

SUPREME COURT OF QUEENSLAND

CITATION: *Wallace & Wallace v Goodwin* [2004] QSC 042

PARTIES: **THOMAS SHEWAN WALLACE & PAULINE JOSEPHINE WALLACE**
(Applicants)
v
JOHN PATRICK ANTHONY GOODWIN
(Respondent)

FILE NO: 487/2003

DIVISION: Trial Division

DELIVERED ON: 12 March 2004

DELIVERED AT: Rockhampton

HEARING DATES: 10 and 11 December 2003

JUDGE: Dutney J

ORDERS: **1. Application dismissed;**
2. Applicants to pay the respondent's costs of the application to be assessed on the standard basis.

CATCHWORDS: EASEMENTS AND PRESCRIPTIONS – EXTINGUISHMENT – whether s. 181(1)(a), (b), (c) or (d) *Property Law Act* 1974 (Qld) satisfied on the evidence – whether an agreement to extinguish the easement existed between the parties - where easement provides alternative access for user of the dominant tenement when required and is used for morning exercise

Property Law Act 1974 (Qld), s. 181(1)(a), (b), (c) and (d)

Eucalypt Group Pty Ltd v Robin [2003] QSC 63 (19 March 2003), considered and followed
Durian (Holdings) Pty Ltd v Cavacourt Pty Ltd (2000) 10 BPR 18,099, cited
Re Eddowes [1991] Qd R 318, cited

COUNSEL: Mr Murray (Solicitor) for the applicants
Mr Bowden for the respondent

SOLICITORS: Kenny & Co for the applicants
 Goodwin & Co for the respondent

- [1] The applicants are the owners of land described as Lot 2 on RP 610402 County of Clinton Parish of Auckland. The land is burdened by right of way easement No 601538275 (Easement A) in favour of the respondent, Mr Goodwin.
- [2] The servient tenement (Lot 2) is a block of rural residential land near Gladstone with an area of a little over 13 acres. It is a long narrow block fronting the Calliope River at the western end and a public road to the east. Lot 2 shares a common northern boundary with the dominant tenement. The dominant tenement (Lot 1) is a 40 acre block also bounded by the Calliope River in the west and the public road in the east.
- [3] A dwelling house has been constructed at the Calliope River end of each of Lots 1 and 2.
- [4] Mr Goodwin bought Lot 1 in 1976. At that time there was a swampy water course covering most of the eastern half of the block, as appears from exhibit "JPAG 2" to Mr Goodwin's affidavit filed 7 November 2003.
- [5] In 1977 the watercourse was dammed as shown in the same exhibit.
- [6] In order to obtain all weather access to the western half of his block Mr Goodwin negotiated and registered Easements A and B with his then neighbour in 1979. Easement A provides right of way from the public road along the southern boundary of Lot 2 to a position about half way along the block. It then traverses Lot 2 to the northern boundary. It then follows the boundary between Lots 1 and 2 parallel with Easement B to a position approximately level with the house on each block. Easement B is on Lot 1. Lot 2 has the benefit of Easement B. The result is that the access along the common boundary of Lots 1 and 2 straddles the boundary. The plan of the easements is exhibit "JAG 4" to Mr Godwin's affidavit.
- [7] The house on Lot 2 was built in 1979. The house on Lot 1 was built in 1981/2. In 1984 the applicants bought Lot 2.
- [8] In about 1999 Mr Goodwin commenced to build an alternative access to his house from the public road along his northern boundary to the dam wall. The access then crosses the dam wall and angles across Lot 1 to link up with Easement B and the corresponding part of Easement A. The route of this access can be seen in exhibit "JAG 2".
- [9] The applicants, Mr and Mrs Wallace, and Mr Godwin do not like each other. The animosity felt by Mr and Mrs Wallace towards Mr Godwin was palpable when they gave evidence. It was such that I cannot confidently accept that they were capable of giving objective evidence in relation to the disputed

questions of fact.¹ This is a significant finding as appears later in these reasons. Mr Goodwin's dislike of Mr and Mrs Wallace was also obvious but it did not manifest itself in quite as extreme a manner. Mr Goodwin also derived some corroboration from contemporary documents to which I will later refer.

