SUPREME COURT OF QUEENSLAND

CITATION:	*Tran & Anor v Cowan & Ors* [2006] QSC 136
PARTIES:	**VAN DAT TRAN and LINDA LE TRAN** (applicants) **v** **KERRY JAMES COWAN and JILLIAN RUTH COWAN** (first respondents) and **B.M.D. CONSTRUCTIONS PTY LTD** **(ABN 69 010 126 100)** (second respondent)
FILE NO:	BS9162 of 2005
DIVISION:	Trial
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	14 June 2006
DELIVERED AT:	Brisbane
HEARING DATE:	1-2 June 2006
JUDGE:	Chesterman J
ORDER:	**1. A statutory right of user in the form of an easement of way be imposed over Lot 251 on SP 163541 on SP 174012 County of Stanley Parish of Oxley, title reference 50466868 in respect of Lot 250 on SP 163541 County of Stanley Parish of Oxley, title reference 50466867 in terms to be agreed by the parties or, failing agreement, determined by the Court; and** **2. the applicants pay to the respondents $1,000 as compensation for the imposition of the statutory right of user.**
CATCHWORDS:	REAL PROPERTY – EASEMENTS – PARTICULAR EASEMENTS AND RIGHTS – RIGHTS OF WAY – CREATION – where applicants and respondents own adjoining land – where applicants seek statutory right of user over part of respondents' driveway – where parties purchased land from developer who intended applicants to have benefit of registered easement in the nature sought but not registered by oversight – where vehicular access in absence of statutory right of way difficult and dangerous – where level of interference to respondents will be minor – whether statutory

right of user is reasonably necessary – where respondents purchased land for price that reflected proposed easement – whether statutory right of user should include provision for payment by applicants of compensation

Property Law Act 1974, s 180

Lang Parade Pty Ltd v Peluso [2005] QSC 112, applied
Re Seaforth Land Sales Pty Ltd's Land (No. 2) [1977] Qd R 317, applied
Stanford v Roberts [1901] 1 Ch 440, applied

COUNSEL: D Kelly for the applicants
P A Kronberg for the respondents

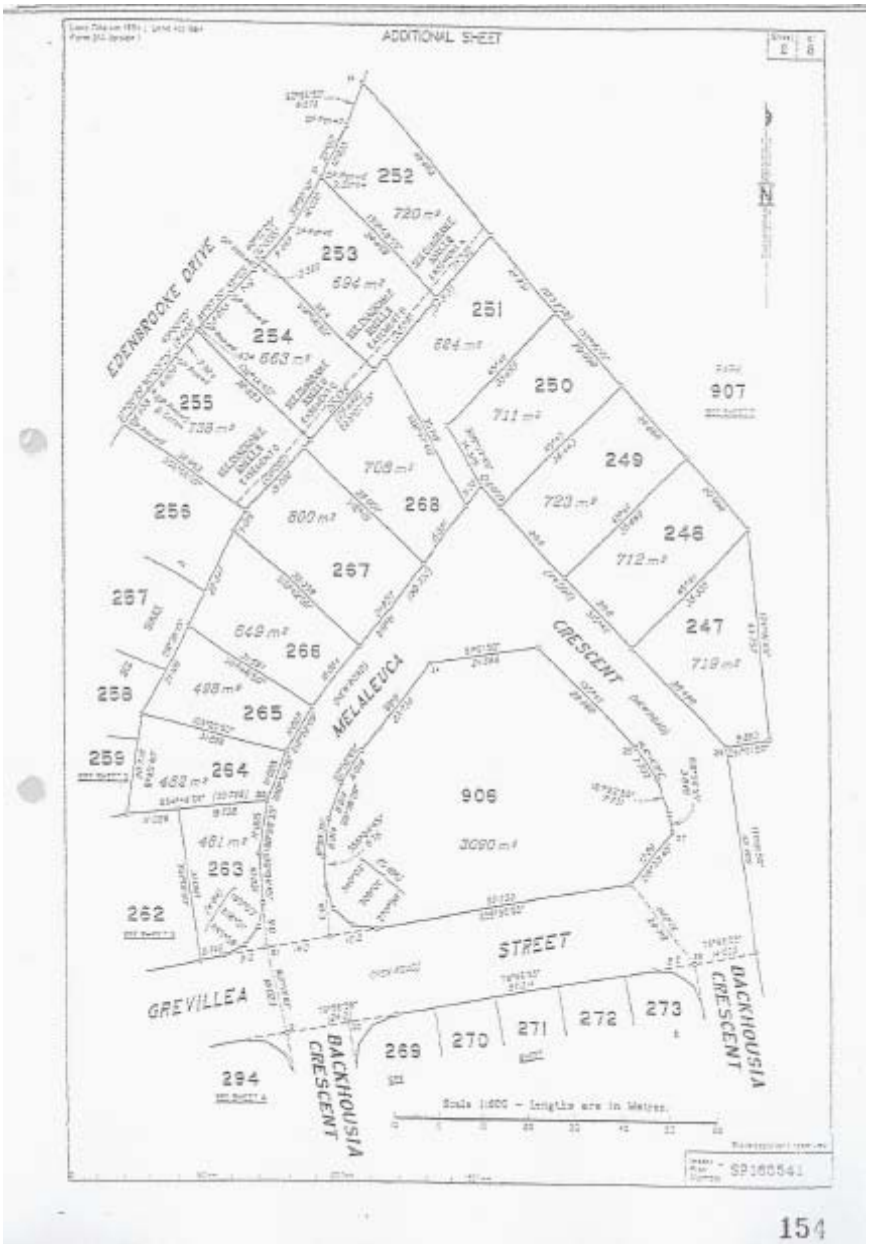
SOLICITORS: Nicol Robinson Halletts for the applicants
Westside Lawyers for the respondents

