# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Bergin v McLeod & Anor* [2011] QSC 325 |
| PARTIES: | **PATRICK THOMAS BERGIN**<br>(plainitff)<br>**v**<br>**OKSANA GENNADIEVNA MCLEOD**<br>(first defendant)<br>and<br>**LINDSAY ROSS MCLEOD**<br>(second defendant) |
| FILE NO: | BS 7145 of 2011 |
| DIVISION: | Trial Division |
| PROCEEDING: | Trial |
| ORIGINATING COURT: | Supreme Court of Queensland |
| DELIVERED EX TEMPORE ON: | 14 October 2011 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 12, 13, 14 October 2011 |
| JUDGE: | Daubney J |
| ORDERS: | **1. Upon the defendants, each by their counsel giving the undertaking set out in paragraphs 2 and 3 of Exhibit 3, it is ordered:**<br><br>**(1) The defendants and each of them, by themselves, their employees, agents or otherwise howsoever, be restrained from interfering with the construction by the plaintiff of the driveway, in accordance with the plan labelled SK02, annexed to the statement of claim.**<br><br>**(2) The defendants pay compensation to the plaintiff in the sum of $13,341.70.**<br><br>**2. The defendants pay the plaintiff's costs including any reserved costs of and incidental to the proceeding on the standard basis.** |
| CATCHWORDS: | REAL PROPERTY – EASEMENTS – PARTICULAR EASEMENTS AND RIGHTS – RIGHTS OF WAY – OBSTRUCTION - where the plaintiff and first defendant are |

the registered properties of adjacent properties – where the second defendant has the right to occupy the first defendant's property – where the plaintiff obtained a grant of easement over the first defendant's property – where a driveway was to be constructed on the easement land - where the second defendant undertook works which adversely impacted the easement land – where the second defendant sought to approve the works being undertaken by the plaintiff on the easement land - where the second defendant obstructed works on the driveway – where the plaintiff seeks injunctive orders and damages – whether the second defendant has an entitlement to approve the works on the easement land – whether the defendants contravened s 179 of the *Property Law Act* 1974 (Qld) – whether the plaintiff should be awarded damages and injunctive relief.

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – CONDUCT OF PARTIES – OTHER CONDUCT – where the plaintiff has enjoyed complete success – where the plaintiff submits that the unreasonableness of the second defendant's conduct warrants an award of costs on an indemnity basis - whether costs should be on the standard or an indemnity basis.

*Property Law Act* 1974 (Qld), s 179, s 180

*Colgate-Palmolive Company and Cussons Proprietary Limited* (1993) 46 FCR 225, cited

COUNSEL: J W Peden for the plaintiff
M Foley for the defendants

SOLICITORS: de Groots for the plaintiff
Redchip Lawyers for the defendants

HIS HONOUR: The plaintiff is the registered proprietor of lot 76 on crown plan A1551, Parish of Albert, County of Ward ("lot 76"). The first defendant is the registered proprietor of lot 77 on crown plan A1551, Parish of Albert, County of Ward ("lot 77").

Even though lot 77 is registered in the first defendant's name, it is occupied by her former husband, the second defendant. He retained the right to occupy lot 77 under the terms of the matrimonial settlement with the first defendant. Although she does not live on the property, the first defendant says that she fully supports and has always fully supported decisions made by the second defendant about lot 77.

Lot 76 and lot 77 front the Logan River. They are adjoining properties. They are also effectively landlocked. Lot 76 is to the north of lot 77. Lot 77 is separated on its southern side from a street called August Lane by another block of land described as lot 78 on CP A1551, Parish of Albert, County of Ward ("lot 78"). A parcel of Crown land lies to the east of lots 78, 77 and 76.

When the plaintiff purchased lot 76 in 2003, both lots 76 and 77 enjoyed the benefit of an access easement over lot 78. That easement extended to a point at the south-eastern edge of lot 77 and provided access to and from August Lane. Further access to lot 76 was not, however, formalised at that time. The plaintiff's practical access to his property was over a

dirt track which meandered from the end of August Lane and traversed both lot 77 and the Crown land.

