# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Tran & Anor v Cowan & Ors* [2006] QSC 162 |
| PARTIES: | **VAN DAT TRAN and LINDA LE TRAN**<br>(applicants)<br>**v**<br>**KERRY JAMES COWAN and JILLIAN RUTH COWAN**<br>(first respondents)<br>and<br>**B.M.D. CONSTRUCTIONS PTY LTD**<br>**(ABN 69 010 126 100)**<br>(second respondent) |
| FILE NO: | BS9162 of 2005 |
| DIVISION: | Trial |
| PROCEEDING: | Originating Application |
| ORIGINATING COURT: | Supreme Court of Queensland |
| DELIVERED ON: | 28 June 2006 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 1-2 June 2006 |
| JUDGE: | Chesterman J |
| ORDER: | **The first respondents are to pay the applicants' costs of and incidental to the application heard on 1-2 June 2006 to be assessed on the indemnity basis.** |
| CATCHWORDS: | PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – OTHER CASES – whether special circumstances exist for award of costs against servient owner under s 180(6) of the *Property Law Act* 1974 – powers of court – whether court may order for costs on indemnity basis<br><br>*Property Law Act* 1974 (Qld), s 180(6)<br><br>*Tran v Cowan* [2006] QSC 136, considered |
| COUNSEL: | D Kelly for the applicants<br>P A Kronberg for the first respondents |
| SOLICITORS: | Nicol Robinson Halletts for the applicants<br>Westside Lawyers for the first respondents |

[1] On 14 June 2006 I acceded to the applicants' application and made an order imposing a statutory right of user over the respondents' land. The nature of the

dispute and the reasons for imposing an easement over the land are set out in [2006] QSC 136.

[2] I made no order for costs, but by arrangement with the parties, have received written submissions on that question. The successful applicants seek an order for costs, and on the indemnity basis. The respondents submit that there should be no order as to costs.

[3] Section 180(6) of the *Property Law Act* 1974 provides that:

> 'In any proceedings under this section the court shall not, except in special circumstances, make an order for costs against the servient owner.'

[4] The applicants identify a number of circumstances which they submit are sufficiently 'special' to justify an order for costs in their favour. The factors are:

> '(a) The conduct of the Applicants has at all times been just and reasonable in the circumstances.
>
> (b) No challenge was made to the evidence of the Applicants and they were not required for cross-examination.
>
> (c) No cross-examination was undertaken on the Applicant's expert witness.
>
> (d) The evidence of the Applicant's witnesses, who were cross-examined, has been found by your Honour to be acceptable in contrast to the evidence of Mr Cowan.
>
> (e) The strong case of the Applicants for the necessity of the easement from the very beginning.
>
> (f) The Respondents' action in creating a dangerous hazard by the erection of the fence in the face of reasonable opposition.
>
> (g) The Respondents' inability to advance any consideration against the sharing of the driveway as set out in paragraph 19 of the Judgment.
>
> (h) The findings made in paragraph 27 of the Judgment.
>
> (i) The conclusions reached in paragraph 35 of the Judgment.
>
> (j) Paragraph 45 of the Judgment.
>
> (k) The Orders made reflect the offer made to the Respondents in correspondence from Nicol Robinson Halletts dated 10 August 2005 exhibited as part of (d) to exhibit RNG1 of the Affidavit of Robert Noel Gallagher filed 31 October 2005 (although the offer made is more favourable than the Orders).

(l) The manifestly unreasonable conduct of the Respondents in:-

(i) their refusal to negotiate their position;
(ii) forcing the Applicants to bring the Application; and
(iii) their deliberate untruths.'

[5] Circumstances (h), (i) and (j) refer to my findings that the respondents' resistance to the application was essentially dishonest. What made the applicants' case overwhelming was the fact that they and the respondents bought their respective parcels of land in the knowledge and expectation that they would share a common driveway and that that would come about by the imposition of an easement over part of the respondents' land. The easement was to have been registered when the plan of subdivision was lodged for sealing. It was omitted through oversight. The respondents falsely contended that they had no knowledge that an easement over their driveway was proposed and they defended the application on the basis that their rights of property, innocently acquired, should not be diminished.

[6] The respondents' submissions correctly identify this point as critical to the determination of whether there are special circumstances justifying an order for costs against the respondents.

[7] In my opinion the dishonest defence of the application is a special circumstance. Had the respondents been truthful they would have admitted that they bought their land expecting it to be burdened with an easement obliging them to share their driveway with their neighbours. Had this fact been admitted no sensible argument against the application could have been mounted. The application would not have been necessary. The applicants have been put to expense only by reason of the respondents' false denials. Accordingly it is an appropriate case to order costs against the respondents.

[8] The applicants seek indemnity costs. There remains a division of judicial opinion as to the degree of alacrity, or lack of it, with which such orders should be made. Commonly the fact that a dishonest claim or defence is made and persisted in is sufficient to justify an award of indemnity costs.

[9] I have no doubt that s 180(6) permits the making of an order for costs to be paid on the indemnity basis. Once the statutory threshold is crossed and an applicant demonstrates 'special circumstances' which allows the court to make an order for costs against a respondent there seems no reason why the discretion as to the particular order should not be exercised according to ordinary principles.

[10] The consideration I have identified typically, if not invariably, results in an order for indemnity costs.

[11] The only ground advanced by the respondents against an order for indemnity costs is that the respondents had grounds, apart from the one I have criticised, for resisting the application. The short answer is that had the respondents been honest it would have been obvious to all concerned, the parties and their advisors, that the application had to succeed.

[12] Accordingly I order the respondents to pay the applicants costs of and incidental to the application to be assessed on the indemnity basis.