[1] The applicants, Mr and Mrs Tran, are the owners of land described as Lot 250 on SP 163541 in the County of Stanley, Parish of Oxley, title reference 50466867. It is located at the end of Melaleuca Crescent, Edenbrooke, a new suburb on the western outskirts of Brisbane. The respondents, Mr and Mrs Cowan, are the owners of Lot 251 on SP 163541 in the same county and parish. The title reference of their land is 50466868. As the descriptions suggest the two lots adjoin. The respondents' address is 14 Melaleuca Crescent.

[2] By an amended originating application the applicants seek an order pursuant to s 180 of the *Property Law Act* 1974 that the court impose upon Lot 251 an obligation of user in respect of Lot 250. The right of user sought is in essence an easement of way by which the applicants would have 'full free and uninterrupted right and liberty at all times of the day and night and from time to time for their agents, employees, workmen, servants, tenants, lessees, licensees, invitees, customers, visitors and all other persons authorised by them with or without vehicles, machinery and equipment for all purposes connected with the use and enjoyment of Lot 250 to enter, leave, re-enter, pass and re-pass along, through, over and across Lot 251'.

[3] The applicants do not ask for an easement over the whole of Lot 251, but only that part on which the respondents have built a driveway to connect their house to Melaleuca Crescent. I shall call this part of Lot 251 the 'access portion', or 'AP'.

[4] The nature of the problem is best understood by a diagram which reproduces the particular geography of Melaleuca Crescent and the applicants' and respondents' land.



[5] As can be seen the respondents' land is of a shape conventionally described as a 'battleaxe' though the handle and blade are disproportionate in size. The 'handle' is the access portion. It is rectangular in shape, is 5.32 metres wide and 14.375 metres long. It is also, as I said, the respondents' driveway. The AP appears on the diagram as that part of Lot 251 which is to the south west of Lot 250. The applicants have their own road frontage to Melaleuca Crescent but it is only six metres wide.

[6] The respondents have secured their property by erecting along the full length of all its boundaries a six feet high (1.8 metre) timber fence. The fence is erected the full length of the driveway and on both sides.

[7] The applicants propose to build a home on Lot 250. Concept plans, though not detailed construction drawings, have been prepared by a firm of architectural draughtsmen. The plans show that a two car garage is planned for the front of the house at its south-eastern corner. That will put the garage at the point closest to the frontage of Lot 250 to Melaleuca Crescent.

[8] Lot 250 was developed and sold to the applicants as a home site. Its only use is for the construction of a dwelling house. Given the size and shape of the lot and its frontage to Melaleuca Crescent the only sensible location for a garage is that depicted on the applicants' design, at the front and adjacent to the road frontage. Mr Wilde, a distinguished architect who was informally appointed by the parties as a joint expert, gave evidence that the location of the garage depicted on the applicants' plans 'is the best place' for it.

