ordered that:**

1. There be imposed upon the land described as Lot 84 on Registered Plan 30247, Parish of Redcliffe, County of Stanley in the State of Queensland an obligation of user in the form of an easement in favour of the land described as Lots 70 to 76 on Registered Plan 30247, Parish of Redcliffe, County of Stanley, and that such easement will include:

(a) a right of way over Lot 84 which shall be exercisable by any person entitled to be upon:

- (i) any of Lots 70 to 76; or**
- (ii) Houghton Street, Petrie, for the purpose of providing or maintaining access, including vehicular access, to any of Lots 70 to 76 from Lot 84;**

(b) a right to any owner of any of Lots 70 to 76, and that owner's servants, agents and contractors, to construct and maintain such works upon Lot 84 as

are reasonably necessary to permit Lot 84 to be used as a right of way in terms of para (a) and provided that such works are consistent with any lawful requirement of the relevant local authority.

2. It is declared that such right of user is exercisable in perpetuity.

3. The applicant prepare a registrable instrument for the easement the subject of this order, in terms satisfactory to the Registrar of the Court, who shall be authorised to execute it, and the applicant shall cause such instrument to be registered.

4. There be liberty to apply.

5. Application made under s 114 of the *Land Title Act* be dismissed.

CATCHWORDS: REAL PROPERTY – EASMENTS - where application for orders pursuant to section 180 *Property Law Act* 1974 (Qld) – whether court satisfied as to matters set out in sub section 180(3) Act –

REAL PROPERTY – EASMENTS - where persons entitled to compensation cannot be found – where applicant prepared to make undertaking pursuant to sub section 180(4) Act to pay compensation to any person who within twelve months of order satisfies court is entitled to compensation

REAL PROPERTY – where application for orders pursuant to section 114 *Land Title Act* 1994 (Qld) – whether applicant a person described in sub section 114(1)(c)(i) Act

Land Title Act 1994 (Qld), s 114

Property Law Act 1974 (Qld), s 180, s 180(3)(a), s 180(3)(b), s 180(3)(c)

Re Jackson SCQld, 27 August 1988, Misc 15 of 1988, considered

Kent Street Pty Ltd v Council of the City of Sydney [2001] NSWSC 268, considered

Re Permanent Trustee Australia Ltd (1997) 8 BPR 15, 551, considered

COUNSEL: A K H Cooper for the applicant

SOLICITORS: Abbott Tout Solicitors for the applicant.

[1] **McMURDO J:** The applicant company is a property developer. In July 2002 it became the registered proprietor of eleven lots of land at Petrie, described as Lots

numbered 66 to 76 on registered Plan 30247 in the Parish of Redcliffe, County of Stanley. They are situated between Connors and Houghton Streets. This is principally an application for orders pursuant to s 180 of the *Property Law Act 1974* (Qld) (“the Act”). The Originating Application seeks an order for the benefit of those eleven allotments, but during the hearing the application was confined to the seven lots with a frontage to Houghton Street, being Lots 70 to 76.