In 2004, the plaintiff commenced negotiations with the second defendant with a view to formalising access to lot 76 by means of an easement along the eastern edge of lot 77. This easement was proposed to join up with the existing easement over lot 78, run along the eastern boundary of lot 77 and provide access to the south-eastern corner of lot 76.

Negotiations were unsuccessful over a period of years. In the meantime the second defendant undertook a number of works on lot 77 including enlarging what had been a small pond into a significant dam on the eastern side of lot 77, fencing the eastern boundary of lot 77 such as to prevent use of the dirt track access to lot 76, across lot 77 and the Crown land, and planting a line of saplings in the eastern part of lot 77.

Between the dam and the eastern boundary there remained a sufficient strip of land running along the eastern boundary to be used for access to lot 76. The saplings were planted along this strip of land.

With negotiations for an easement having failed, the plaintiff instituted proceedings in this Court with a view to obtaining a grant of easement. That proceeding came on for trial in November 2009 but settled on the first day of trial.

On 17 November 2009 the plaintiff and the first defendant

executed a deed of settlement by which the first defendant agreed to grant the plaintiff a registered easement over lot 77 in accordance with the draft easement document annexed to the settlement agreement. I observe in passing that this agreement was actually signed by the second defendant as "authorised agent" of the first defendant.

Moreover, on 17 November 2009 the parties consented to the following orders being made by the Court:

"By consent, the order of the Court is that:

(1) pursuant to section 180 subsection (1) of the Property Law Act 1974 (Qld), there be imposed upon the land described as lot 77 on CP A1551, Parish of Albert, County of Ward, in the State of Queensland a statutory right of user in the form of an easement in favour of the land described as Lot 76 on CP A1551, Parish of Albert, County of Ward, in the State of Queensland; (2) Such easement is to be in terms of the draft easement marked Annexure A to this order;

(3) The Applicant pay to the Respondent the sum of $82,500 by way of compensation for the imposition of the easement;

(4) There be no order as to costs."

It was further declared that the right of user in order 1 was exercisable in perpetuity. The form of draft easement annexed to the order was the same as the easement annexed to the terms of settlement.

The easement was ultimately registered in the Queensland Land Registry on 22 July 2010. The land, which is the subject of

the easement, is a four metre wide strip of land along the eastern boundary of lot 77. The terms of the easement include the imposition on the plaintiff of an obligation to construct a driveway along the easement.

By clause 4.1 of the easement the plaintiff:

"must construct a Driveway and Improvements on the Burdened Land at the Grantee's cost, including conducting all earthworks and obtaining all Local Government approvals and environmental approvals (if applicable) necessary to construct the Driveway and Improvements; and

4.1.1. the Driveway must be sealed in a manner similar to the easement over Lot 24A, also known as Lot 78 on Crown Plan A1551; and

4.1.2. The easement must have a maximum width of four (4) metres at any point and the sealed section of the Driveway must be no wider than is reasonably necessary to provide the Access and must be constructed in a way which, as far as is reasonably possibly[sic] will avoid damage to the existing trees; and

4.1.3. the Grantee will plant a line of trees or similar screening plants along the driveway to act as a privacy screen."

The term "Driveway" was defined in clause 1 of the easement to mean "a sealed driveway sealed in a manner similar to the driveway over Lot 24A, also known as Lot 78 on Crown Plan A1551, constructed of any material for the carriage of vehicles, trucks, natural persons or animals located upon the

Burdened Land."

By clause 2 the first defendant granted the plaintiff an easement over the burdened land for what was described as the "Purpose". Clause 3 defined "Purpose" as including access which meant "allowing access (including carriageway or footway) or right of way over the Burdened Land, to persons and to vehicles".

By clause 4.10 of the easement the plaintiff acknowledged that if the plaintiff breached the easement then "the grantor may do anything the Grantor thinks is reasonably necessary to correct the breach (such as removing a structure erected on the Burdened Land in breach of this easement) at the [plaintiff's] cost."

