SUPREME COURT OF QUEENSLAND

CITATION:	*Averono & Anor v Mbuzi & Anor* [2005] QCA 295
PARTIES:	**MARCO ADAMO AVERONO** **ANNABEL LOUISE AVERONO** (applicants/respondents) **v** **JOSIYAS ZIFANANA MBUZI** **VAINESS BANDA MBUZI** (respondents/appellants)
FILE NO/S:	Appeal No 1254 of 2005 SC No 10869 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	15 July 2005
JUDGES:	Williams, Jerrard and Keane JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal dismissed** **2. The appellants to pay the respondents' costs of the appeal up to 8 July 2005 with those costs to be assessed on the standard basis**
CATCHWORDS:	REAL PROPERTY - EASEMENTS - EASEMENTS GENERALLY - ABANDONMENT, SUSPENSION OR EXTINGUISHMENT - EXTINGUISHMENT - where the appellants and respondents were neighbours owning adjacent blocks of land - where both parties had an easement granting right of way from their land across the land of the other party in order to access nearby streets - where a driveway was located down the middle of the land subject to these two easements - where the appellants asserted a right to place a fence down the middle of this driveway in order to fence their property boundary - where the respondents applied to the primary judge for an injunction restraining the construction of this fence by the appellants - where the appellants applied for the extinguishment of the easement over their land - where the appellants appealed against the decision of the primary judge not to extinguish the easement - whether the appellants

had established a case for extinguishing the easement in terms of s 181 *Property Law Act* 1974 (Qld)

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

Ashoil Holdings Pty Ltd v Fassoulas [2005] NSWCA 80; CA 40616/04, 30 March 2005, cited
Pieper v Edwards [1982] 1 NSWLR 336, cited
Re Eddowes [1991] 2 Qd R 381, applied
Re Mason and the Conveyancing Act [1962] NSWR 762, cited
Re Parimax (SA) Pty Ltd (1954) 72 WN(NSW) 386, applied
Stannard v Issa [1987] AC 175, cited

COUNSEL: The appellants appeared on their own behalf
The respondents appeared on their own behalf

SOLICITORS: The appellants appeared on their own behalf
The respondents appeared on their own behalf

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Keane JA and agree with all that is said therein.

[2] I would add by way of emphasis that the only question raised by the appeal to this Court was with respect to the extinguishment of the subject easements pursuant to s 181 of the *Property Law Act* 1974 (Qld). The proceedings before Muir J did involve some other disputes between the parties relating to the easements, but those matters appear to have been resolved by the subsequent judgment of Mullins J: *Averono v Mbuzi* [2005] QSC 061, delivered 31 March 2005. No appeal has been lodged from that decision.

[3] Hopefully the decision of Mullins J, and the dismissal of this appeal, will finally resolve the disputes between the parties so that both sides will be able to fully enjoy the benefits of the easements in the future.

[4] I agree with the orders proposed by Keane JA.

[5] **JERRARD JA:** In this appeal I have read the reasons for judgment of Keane JA and the orders His Honour proposes, and I respectfully agree with his reasons and orders.

[6] **KEANE JA:** The appellants and the respondents are neighbours residing at Eucalypt Court in the suburb of Warner in the Pine Rivers Shire. The appellants are the registered proprietors of Lot 32 on Registered Plan SP112285 ("the appellants' land"). The respondents are the registered proprietors of Lot 31 on Registered Plan SP112285 ("the respondents' land"). The appellants applied for an order pursuant to s 181 of the *Property Law Act* 1974 (Qld) ("the Act") that Easement No 702880341 be extinguished. This application was subsequently amended to refer to Easement No 702880356. It seems to have been the appellants' intention also to seek the

extinguishment of Easement No 702880330. This application was dismissed by the learned primary judge.[1]

[7] It is convenient to refer to Easement No 702880356 as Easement E. It confers rights of access over that part of the appellants' land which connects it to the nearest street frontage in favour of the respondents' land. The respondents themselves sought, unsuccessfully, injunctions restraining the appellants from removing bitumen and erecting a fence upon the appellants' land the subject of Easement E.

[8] It is convenient to refer to Easement No 702880330 as Easement D. It confers rights of access over that part of the respondents' land which connects it to Eucalypt Court in favour of the appellants' land.

[9] Each of the parcels of land are battleaxe blocks 6000 square metres in area. Easement D is 5.011 metres wide at its boundary with Eucalypt Court and 4.234 metres wide where it runs into the larger part of Lot 31. Its boundary with Lot 32 is 77.643 metres long. That part of Lot 32 which is subject to Easement E has substantially the same dimensions as Easement D.