- [10] The power to modify or extinguish easements is found in s. 181 of the *Property Law Act 1974 (Qld)* which provides:

181 Power to modify or extinguish easements and restrictive covenants

(1) Where land is subject to an easement or to a restriction arising under covenant or otherwise as to the user of the land, 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 because of change in the user of any land having the benefit of the easement or restriction, 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

(b) that the continued existence of the easement or restriction would impede some reasonable user of the land subject to the easement or restriction, or that the easement or restriction, in impeding that user, either—

(i) does not secure to persons entitled to the benefit of it any practical benefits of substantial value, utility, or advantage to them; or

(ii) is contrary to the public interest;

and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the extinguishment or modification; or

(c) 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 waived the benefit of the restriction wholly or in part; or

(d) that the proposed modification or extinguishment will not substantially injure the persons entitled to the easement, or to the benefit of the restriction.

- [11] The applicants submitted that the easement should be extinguished on the following bases:

¹ While the transcript cannot record the manner in which the evidence was given, some idea of the ill feeling can be gleaned from the exchange between Mr Bowden of counsel and Mrs Wallace at pages 61 and 62.

- that it was obsolete within the meaning of s. 181(1)(a);
- it impedes the user of the front section of Lot 2 facing the road without securing any practical benefits to the respondent or, alternatively, any benefit not adequately compensated by money within the meaning of s. 181(1)(b);
- that the respondent in correspondence dated 12 September 2003 and 26 September 2003 indicated he would consent to the extinguishment or alternatively an agreement to extinguish the easement was made for consideration in late 1999 within the meaning of s. 181(1)(c); alternatively the easement has been abandoned within the meaning of s. 181(1)(c).

[12] To succeed under s. 181(1)(a) on the grounds of obsolescence it is not sufficient to prove only that the continuation of the easement is not essential to the user of the dominant tenement. If an easement is useful it is not obsolete.² An easement may be obsolete when the purpose for which it was created can no longer be achieved. That is not the case here. The easement, although no longer the primary access to Lot 1, still provides Lot 1 with an alternative all weather road. As an alternative route, the easement is available to the respondent in the event of an overflow of the dam wall spillways. The value of this benefit cannot be said to be insignificant. Where Easement A and Easement B run parallel Mr McLean, the surveyor, gave evidence that Mr Goodwin's current access still used part of Easement A. I have ignored this continued usage in the balance of these reasons. I have concentrated on that part of Easement A which crosses the applicant's land from boundary to boundary. This is, in reality, what the applicants want extinguished.

[13] I do not consider that the right of way across Lot 2 has no practical value or utility to Lot 1 even though it no longer represents the usual means of access. It appears that the right of way is actually used by Mr Goodwin on a reasonably regular basis for morning walks. In *Eucalypt Group Pty Ltd v Robin*³ Ambrose J, refusing to extinguish an easement under s. 181(1)(a) or (b) at [27] observed that:

“although the respondents have not used their easement access over the applicant's lands for the purpose of passing and repassing, they have walked across it once a year for the purpose merely of avoiding a contention that they have never used it. Obviously they have never regarded it as being of no value or benefit to them. I infer that they always regarded its value principally as an alternative means of access in the event of cyclonic erosion of the Esplanade. The applicant's corner allotment however has a fence across the easement access although for exactly how long this fence has been in that position was not canvassed... That obstruction to the easement could easily be removed in the event of imminent erosion of the Esplanade and/or the allotments with a frontage to it.”

² *Durian (Holdings) Pty Ltd v Cavacourt Pty Ltd* (2000) 10 BPR 18,099 at 18,100; Re *Eddowes* [1991] Qd R 318; *Eucalypt Group Pty Ltd v Robin & Anor* [2003] QSC 63 (19 March 2003) at para [92].

³ [2003] QSC 63 (19 March 2003).