Despite having signed the settlement agreement and consented to the Court making the order it did in November 2009, the second defendant thereafter undertook works which adversely impacted on the easement land. Those works can generally be described as falling into two categories:

(a) He enlarged the eastern edge of the dam in such a way as to cause the dam to encroach on the southern third of the easement land - this is depicted in Exhibit 10;

(b) He removed topsoil from the easement such as to camber the surface of the easement land down to the level of the dam surface - this is depicted in Exhibit 26.

I have already mentioned that the second defendant had

previously undertaken works to enlarge the dam. I should also mention that he only retrospectively obtained the necessary local authority approvals to undertake those works. The local authority did, however, give approval but subject to extensive conditions concerning inter alia the permitted height of water in the dam.

The second defendant claimed that the further works undertaken after the signing of the settlement agreement and the making of the consent order and which impacted on the easement land was done in early January 2010. He made this claim by reference to a cheque stub and bank statement which he claimed evidenced payment to an earthworks contractor for work done prior to 22 January 2010. No evidence was led from the earthworks contractor.

On the other hand, Mr Nolan, a surveyor, expressed the opinion by reference to aerial or satellite photos of the property that the earthworks were probably carried out between 23 January 2010 and 25 April 2010. Another surveyor, Mr Fussell, said that when he surveyed the easement on 4 February 2010 he was able to drive along its length and he did not notice anything untoward about its width.

The combined independent evidence of the surveyors and the lack of corroborating evidence for the second defendant lead me to conclude that the works which impacted on the easement land were performed at some time between 4 February 2010 and 25 April 2010.

In making that finding I also note that even on the second defendant's version he caused these works to be undertaken at a time after the parties had agreed to the grant of the easement and the Court had made the order by consent to effect the grant of easement.

In late 2010 the local authority confirmed to the plaintiff that no further operational works approval was required for the construction of the driveway.

Between December 2010 and mid-2011 the plaintiff and the second defendant exchanged e-mail correspondence which became increasingly belligerent. The plaintiff was wanting to get on with the construction of the driveway. The second defendant was insisting on being present and in effect insisting on approving the works undertaken. Apart from some general assertion that he had the right to do so because it was his land, the second defendant could point to no lawful entitlement to impose his approval as a condition of the works on the driveway. His misplaced belief in this "entitlement" led him to obstructing works on the driveway. He caused a bulldozer and a trailer to be parked in positions which prevented access to the easement land in late 2010/early 2011.

The extreme rainfall of early 2011 led to an effective but temporary moratorium. In May 2011 the plaintiff gave the second defendant notice of the plaintiff's intention to commence construction on the driveway. That construction commenced on the 2nd of June 2011 with preliminary earthworks.

The second defendant, however, took great exception to how those works were being undertaken. In particular he resented the fact that saplings along the easement were removed and, together with fence posts which he had inexplicably left piled on the easement land, were being used, so he perceived it, as part of the base of the driveway being constructed. He was mistaken about that. I accept the explanation given by Mr Rolton, the plaintiff's earthworks contractor, that these items were being used temporarily to assist in stabilising the earthmoving equipment and were not to be used permanently as part of the driveway base.

In any event, the second defendant took matters into his own hands. He drove a small bulldozer along the easement in such as way as to prevent the plaintiff's contractors from continuing their work. Construction work ceased.

The plaintiff's response to this conduct by the second defendant was to invoke his lawful remedies by instituting proceedings in this Court. On 16 August 2011 the plaintiff filed a claim and statement of claim seeking a range of injunctive orders and also claiming damages.

On 25 August 2011 the plaintiff filed an application for an interim injunction to restrain the second defendant from blocking or obstructing the easement. That application came before the Court on 26 August 2011. The hearing was resolved on the basis of undertakings in the following terms:

"Upon the undertaking of the plaintiff by his Counsel giving

the usual undertaking as to damages (sic).
And upon the undertaking of the defendants, by themselves, their servants, agents or otherwise, howsoever, not to block or obstruct or permit the blocking up of or obstructing of the Easement Number 713366693 at Lot 77, CP A1551, County of Ward, Parish of Albert, title reference 50156699, being the land located at 24B August Lane, Alberton in the state of Queensland ("Easement land") until further Order.
And upon the undertaking of the defendants by their Counsel giving the usual undertaking as to damages.
And upon the undertaking of the plaintiff, by himself, his servants, agents or otherwise, howsoever not to construct a driveway on the Easement land until further Order."