[10] Each of these easements was granted for the purposes of right of way in June 1998, evidently at the time of the original subdivision by the then registered proprietor. Each grantor granted to the grantee and its successors in title the right "… in common with the Grantor … to pass or repass with or without vehicles of any description and with or without animals for all purposes ordinarily incidental to the Grantee's business or connected with the use and enjoyment of the dominant tenement … over, along or across the easement …". It is not clear that easements of the width of those in question were not a condition of the original subdivision, although it appears that the Pine Rivers Shire Council's minimum width for the standard residential access driveway is 2.5 metres.

[11] There is a driveway located down the middle of the land the subject of Easements D and E. The learned primary judge found that the driveway had a bitumen surface.[2] The appellants dispute that finding on the footing that it was based, in part at least, upon photographs exhibited to an affidavit on behalf of the respondents which was not properly admitted into evidence. However that may be, it is not, in my view, strictly necessary to come to a conclusion as to the precise nature of the surface of the driveway in order to reach the conclusion that this appeal must fail.

The dispute

[12] The appellants and respondents became embroiled in a dispute in September 2004 and October 2004 in which the appellants asserted, and the respondents denied, an entitlement to erect a fence down the middle of the driveway. The respondents expressed concern that a fence down the middle of the driveway would prevent bus access to the respondents' land and ultimately sought an injunction to restrain the appellants from continuing this construction.

[13] The appellants sought to justify the order which they sought under s 181 of the *Property Law Act* on the footing that there was no need for the easements because they were not necessary to permit vehicular access by car to each block, and because the appellants wish to fence their property boundary as the respondents'

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1 *Averono & Anor v Mbuzi & Anor* [2005] QSC 006; SC No 10869 of 2004, 21 January 2005.

2 *Averono & Anor v Mbuzi & Anor* [2005] QSC 006; SC No 10869 of 2004, 21 January 2005 at [6].

dogs come onto their land, frighten their children, and pose a risk of accident when the appellants' children are riding their bikes on the driveway. Further, the appellants contended that the respondents had acquiesced in the appellants' carrying out work inconsistent with the continued subsistence of their rights under Easement E. It was also said that the continued existence of the easements will provide a source of friction and animosity between the appellants and the respondents.

[14] The respondents objected to the extinguishment of Easement E on the basis that they would be put to the expense of widening and sealing their side of the driveway. They would also have to make provision for stormwater drainage. Further, the respondents relied upon the obviously correct proposition that the driveway in its present position allows more room to enable vehicles, especially large vehicles with large loads, to pass and repass. Finally, the respondents relied upon drainage Easements 702880307 and 702990341 whereby the parties and other persons are permitted to "drain sewerage, sullage and other forms of waste in pipes through the easement and drain water from any national source through the easement in pipes … ". These easements are associated with Easements D and E. The respondents contended that if the easements were to be extinguished, associated drainage easements would also effectively be extinguished, thus depriving the respondents and other land owners of the practical benefit of their rights under the drainage easement. The appellants complain that this drainage point was irrelevant and that it was raised late. The drainage easement point did not loom large in the reasons of the learned primary judge. It was not critical to his decision. He referred to it as suggesting the need for further investigation of the potential impact of the extinguishment of Easement E on drainage from the respondents' land.[3]

The judgment

[15] The learned primary judge declined to grant the injunctions sought by the respondents because the evidence did not disclose that the appellants were likely to act unlawfully.[4] So far as the injunctive relief sought by the respondents sought to restrain the appellants from erecting a fence between the two easements, his Honour took the view that injunctive relief was not necessary because the appellants had made it clear that they did not intend to erect a fence while Easement E remained in force. His Honour commented that it was "a pity that Mr Mbuzi did not make that intention plain" before proceedings were commenced.[5]

[16] The learned primary judge dismissed the appellants' application for extinguishment of the easement. His Honour ordered that the appellants pay the respondents' costs of and incidental to the applications to be assessed on the standard basis excluding the respondents' costs of the hearing of 22 December 2004. The appellants now seek to appeal against these orders.