- [14] As can be seen from the above passage, the benefit of the easement to the holder of the dominant tenement need not be continuous. The fact that the right is exercised only as an alternative in the event of a rare or perhaps even unlikely event may well be sufficient to make it sufficiently useful and valuable as to prevent its extinguishment under s. 181(1)(a) or (b). In the case of paragraph (b) the utility of the easement must be compared with the severity of the impedence.
- [15] The evidence here does not establish that the continued existence of the easement impedes some reasonable user of Lot 2. I do not regard it as sufficient to point only to the location of the easement and submit that its mere existence necessarily constitutes an impedence. Mr Sheehan gave evidence that a sub-division of Lot 2 might be more valuable if the easement was extinguished, but there is no evidence Mr and Mrs Wallace want to subdivide or would be prevented by the easement from doing so. Lot 2 is a rural residential block. To found an extinguishment claim based on impedence, evidence of some practical use which is affected would be necessary.
- [16] In any event, having regard to the possibility that the alternative direct access from the public road might on occasion be obstructed by flood water over the dam spillway and to the fact that Mr Goodwin in fact takes advantage of his right for morning exercise, I am not satisfied that a basis for extinguishment under s. 181(1)(b) has been made out.
- [17] The principal argument advanced on behalf of the applicants was in relation to an alleged agreement to extinguish the easement. The alleged agreement is set out in the affidavit of Mr Wallace filed 4 December 2003 and the affidavit of Mrs Wallace filed on the same date. The agreement was said to have been made in late 1999 after Mr Goodwin telephoned Mr Wallace and asked if he could come and speak to him.
- [18] In his affidavit Mr Wallace gives the conversation as follows:
- Mr Wallace:** What's it all about Tony?
Mr Goodwin: Well I want to build some stables.
Mr Wallace: Where?
Mr Goodwin: Down on some flat land I've cleared. If you don't object to my application to the council I will come off the easement and build my own road to access the stables and my house.
Mr Wallace: What do you think Paula?
Mrs Wallace: As long as you are off the easement
Mr Goodwin: Definitely.
Mr Wallace: Ok, you have our consent.
Mr Goodwin: Great. I will take care of it."
- [19] Mrs Wallace's version of the conversation is substantially the same. She recalls it as follows:

Mr Goodwin: Well, I've come to discuss the stables I'm going to put up. Would you have any objection to me building them? If you agree, I'm off the road. I'll build my own.

Mr Wallace: What do you think Paula?

Mrs Wallace: I have no objection to Tony building any stables as long as he's off the road.

Mr Goodwin: I will be.

Mr Wallace: Ok, you have our consent.

Mr Goodwin: Very good, I'll get started."

- [20] Both Mr and Mrs Goodwin say that in reliance on this agreement they did not object to the construction of the stables.
- [21] Mr Goodwin agreed that there had been a discussion about him relinquishing the easement. He said that the discussion had taken place in 1995 and no agreement was reached. Mr Goodwin's version of the conversation was that the proposal in 1995 concerned his construction of an access road along the southern boundary of Lot 1. In 1998 Mr Goodwin said that he had a further conversation concerning reorganisation of the power supply to both Lots 1 and 2 at which time possible extinguishment of the easement was discussed. Both of these conversations were vehemently denied by Mr and Mrs Wallace. Mr Goodwin's version of the conversations draws some support from correspondence, including a report on the proposal to council, which suggest that the approval to construct the stables was in fact sought in 1995. While there is no document formally confirming council consent to the construction, I accept that the stable proposal was dealt with in 1995.
- [22] Having regard to the vigour with which Mr and Mrs Wallace refused to contemplate the possibility of their being inaccurate in relation to the year in which the conversation took place, and the comment I made above concerning their demeanour generally, I reject their evidence of the conversation to which they depose and accept Mr Goodwin's evidence that no such conversation took place in 1999. I also prefer his version of the conversations in 1995 and 1998.
- [23] There was some more recent self corroboration for Mr Goodwin's evidence that no agreement had ever been reached regarding the extinguishment of the easement. In his letter to Mr Wallace dated 12 September 2003. In paragraph 4 of that letter⁴ he writes:

"Several years ago I visited you with a proposal involving the rearrangement of access and power supply to our properties that had benefits to both of us. I was prepared to let bygones be bygones. You have never given me the courtesy of a response, despite several reminders. I gave up waiting and have now at very considerable expense made other arrangements for provision of all weather access and supply of power to my own property."

⁴ Exhibit "JPAG8" to Mr Goodwin's affidavit filed 7 November 2003.

- [24] While this is self-serving and not of great weight, it at least demonstrates a consistency in the evidence of Mr Goodwin and an unsolicited acknowledgement that the topic had been previously discussed. The applicant responded through their solicitors asserting the agreement to which they later deposed but without reference to the year.
- [25] In the circumstances, I am not persuaded that an agreement was made in 1999, or in any year, in the terms deposed to by Mr and Mrs Wallace.
- [26] Some attempt was made by the applicants to rely on the letter of 12 September 2003 to which I have just referred. This was on the basis that Mr Goodwin goes on in the letter to offer to extinguish the easement providing certain conditions are met. The conditions were not accepted.
- [27] Having regard to the limited continued use of the easement to which I have already referred, and that part of the history I have set out, I am satisfied that the respondent has not abandoned the easement. There is thus no case for extinguishment made out under s. 181(1)(c).
- [28] In the result the application is dismissed. I order the applicants to pay the respondent's costs of the application to be assessed on the standard basis.