The Court also made directions to bring the matter on for an expedited trial.

The relief claimed by the plaintiff in this proceeding was articulated in the prayer for relief as follows:
"1. Damages.
2. Interest on such damages under 47 of the Supreme Court Act 1995.
3. An injunction restraining the defendants, by themselves, their servants, agents or otherwise howsoever, from interfering with the construction by the plaintiff of the driveway in accordance with the plan labelled SKO2 annexed to this statement of claim.
4. An injunction restraining the defendants, by themselves, their servants, agents or otherwise howsoever, from blocking

or obstructing or permitting the blocking up of or obstructing of the Easement land.

5. An injunction requiring the defendants to construct and maintain the Dam in accordance with the dimensions and infrastructure set out in the Development Approval dated 6 March 2009 and for so long as either of them is the legal owner or occupier of the First defendant's Land to maintain that infrastructure such as to ensure the water level of the Dam is no higher than 1.2 metres AHD."

When the matter was called for trial before me counsel for the defendants offered a number of undertakings on behalf of his clients. Following some useful and productive discussion between the Bench and the Bar table counsel for the defendants obtained instructions to expand the scope of the undertakings offered. Those undertakings are set out in Exhibit 2.

It seems to me that several of those undertakings are sufficient to meet a number of the claims advanced by the plaintiff. The defendants have offered an undertaking that they by themselves, their servants or agents will not block or prevent blocking up of or obstruction of the easement land. That undertaking answers paragraph 4 of the plaintiff's prayer for relief.

The defendants also offer an undertaking that they “will not do anything to increase height or cause blocking of the existing drain or do anything that will un-naturally increase the water level of the dam above approximately 1.2 metre AHD

as per Project Number 08351 Drawing Number C03 of the Gold Coast City Council."

The injunction sought by the plaintiff was, as is apparent from paragraph 5 of the prayer for relief, much more extensive in its ambit. I accept the submission of counsel for the defendants that it amounted to a request for an injunction to compel complete compliance with all the terms of the local authority's approval. Even if such an injunction were available it would clearly go beyond what is required to protect the plaintiff's legitimate interest in the easement land in the present case.

If the second defendant is foolish enough to breach the conditions of the local authority approval that is a matter which can be taken up with the local authority. What the second defendant has demonstrated, however, is a propensity to cause impact to the easement land by adjustment of the dam levels or dam walls and that is the appropriate subject of relief in the present case. That issue, it seems to me, is adequately addressed by the terms of undertaking number 3 contained in Exhibit 2.

The issues left for determination then are the plaintiff's claim for an injunction to enable construction of a driveway and a claim for damages.

In respect of the injunction the undertaking originally offered by the defendants at the commencement of the trial was

in the following terms:

"The First and Second defendant, by themselves, their servants or agents will not interfere with the construction by the Plaintiff of the driveway on the following condition:

a. That the Plaintiff builds the driveway in accordance with the 'PROPOSED DRIVEWAY DETAILS 5763-110804-SK01" attached to the HCE Engineers report dated 7 July 2011."

The "condition" stated in that undertaking was subsequently expanded to purport to permit a 3.3 metre wide driveway with one edge 300 millimetres from the eastern boundary and the other edge 300 millimetres from the western alignment of the easement. Regardless of the width of the driveway offered under this undertaking however, the form of the undertaking betrays the same error of thinking which has pervaded much of the second defendant's approach to this matter. Once again, he seeks to impose a condition of his own satisfaction on the plaintiff's construction of the driveway in circumstances where, by the terms of the easement, he has no entitlement to do so. What the easement requires is that the plaintiff construct a driveway, the sealed section of which "must be no wider than is reasonably necessary to provide the Access and must be constructed in a way which is far as is reasonably possibly (sic) will avoid damage to the existing trees". That is the obligation on the plaintiff.