The appeal

[17] In the exercise of this statutory jurisdiction to extinguish the proprietary right of the owner of the dominant easement, it is insufficient to show, for example, that "to an impartial planner [the] proposal appeared a good and reasonable proposal".[6] Quite apart from the particular matters of objection to which the respondents referred, the

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3 *Averono & Anor v Mbuzi & Anor* [2005] QSC 006; SC No 10869 of 2004, 21 January 2005 at [18].
4 *Averono & Anor v Mbuzi & Anor* [2005] QSC 006; SC No 10869 of 2004, 21 January 2005 at [41].
5 *Averono & Anor v Mbuzi & Anor* [2005] QSC 006; SC No 10869 of 2004, 21 January 2005 at [38].
6 *Stannard v Issa* [1987] AC 175 at 187.

appellants bore the onus of making out a case for the extinguishment of the respondents' property rights in terms of s 181 of the *Property Law Act*. The learned trial judge concluded that the appellants had not discharged that onus in relation to the matters relevant under the legislation.

[18] Mr Mbuzi, who presented the argument for the appellants, was disposed to emphasize what he saw as conduct on the part of the respondents inconsistent with the continued subsistence of "reciprocity" between Easements D and E. In this regard, he failed to appreciate that the rights conferred by an easement are proprietary in nature and thus not as susceptible to loss by reason of inconsistent conduct as contractual rights. To the extent that the appellants sought to bring their case within the terms of the statutory provisions which authorize the court to extinguish an easement, reference should now be made to the text of s 181 of the *Property Law Act*. It provides relevantly as follows:

> "(1) Where land is subject to an easement …, 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 -
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> (a) that because of change in the user of any land having the benefit of the easement …, or in the character of the neighbourhood or other circumstances of the case which the court may deem material, the easement ought to be deemed obsolete; or
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> (b) that the continued existence of the easement … would impede some reasonable user of the land subject to the easement … or that the easement …, in impeding that user, either -
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> (i) does not secure to persons entitled to the benefit of it any practical benefits of substantial value, utility or advantage to them; or
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> (ii) is contrary to the public interest;
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> 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
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> (c) …
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> (d) that the proposed modification or extinguishment will not substantially injure the persons entitled to the easement, …
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> (2) In determining whether a case is one falling within subsection (1)(a) or (b), and in determining whether (in such case or otherwise) an easement … ought to be extinguished or modified, the court shall take into account the town plan and any declared or ascertainable pattern of the local government for the grant or refusal of consent, permission or approval to use any land or to erect or use any building or other structure in the relevant area, as well as the period at which and context in which the easement or restriction was created or imposed, and any other material circumstance.
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> ...
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> (4) An order extinguishing or modifying an easement … under subsection (1) may direct the applicant to pay to any person entitled to the benefit of the easement … such sum by way of consideration

> as the court may think it just to award under one, but not both, of the following heads, that is to say, either -
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> (a) a sum to make up for any loss or disadvantage suffered by that person in consequence of the extinguishment or modification; or
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> (b) … "

[19] The learned primary judge noted the scant evidence adduced to support the respondents' grounds of objection to the extinguishment of the easement, but there can be no doubt that his Honour was correct when he observed "I would not readily conclude that reduction of the width of such a long driveway by half did not deprive [the respondents] of a property right of appreciable value".[7] The approach adopted by the learned primary judge was plainly correct. It is well established that the courts should approach an application for extinguishment of an easement on the footing that it is "a serious inroad upon the proprietary right which is vested" in the owner of the dominant tenement.[8]

[20] In relation to s 181(1)(a) of the *Property Law Act*, the learned primary judge was, in my respectful opinion, correct to conclude that the appellants had not shown that there had been such a change in "user" of the respondents' land since the time of the grant, that Easement E could be deemed to be obsolete. As his Honour said:

> "… the easement land is being used for the purpose of the easement in accordance with and subject to its terms."[9]

To show merely that rights are not currently exercised to their fullest extent is to fall far short of showing that the rights are obsolete. To be successful on this ground it must be shown that the purpose for which the easement was granted can no longer be achieved.[10] The onus on the appellants in this regard was substantial bearing in mind that the grants were made comparatively recently and that there was no evidence to show that the exigencies of the user of such blocks had altered in the six years since the original grant was made. In particular, there was no reason to think that in the future owners of the blocks may not require the wide avenue of access to street frontage to make the best use of their land.