[9] Something must be said about the fence which divides the access portion from Lot 250 and runs along the line of the boundary between the AP and Lot 250. It is constructed not on the boundary but a few centimetres to the south of it by so that it is entirely erected on Lot 251. It was paid for by the respondents without any contribution from the applicants who objected to its construction because, as will emerge, they wanted to be able to make use of the AP to gain access to their property. They did contribute equally to the cost of the fence erected on the other boundary between the two lots.

[10] A motorist driving from the respondents' property along the driveway towards Melaleuca Crescent is unable to see any pedestrian or vehicular activity on Lot 250 because of the fence. If a pedestrian, adult or child, stepped across the frontage of Lot 250 towards the road any view of a car approaching along the AP will be obscured by the fence. If a car were driven from the proposed location of the applicants' garage to the roadway it would have to reverse up a slight slope while traversing a slight S bend. The driver of the vehicle would be unable to see a car approaching from the driveway of Lot 251 until the front of the reversing car was on the driveway. Because Melaleuca Crescent curves at the point where both lots have their street frontage, and because of the configuration of the lots, the driveway of each where it crosses the footpath to the road will be common. The footpath is not depicted on the diagram.

[11] Mr Lewis, an experienced engineer, has investigated vehicular access to Lot 250 from Melaleuca Crescent and from the lot to the road, taking as his reference the plan for the house which the applicants have obtained from their draughtsman. Mr Lewis has concluded that a car of ordinary size, such as a Commodore or Camry, could not drive from the street into the western half of the garage (left hand side as one approaches from the street) because of the existence of the fence. The turn required if one is driving into the left hand side of the garage is such that it cannot be accomplished by utilising only the six metre frontage of Lot 250. One would be compelled to traverse the end of the respondents' driveway. A diagrammatic representation of Mr Lewis' evidence is contained in his drawings 3815-01 attached to his affidavit.

[12] Mr Wilde thought that the problem might be overcome by the construction of a driveway a single car in width which 'fanned out' to the full width of the garage once the vehicle had traversed the footpath and entered entirely onto Lot 250.

[13] This point was elicited from Mr Wilde in cross-examination. He had little time to consider it, and he did not have recourse to dimensions or plans. Mr Lewis was not required by the respondents' counsel for cross-examination. His report had therefore been accepted by the respondents. Mr Lewis was not given the opportunity to answer Mr Wilde's opinion. In this unsatisfactory state of evidence I am not prepared to discount Mr Lewis' opinion that there are difficulties of

vehicular access from Melaleuca Crescent into the western side of the garage proposed for Lot 250. The answer to Mr Wilde's suggestion may be contained in Mr Lewis' report in which he wrote 'that … vehicles attempting to make a direct entry to the site must pass over the nature strip and the north-west corner of allotment 249 which would constitute an unsafe act.' The conclusion is advanced on the basis of photographs attached to the report which indicate, to some extent, the route which has to be taken to avoid traversing the respondents' driveway.

[14] The bigger problem is with leaving Lot 250. Mr Lewis makes the point that if one reverses out of the lot one is obliged to describe an S bend, up a slope, onto the roadway, across a driveway (the access portion of Lot 251) into which one cannot see because of the fence. Mr Lewis describes the manoeuvre as 'very dangerous' because the driver has to 'negotiate the ramp driveway to the crossover while not being able to observe vehicles, pedestrians and children in the [driveway] area, nor initially on Melaleuca Crescent.'

[15] The alternative to this manoeuvre is to turn a car around in the space in front of the proposed residence on Lot 250. What is required for that manoeuvre appears on drawing 3815-02 which shows that the available space is too confined for the manoeuvre. If perfectly executed a four point turn is required. If not so executed more turns would be required. The danger of crossing the respondents' driveway with obscured visibility would remain.

[16] If the applicants were granted an easement of way over the access portion the problems would disappear. One could then drive readily from the street on a curvelinear course which took the vehicle over the western end of the driveway and directly into the garage. By way of egress a car could be reversed from the garage in a wide arc into the access portion and then be driven forward onto the road. This is also shown in Mr Lewis' drawing.