By executing the settlement agreement, consenting to the Court order and executing the easement, which was subsequently registered, the defendants implicitly agreed to permit the

plaintiff to perform the works necessary to fulfil his obligations under the easement. The facts of this case show that the second defendant clearly impeded the plaintiff in fulfilling those obligations. That manifested itself in:

(a) the second defendant's physical obstruction of the works; and

(b) the excavation work undertaken by the second defendant which adversely impacted on the easement land (as described above).

The debate before me then descended into the detail of what width of driveway should be constructed and what works are required for that. That debate was relevant to both the terms of the injunction sought and the claim for damages. The debate on both sides was a little artificial in several respects. First, the debate turned on engineering plans for the driveway showing different widths of sub-base work required to achieve different widths of driveway on the surface. These plans did not exist, however, when the plaintiff's contractors commenced work in June 2011. Indeed, Mr Rolton confirmed in evidence that he did not have any plans or diagrams of the nature of the work he was about to perform when he started work on 2 June 2011.

The debate was also quite artificial from the defendants' perspective. The defendants, by their counsel, were adamant that they wanted a driveway constructed properly and safely to ensure, as counsel put it, that the defendants' duty of care to people using the driveway would be satisfied. I have

already noted the second defendant's misconception about his entitlement to "approve" the construction of the driveway. This misconception was evident even in his conduct after he blocked access to the easement land in June 2010 when he, as he deposed in his affidavit sworn 26 August 2011, called on the plaintiff to provide "evidence of the Plaintiff's compliance with the Easement, namely:

(a) A copy of any permits relating to building of the driveway;

(b) A complete copy of plans and engineering details of the Driveway;

(c) Undertaking that the Plaintiff would replace the trees that the Plaintiff unnecessarily removed from the Property and in the process of preparation of building of the driveway."

The second defendant had no entitlement to (a) or (b) Requirement (c) was already covered under the express terms of the easement. This false sense or claim of entitlement contributed to the artificiality of the defendants' position, the truth of which was probably best expressed by the first defendant who when asked about the width of the driveway said in evidence, "I believe that 3.5 metres would be enough, but four metres is fine for me." There is also a sense of artificiality in seeking to determine what driveway can be constructed by reference to the easement land as it was in November 2009 when the parties agreed to the grant of the easement. The reality is that the second defendant, by his subsequent works, both partly encroached on and generally adversely affected the easement land and this in turn has an impact on what should now happen to enable the plaintiff to

fulfil his obligation under the easement to construct a driveway.

It is possible that works could now be conducted wholly within the four metre width of the easement land which would yield a driveway (some three metres wide) which runs hard up against the eastern boundary of lot 77. This is what is depicted in the engineer's drawing marked SKO1. The fact that this is possible does not make it reasonable. The easement expressly contemplates that the purpose of the easement includes allowing access to person and vehicles. The width and placement of the driveway on the easement land is to be such as is "reasonably necessary" to provide the access. That clearly allows for something more than the bare minimum. It seems to me that the driveway proposed in drawing SKO2 satisfies the requirement of reasonable necessity.

Construction of a driveway in accordance with SKO2 will require however the placement of sub-base material beyond the four metre width of the easement land. That has been necessitated in no small part by the second defendant's conduct in excavating the dam in a way which has encroached on the easement and in removing the surface from the easement land to create a camber or "bench" towards the dam. In so doing the defendants contravened section 179 of the Property Law Act 1974. Counsel for the defendants faintly advanced an argument that the fact that the easement was not registered until June 2010 meant that conduct by the defendants prior to that date could not be considered as constituting contravention of section 179. That section however expressly

operates for the benefit of "all interests" in the subject land and that clearly extends to the equitable interest the plaintiff held in the easement land from 17 November 2009.

The second defendant's excavations in 2010 had the effect of removing support from the easement land. The works contemplated in SKO2 are necessary to restore that support, notwithstanding that they involve the placement of sub-base on the dam side of the easement land.

Before departing from this aspect I should note that the second defendant also sought to justify his "self-help" on the basis of clause 4.10 of the easement. Again, his reliance in that regard is misplaced. That clause allows him to correct a breach, not to take the law into his own hands by preventing the plaintiff from fulfilling his obligations under the easement.