[21] So far as s 181(1)(b) is concerned it was open to his Honour to conclude that a concern that their children will be prevented from using the land subject to Easement E as a play area unless it is fenced off should not be recognized as impeding the reasonable use of the Easement E land. As his Honour said:

> "The provision under consideration is looking to the consequences flowing from the existence of the easement and the rights and obligations created thereby. It is not addressing specific acts or omissions in breach or exercise of such rights or obligations."[11]

[22] Equally, it was open to the learned primary judge to conclude that the appellants' concerns in relation to "the occasional appearance of a neighbour's dog" did not

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7 *Averono & Anor v Mbuzi & Anor* [2005] QSC 006; SC No 10869 of 2004, 21 January 2005 at [19].

8 *Re Parimax (SA) Pty Ltd* (1954) 72 WN(NSW) 386 at 387. See also *Pieper v Edwards* [1982] 1 NSWLR 336 at 341.

9 *Averono & Anor v Mbuzi & Anor* [2005] QSC 006; SC No 10869 of 2004, 21 January 2005 at [26].

10 *Re Eddowes* [1991] 2 Qd R 381 at 391; *Ashoil Holdings Pty Ltd v Fassoulas* [2005] NSWCA 80; CA 40616/04, 30 March 2005 at [61] - [63].

11 *Averono & Anor v Mbuzi & Anor* [2005] QSC 006; SC No 10869 of 2004, 21 January 2005 at [28].

justify a conclusion that the existence of the easement impeded the reasonable user of the appellants' land.

[23] Importantly in relation to s 181(1)(b), the appellants neither sought to identify an "adequate compensation" nor did they offer to pay any such sum to the respondents.

[24] It was open to his Honour to conclude that the prospect of continuing friction between neighbours did not warrant the destruction of the respondents' proprietary rights under the easement.

[25] The ground for extinguishment contained in s 181(c), that there had been agreement to extinguishment or that the easement itself had been abandoned, was obviously inapplicable.

[26] As to s 181(1)(d), his Honour was unable to be satisfied that extinguishment of the easement would not injure the respondents substantially.[12] His Honour was plainly correct in this regard. Having regard to the absence of evidence that the extinguishment of the easement would not diminish the value of the respondents' land, it is difficult to see how his Honour could have come to any other view, even in the absence of the consideration that extinguishment of the easement would put the respondents to the expense of widening and sealing their side of the driveway. It is to be emphasized that, in this context, "substantial" injury is not an injury which is large or considerable but one "which is real and which has a present substance".[13]

[27] In my respectful opinion, the learned primary judge was correct to conclude that the appellants had failed to make out a case for the extinguishment of the easement by an order of the court under s 181 of the *Property Law Act*.

[28] It may be noted that the appellants advance a number of complaints as to issues of procedure, but none of these issues, even if resolved in the appellants' favour, can alter the conclusion that the appellants failed to show sufficient cause to warrant the judicial destruction of the respondents' property rights. Insofar as the appellants complain that they were not granted an adjournment of the hearing because Mr Mbuzi had been ill prior to the hearing, and was privately disposed to seek an adjournment of it, it is clear that no application for an adjournment was made to his Honour and so his Honour cannot fairly be criticized for failing to grant it.

[29] In relation to the appellants' challenge to the order for costs made by the learned primary judge, the failure of the appellants' challenge to the dismissal of their application for the extinguishment of the easement means that the appellants' appeal against the costs order made by the learned primary judge requires leave from his Honour by reason of s 253 of the *Supreme Court Act* 1995 (Qld). That leave was neither sought nor obtained. The appeal in relation to costs only is incompetent. In any event, there is no reason to suppose that his Honour's order as to costs did not reflect an appropriate balance of the considerations relevant to the exercise of his Honour's discretion in that regard. Finally, as his Honour observed, the major part of the appellants' claim for costs was in the nature of expenses or damages for

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12 *Averono & Anor v Mbuzi & Anor* [2005] QSC 006; SC No 10869 of 2004, 21 January 2005 at [31].

13 *Re Mason and the Conveyancing Act* [1962] NSWR 762 at 766; *Hoy v Allerton & Anor* [2001] QSC 440; SC No 6002 of 2001, 25 October 2001 at [31].

disruption,[14] and as the appellants were self-represented, they were not entitled to an order for costs in their favour.

Conclusion and Orders

[30] The appeal should be dismissed. The respondents represented themselves at the hearing but were legally represented in relation to the appeal until 8 July 2005. The appellants should be ordered to pay the respondents' costs of the appeal to be assessed on the standard basis.

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[14] *Averono & Anor v Mbuzi & Anor* [2005] QSC 006; SC No 10869 of 2004, 21 January 2005 at [40].