SUPREME COURT OF QUEENSLAND

CITATION:	*Eucalypt Group P/L v Robin & Anor* [2003] QSC 178
PARTIES:	**EUCALYPT GROUP PTY LTD** ACN 288 126 785 (applicant) **v** **PHILIP DAVID ROBIN** **SUSANNE PAULINE ROBIN** (respondents)
FILE NO:	SC 6087 of 2002
DIVISION:	Trial Division
PROCEEDING:	Order for costs
DELIVERED ON:	12 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	19 March 2003
JUDGE:	B W Ambrose J
ORDER:	**I order that the applicant pay to the respondents their costs of and incidental to the application (including the application for costs) to be assessed on an indemnity basis**
CATCHWORDS:	COSTS – indemnity costs – where respondents successfully opposed extinguishment of easement – where respondents had made clear their wish to retain easement – where applicant developer aware of this when it purchased the property – where existence of boulder sea wall principle issue in whether easement obsolete – where no evidence of sea wall construction tendered by applicant – whether Court should exercise discretion to order costs on indemnity basis *Property Law Act* 1974 (Qld), s 181 *Uniform Civil Procedure Rules* 1999 (Qld), r 704 *Coles Myer NSW Ltd v Dymocks Book Arcade Ltd* (1996) 7 BPR 14,638, considered *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225, considered *In re Jeffkin's Indentures* [1965] 1 WLR 375, considered *In re Wembley Park Estate Co Ltd's Transfer* [1968] 1 CH 491, considered *Tregoyd Gardens Pty Ltd v Jervis* (1997) 8 BPR 15,845, considered
COUNSEL:	W Sofronoff QC with D J Campbell for the applicant

S L Doyle SC with B J Clarke for the respondents

SOLICITORS: Hemming and Hart for the applicant
M F Lyons and Associates for the respondents

[1] **AMBROSE J**: In this matter the respondents have successfully opposed the applicant's effort to extinguish an easement the object of which I have found was to safeguard their access to their beachfront property in the event of cyclonic erosion of an Esplanade from which they have always obtained such access since they first acquired it.

[2] I have no doubt upon the whole of the evidence – and in particular having regard to the content of letters written by the applicant to the respondents shortly after it purchased its allotments of land adjacent to that of the respondents that initially in any event it contemplated erecting a multi-unit apartment block upon those allotments which were subject to the respondents' easement. I infer that those allotments were purchased by another real estate development company for the purpose of demolishing the improvements on them and constructing in substitution a multi-storey apartment block. The applicant then purchased them from that developer for the same purpose.

[3] The essence of the applicant's claim was that the easement of which the respondents were the registered proprietors was obsolete. Its contention which it supported by expert evidence was that the Esplanade by virtue of works effected to control erosion was no longer in danger of cyclonic storm surge erosion.

[4] The applicant failed on this contention.

[5] A second or a subsidiary argument advanced to support the application was that the applicant was prepared to substitute for the easement located towards the eastern end of its allotments a fresh easement to be located at the western end. The suggestion was I think that the respondents could then share that easement access with occupants of any redevelopment of the applicant's land. This contention also failed for reasons already given.

[6] One of the principal arguments upon which the applicant relied was the fact that the respondents' ocean views from their seaside house were not in any way secured or protected by their easement which gave them right of way, merely because one consequence of that right of way was that no building could be erected upon it the effect of which would be to obscure those sea views. This contention was argued at great length on the basis that as an easement of right of way the respondents' easement was obsolete. This principal contention having failed it was unnecessary strictly to determine this aspect of the applicant's argument. However for the reasons expressed I have reservations as to the correctness of the contention that the protection of the respondents' residential amenity resulting from the maintenance of their unobstructed easement was a completely irrelevant consideration upon the application.

[7] Initially before lengthy submissions were made on the topic of costs I did contemplate making an order that the applicant pay the respondents' costs to be assessed on a standard basis.

[8] However after very lengthy submissions and reference to authority I have given further consideration to the matter.

[9] Under UCPR 704 the court has a discretion to order costs to be assessed on an indemnity basis. In *Re Jeffkin's Indentures* [1965] 1WLR 375 Cross J expressed the view that a plaintiff applying for the extinguishment of a restrictive covenant for the benefit of a defendant was expected to pay the defendant's costs at least up to the time when upon a proper investigation of the circumstances the defendant would come to the conclusion that he would not oppose the plaintiff's application. Should such a defendant continue to oppose the application then from that time onwards that defendant would bear his own costs – although not the costs of the successful plaintiff.

[10] In *Re Wembley Park Estate Co Ltd's Transfer* [1968] 1 CH 491, 507 Goff J concluded that at least up to the time when it was determined that the defendant ought pay its own costs the plaintiff should pay the defendant's costs on the equivalent of an indemnity basis. The basis of this approach seems to have been that the plaintiff in such a case was obtaining relief which was something "in the nature of a luxury" ie because he was seeking to extinguish the interest of another to enhance the value of his own property.

[11] In my view had the respondents been persuaded to accept one of the many offers made by the applicant to consent to the extinguishment of their easement the applicant should have anticipated paying their costs on an indemnity basis up to that time.

[12] I am satisfied from the content of the many offers made by it, that indeed the applicant did contemplate paying their costs on such a basis should they accede to its request to consent to the extinguishment of their easement.