[17] It was Mr Wilde's opinion that 'the privacy, utility and value of Lot 251 would not be adversely affected' by the imposition of an easement of way. In fact he thought that the value of the lot would be increased if the fence were removed along the northern boundary of the driveway and 'a more aesthetically pleasing treatment' were substituted. He thought that 'such a treatment would give a better sense of arrival to Lot 251.' He had in mind a hedge which would provide a barrier but not obstruct vision and would be more attractive than the tall, stark wooden fence.

[18] I, at the request of counsel, had a view of the lots. I accept Mr Wilde's opinion that the privacy and utility of Lot 251 would be unaffected. I accept also that the fence constitutes a danger. The removal of the fence would not reduce the privacy of that part of Lot 251 used for residential purposes. The AP is used only as a means of pedestrian and vehicular access. Given that the proposed easement is to allow an adjoining family to drive over part of it on the occasions that they enter and leave their property it is hard to see any real detriment to the respondents' enjoyment of their land.

[19] When pressed the only consideration Mr Cowan could advance was that if the respondents had to share the AP with the applicants it would be more likely that strangers would park in the driveway and block his family's access. No reason was advanced why that should occur more frequently if the AP was shared than if it were kept exclusively for the respondents' use.

[20] There is another dimension to the applicants' case. When they, and the respondents, agreed to buy their respective lots, title to them had not been registered. The housing estate in which the land was located was in a state of development by BMD Constructions Pty Ltd ('Constructions') which had been the second respondent to the application. The claim against it was struck out some time ago. The applicants and respondents agreed to buy their lots subject to the registration of a plan of subdivision. Each contract had annexed a 'disclosure plan' which identified the proposed lot which, when title to it was registered, would become the subject of the contract of sale.

[21] The disclosure plan annexed to the respondents' contract depicts Lot 251 and shows the area which I have described as the access portion. On it was printed 'EMT'.

[22] The respondents dealt with Ms Woodham, a sales consultant employed by the developer. Mr Cowan testified that he asked Ms Woodham what the letters 'EMT' meant and was told they designated the driveway for Lot 251. Ms Woodham's account is that she told the respondents 'they were buying an easement block which meant that they would have shared access with the neighbouring property (proposed Lot 250).' She told them 'You will lose some of the area (of Lot 251) because of the shared driveway.' Ms Woodham remembers that Mr Cowan asked her about the supply of services to the lot and she indicated on the plans attached to the contract the location to which services (water and electricity) would be delivered by the developer. The point is that the services were not to be connected to the street frontage of Lot 251 but to the western end of the access portion. Ms Woodham told the respondents that Constructions would pay the cost of laying a concrete driveway along the AP because of the fact that it would be shared.

[23] The surveyors engaged by the developer neglected, through oversight, to register the easement when the subdivisional plan was lodged for approval and sealing. The result is that when title to Lot 251 issued the driveway was unencumbered by an easement in favour of Lot 250.

[24] The respondents' case is that they did not know of the proposal to impose an easement over Lot 251, and they were not told of the proposal by Ms Woodham, or any other agent or employee of the developer, and that they would not have agreed to buy Lot 251 had they understood that part of it was to be subject to an easement. Mr Cowan's evidence on this point was unequivocal.

[25] The applicants' case is that the statutory right of user should be imposed because it is necessary for them to enjoy safe and reasonable access to their property and because it was also intended, by the developer/vendor, the applicants and the respondents that the driveway would be shared by the owners of Lots 250 and 251 to provide safe and reasonable access. I accept the factual basis which underlies the applicants' contentions. I reject Mr Cowan's evidence that he and his wife knew nothing of a proposed easement, and would not have bought Lot 251 had they apprehended that the driveway was to be shared with the owners of Lot 250. Mr Cowan was a most unsatisfactory witness. He was evasive and argumentative. He was, as well, deliberately untruthful.

[26] The respondents signed a contract to buy Lot 251 on 10 August 2003. Settlement occurred in February 2004. On 17 December 2003 their solicitors wrote to the vendors' solicitors:

> 'It has come to our notice that the access to the land to be purchased by our client passes through a part of the adjacent property that bears the description Lot 250 … . Would you kindly confirm that the access to the land being purchased by our client will be protected by a registered easement over that part of the roadway to be located within their neighbours' block and provide a copy of the proposed covenants and conditions of the easement as soon as possible.'