- [2] The land over which the applicant seeks a statutory right of user is described as Lot 84 on Registered Plan 30247. The registered proprietor of Lot 84 is Ernest William Cross who is deceased. The title search shows that Mr Cross became proprietor of Lot 84 on 23 April 1887. According to the searches and enquiries conducted by the applicant’s solicitor, Mr Andrews, Mr Cross died in New South Wales in 1919. Mr Andrews deposes to the extensive investigations which he has conducted in order to identify the person or persons entitled to Lot 84. Mr Cross was survived by a widow and five children, one of whom, Thomas Douglas Cross, is still alive and living with his daughter at Terrigal in New South Wales. Mr Andrews has posted to this gentleman, care of his daughter, copies of the application and affidavits and some relevant correspondence, but he has received no response. Mr Andrews also located a grandson of the registered proprietor, Dr R B Cross, who lives at Indooroopilly. Mr Andrews had lengthy discussions with Dr Cross who claims no interest in this land, and has told Mr Andrews that he believes that the registered proprietor left his estate to his widow, who in turn left her estate to her surviving youngest daughter. It appears from Mr Andrews’ affidavit filed on 27 March 2003 that this daughter was Mary Louisa Gill Somerville (née Cross) who died in September 2002 in New South Wales. Mr Andrews has had discussions and correspondence with her daughter, Mrs Margaret Roberts who lives in Sydney. Mr Andrews made known to Mrs Roberts the purpose of these enquiries, and it appears that she took legal advice from her son-in-law, Mr David Castersann, who is a practising barrister in Sydney. Through Mr Castersann, Mrs Roberts at first showed some interest in this application and I directed that she be served with the material. After that was done, however, through Mr Castersann, she advised that she did not “wish to take the matter further”. The evidence of Mr Andrews shows other searches and enquiries to the same end and it is unnecessary to set out all of that evidence in these reasons. Mr Andrews has not been able to identify the owner of Lot 84. There is no evidence of the ownership of Lot 84 within the records of the local authority. As will appear from the description of Lot 84 below, it is unoccupied and its only potential use is as a means of access to other land.
- [3] An order of the kind which is sought is not to be made unless the court is satisfied that, amongst other things, the owner of the servient land has refused to agree to accept the imposition of the relevant obligation or, “no person can be found who possesses the necessary capacity to agree to accept the imposition of such obligation”: s 180(3)(c). I am satisfied that no such person can be found. In the circumstances the application was argued without opposition. The Pine Rivers Shire Council was aware of the application and relevant correspondence with it was in evidence.
- [4] The absence of any person claiming to be the owner of Lot 84 is easier to understand when its size and situation are considered. It consists of a strip of land some 20 metres long but only 40 cm in width. Along its western length is the eastern end of a road called Carmody Court. On its eastern length is an end of Houghton Street. Lots 70 to 76 are on the northern side of Houghton Street. The

southwest corner of Lots 70 meets the northeast corner of Lot 84. The only possible use which can be made of Lot 84 is as a means of linking Carmody Court and Houghton Street, the width of each corresponding with the length of Lot 84.

- [5] As each of Lots 70 to 76 has a frontage to Houghton Street, it is potentially accessible without use of Lot 84. But Houghton Street, to the east of Lot 76, is not a constructed road, and because of its topography, substantial engineering works would be required to construct a useable surface in this part of the street. There is a gully which would require substantial filling and other earthworks. In a letter dated 28 April 2003 to the applicant's solicitors, the chief executive officer of the Pine Rivers Shire Council said:

“2. *Closure of Houghton Street*

Council has no proposal to apply for a road closure of the Houghton Street road reserve. Council's Development Control Plan for this area considered the linkage of roads in this area, particularly the connection of Houghton Street to Carmody Court and resolved that when Carmody Court was connected to Houghton Street there would be no constructed link to Old Dayboro Road.

Access to Lot 70 to 76 is restricted due to the topography of the existing Houghton Street road reserve, there being a deep gully between Lots 78 to 80, making vehicular access difficult and expensive. Council has indicated in the Development Control Plan that it was Council's policy not to construct that part of Houghton Street which crossed at the gully. The effect of this is that there is no vehicular access between Carmody Court and Old Dayboro Road.”

(Old Dayboro Road joins the other end of Houghton Street).

- [6] In 2002 the applicant sought approval from the Council to construct roads, drainage, water and sewerage reticulation works in relation to Lots 66 to 76. The Council appears to have approved the works subject to a number of requirements and conditions, which it set out in a letter dated 20 December 2002 to one of the applicant's consultants. Relevant requirements of the Council included the following:

“1. No works are to commence in the Houghton Road Reserve until Lot 84 on RP 30247 has been surrendered and dedicated as Road Reserve.

...

4. Dedication of an easement in favour of Council is required over the turning area in Lot 76 Houghton St.”

It can therefore be seen that the Council is indeed requiring the use of Lot 84 to link Carmody Road with Houghton Street and that it is proposing a turning area in Lot 76 consistent with Houghton Street being effectively a dead-end street outside Lot 76. After the Council was informed of this application to the Court and given

copies of the affidavits, it was asked whether it would be prepared to provide evidence to the effect that “the Council approves (the applicant’s) development and the use of Lot 84 for access purposes subject to an appropriate order of the Court in that regard or other appropriate arrangements for the usage of Lot 84 being made”. In the chief executive’s letter of 28 April 2003, he said:

“1. *Council Approval*

Council’s letter dated 20 December 2002 approved the proposed construction of road works within the Houghton Street Road Reserve to provide access to the existing Lot 70 to Lot 76 on RP 30247, subject to conditions, particularly to dedication of Lot 84 on RP 30247 as road reserve (copy attached).”