[13] However the respondents did not so consent and indeed contested vigorously the application. They succeeded in all respects in maintaining the easement which they had always enjoyed since they purchased their property some 20 years earlier.

[14] In *Coles Myer NSW Ltd v Dymocks Book Arcade Ltd* (1996) 7 BPR 14,638 applicants who succeeded in overcoming the opposition of the respondent to the imposition of a statutory easement over its property were ordered to pay its costs up to and including trial to be assessed on an indemnity basis.

[15] In *Tregoyd Gardens Pty Ltd v Jervis* (1997) 8 BPR 15,845 Hamilton J ordered that the respondents who had declined to accept an offer of compensation for the acquisition of an interest by way of an easement over their land but who at the end of the day after an assessment of compensation were no better off than if they had accepted an earlier offer were nevertheless awarded indemnity costs by Hamilton J adopting the approach of Simos J in *Coles Myer NSW*.

[16] In *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 Sheppard J reviewed extensively the authorities relating to the award of indemnity costs. He pointed out that there is sometimes a very substantial difference between costs assessed on a party and party basis and those assessed on an indemnity basis and commented that there is a great deal to be said for the proposition that a successful party should always be fully indemnified for its costs.

[17] In my view one should keep in mind this observation on the facts of this case where the respondents for many years had made it clear that they wished to maintain their easement which had been granted to their predecessor in title, in my view almost

certainly as a protection against the loss of access to their allotment due to a cyclonic erosion of the Esplanade. That Esplanade had been a full width trafficable roadway giving access to their allotment at the time the easement was granted to give access to their allotment and to one to its north.

[18] In the circumstances of this case the only thing that the respondents did which led to the application being made against them was to refuse voluntarily to extinguish their easement which had been in existence for many years and the benefits of which they had always enjoyed from the time they purchased their beachfront house.

[19] The applicant's predecessor in title who was also a developer had also sought to persuade the respondents to extinguish their easement. He had failed to do so and the applicant was aware of this fact when it acquired its land from that developer.

[20] The applicant real estate developer purchased its allotments adjacent to the respondents' land for the purpose of their redevelopment for residential purposes at a profit. Initially its intention was obviously to redevelop them to achieve their full potential as a multi-storey high rise development site. Later this proposal was varied to redevelop the allotment into two very expensive single unit residential developments. This change in plan seems to have been made with a view to persuading the respondents that they would not be overshadowed by a six or seven storey apartment block. However one of the early offers was to shift the respondents' residence forward so that it would be level with what was conceived to be the building line for development along the Esplanade so that its view to the south and east would be no more obstructed than it was when it was built the same distance back from the Esplanade as the applicant's building to be demolished to permit redevelopment.

[21] The director of the applicant development company was legally qualified and was aware of its right to make an application under s 181 of the *Property Law Act* and in my view the applicant purchased the allotments of land subject to the respondents' easement in the hope, if not indeed expectation, that its application under s 181 of the *Property Law Act* would succeed or at least had a good prospect of success – irrespective of the respondents' opposition.

[22] The applicant has failed completely in its application to extinguish the respondents' easement.

[23] In my view the respondents cannot be criticised in any way for resisting that application. As I have indicated they did nothing whatever to encourage either the applicant or its predecessor in title to acquire the allotments next door to theirs for the purpose of redevelopment. The only thing they did was to resist concerted efforts made to extinguish their easement which I am satisfied upon a proper evaluation of the expert evidence they were quite justified in maintaining to protect access to their property should further cyclonic erosion occur.

[24] The existence of a properly designed and constructed beach front boulder wall in the vicinity of the respondents' and applicant's beach front allotments was a fact critical to the success of the applicant's contention that the easement had become obsolete because it was no longer necessary to give the respondents protection against cyclonic erosion. However there was no adequate evidence whatever led by the applicant as to the construction of such a wall. Indeed all the evidence was to the contrary.

[25] It appears that the applicant retained a number of very senior counsel to advance and argue its case on the hearing of this application; the respondents also retained senior and junior counsel. Having regard to the way the case was conducted I am satisfied that it was reasonable indeed desirable that the respondents retain both senior and junior counsel to argue their case.

[26] I observe merely that the male respondent himself obviously engaged in a great deal of research and investigation as to the history of cyclonic erosion of the Palm Beach area in the location of his allotment over the last half century. To no small extent the in-depth investigation of the times and nature of erosion in the area generally provided a factual basis from which the expert opinion evidence called by the applicant could be challenged. Neither of the expert witnesses who were called on behalf of the applicant had made any investigations concerning the construction of a boulder wall on the Esplanade frontage outside the allotments of land involved in the application. It was clear in my view that the evidence established that no such wall had ever been designed or constructed and yet the existence of such a wall seemed to be the principal factual basis upon which the applicant relied to support its contention that the respondents' easement had become obsolete.

[27] In the circumstances of this case the respondents in my view ought be indemnified to the greatest extent possible for the costs they have incurred in opposing the application. Those costs will not include any recompense for the time and personal effort contributed by the male respondent to the preparation of his case.

[28] I order therefore that the applicant pay to the respondents their costs of and incidental to the application (including the application for costs) to be assessed on an indemnity basis.