[27] The respondents and/or their solicitors were mistaken. Their land was not to be the dominant tenement protected by an easement over the adjoining Lot 250. What was proposed was the reverse: that the owners of Lot 250 should have access over part of Lot 251, as I have described. The point of the correspondence is, however, that it demonstrates that the respondents understood, before they settled their contract of sale, that their land was to be affected by an easement. With that knowledge they were prepared to proceed to settlement. The letter proves that Mr Cowan was untruthful when he said:

(a) he and his wife would not have bought land subject to an easement; and

(b) that he knew nothing of an easement until after title to the land had been conveyed to them.

[28] Mr Cowan identified the time when he first learned of the easement. It was subsequent to August 2004 when he had constructed the fence along the northern boundary of the AP. Mr Venitis, an engineer employed by the developer, saw the fence and remonstrated with Mr Cowan. He said that the fence should not have been built because the land was burdened with an easement to give access to Lot 250.

[29] It is apparent from correspondence which passed between the applicants and the respondents about their respective contributions to the construction of dividing fences that, before the fence was constructed, Mr Cowan was aware that the applicants contended that they should have had the benefit of an easement over the driveway and that they would not contribute to the cost of a fence which prevented that access. Mr Cowan's testimony that he had built the fence in ignorance of the applicants' claim was untruthful. I have already noted that the respondents paid for the construction of the fence themselves without contribution from the applicants, and located it on their side of the boundary.

[30] On the question of credit I mention without elaboration Mr Cowan's evidence of the circumstances in which guests invited to attend a significant family function parked on the vacant Lot 250. Mr Cowan lied about those circumstances.

[31] There are other indications that the evidence of Ms Woodham is to be preferred to Mr Cowan's. Ms Woodham said that she understood what was meant by the abbreviation 'EMT'. Mr Cowan admits asking her what it meant. It is inconceivable that Ms Woodham would not have explained it designated an easement over the land. In that context she explained, she said, that the developer would run a conduit, to give access to services, to the western end of the easement rather than at the street frontage of Lot 251. There is on the respondents' copy of the disclosure plan a letter 'A', encircled, which Mr Cowan admits is in his hand. The 'A' is at the point on the plan at which the vendor in fact terminated the conduit

for the supply of services to the land. Mr Cowan wrote an additional clause into the contract. It read:

> 'This contract is subject to and conditional upon Purchasers being satisfied of the location of services and driveway for Lot 251 within 72 hours from the date of this contract.'

[32] The additional condition was inserted obviously so Mr Cowan could satisfy himself that the services were to be led to a point at the end of the driveway as the agent had indicated. It is obvious that some feature of the land had persuaded the developer to facilitate the delivery of services to the land beyond the normal: delivery to street frontage. It is not credible that Mr Cowan was not told that the reason was that the land was to be subject to an easement.

[33] The housing estate contained a number of lots which replicated the configuration of Lots 250 and 251. There were about ten in all which were intended to share a driveway. For all of these the developer itself paid for the construction of a concrete driveway for vehicular access to the servient tenements. Mr Venitis explained it was an inducement to buyers of those lots which might otherwise be difficult to sell.

[34] Mr Cowan knew that the developer intended to construct the driveway, or pay for its construction, before the respondents agreed to buy the land. Indeed he later insisted upon the developer honouring its promise which was of doubtful contractual force. Ms Woodham said she explained to Mr Cowan why the developer would provide the driveway. Mr Cowan denied he had been told that the existence of the easement was the reason for the developer's promise but he had no satisfactory explanation for why the developer should act with such uncharacteristic generosity.