- [7] This gives the impression that the Council does not appreciate the applicant’s difficulty in procuring the dedication of Lot 84 as a road reserve, due to its not being the owner and its inability to identify the owner. Nevertheless I do not understand the Council to be adverse to the making of the orders sought. It has been given the opportunity to express its opposition to this application but it has not done so. Plainly it considers that the access to Lots 70 to 76 should be over Lot 84, rather than from Houghton Street to the east of these lots. Whilst it appears that the Council is not adverse to the order sought, it appears from its correspondence, and in particular its letter of 20 December 2002, that the order would not satisfy the Council’s requirements or conditions of approval of the engineering works on the applicant’s land. Any order I make will not amend those requirements, and it will remain the task of the applicant to persuade the Council that a statutory right of user is sufficient.
- [8] The applicant has also put in evidence a copy of a report in the *Pine Rivers Press* on 26 March 2003.¹ According to that report, local residents, especially in Carmody Court, have been concerned about the prospect of extra traffic from motorists using their street “as a short-cut to Petrie’s shopping centre,” if Carmody Court became a “through road”. However the evidence satisfies me that there is no prospect that the granting of the order sought would lead to such a through road. Instead, the Council has plainly rejected any suggestion that Houghton Street would be the subject of the extensive works required to construct a road surface to the east of the applicant’s land to link Carmody Court with the other end of Houghton Street.
- [9] The applicant’s land is vacant and zoned “residential”. Having regard to the topography of Houghton Street, and the Council’s unequivocal view against the construction of a usable road so that Houghton Street could be used to gain access to these lots, the only practicable means of access is by the use of Lot 84. In the circumstances I am satisfied that it is reasonably necessary in the interests of the effective use in any reasonable manner of Lots 70 to 76 that such land should have a statutory right of the user in respect of Lot 84.
- [10] An order under s 180 is not to be made unless the Court is satisfied of the matters set out in s 180(3). I have already found that I am satisfied as to the matters in s 180(3)(c). By s 180(3)(a), it must be “consistent with the public interest that the

¹ Exhibit JDA 8 to the affidavit of Mr Andrews filed 16 April 2003.

dominant land should be used in the manner proposed”. In my view, having regard to the matters set out above, this requirement is met. By s 180(3)(b), the Court must be satisfied that the owner of the servient land can be adequately recompensed in money for any loss or disadvantage which the owner may suffer from the imposition of the obligation. The applicant has put in evidence a letter from a valuer which values Lot 84 at but one dollar. I do not suggest that the task of realistically valuing such a parcel is straightforward, but I doubt whether much weight should be given to a valuation in these circumstances which is expressly “based on sales evidence in the immediate locality”. The imposition of the obligation would disadvantage the owner of Lot 84 only in the sense that the owner would lose his or her ability to negotiate terms for the granting a right of way for the benefit of someone such as the applicant. It is unnecessary in the present circumstances to consider what would be appropriate compensation. I am satisfied that whatever is that amount for compensation, the owner or owners of Lot 84 can be adequately recompensed, so that s 180(3)(b) is satisfied.

- [11] I conclude that there should be a statutory right of user imposed upon Lot 84. By s 180(4)(a) such an order shall, except in special circumstances, include provision for payment by the applicant to such person or persons as may be specified in the order of such amount by way of compensation or consideration as in the circumstances appears to the Court to be just. The circumstances here are special, because the person entitled to any compensation cannot be found. I suggested to the applicant’s counsel that the applicant should give an undertaking to pay compensation to any one who could prove that he or she was the owner of Lot 84, in such amount as the Court assessed. The applicant expressed some concern as to that undertaking, because it did not wish to be subject to a contingent liability for an indefinite period. This seemed to me a reasonable concern and I suggested that the undertaking should be in force for perhaps one year from the making of the order, to cover the remote contingency that someone does emerge who can prove an ownership of Lot 84 and who wishes to claim compensation. Subsequently, I have seen that such an undertaking was required in two decisions in the Supreme Court of New South Wales in similar circumstances, that is where it was not possible to identify the owner: *Re Permanent Trustee Australia Ltd* (1997) 8 BPR 15, 551 and *Kent Street Pty Ltd v Council of the City of Sydney* [2001] NSWSC 268. In neither case does the undertaking appear to have been of a limited duration. In the circumstances of this case, however, that seems to me still to be a reasonable qualification upon the undertaking. An undertaking in the following terms would be appropriate:

An undertaking by the applicant that it will pay to any person who within twelve months of the making of this order, satisfies the court that such person at the date of this order has the necessary capacity to agree to accept the imposition of the obligation of user imposed by this order, such amount by way of compensation or consideration for the imposition of the obligation (if an amount is not agreed) as appears to the court to be just.