I am satisfied that the plaintiff should have an injunction which will enable him to undertake works on the easement land to build a driveway in accordance with plan SKO2. The history of obstruction by the second defendant makes it clear that such an injunction is necessary.

There remains then the question of damages, or, more appropriately titled, compensation. As I found above, the defendants, by the actions of the second defendant, breached the obligation of support imposed by section 179 of the Property Law Act. The plaintiff will undoubtedly be put to extra expense in constructing the driveway as a consequence.

The plaintiff claimed the sum of $26,683.80 (including GST) being for hire of machinery and for materials. This was based on a quote from Mr Rolton for performing the "additional work" involved in implementing plan SK02.

There are, however, a number of difficulties in simply accepting those figures. The first is, as I have said, that SK02 did not exist when Mr Rolton first went to perform works on the driveway on 2 June 2011.

It was not suggested that he was not going to construct an appropriate driveway if he had been permitted to proceed on that date. The extent of the difference between what he was originally going to build and the works required under SK02 were never made clear in evidence.

Secondly, his evidence was, to say the least, confused, as to whether there was overlap between the so-called "additional work" and work which he would have performed in any event.

Doing the best I can in the circumstances, I consider it appropriate to allow 50 per cent of the claimed additional costs as representative of the extra work required to re-instate the support for the easement land. That yields an award of $13,341.70. That cost has not yet been incurred by the plaintiff, so no interest is payable.

The following outcome then ensues: Upon the defendants, each by their counsel giving the undertaking set out in paragraphs

2 and 3 of Exhibit 3, it is ordered:

(1) The defendants and each of them, by themselves, their employees, agents or otherwise howsoever, be restrained from interfering with the construction by the plaintiff of the driveway, in accordance with the plan labelled SK02, annexed to the statement of claim.

(2) The defendants pay compensation to the plaintiff in the sum of $13,341.70.

...

HIS HONOUR: The plaintiff has enjoyed substantive success in this proceeding in respect of two of the injunctions sought. The necessity for me to rule in respect of those was obviated only by the fact that the defendants offered sufficient undertakings at the commencement of the trial.

In respect of the balance of the relief sought, for the reasons that I gave earlier, the plaintiff has enjoyed complete success. There is, in the circumstances, no reason why costs should not follow the event.
The only real question is whether I should accede to the plaintiff's request that he have his costs, not on the standard basis, but on the indemnity basis. Reliance was placed on the well-known articulation of principles by Justice Sheppard in Colgate-Palmolive Company and Cussons Proprietary Limited (1993) 46 FCR 225.

The submissions by the plaintiff in that regard focussed on the unreasonableness, if not irrationality, of the second defendant's conduct in blocking construction and a perverse attitude to his entitlement to have control over the works being performed for construction of the driveway.

All those matters were canvassed by me in my reasons for Judgment and contributed to my conclusion that the plaintiff should enjoy the relatively rare phenomenon of the form of injunctive relief which I, ultimately, ordered. Those matters do not, however, amount, in my view, to sufficient cause to advance beyond the usual order as to costs to what the authorities repeatedly described as an exceptional award, that is, to award costs on the indemnity basis.

The one matter which was highlighted by counsel for the plaintiff in his submissions was, in effect, the deterrent factor which would flow from making an award of costs on an indemnity basis. It was submitted that an award of indemnity costs would possibly, and hopefully, have the effect of causing all parties to consider, carefully, in the future any conduct in breach of their lawful obligations.

It is not properly within the province of an award of costs to be penal or to prevent people from either exercising their rights or seeking to vindicate any defences they might have. I am not aware of any authority which would justify an award of indemnity costs for the purposes of deterring conduct in the future and I do not think that this is an appropriate case

for such a precedent to be set.

The order will therefore be that the defendants pay the plaintiff's costs including any reserved costs of and incidental to the proceeding on the standard basis.

In pronouncing that order I express the fervent hope that the parties are now quit of the Supreme Court of Queensland and, indeed, every other Court in this State and that they can get on in neighbourly fashion and enjoy the amenities that they, undoubtedly, have worked hard for on the banks of the Logan River.

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