[35] I therefore conclude that:

(a) the respondents were told by Ms Woodham that:

  (i) there would be an easement over part of Lot 251 to provide access to Lot 250;

  (ii) the developer/vendor would construct or pay for the construction of a vehicular driveway along the length of the land to be subject to the easement and would deliver services to Lot 251 to a point at the end of the easement; and

  (iii) the existence of the easement was the reason for the vendor agreeing to do the acts described in (b);

(b) the respondents knew of the facts identified in (i), (ii) and (iii) before they executed the contract to buy Lot 251;

(c) the respondents constructed a fence along the full length of the southern boundary of Lot 250 where it joins Lot 251 knowing that the applicants' contended that that part of Lot 251 should be subject to an easement in their favour and that they had understood there would be such an easement when they agreed to buy Lot 251;

(d) the respondents appreciated that the proposed easement had not been registered because of a mistake;

(e) without the easement the applicants cannot enjoy safe vehicular access from Melaleuca Crescent to their land and, in particular, from their land to the street; and

(f) the construction of the fence is the source of considerable danger to motorists effecting egress from both lots by reason of its complete obstruction of view from each property to the other.

[36] Section 180 of the *Property Law Act* 1974 provides:

> '(1) Where it is reasonably necessary in the interests of effective use in any reasonable manner of any land (the dominant land) that such land … should in respect of any other land (the servient land) have a statutory right of user in respect of that other land, the court may, on the application of the owner of the dominant land subject to this section, impose upon the servient land … an obligation of user … in accordance with that order.
>
> (2) A statutory right of user imposed under subsection (1) may take the form of an easement … and may be declared to be exercisable … in such manner … as may be specified in the order.
>
> (3) An order … shall not be made unless the court is satisfied that–
>
> (a) it is consistent with the public interest that the dominant land should be used in the manner proposed; and
>
> (b) 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; and
>
> (c) either –
>
> (i) the owner of the servient has refused to agree to accept the imposition of such obligation and the owner's refusal is in all the circumstances unreasonable; or
>
> (ii) …
>
> (4) An order under this section …
>
> (a) shall, except in special circumstances, include provision for payment by the applicant … of such amount by way of compensation as … appears to the court to be just …'

[37] The principles applicable to whether the court should impose a statutory right of user were usefully summarised by Douglas J in *Lang Parade Pty Ltd v Peluso & Ors* [2005] QSC 112 (at [23]). The principles are:

> ‘(a) One should not interfere readily with the proprietary rights of an owner of land.
>
> (b) The requirement of “reasonably necessary” does not mean absolute necessity.
>
> (c) What is “reasonably necessary” is determined objectively.
>
> (d) Necessary means something more than mere desirability or preferability over alternative means; it is a question of degree.
>
> (e) The greater the burden of the imposition that is sought the stronger the case needed to justify a finding of reasonable necessity.
>
> (f) For a right of user to be reasonably necessary for a development, the development with the right of user must be (at least) substantially preferable to development without the right of user.
>
> (g) Regard must be had to the implications or consequences on the other land of imposing a right of user.’

[38] In *Re Seaforth Land Sales Pty Ltd’s Land (No. 2)* [1977] Qd R 317 Hanger CJ rejected a submission that a statutory right of user should be granted only where, without it, there could be no effective use of the applicant’s land. In the same case D M Campbell J held (at 331) that ‘a right of user in the form of an easement of right of way may be imposed though there is alternative means of access.’ The Chief Justice noted that the requirement found in s 180(3)(a) that an order should not be made unless the court be satisfied that it was consistent with public interest that the dominant land be used ‘in the manner proposed’, contemplates that an applicant will come to court with a proposal to use the land in a particular manner. The applicant must show that in the interests of effective use of the land in this particular manner, the grant of a statutory right of user is reasonably necessary. As to that requirement reference to, and reliance upon *Stanford v Roberts* [1901] 1 Ch 440 was made. In that case Buckley J had said (at 444):

> ‘I understand “reasonably necessary or proper” to mean something which, although not absolutely necessary, a reasonable and prudent owner of property, if he were the absolute owner, would do.’

[39] The application of these principles to the facts indicates that a statutory right of user in the form of an easement of way should be imposed over that part of Lot 251 which abuts the road frontage of Melaleuca Crescent and is 14.37 metres long and 5.32 metres wide and designated on the disclosure plan attached to the contract of sale between the respondents and constructions as an easement.

[40] The applicants approached the court with a definite proposal in mind. They wish to erect a home on Lot 250 which is a residential allotment in a housing estate. Vehicular access to the lot without the easement will be difficult and, indeed, dangerous. Although access is possible without the easement it will be

unsatisfactory because of the difficulty and danger. Lot 250 cannot be effectively used without safe access. The provision of such access is 'reasonably necessary', as that concept is explained in *Stanford*, for the effective use of Lot 250 as a site for a dwelling house which is itself a reasonable use of that land.