- [12] Upon that undertaking of the applicant there will be an order imposing upon the land described as Lot 84 on Registered Plan 30247, Parish of Redcliffe, County of Stanley in the State of Queensland an obligation of user in the form of an easement in favour of the land described as Lots 70 to 76 on Registered Plan 30247, Parish of Redcliffe, County of Stanley, and that such easement will include:

- (a) a right of way over Lot 84 which shall be exercisable by any person entitled to be upon:
 - (i) any of Lots 70 to 76; or
 - (ii) Houghton Street, Petrie, for the purpose of providing or maintaining access, including vehicular access, to any of Lots 70 to 76 from Lot 84;
- (b) a right to any owner of any of Lots 70 to 76, and that owner's servants, agents and contractors, to construct and maintain such works upon Lot 84 as are reasonably necessary to permit Lot 84 to be used as a right of way in terms of para (a) and provided that such works are consistent with any lawful requirement of the relevant local authority.

and it will be declared that such right of user is exercisable in perpetuity. The easement should be registered: see s 180(4)(c). It will be necessary for the applicant to prepare an instrument to be registered, and I shall further order that the applicant prepare a registrable instrument for the easement the subject of this order, in terms satisfactory to the Registrar of the Court, who shall be authorised to execute it.

[13] The terms of the order proposed are a little different from those of the draft handed up by the applicant's Counsel. However, I think it is necessary to make provision for the use of Lot 84 not only to enter Lots 70 to 76 but also to obtain access to Houghton Street to do such works as are required from time to time to maintain the roadway outside Lots 70 to 76. It seems to me that this is still a right of user in favour of the land presently constituted by Lots 70 to 76, and for the sole purpose of benefiting those lots.

[14] There was an alternative application, for an order under s 114 of the *Land Title Act* 1994 (Qld) ("*Land Title Act*") which provides as follows:

- “(1) This section applies to-
 - (a) the Attorney-General; or
 - (b) a trustee or beneficiary under a trust; or
 - (c) a personal representative, a devisee or anyone else interested in-
 - (i) a lot of a deceased registered proprietor; or
 - (ii) a trust involving a lot of a deceased registered proprietor.
- (2) A person to whom this section applies may apply to the Supreme Court for an order that a named person be registered as proprietor of a lot.
- (3) The Supreme Court may make 1 or more of the following orders-
 - (a) that a person be registered as proprietor of the lot;
 - (b) that a person be removed from the freehold land register as proprietor of the lot;
 - (c) that a caveat be lodged to protect a person's interest in the lot;

- (d) that a person advertise in a specified form, content or way;
 - (e) that costs be paid by any person or out of any property.
- (4) The registrar must register particulars of an order if a request to register the order is lodged and an office copy of the order is deposited.
- (5) An order does not vest an interest in the lot until it is registered.”

[15] The applicant claims to be within the description of “anyone else interested in ... a lot of a deceased registered proprietor.”. The applicant says that its interest in that lot arises because of what was described as “its statutory right to apply pursuant to s 180 of the *Property Law Act 1974*”. It is submitted that “interest” for the purposes of s 114 is not confined to a legal or equitable interest, and a judgment of Demack J in *Re: Jackson* (unreported 27 August 1988) was said to support that proposition. But his Honour clearly held that the applicant there was the holder of an equitable interest in the land, and also had an interest under the rules of distribution upon intestacy. The case does not support the proposition advanced. The applicant did not submit that, once an order under s 180 is made, there would then be a sufficient interest for the purposes of s 114 of the *Land Title Act*. If that would bring the applicant within the category of persons entitled to apply under s 114, I would not make the order sought under that section. It would seem to me to involve something of a misuse of these two powers to make orders under s 180 simply as a means to an end under s 114 of the *Land Title Act*. One consequence of orders under both provisions would be that the dominant and servient tenants would be the same, which would extinguish an easement under the general law.²

[16] I dismiss the alternative application made under s 114 of the *Land Title Act*.

² Gale on Easements (16th Ed) at 12