[41] I accept that courts should not readily grant statutory rights of user and should not readily interfere with the proprietary rights of landowners. In this case, however, the critical fact is that the lots in question were designed by the developer to share the driveway portion of Lot 251 and that, but for the surveyor's oversight, the easement sought by the applicants would have been registered as an encumbrance on the respondents' title when they acquired the land. The applicants, respondents and vendor all knew this to be so and the applicants and respondents contracted to buy their respective lots of land on the express understanding that they would share the driveway.

[42] The level of interference with the respondents' land will be small if the easement is granted. The detriment to the applicants' land should the easement not be granted is substantial.

[43] It is obviously consistent with the public interest that the applicants' land be used in the manner they propose, with safe access for them and their children. The respondents can be adequately recompensed in money for any disadvantage they may suffer from the imposition of the easement. The respondents have refused to accept the imposition of the easement and their refusal is unreasonable.

[44] This disposes of the three pre-conditions found in s 180(3).

[45] Something should be said about the third pre-condition. The respondents' refusal was justified on the basis that they would lose privacy, value and utility in the enjoyment of their lot. None of these contentions is true. Mr Wilde's evidence establishes the falsity of contentions 1 and 3. I will address the question of diminished value when dealing with the requirement that compensation should be paid, except in special circumstances. The respondents also justified their refusal on the basis that they bought the land unencumbered with an easement and in ignorance of any proposal that there should be an easement. They claim it is unfair that their land should be burdened with an easement because the applicants can enjoy safe and reasonable access to their property without it. These assertions are equally false. The first is a deliberate untruth. The respondents erected a fence in an endeavour to defeat the applicants' claim to an easement. They did so when they knew that the applicants maintained, correctly, that there should have been an easement in their favour and when the vendor was endeavouring to secure the respondents' agreement to the grant and registration of the easement. The unreasonableness of the respondents' conduct is manifest.

[46] By s 180(4) a statutory right of user should not be imposed unless it include provision for payment by the applicant of such amount of compensation as is just, 'except in special circumstances'. The question of compensation was addressed very late. The applicants conducted their case on the basis that no compensation, apart from the payment of incidental expenses, should be paid because the respondents would suffer no diminution in the value of their property by the imposition of the easement. They bought land which was to be subject to an easement of way and the price they paid reflected that proposed encumbrance. If a

statutory right of user is imposed the respondents will enjoy the land in the state they anticipated when they bought it.

[47] The respondents appeared to accept this contention until the morning of the first day of trial when their solicitors produced a report by a valuer apparently expressing the opinion that the diminution of value of the respondents' land, should the easement be imposed, was $50,000. The applicants were in no position to defend this very late assertion and I ruled that the respondents could not adduce the evidence. I indicated that if it appeared that an order of compensation should be made as a condition of the grant of an easement the question of the *quantum* could be separately addressed. The parties were content to proceed on that basis.

[48] This is, in my opinion, an application in which special circumstances make it inappropriate to order compensation save for the amount offered by the applicants, $1,000, to cover the respondents' incidental costs connected with their part in complying with the order I propose to make.

[49] The critical point is the one I have mentioned: that the applicants paid fair market value for the land burdened with an easement of right of way in favour of Lot 250. The price they agreed to pay was for land burdened with an easement. They will suffer no loss by reason of the imposition of such a statutory right of user assuming it be right that the land without the easement is worth $50,000 more than with the easement imposed. To order compensation in that, or another, sum would not be to compensate the respondents for loss but to reward them for taking opportunistic advantage of the surveyor's mistake to their neighbours' detriment. By reason of the mistake they have received a windfall in the form of improved value to their land. It would not be just to require the applicants to pay the value of the enhancement.

[50] I therefore order that a statutory right of user in the form of an easement of way be imposed over Lot 251 on SP 163541 on SP 174012 County of Stanley Parish of Oxley, title reference 50466868 in respect of Lot 250 on SP 163541 County of Stanley Parish of Oxley, title reference 50466867 in terms to be agreed by the parties or, failing agreement, determined by the Court.